



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 21 OF 2016

CALISTUS BUHURU SHIMALANDE..... PLAINTIFF

VERSUS

PATRICK BRANDON L. MUKHUBI

LUKA MUSULA MUKHOBIDEFENDANTS

JUDGEMENT

The plaintiff herein avers that he is the sole registered proprietor of that parcel of land known as Kakamega/Shikulu/278 which borders WITH those of the defendants with the 1st defendant being a registered proprietor of Kakamega Shikulu/3023, while the 2nd defendant is a registered owner of land parcel No. Kakamega/Shikulu/3022 respectively. The plaintiff further avers that on or before the year 2013, the said defendants herein without any colour of right and/or any reasonable excuse have trespassed onto the plaintiff's land and are occupying four (4) meters inside from the common boundary. The plaintiff's claim against the defendants severally and jointly is for an injunction order restraining the said defendants from trespassing onto the plaintiff's land No. Kakamega/Shikulu/278. Despite several demands and notice of intention to sue having been made, the said defendants have refused, neglected and/or ignored the same and to persists onto such refusal. The plaintiff prays for:-

- a. An order the defendants severally and jointly is for an injunction order restraining the said defendants from trespassing onto the plaintiff's land No. Kakamega/Shikulu/278.
- b. Costs of the suit.
- c. Other reliefs.

The 1st defendant further state that the land parcel No. Kakamega/Shikulu/3023 is registered in the name of Patrick Lidala Mukhobi who is not himself. The 1st defendant avers and states that the plant and/or the claim is misdirected and same should be struck out. That the 1st defendant states that he stays on Land Parcel No. Kakamega/Shikulu/3023 where he is only a caretaker and he is not a proprietor of the same. 2nd defendant stated that he has not encroached of the plaintiff's land as per the survey report.

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 as Kakamega/Shikulu/278. The issue for determination is whether or not the defendants have trespassed on his land. The court ordered by the consent of the parties for the surveyor to visit the land parcels in dispute and file a report. PEx 1 the surveyors report indicated that there was encroachment into the plaintiff's land by the 1st defendant and the boundaries were marked. The 1st defendant chose to stay away during the survey exercise and maintains the land is not his. I find that the plaintiff has proved his case on a balance of probabilities against the first defendant only and I grant the following orders;

1. An injunction order to issue against the 1st defendants restraining him from trespassing onto the plaintiff's land No. Kakamega/Shikulu/278.
2. Costs of the suit to be borne by the 1st defendant.

It is so ordered.

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

N.A. MATHEKA

JUDGE