



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 307 OF 2014

AINEA OTUBA MULEKANO.....PLAINTIFF

VERSUS

HASSAN SILIWA MALIA

SALIM WEFWAFWA.....DEFENDANTS

JUDGEMENT

The 1st defendant now deceased was the originally registered owner of Land Parcel No. Kakamega/Bunyala/Budonga 771 measuring about 1.06 hectares. During 1986, the 1st defendant sold 0.68 hectares of the land to the plaintiff and transferred the said parcel to the plaintiff thereby giving to plaintiff parcel Budonga 1244 and retaining parcel Budonga/1243. During 2009, the 1st defendant fraudulently purported to subdivide parcel No. Budonga/1243 and transfer parcel Budonga No. 1245 to the 2nd defendant who is his nephew. In furtherance of the fraud, the defendants moved into the plaintiff's land, destroyed the boundaries, trees and crops thereon and put up houses on the land thereby illegally and effectively evicting the plaintiff from the land and went to Mumias Sugar Company to change the contract. The plaintiff has as a result suffered damages resulting from the destruction of sugarcane and trees. The plaintiff has incurred and still incurs expenses in sorting out the problem. The plaintiff's claim against the defendants jointly and severally is the cancellation of the purported title parcel No. 1245 and the restoration of the boundaries of parcel No. 1244/Kakamega/Bunyala/Budonga and the order that the plaintiff's contract with Mumias Sugar Company be reinstated and all proceeds held be released to him. The plaintiff claims damages aforesaid resulting from the defendants' actions and eviction of the defendants from his parcel of land. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) Reinstatement of the boundaries of parcel No. Kakamega/Bunyala/Budonga/1244 and declaration of the rights thereto.
- (b) Damages for the properties destroyed and inconvenience caused.
- (c) Costs of this suit.
- (d) Any other remedy the honourable may deem fit to grant.

The Defendant avers that during the year 1984 the plaintiff leased some portion of land from the 1st defendant for the purpose of planting sugarcane to harvest three cuttings which harvests ended in the year 1994. The defendants avers that the plaintiff is unknown and that land parcel No. Bunyala/Budonga/1245 was transferred to the 2nd defendant as a gift during the year 2009. That parcel No. 1244 never existed and does not exist. The plaintiff has disturbed the defendants to an extent that the defendants have suffered irreparable loss of losing all sugarcane crops from the year 1994-2009. The defendants will claim the refund of all sugarcane proceeds from the plaintiff from the year 1994-2009.

This court has carefully considered the evidence and the submissions therein. On the 2nd March 2017 the plaintiff applied to proceed against the 2nd defendant only as the 1st defendant was deceased and this was granted by consent. 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 Bunyala/Budonga 1244. It is the plaintiff’s case that the 1st defendant now deceased was the originally registered owner of Land Parcel No. Kakamega/Bunyala/Budonga 771 measuring about 1.06 hectares. During 1986, the 1st defendant sold 0.68 hectares of the land to the plaintiff and transferred the said parcel to the plaintiff thereby giving to plaintiff parcel Bunyala/ Budonga 1244 and retaining parcel Bunyala/Budonga/1243. During 2009, the 1st defendant fraudulently purported to subdivide parcel No. Budonga/1243 and transfer parcel Bunyala/Budonga No. 1245 to the 2nd defendant who is his nephew. PW2 the County Land Registrar testified that Land Parcel No. Kakamega/Bunyala/Budonga 771 was subdivided in 1993 and transferred the said parcel Bunyala/Budonga 1244. The seller was the 1st defendant and she produced the green card PEX6, Mutation form PEX7 and consent PEX8. PW3 the Land Surveyor produced the surveyors report in this matter PEX9. The report stated that the subdivisions of Land Parcel No. Kakamega/Bunyala/Budonga 771 and Land Parcel No. Kakamega/Bunyala/Budonga 1243 were done on different dates by different surveyors. The first subdivision of Land Parcel No. Kakamega/Bunyala/Budonga 771 was done on 30th September 1993 and registered on 27th October 1993. The second subdivision of Land Parcel No. Kakamega/Bunyala/Budonga 1243 was done on 4th October 1993 and registered on 16th November 1993. The subdivision of Land Parcel No. Kakamega/Bunyala/Budonga 771 should have been amended first before the subdivision on Land Parcel No. Kakamega/Bunyala/Budonga 1243.

The report goes on to state that Land Parcel No. Kakamega/Bunyala/Budonga 1244 Land Parcel No. Kakamega/Bunyala/Budonga 1245 are in one and the same position on the ground and have the same measurements. However since Land Parcel No. Kakamega/Bunyala/Budonga 1244 preceded Land Parcel No. Kakamega/Bunyala/Budonga 1245 then the former should be the one appearing in the position of the latter on the map. I concur with the surveyors report entirely. From documentary evidence adduced I find that the first subdivision of Land Parcel No. Kakamega/Bunyala/Budonga 771 was done on 30th September 1993 and registered on 27th October 1993. The 1st defendant transferred the said parcel to the plaintiff thereby giving to plaintiff parcel Bunyala/Budonga/1244 and retaining parcel Bunyala/Budonga/1243. The subdivision of Land Parcel No. Kakamega/Bunyala/Budonga 771 should have been amended first before the subdivision on Land Parcel No. Kakamega/Bunyala/Budonga 1243. I am satisfied that the plaintiff was a bonafide purchaser for value and his title in good. At the time of the second subdivision of Land Parcel No. Kakamega/Bunyala/Budonga 1243 which was done on 4th October 1993 and registered on 16th November 1993, the said parcel of land was not available for subdivision as Land Parcel No. Kakamega/Bunyala/Budonga/1244 and Land Parcel No. Kakamega/Bunyala/Budonga 1245 are in one and the same position on the ground and have the same measurements. The 2nd defendant’s title is bad and illegal. The award of damages will not be granted as the same have not been proved. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

(1) Land parcel No. Kakamega/Bunyala/Budonga/1244 is the valid title and the map to be amended to reflect the same.

(2) Costs to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH JUNE 2019.

N.A. MATHEKA

JUDGE