



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 464 OF 2014

SAMWEL PATRICK ORIYO.....PLAINTIFF

VERSUS

MACDUFF ONGOYO OGWINDO

JANE NAMWANYA ANABWANI.....DEFENDANT

JUDGEMENT

By a plaint dated 11th April 2011, the plaintiff stated that he is the registered proprietor of the whole of that parcel of land known as Butsotso/Esumeyia/2060. That vide an agreement dated 22nd May, 2004, the plaintiff offered to sell and the defendants agreed to buy the whole of that parcel of land known as Butsotso/Esumeyia/2060 at the consideration of Ksh. 270,000/= being the agreed purchase price. That the plaintiff did sign the agreement but thereafter the defendants promised to draw a cheque in his favour to cover the purchase price but they changed their minds and have to-date never released the said cheque. That immediately after the agreement, the defendants moved onto the plaintiff's land and started making use thereof by planting sugarcane. That despite the plaintiff's demand that the defendants having failed to pay the purchase price, they do vacate his land, the defendants have refused to do so and they still remain in occupation. That the said occupation and use of the suit land is illegal, unlawful and amounts to land grabbing and is actuated by fraud. The plaintiff avers that the title deed was stolen from his possession during a robbery incident which was duly reported and the defendants have admitted being in possession thereof. The plaintiff prays for judgment against the defendants jointly and severally for:-

1. A declaration that the agreement made on 22nd May, 2004 between the plaintiff and the defendants is null and void and enforceable for breach by the defendants, by operation of law and no compliance with the Land control Act Cap 302 Laws of Kenya.
2. An order of eviction against the defendants, their agents, servants and or employees from land parcel No. Butsotso/Esumeyia/2060.
3. An order of injunction restraining the defendants, their agents, servants and or employees, once evicted from ever trespassing onto or in any way laying claim to land parcel No. Butsotso/Esumeyia/2060.
4. Mesne profits of Ksh. 150,000/= per year from 22nd May, 2004 till the giving of vacant possession.
5. Restitution of the title deed to Land Parcel No. Butsotso/Esumeyia/2060.
6. Interest on above at court rates.
7. Any other relief this honourable court deems fit to grant.

The defendants avers that on the contrary a legal agreement was entered into on 22nd May, 2004 between the parties, full consideration paid and the defendants went into and still are in occupation of the piece of land known as Butsotso/Esumeyia/2060. The defendant aver that the agreement is a clear document and there are witnesses who appended their signatures confirming that the plaintiff acknowledges receipt of Ksh. 250,000/=. It was until 18th December, 2004 that they were allowed to move into occupation that was after the plaintiff's mother moved out of the land and the entire purchase price totaling Ksh. 270,000/= had been paid. The defendants aver that the plaintiff has never at any time made a demand for the purchase price nor have they been asked to vacate the land. The defendants have never committed any fraud and that the agreement between the plaintiff and themselves was that of willing seller and willing buyer and that what transpired after the of the agreement was cordial, mutual and done in the presence of witnesses. The defendants categorically deny that they are parties to any robbery occasioned on the plaintiff property whereupon the title deed to this piece of land was stolen and aver that the plaintiff willingly handed it to them on 18th December, 2004. The defendants state that plaintiff bought a piece of land S. Kabras/Shamberere/2789 with the proceeds of the sale of this land and thus contend that this suit is unduly delayed incurably defective inept ambiguous, mischievous, vexatious and fail to disclose any or any semblance of a cause of action against the defendants.

This court has carefully considered the evidence and submissions therein. The defendants were served but failed to attend the hearing to give oral evidence. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon. Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

It is not in dispute that the registered owner of land parcel No. Butso/Esameyia/2060 in 1997 was the plaintiff. PEx2 is the green card confirming this which was produced as an exhibit. It is the plaintiff’s evidence that vide an agreement dated 22nd May, 2004, the plaintiff offered to sell and the defendants agreed to buy the whole of that parcel of land known as Butso/Esameyia/2060 at the consideration of Ksh. 270,000/= being the agreed purchase price. That the plaintiff did sign the agreement but thereafter the defendants promised to draw a cheque in his favour to cover the purchase price but they changed their minds and have to-date never released the said cheque. I have perused that said agreement PEx1 in great detail. Paragraph 2 states and I quote;

“2. That the purchase price hereby agreed for the said plot Kshs 270,000/=(Two Hundred and Seventy Thousand) payable as here under

I. Kshs 250,000/= being the deposit at the signing hereof and the receipt where of the buyer acknowledges by signing this agreement.

II. Kshs 20,000/= being the balance here for to be paid on or before 30th July 2014.”

According to the agreement the deposit was to be paid at the signing. The agreement had witnesses and the plaintiff did not call any of them to testify. I find it difficult to believe that the deposit and indeed the entire purchase price was never paid. The plaintiff states that the title deed got lost and he reported that matter to the police (PEx 3 and 4). However he then states that the defendants are in possession of the title deed. Why report it lost when he knows it is with the defendants? The plaintiff’s case leaves a lot of doubts in my mind. Why then did he allow the defendants to take possession if not a single cent of the purchase price was paid? This is a case of a seller changing their mind midstream and refusing to transfer title after being paid the purchase price. For these reasons I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE