



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 298 OF 2015

MICHAEL OTIENO.....PLAINTIFF

VERSUS

THOMAS ONDIMO DINDI.....DEFENDANT

JUDGEMENT

This case is briefly that, at all material times to this suit the plaintiff is the absolute registered proprietor of all that parcel of land comprising title South Wanga/Bukaya/1012 measuring approximately 1.40 hectares. The defendant either by himself or his family members and or agents without the plaintiff's consent is illegally occupying and using the whole of the said parcel of land and has refused to peacefully and voluntarily vacate the same and give to the plaintiff vacant possession. The defendant has no legally recognized rights to the suit parcel after a claim of adverse possession instituted vide KAK HCC NO. 123 of 2009 by his father Cleophas Dindi now deceased was dismissed on 18th March, 2015. The plaintiff prays for judgment against the defendant for:-

(a) An order for immediate eviction of the defendant whether by himself and or other family members and/or other family members and/or agents from land parcel No. S. WANGA/BUKAYA/1012 and demolition of any buildings and or structures erected thereon by the defendant and or family members and or agents.

(b) Costs of this suit.

PW1, the plaintiff testified that, he inherited that suit land from his mother in 1997 and produced the title deed and the green card as PEx1 and PEx2. PW2 corroborated the plaintiff's evidence and maintains that no one lives on that land.

The defendant pleads that the plaintiff lacks capacity to sue on behalf of the estate of Clement Okumu Ohodha (deceased) and bring this suit against the defendant thus the suit is incompetent and wasting court time and the defendant shall raise a preliminary objection during the hearing of the case. That the plaintiff is a stranger to the defendant and he never own or reside into a land parcel No. South Wanga/746 which was fraudulently subdivided by the late Clement Okumu Ohodha in 1997. That the plaintiff has no capacity to evict the defendant in their ancestral land. That the plaintiff resides in Ulima within Siaya County and in a different land parcel. That the defendant's father cultivated the suit land parcel LR. South Wanga/Wanga/746 which was secretly subdivided into several parcel by the late Clement Okumu Ohodha. That the defendant and his family have lived in the said parcel of land for more than 40 years. That the defendant denies that the plaintiff is the registered owner of L.R. South/Wanga/1012 measuring 1.40 hectares if so he obtained the title deed through fraud. That the defendant denies that Kakamega /HCC NO.123 of 2009 filed by his late father Cleophas Dindi has been concluded and decree issued that said the matter is pending for hearing and determination and defendant shall apply to substitute his father and have the same consolidated with this one through the leave of the court. That the defendant avers that the plaintiff lodged a criminal case against the defendants late father Cleophas Dindi vide Mumias Criminal case No. 270 of 2001 which the deceased was charged with criminal offence of trespass but later the accused person was acquitted under section 215 of Criminal Procedure Code. That the criminal department from Butere police station also investigated the plaintiff on how he obtained the title deed of LR S/WANGA/BUKAYA/746 and there was no record at LCB to that effect. DW1 the defendant testified that he does not live on that land but cultivates the same. He confirms that the land belonged to his uncle. DW2 testified that the defendant was using the suit land.

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 land comprising title south Wanga/Bukaya/1012 measuring approximately 1.40 hectares from 1997. It is the plaintiff's testimony that the defendant either by himself or his family members and or agents without the plaintiff's consent is illegally occupying and using the whole of the said parcel of land and has refused to peacefully and voluntarily vacate the same and give to the plaintiff vacant possession. The plaintiff testified that, he inherited that suit land from his mother in 1997 and produced the title deed and the green card as PEx1 and PEx2. PW1 corroborated the plaintiff's evidence and maintains that no one lives on that land. I find that the defendant has not adduced any evidence of fraud in the plaintiff's title. The plaintiff is suing in his own capacity and not on behalf of the estate of Clement Okumu Ohodha (deceased). He therefore has the locus standi. I find that the defendant has no legally recognized rights to the suit parcel after a claim of adverse possession instituted vide KAK HCC NO. 123 of 2009 by his father Cleophas Dindi now deceased was dismissed on 18th March, 2015. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. The defendant whether by himself and or other family members and/or other family members and/or agents are to vacate from the suit land parcel No. S. WANGA/BUKAYA/1012 and demolish any buildings and or structures erected thereon by the defendant and or family members and or agents within the next 6 (six) months from the date of this judgement and in default eviction notice to issue forthwith.
2. No orders as to costs as the parties are relatives.

It is so ordered.

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

N.A. MATHEKA

JUDGE