



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 191 OF 2013

ALFRED AKHISERO DIVISI.....PLAINTIFF

VERSUS

CHARLES MAMBILI.....DEFENDANT

JUDGEMENT

The plaintiff avers that he is the registered owner of L.R. Kakamega/Virembe/255 bordering the defendants' land L.R. Kkamega/Virembe/256. The plaintiff avers that there is a government access road to his parcel through the defendant's' land which the defendant has closed since 1994 enabling him to access his land. The plaintiff avers despite several demands and efforts through the local administration to have the said access road opened by the defendant, he has refused and continues to refuse to re-open the same. The plaintiff's claim against the defendant herein is for an order compelling the defendant to open the access road to the plaintiff's land L.R. Kakamega/Virembe/255 as surveyed by the government and in default, the Land Registrar Kakamega and the District Surveyor Kakamega do visit L.R. Kakamega/Virembe/255 and L.R. Kakamega/Virembe/256 and survey the same and open the access road to the plaintiff's land L.R. Kakamega/Virembe/255. The plaintiff prays for judgment against the defendant.

(a) An order compelling the defendant to open the access road to the plaintiff's land L.R. Kakamega/Virembe/255 as surveyed by the government and in default the land Registrar Kakamega and The District Surveyor Kakamega do visit L.R. Kakamega/Virembe/255 and L.R. Kakamega/Virembe/256 and survey the same and open the access road to the plaintiff's land L.R. Kakamega/Virembe/255.

(b) Costs and interest.

The defendant vehemently denies the plaintiff's allegations. The defendant did not give any oral evidence and submitted that this matter should be dealt with by the Land Registrar.

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. 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 not disputed that the plaintiff is the registered proprietor of the suit land parcel L.R. Kakamega/Virembe/255 bordering the defendants' land L.R. Kkamega/Virembe/256. The plaintiff testified that there is a government access road to his parcel through the defendant's' land which the defendant has closed since 1994 enabling him to access his land. PW2 corroborated his evidence. PEx 5 the Land Registrars' report confirmed that an access road did exist but was blocked. This evidence was not challenged. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendant is to open the access road to the plaintiff's land L.R. Kakamega/Virembe/255 as surveyed by the government and in default the land Registrar Kakamega and The District Surveyor Kakamega do visit L.R. Kakamega/Virembe/255 and L.R. Kakamega/Virembe/256 and survey the same and open the access road to the plaintiff's land L.R. Kakamega/Virembe/255.

2. Costs to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH JULY 2019.

N.A. MATHEKA

JUDGE