



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 376 OF 2017

ALBERT SORE MANGULA.....PLAINTIFF

VERSUS

JOSEPHAT N. WANANGWE

LIVINGSTONE ODENYI WANANGWE

LABAN J. WANANGWE..... DEFENDANTS

JUDGEMENT

This case is that, at all material time to this suit the plaintiff is the registered proprietor of L.R. Marama/Lunza/54 measuring 2.6 acres and was registered on 12th February, 2014 through Succession Cause No. 441/2002. The plaintiff avers that the defendants herein who are his brother's sons have without any colour of right encroached and or trespassed onto his land and they have constructed houses thereon and using his land by cultivating and planting crops and trees thereon without his consent. The plaintiff avers that the defendants herein own L.R. Marama/Lunza/52 measuring 0.7 Ha but they have refused to settle on their father's land but have instead chosen to illegally occupy the plaintiff's land. The plaintiff's claim against the defendants herein is for an order of eviction to issue against the defendants herein, their relatives, agents and or licenses from LR Marama/Lunza/54 measuring 2.6 acres and subsequent demolition of any structure and or houses constructed thereon. The plaintiff avers that the 1st defendant herein raised an objection against him over the suit land i.e. Kakamega Succession Cause No. 441/2002 which was dismissed. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) An order of eviction to issue against the defendant herein, their relatives, agents and or licenses from L.R. Marama/Lunza/54 measuring 2.6 acres and subsequent demolition of any structures and or houses constructed thereon.
- (b) Costs and interests.
- (c) Any other relief the court deems fit and just to grant.

PW1 produced the certificate of search, title deed, ruling of the Succession Cause No 441 of 2002, green card of L.R. Marama/Lunza/54 and L.R. Marama/Lunza/52 and PEx 1 to 6.

The 1st defendant avers in his defence that he is not aware that the suit land parcel No. Marama/Lunza/54 has been bequeathed to the plaintiff prior to the demise of his late father. The defendant denies that he has encroached and continually interfered with the plaintiff's quiet possession of the suit property but the plaintiff's possession of the mentioned suit land was through fraud. The defendants stated as a result of the fraudulent acts of the plaintiff the estate of the deceased Joshua Mangula Osore has suffered and continues to suffer loss and damages. The defendant's claim against the plaintiff is an order for the cancellation of the land parcel No. Marama/Lunza/54 and the title deed issued to the plaintiff and the title Marama/Lunza/54 to revert to the deceased Joshua Mangula Osore. The defendant prays for the plaintiff's case be dismissed with costs and judgment be entered against the plaintiff for:-

- (a) An order for cancellation of title deed Marama/Lunza/54 registered in the name of the plaintiff and the same be reverted to the name of the deceased Joshua Mangula Osore.
- (b) Costs of the suit.
- (c) Any other relief the court may deem fit to grant.

The 1st defendant was served but failed to attend court and give oral evidence. The 2nd and 3rd defendants stated in their oral evidence that they are cultivating in their fathers land and not on the plaintiff's 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 beneficial and/or registered owner of that parcel of land known as Marama/Lunza/54 measuring 2.6 acres is the plaintiff and he was registered on 12th February, 2014 through Succession Cause No. 441/2002. The plaintiff avers that the defendants herein who are his brother’s sons have without any colour of right encroached and or trespassed onto his land and they have constructed houses thereon and are using his land by cultivating and planting crops and trees thereon without his consent. The plaintiff avers that the defendants herein own L.R. Marama/Lunza/52 measuring 0.7 Ha but they have refused to settle on their father’s land but has instead chosen to illegally occupy the plaintiff’s land. I find that the defence is a mere denial. The 1st defendant never attended court to prove his counterclaim and the same is dismissed. I find that the plaintiff’s case has not been challenged. The plaintiff obtained the suit land through a legal process in Kakamega Succession Cause no. 441/2002 (PEx 2 is a copy of the ruling). I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. The defendants, their family, servants, agents and relatives are to vacate the suit land parcel No. L.R. Marama/Lunza/54 measuring 2.6 acres within the next six (6) months from the date of this judgement and in default eviction order to issue forthwith.
2. Each party to bear its own costs as they are relatives.

It is so ordered.

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

N.A. MATHEKA

JUDGE