



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 94 OF 2016

LINUS SHIKANGA ISALAMBA ... PLAINTIFF

VERSUS

HENRY MUYONGA

JANE AYUMA ISHILINGI

KIZITO KONJI

BONFACE AMUKANGA

ANTONY ISHILINJI.....DEFENDANTS

JUDGEMENT

By a plaint dated 2nd June 2016 the plaintiff avers that he is the sole registered proprietor of land parcel registration number KAKAMEGA/SHITACHI/1886 measuring 0.4 Hectares. The plaintiff avers that land parcel registration number KAKAMEGA/SHITACHI/1886 came about as a result of subdivision of the original land parcel registration number KAKAMEGA/SHITACHI/1395. The plaintiff avers further that he bought the said parcel from Christine Muyuka who also bought from John Shilingi Amabwa, the then registered owner who then transferred the portion to the plaintiff. The plaintiff avers further that the defendants have without any colour of right, his permission and consent encroached and trespassed to the plaintiff's land parcel registration number KAKAMEGA/SHITACHI/1886 and put up structures thereon. It is the plaintiff's case that subdivision of land parcel registration number KAKAMEGA/SHITACHI/1395 gave rise to two parcels of land namely KAKAMEGA/SHITACHI/1885 and 1886. The defendants have their own land parcel registration number KAKAMEGA/SHITACHI/1886 with clear boundary on the ground but they have since encroached on the land belonging to the plaintiff. The defendants have ignored, refused and or neglected the plaintiff's efforts to have them peacefully and or honourably move to their land that is next to the plaintiff's land. The plaintiff's claim against the defendants is for an order of eviction against the defendants and an order for a permanent injunction restraining the defendants herein, their servants, agents, employees and any person acting on their behalf from interfering with the plaintiff's peaceful occupation of land parcel registration number KAKAMEGA/SHITACHI/1886. PW1, the plaintiff produced the sale agreement, the bank transfer, title deed and official search as exhibits. PW2 a witness to the said agreement confirmed the sale agreement took place. The plaintiff prays for judgment against the defendant for:-

- a. Permanent injunction restraining the defendants herein, their servants, agents, employees and any person acting on their behalf from interfering with the plaintiff's peaceful occupation of land parcel registration number KAKAMEGA/SHITACHI/1886.
- b. Eviction of the defendants from land parcel registration number KAKAMEGA/SHITACHI/1886.
- c. Costs and interests of the suit.

The defendants aver that the late Rita Tsisika Witunda who is the mother of Christine Muyuka Ruhara bought a portion of land measuring about ¼ an acre from the late John Ishilingi Amabwa the father of the 1st, 3rd and 4th defendants, and husband of the 2nd defendant, and that this portion, which is clearly identifiable with clear boundary marks is the portion that Rita occupied up to the time of her death. The defendants aver that, indeed, upon the demise of the late Rita Tsisika Witunda her daughter Christine Muyuka Ruhara demolished all the buildings that were erected in this portion of land. That the defendants aver that it is only upon the filing of these proceedings that the defendants realized that upon processing the title deed for the portion she bought the late Rita Tsisika got land measuring 0.4 ha. now known as KAKAMEGA/SHITACHI/1886 instead of ¼ an acre. The defendants aver that the late Rita Tsisika never occupied the portion of land in excess of ¼ an acre and that is the land the plaintiff would be entitled to. The defendants aver that the defendants have always been in possession of this land for over 40 years save for the ¼ an acre Rita Tsisika purchased from the late John Ishilingi. The defendants' counter-claim, therefore, is that title of land known as KAKAMEGA/SHITACHI/1886 be sub-divided so that the plaintiff receives ¼ an acre as the

balance remains in the names of the defendants. DW1 the 1st defendant testified that the plaintiff is entitled to only ¼ of the land where he has developed and not one acre. DW2, 3,4 and 5 corroborated his evidence.

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 disputed that the plaintiff is the registered proprietor of the suit land parcel registration number KAKAMEGA/SHITACHI/1886 measuring 0.4 Hectares. The issue for determination is whether or not he holds a good title of the said suit land. The plaintiff testified that he bought the said parcel from Christine Muyuka who also bought from John Shilingi Amabwa, the then registered owner who then transferred the portion to the plaintiff. The plaintiff produced the sale agreement, the bank transfer, title deed and search as exhibits. It is the plaintiff's case that subdivision of land parcel registration number KAKAMEGA/SHITACHI/1395 gave rise to two parcels of land namely KAKAMEGA/SHITACHI/1885 and 1886. The defendants have their own land parcel registration number KAKAMEGA/SHITACHI/1885. The defendants maintain that the plaintiff bought and is only entitled to ¼ acre of the suit land and not one acre. I have perused that documents adduced as evidence and it is clear there was a sale agreement between the plaintiff and Christine Muyuka for land measuring 0.4 Hectares. It was the subdivision of land parcel registration number KAKAMEGA/SHITACHI/1395 which gave rise to two parcels of land namely KAKAMEGA/SHITACHI/1885 and 1886. The defendants retained land parcel registration number KAKAMEGA/SHITACHI/1885 as per the search certificates produced in court. I see no evidence of fraud or misrepresentation on the part of the plaintiff. He is a bonafide purchaser. I find that the defendants have failed to prove their counter claim and I dismiss the same with costs. The plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. Permanent injunction restraining the defendants herein, their servants, agents, employees and any person acting on their behalf from interfering with the plaintiff's peaceful occupation of land parcel registration number KAKAMEGA/SHITACHI/1886.
2. The defendants are to vacate the suit land parcel registration number KAKAMEGA/SHITACHI/1886 within the next six months from the date of this judgement and in default of eviction order to issue.
3. Costs to the plaintiff.

It is so ordered.

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

N.A. MATHEKA

JUDGE