



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 215 OF 2013

FESTUS ANENE ANENE.....PLAINTIFF

VERSUS

WILFRED MAKOMERE KULATI

JOHN AMBALE AMIMODEFENDANTS

JUDGEMENT

The plaintiff is the absolute registered owner of the parcel of land known as MARAMA/SHIBEMBE/1348. The plaintiff avers that the defendants have unlawfully, and without any colour of right trespassed onto the plaintiff's parcel of land aforementioned and started constructing houses thereon without the consent of the plaintiff. The plaintiff further avers that the defendants are unlawfully using the plaintiff's parcel of the land known as MARAMA/SHIBEMBE/1348 thus rendering the plaintiff landless. The plaintiff claims against the defendants both jointly and severally in for an order of eviction against the defendants, their heirs, relatives and or agents from the parcel of land known as MARAMA/SHIBEMBE/1348 and subsequent demolition of all illegally constructed houses or structures thereon. The plaintiff prays for judgment against the defendants jointly and severally for:-

1. An order of eviction against the defendants from the parcel of land known as MARAMA/SHIBEMBE/1348 and demolition of any houses or structures erected by the defendants thereon.
2. Costs of this suit.
3. Interest on (2) above at court rates.
4. Any other relief this honourable court may deem just and fit to grant.

The plaintiff PW1, testified that he bought the land from the 2nd defendant and his wife was a witness. PEx1 is the sale agreement. He paid the full purchase price and the suit land was transferred to him PEx 2. He also produced the official search to prove ownership PEx3. He was charged with forgery and was acquitted in the Butere Court. PW2 the village elder confirmed that the 2nd defendant sold the land to the plaintiff and they did the demarcation and marked the boundary.

The defendants deny that the plaintiff is the absolute owner of L.R. No. Marama/Shibembe/1348. They deny that they have unlawfully or without a colour of right trespassed onto the said parcel of land, they deny that they are unlawfully using the said parcel of land, they deny that they require the plaintiff's consent to use the said parcel of land and they deny rendering the plaintiff landless. The 1st and 2nd defendants aver that they are the brother and son respectively of the deceased Josam Amimo Kulati who died on 8/9/1981 and who was the registered owner of L.R. NO. MARAMA/SHIBEMBE/109. The defendants aver that they are the deceased's heirs and or beneficially entitled to L.R. NO. MARAMA/SHIBEMBE/109 which they have occupied and utilized by constructing homes and growing trees and crops thereon peacefully, continuously, openly and exclusively from the time they were born to-date and that they are lawfully entitled to such occupation and use. The defendants aver that they were shocked to learn that despite the deceased Josam Amimo Kulati having died on 8/9/1981, the plaintiff fraudulently, unlawfully, unprocedurally and improperly caused the deceased's land title No. MARAMA/SHIBEMBE/109 to be sub-divided on 28/1/1999 purportedly creating new titles, to wit L.R. NO. MARAMA/SHIBEMBE/1347 and 1348 and thereafter had title No. MARAMA/SHIBEMBE/1348 registered in the plaintiff's name though there is no sub-division of the land on the ground. The defendants aver that as a result of the said forgery the plaintiff was arrested and charged with the offence of forgery vide Butere Criminal Case No. 529 of 2001 and the defendants are seeking the cancellation of titles NO. MARAMA/SHIBEMBE/1347 and 1348 and or revocation of the plaintiff's registration on title NO. MARAMA/SHIBEMBE/1348. In view of the foregoing the defendants aver that the plaintiff is not entitled to an order of eviction against the defendants as sought in paragraph 6 of the plaint or any remedy at all.

The defendants aver that they are the administrators of the estate of the deceased Josam Amimo Kulati who was the registered proprietor of land parcel No. L.R. MARAMA/SHIBEMBE/109 having obtained a grant of letters of administration vide Butere SRM Succession Cause No. 69 of 2005. By reasons of the particulars of fraud aforesaid, the defendants' prayer is for this honourable court to hold and or declare

that the closure and sub-division of title No. MARAMA/SHIBEMBE/109 was illegal, untenable and fraudulent and to cancel the titles created therefrom, to wit, L.R. NO. MARAMA/SHIBEMBE/1347 and 1348 together with the new registrations so that the original title L.R. NO. MARAMA/SHIBEMBE/109 in the deceased's names is reverted to. The defendants' further prayer is for an order of a permanent injunction restraining the plaintiff either in person or through his relatives, agents, servants or employees from ever alienating, trespassing or moving onto, laying claim to, farming or carrying out any works on the deceased's above said parcel of land. The 2nd defendant testified that he never sold the land to the plaintiff but gave him or an access road.

This court has carefully considered the evidence and submissions therein. The 1st defendant died before the commencement of the hearing of the suit and he was never substituted and therefore the suit herein abated against him. 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 Nyang'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 a finding of fact that the plaintiff is the absolute registered owner of the parcel of land known as MARAMA/SHIBEMBE/1348. The plaintiff has produced a sale agreement PEx1 dated 31st March 1999 signed by the 2nd defendant and duly witnessed. I have perused the green card of the suit land before subdivision MARAMA/SHIBEMBE/109 (DEx2) and indeed it shows that the 2nd defendant was the registered proprietor in 1999. I find no evidence of fraud or misrepresentation on the part of the plaintiff. I find the counterclaim has not been proved on a balance of probabilities and I dismiss the same. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The 2nd defendant, his agents, servants or personal representatives are to vacate the suit land L.R. NO. MARAMA/SHIBEMBE/1348 within six (6) months from the date of this judgement and demolition of any houses or structures erected by the defendants thereon and in default eviction order to issue.
2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE