



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 159 OF 2016

ADANUS MWANGANI GANANE.....PLAINTIFF

VERSUS

MARGARET KANGUHA MUGESANI.....DEFENDANT

JUDGEMENT

The plaintiff's case is that at all material times from the 19th July, 2001, the defendant is the sole registered owner of land parcel Tiriki/Hamisi "A"/1338 situated in Hamisi Sub-County, Vihiga County. The plaintiff vide Kakamega High Court Succession Cause No. 998 of 2014 has filed for letters of administration of the estate of Paul Atsenga Ganane (deceased). Paul Atsenga Ganane before his demise was the plaintiff's biological kin. Land parcel numbers Tiriki/Hamisi "A"/1337 and 1338 are resultant parcels of the initial land parcel no. Tiriki/Hamisi "A"/645 which is or was registered in the name of Paul Atsenga Ganane (deceased) who was kinfolk to the plaintiff herein. An order to allow the county surveyor to identify the access road bore no fruit since the defendant herein became hostile and uncooperative thereby occasionally no action. The defendant has ignored and resorted to threats to the extent that the Land Registrar and Land Surveyor's attempt to resolve the dispute have become futile. The plaintiff prays for judgment and for orders that:-

- (a) The defendant be compelled to allow the Land Registrar and Surveyors to re-identify and permanently re-open/restore the said access road.
- (b) A permanent injunction do issue restraining the defendant and or her agent or anyone else acting on her behalf from interfering with the public access road.
- (c) Costs occasioned by and/or arising herefrom be borne by the defendant herein.

The defendant denies that the land parcels numbers Tiriki/Hamisi 'A'/1337 and 1338 are resultant parcels of the initial land parcel number Tiriki/Hamisi 'A'/645 which is or was registered in the name of Paul Atsenga Ganane (deceased) and who was kinfolk to the plaintiff. The defendant counterclaims against the plaintiff for an eviction order to issue against the plaintiff, his servants, agents, employees and or proxies and any other parties from the suit property. The defendant testifies that she moved there in 1996 and there was no road there. The plaintiff was using a footpath through the neighbours land. The defendant prays that:-

- (a) The plaintiff suit be dismissed with costs.
- (b) A declaration that the there is no access road passing through the subject parcel of land known as Tiriki/Hamisi 'A'/1338
- (c) That a permanent injunction restraining the plaintiff and/or any other third parties by themselves and or their servants and or agents from entering upon, occupying, constructing and or in any other manner whatsoever from dealing with and or interfering with the suit property.
- (d) Special damages Ksh. 10,000/=.
- (e) Costs of this counterclaim.
- (f) Any other relief this honourable court may deem fit and just to grant.

This court has carefully considered the evidence and submissions therein. 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 defendant is the sole registered owner of land parcel Tiriki/Hamisi “A”/1338 situated in Hamisi Sub-County, Vihiga County. The issue for determination is whether or not the defendant has blocked the access road to the plaintiff’s parcel of land number Tiriki/Hamisi “A”/1337. PW1 testified that the defendant has closed the access road to his land and the court ordered the survey of the same. PW2 confirmed that his father sold the land to the defendant. PW3 the County Surveyor confirmed that there exists a road through the defendant’s land which needed to be reopened. PEx 4 is the Surveyors report. The report reads in part that;

“The road that leads to parcel no. 1337 is the road that was there from the time of adjudication and this road was found to have been used by the owners of parcel number 1337 and 1338 as it is to serve parcel no. Tiriki/Hamisi “A”/646 and 1072 and is needed to be reopened.”

It is clear to me that the defendant has deliberately blocked the access road. I find that the defendant has failed to establish her counter claim on a balance of probabilities and I dismiss it with costs. The plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendant to be compelled to allow the County Land Registrar and County Land Surveyor to re-identify and permanently re-open/restore the said access road.
2. A permanent injunction do issue restraining the defendant and or her agent or anyone else acting on her behalf from interfering with the public access road.
3. Costs of this suit to be borne by the defendant herein.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE