



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 337 OF 2013

ELIAB IMBIAKHA MUSHA.....PLAINTIFF

VERSUS

RODGERS ORATA KWEYU

ERNEST OLUMU WAMACHE

HARRISON MASSANGA MUTOBERA.....DEFENDANTS

JUDGEMENT

The plaintiff filed Kakamega HC Civil Suit No. 16 of 2009 seeking the following orders:-

- (a) For a declaration that the defendant's conduct is unlawful and that the disputed portion of land being part of Butso/so/Shikoti/1814 be surveyed and rectified.
- (b) Costs.
- (c) Any other further relief that this honourable court may deem just to grant.

Before the case was heard and determined the plaintiff filed the present suit Kakamega HC ELC Case No. 337 of 2013 seeking the following orders:-

- (a) Kakamega Land Registrar and District Surveyor to visit the suit land and reinstate the road connecting parcels number Butso/so/Shikoti/1814, 5146, 5147 and 1767 into its original position as on the diagram No. 11 of the survey of Kenya 1968.
- (b) Costs.
- (c) Any other relief deemed fit.

The 1st suit was filed against one defendant, Rodgers Orata Kweyu, the 2nd suit was filed against 3 defendants Rodgers Orate Kweyu, Ernest Olumu Wamache and Harrison Masanga Mutobera. The two suits were consolidated and the court proceeded to hear the same.

PW1 testified and submitted that the High Court at Kakamega Civil Suit No. 337 of 2013 was already heard and the judgment was done and the court order was issued to direct the County Land Registrar and Surveyor to visit and confirm the boundary of Butso/so/Shikoti/1814 with Land Parcel No. Butso/so/Shikoti/5147, Butso/so/Shikoti/5146 and Butso/so/Shikoti/1767 already the County Land Registrar and Surveyor are already visited and implement the court order. The reports are in the court files at Kakamega. That in the High Court at Kakamega Civil Suit No. 16 of 2009 was already heard and the judgment was done and the court order was issued to direct the District Land Registrar Kakamega and the Western Provincial Land Surveyor to visit L.R. No. Butso/so/Shikoti/1814 and Butso/so/Shikoti/5147 already the Land Registrar and Surveyor are already visited and implement the court order. The reports are in the court files at Kakamega. He prays that the defendants pay costs for the damages.

PW2 the County Land Registrar testified that they visited the scene and recommended that the road be opened and needed a court order to do so.

DW1 The 1st defendant testified that, in the year 2005 he purchased land parcel No. Butso/so/Shikoti/5147 from one Alexander Khainga Mutsembi. The title to that parcel of land was created on 13th May, 1994 as appears on the green card. Ownership of the land had changed several times from Anzelimo Wamache Mukah to Gregory Mutachi Wamache then Ibrahim Nanzala Weremba then to Alexander Khayinga

Mutsembi and finally to Rodgers Orata Kweyu. It is worth noting that the plaintiff had no dispute with the previous owners of land. Having purchased land parcel No. Butso/5147, the 1st defendant realized that there was some encroachment on his land by the plaintiff herein. The 1st defendant invited the land registrar to visit and rectify the encroachment. The Land Registrar visited the ground and recommended that Rodgers Orata Kweyu files a dispute with the land disputes tribunal as the encroachment was beyond 14 meters. It was actually a land dispute and not a boundary dispute.

The 1st defendant Rodgers Orata Kweyu then filed at the Lurambi Land Disputes Tribunal his case which was heard by the tribunal and the award adopted as the judgment of the court in Kakamega CM Misc. Award No. 214 of 2007. The findings of the tribunal were that the Land Registrar and the District land Surveyor visit the site and correct the encroachment and to open the way to enter plot No. 5147 and 5146. The orders were extracted and duly executed. They were produced among the 1st defendant's exhibit. The execution of the order was done in the year 2008. See the order dated 4th September, 2008 together with the surveyor's report produced by the 1st defendant as his exhibits.

The plaintiff did not move to challenge those orders on appeal as was stipulated by law. He instead filed Kakamega HCCC No. 16 of 2009 which abandoned after he obtained the orders issued by Justice S.A. Chitembwe on 4th June, 2014. The plaintiff abused the said orders by cutting down the 1st defendant's crops, trees and demolishing his permanent latrine which had not been ordered by the court. The judge was so surprised by the turn of events that he admonished the plaintiff and issued the orders dated 25th July, 2014 directing the Agricultural Officer and Forest officer Butso North Ward to visit L.R. No. Butso/Shikoti/5147 and 1814 and carry out an assessment of the damage carried out therein on 16th July, 2014 and thereafter file a report in this court. The orders were complied with the two reports filed in court. The forest officer's report is dated 31/7/2014 while that of the Agricultural officer is dated 30th July, 2014. Both reports were filed in court on 18/4/2016 and form part of the court's record. The forest officer's report indicate that the 1st defendant suffered a projected loss in the sum of Ksh. 2,370,000/=. The agricultural officer's report indicates that the 1st defendant suffered loss in the sum of Ksh. 188,840/=. The 1st defendant has since filed suit for recovery of the said losses vide Kakamega CMCC No. 177 of 2017. It was during the said malicious damage that the plaintiff closed the road of access in dispute, which remains closed to date.

The 1st defendant was the first one to obtain a report from the Land Registrar and District Surveyor dated 3rd December, 2008 and 23/2/2010. The reports indicate that the plaintiff was violent and even tried to disrupt the exercise but security officers were alert. The ground measurements taken clearly revealed that the plaintiff had shifted the road of access from its right position. That the area where the road ought to have been had been ploughed and sugarcane planted by the plaintiff, who was the defendant in that case. The evidence of sugarcane having been planted on the dispute area was reiterated by the Regional Surveyor when he gave evidence in this matter. According to him the road could not be opened until when the sugarcane is harvested. The defendants have been patient to date unlike the plaintiff who for no apparent reason cut down the defendant's crops and trees without orders for that purposes.

DW2, the 2nd defendant submitted that he was not supposed to be a party to this suit. He does not share a common boundary with the plaintiff, though the road of access that the plaintiff blocked served his plot and the 1st defendant's. DW3, the 3rd defendant stated that he does not own any land. His father's land as per the map does not share a common boundary with the plaintiff's. There is a road of access separating the two parcels of land, which road has been interfered with by the plaintiff. Should that road be restored there will not be any conflict between the two. The 3rd defendant testified and demonstrated that land parcel No. Butso/Shikoti/1767 is currently registered in the name of his father who is deceased, a fact well known to the plaintiff.

DW4 the Regional Surveyor testified that the boundary on the ground was correct and they is need for are resurvey for the access road to remain open. In his opinion the road does not pass within of Butso/Shikoti/1814. He produced that mutation map and report as exhibits.

This court has carefully considered the evidence and submissions herein. 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 Nyang'wa –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. The Judge 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 Butsotso/Shikoti/5147 is the 1st defendant. This court has perused the exhibits produced in evidence, on 8/2/2012 the plaintiff obtained orders that the District Land Registrar, Kakamega and Western Province Land Surveyor to visit plot numbers Butsotso/Shikoti/1814 and 5147 and demarcate the boundary for the two plots as agreed and the Surveyor to file a report in 45 days. The exercise was carried out on 25th and 26th September, 2013 and they filed their report. The said report indicates that the exercise was not concluded. There was a recommendation that for further steps to be taken before the exercise is concluded which steps are yet to be taken to date. The report was produced by both sides of the case and by the Regional Surveyor when he testified for the defence. Again another survey was done in the year 2016 at the request of the plaintiff and a report filed in court. The said report indicates that the dispute was still not resolved. The report states that the plaintiff Eliab Imbiakha Musha's parcel of land would become land locked. It was recommended that a road be created through land parcel No. Butsotso/Shikoti/1813 which was not done. Parcel No. Butsotso/Shikoti/1813 was not one of the parcels in dispute. The Land Registrar PW2, indicated that the road was created and she admitted on cross examination that the exercise is yet to be completed. Her report was filed in court on 7th May, 2018. It seems that the said report contradicts the report of the Regional Surveyor which had been filed earlier in 2013. The court is now faced with several survey reports which are not consistent. I find this case is not concluded as clearly stated in evidence by the County Land Registrar, PW2 and the Regional Surveyor, DW5. It has come out in evidence that the plaintiff has closed the access road. I find that the land parcels in dispute need to be re surveyed and a final report be made jointly with the professionals concerned. I therefore make the following orders;

1. The County Land Registrar and County Surveyor to visit Land Parcel No Butsotso/Shikoti/1814, Land Parcel No. Butsotso/Shikoti/5147, Butsotso/Shikoti/5146 and Butsotso/Shikoti/1767 to establish the boundaries and reopen the access road and file their report in court within the next 60 days.
2. Each party is to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH JUNE 2019.

N.A. MATHEKA

JUDGE