



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 575 OF 2014

MARK L. NATILI.....PLAINTIFF

VERSUS

BILHA SAVAYA SHIHEMBEKHO..... DEFENDANT

JUDGEMENT

The plaintiff's claim against the defendant is for the provincial surveyor to visit the boundary of the two parcels No. Kaka/Shiswa/165 and Kaka/Shiswa/163 and do the correction of the boundary which was mistakenly planted wrongly by the District Surveyor who is related to the defendant herein despite the plaintiff's protest on 24th June, 2014. The District Surveyor who is also related to the defendant planted a new boundary between the two parcels and encroached onto the plaintiff's land No. Kaka/Shiswa/165 without considering that there was an old boundary which is still existing which shows that the plaintiff's land is measuring 4 ½ acres. The plaintiff prays for recovery as follows:-

- (a) Provincial Surveyor and Land Registrar to visit the boundary between Kaka/Shiswa/165 and Kaka/Shiswa/163 and restore the old boundary back.
- (b) Costs of this suit.

The defendant submitted that the plaintiff and the defendant share a boundary after a successful conveyance that was made in 2008. That the plaintiff is the one that requested the District Surveyor to come and map the said piece of land, which we obliged to without any problem whatsoever. But when the finding of the survey came out, the plaintiff protested the said finding. That, the plaintiff alleges that the District Surveyor, whom he initiated to come, is his relative. This is untrue and baseless. That the plaintiff made a prayer to this court for a new survey to be made. The court granted the same and gave an order and a team consisting of the District Lands Registrar and the District Surveyor visited the site. The Land Registrar, a team of Surveyors and all the parties in this suit plus other witnesses, went to execute the court order. A technical report for the implementation of the court order was filed on the 15th of July, 2019 before this court.

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 registered proprietor of Kakamega/Shiswa/165 and the defendant of Kakamega/Shiswa/163. The plaintiff in the instant case alleges that the boundary between plots Kakamega/Shiswa/165 and Kakamega/Shiswa/163 was planted wrongly by the District Surveyor to whom he claims is a relative of the defendant. This came after he initiated the process of having a Survey in June, 2014, and when the survey was done he protested. The issue before this court, therefore arises as to whether the boundary was planted wrongly as alleged by the plaintiff. The court granted an order for another survey and a team consisting of the District Lands Registrar and District Surveyor repeated the exercise. The Land Registrar, a team of surveyors and all the parties in this suit plus other witnesses, went to execute the court order. A technical report for the implementation of the court order was filed on the 15th of July, 2019 before this court. The report confirmed that the boundaries were correct and as per their map. I find that the plaintiff is a vexatious litigant and out to waste the court's time. I find that he has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE