



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 236 OF 2015

ELARIOUS LUTIALI.....PLAINTIFF

VERSUS

LIYAI AKWEYWA

HENRY MUKHOVI.....DEFENDANT

JUDGEMENT

The plaintiff is at all material times to this suit the registered owner of land parcel No. ISUKHA/SHITOTO/462. The 1st defendant is at all material times to this suit be registered owner of land parcel no. ISUKHA/SHITOTO/460 which borders the plaintiff's land. At all material times to this suit the 2nd defendant on instructions of the 1st defendant has illegally encroached and is cultivating a portion of the plaintiff's land. The plaintiff avers that without his permission and without any colour of right the 1st defendant upon moving his boundary into a portion of the plaintiff's land, cause the 2nd defendant to enter into the land and began cultivating it which acts are illegal. The plaintiff further avers that he has on several occasions demanded the 1st and 2nd defendant to vacate his portion of land but they declined. The plaintiff seeks for a survey, rectification of boundary and an order for eviction of the 1st and 2nd defendants from his illegally encroached portion of the land. The plaintiff also avers that he has been denied use of the illegally encroached portion of land for more than 4 years and he claims for damages for loss of usage for those 4 years. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) An order for survey of the boundary between land parcels No. ISUKHA/SHITOTO/462 and ISUKHA/SHITOTO/460 after which an order for the rectification of the boundary.
- (b) An eviction order against the defendants on the plaintiff's illegally encroached land.
- (c) Mesne profits for the encroached parcel of land for 5 years.
- (d) Cost plus interest.

The 2nd defendant in his defence is not aware if there are any boundary dispute between the plaintiff and the 1st defendant. The 2nd defendant states that in the year 2011, he requested the 1st defendant to give him land so that he could plant some potatoes in it. That the 1st defendant gave the 2nd defendant a small portion of his land on land parcel No. ISUKHA/SHITOTO/460 on the condition that he will vacate the land when the season of planting maize approaches. That indeed the 2nd defendant planted the potatoes but the plaintiff was not happy with that and he brought in his cattle which ate the potatoes and 2nd defendant reported to the police. The 2nd defendant states that he has never encroached on the plaintiff parcel of land as land parcel ISUKHA/SHITOTO/460 does not belong to the 2nd defendant but belongs to the 1st defendant. The 2nd defendant states that as per now he is not cultivating nor using land parcel No. ISUKHA/SHITOTO/460 and so it cannot be said that he has encroached on the plaintiff parcel of land and that he left cultivating the suit parcel of land in the year 2011.

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. 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 a finding of fact the plaintiff is the absolute registered proprietor of all that parcel of No. ISUKHA/SHITOTO/462. The 1st defendant is at all material times to this suit the registered owner of land parcel no. ISUKHA/SHITOTO/460 which borders the plaintiff's land. The plaintiff testified and produced the title deed and the official searches as PEx1 PEx 2 and PEx3. At all material times to this suit the 2nd defendant on instructions of the 1st defendant has illegally encroached and is cultivating a portion of the plaintiff's land. Both the defendants testified and maintained they have not trespassed on the plaintiff's land. I find that the defendants are not being truthful. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. An order for survey of the boundary between land parcels No. ISUKHA/SHITOTO/462 and ISUKHA/SHITOTO/460 and the rectification of the boundary.
2. The defendants to vacate from the suit land parcel No. ISUKHA/SHITOTO/462 within the next 6 (six) months from the date of the said survey and rectification and in default eviction notice to issue forthwith.
3. Each party to bear its own costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE