



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 226 OF 2015

OTINYA OMUKUBA.....PLAINTIFF

VERSUS

SAMUEL KUYA.....DEFENDANT

JUDGEMENT

The plaintiff's case is that, at all material times herein the plaintiff is the sole proprietor of the whole of that parcel of land known as Kisa/Emasatsi/824. The plaintiff avers that he is the absolute registered owner of parcel of land No. Kisa/Emasatsi/824 measuring approximately 5.2 acres. The plaintiff avers that on or about the year 2013 the defendant without the authority and/or permission of the plaintiff trespassed onto and started ploughing the parcel of land aforementioned. The plaintiff avers that the defendant as his neighbor has without justifiable cause and/or excuse trespassed and encroached into the plaintiff's parcel of land number Kisa/Emasatsi/824 and hived off part of the said land and added the hived off portion to L.R. No. Kisa/Emasatsi/1172 which portion he is ploughing. The plaintiff avers that the defendant's act of ploughing the plaintiff's land aforementioned is unjustified and unlawful. The plaintiff avers that as the absolute registered owner of parcel of land number Kisa/Emasatsi/824 he has indefensible rights over the same and the action of trespass by the defendant is unconstitutional as the same is against the rights to private property. The plaintiff's claim against the defendant therefore is that a permanent injunction be issued to restrain the defendant, defendant's agents, and/or employees from interfering in whatever manner with the plaintiff's peaceful enjoyment of the parcel of land known as Kisa/Emasatsi/824. The plaintiff prays for an order that the Land Registrar and the District Surveyor Kakamega County to move onto the plaintiff's and defendant's parcel of land numbers Kisa/Emasatsi/824 & Kisa/Emasatsi/1172 and rectify the boundary between the plaintiff's and the defendant's parcel of land mentioned above. The plaintiff further prays for an order of eviction and permanent injunction be issued to restrain the defendant, his agents, servants, employees and or anyone acting under his instructions from interfering in whatever manner with the plaintiff's parcel of land No. Kisa/Emasatsi/824 in the event it would be determined that they are on his land. The plaintiff prays for judgment against the defendant severally for:-

- (a) An order that the Land Registrar Kakamega and the District Surveyor Kakamega County to move onto the plaintiff's parcel of land number Kisa/Emasatsi/824 and the defendant's parcel of land number Kisa/Emasatsi/172 to determine and rectify the common boundary between the said parcels of land.
- (b) An order of eviction and permanent injunction be issued to restrain the defendant, his agents, servants, employees and or anyone acting under his instructions from interfering in whatever manner with the plaintiff's parcel of land No. South Kisa/Emasatsi/824. In the event it will be determine they are on his land.
- (c) Costs of this suit and interest.
- (d) Any other relief this honourable court may deem fit and just to grant under the circumstance.

The defendant's statement is a mere denial. In his testimony the defendant stated that he has lived there since 2012 and his parents were buried there. The plaintiff had closed the road and the Surveyor said it was to be opened. He confirms that there has been a long standing dispute with the plaintiff over land.

This court has carefully considered the evidence and submissions therein. The plaintiff failed to attend court nor provide any 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 a finding of fact that the plaintiff is the absolute registered owner of the parcel of land known as Kisa/Emasatsi/824. The plaintiff maintains that the defendant has trespassed on his land and the defendant denies. This appears to be a boundary dispute and access road dispute. PEx 2 the surveyors report observed that the plaintiff's parcel of land seemed to vary greatly in terms of the registered acreage, actual acreage and boundary positions on the map and on the ground. I find that the map needs to be amended to reflect the actual position. I find that the plaintiff has proved his case on a balance of probabilities to that extent and I grant the following orders;

1. An order that the Land Registrar Kakamega and the District Surveyor Kakamega County to move onto the plaintiff's parcel of land number Kisa/Emasatsi/824 and the defendant's parcel of land number Kisa/Emasatsi/172 to determine and the common boundary between the said parcels of land as they exist on the ground and rectify the map.
2. An order of eviction and permanent injunction be issued to restrain the defendant, his agents, servants, employees and or anyone acting under his instructions from interfering in whatever manner with the plaintiff's parcel of land No. South Kisa/Emasatsi/824. In the event it will be determine they are on his land.
3. Each party 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