



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 38 OF 2012

ATANUS ASIENWA.....PLAINTIFF

VERSUS

SALIM ASUMANI

MUSTAFA ASUMANI

ASINUS ASUMANI

SHARIFU ASUMANI

NIPREDA AIMUCHE

VERONICA WANJIKO

JACOB SUKUVI

ABRAHAM NYONGESA.....DEFENDANTS

JUDGEMENT

At all material time the plaintiff was and is the registered proprietor of the adjacent parcels of land known as Lugari/Likuyani/Block 1/Vihiga/204 measuring 0.3358 hectares or thereabouts and Lugari/Likuyani/Block 1/Vihiga/205 measuring 0.3305 Hectares or thereabouts respectively. The plaintiff avers that in 1979 or thereabouts he was allocated the said parcels of land from Vihiga Farmers Company Ltd acquired through his membership for a consideration of his shares. The plaintiff further avers that he put up a two roomed semi-permanent house on land parcel known as Lugari/Likuyani/Block 1/Vihiga/205 which he occupied while the other five rooms put up on land parcel known as Lugari/Likuyani/Block 1/Vihiga/204 were rented to tenants. The plaintiff further avers that he occupied the said residential house since 1979 to 1985 when he shifted to his other parcel of land in Lumino and rented all the houses to tenants until 2007-2008 or thereabouts. The plaintiff further avers that the defendants herein jointly and severally without any colour of right or justification forcefully trespassed on his said two parcels of land in 2007-2008 during the post-election violence and vandalized and demolished his said semi-permanent houses thereon and interfered with and destroyed boundary features. The plaintiff's claim against the defendants jointly and or severally is for an order of eviction to issue against them to vacate the plaintiff's said land parcel Nos. Lugari/Likuyani/Block 1/Vihiga/204 and Lugari/Likuyani/Block 1/Vihiga/205. In the alternative the plaintiff prays for an order of permanent injunction to issue restraining the defendants, their workers, family members and or any other persons claiming under them for interfering with the plaintiff's occupation and or enjoyment of the parcel of land Nos. Lugari/Likuyani/Block 1/Vihiga/204 and Lugari/Likuyani/Block 1/Vihiga/205. The plaintiff further claims for general damages against the defendants jointly and or severally for loss of user of the said parcels of land. The plaintiff prays for judgment against the defendants jointly and or severally for;

- (a) Eviction orders.
- (b) Injunctive orders.
- (c) General damages.
- (d) Costs of this suit.

(e) Interest on (c) and (d) above at court rates.

The defendants state that if there was a demolition of houses, which they deny, the same was not done by them. The defendants aver that the reliefs sought by the plaintiff are misplaced, misconceived, bad in law and a waste of the judicial time. The defendants state that all the parties herein are members of Vihiga Farmers Co. Ltd which was formed to purchase plots on behalf of its shareholders and then sub divide the same and give title to each individual member the portion so purchased. The defendants further state that the said company acquired L.R. No. 840312 so as to subdivide it and transfer to its members aforesaid. The defendants further state that the said company was however frustrated in its efforts to sub divide and transfer the land to its members due to interference by the D.O. and the Chief of Lugari as a result of which the said company instituted Kakamega HCC No. 344 of 1988 challenging the actions of the said administrators. The defendants further jointly state that Kakamega HCC No. 344 of 1988 declared the actions of the said administrators annulity. The defendants further state that the plaintiff is one of the persons who took advantage of the interference by the said administrators to fraudulently acquire land parcels No. Lugari/Likuyani/Block 1/Vihiga/204 and 205 measuring approximately 0.358 hectares and 0.3305 hectares respectively hereinafter referred to as the suit parcels. The defendants pray that the case be struck out with costs.

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 parcels of land known as Lugari/Likuyani/Block 1/Vihiga/204 measuring 0.3358 hectares or thereabouts and Lugari/Likuyani/Block 1/Vihiga/205 measuring 0.3305 Hectares or thereabouts respectively. The plaintiff avers that in 1979 or thereabouts he was allocated the said parcels of land from Vihiga Farmers Company Ltd acquired through his membership for a consideration of his shares. PW2 a neighbour corroborated the plaintiff's case. DW1 the Chairman of Vihiga Farmers Company Ltd testified that indeed the plaintiff was a member of the company and had bought two shares for Kshs. 6000/=. Initially it was three acres per share but there was no land on the ground and he accepted the two plots of 50 by 100 feet of which he is in possession to date. The company was however frustrated in its efforts to sub divide and transfer the land to its members due to interference by the D.O. and the Chief of Lugari as a result of which the said company instituted Kakamega HCC No. 344 of 1988 challenging the actions of the said administrators. The defendant further jointly states that Kakamega HCC No. 344 of 1988 declared the actions of the said administrators annulity. He produced the judgement and decree of the said case as DEX3 and DEX4. There is a further case Kakamega ELC No. 400 of 1992 which is still pending in court. He also produced the subdivision plans DEX2. DW2 the Secretary of the said Vihiga Farmers Company Ltd corroborated DW1's evidence. He states that it is the administration interfered with the sub division. The 4th and 8th defendants all testified stating that they are occupying their plots which were allocated to them by the said Company. I have perused the documents adduced as exhibits and it is indeed true that the court in Kakamega HCC No. 344 of 1988 declared the actions of the said administrators annulity. The said judgement and decree was delivered way back in 1990. The plaintiff was registered proprietor of the suit land parcel known as Lugari/Likuyani/Block 1/Vihiga/204 measuring 0.3358 hectares or thereabouts and Lugari/Likuyani/Block 1/Vihiga/205 measuring 0.3305 Hectares or thereabouts in 1989 and 2002. The court nullified the same in 1990 and the decree still stands. Indeed there is a similar matter pending in court Kakamega ELC No. 400 of 1992. The defendants stated that the other members on the Company do not have titles of their plots and that there is no agricultural land on the ground. . The plaintiff ought to pursue the Company for a refund if he can prove that he was entitled to a larger parcel of land. As matters stand now his allocation was nullified by the court in 1990. I find that the plaintiff has failed to establish his case on a balance of probabilities and the same is dismissed with no orders as to costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE