



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 222 OF 2016

IJAIT C ALUKU.....PLAINTIFF

VERSUS

SALOME MWANAISHA MADAGA

COUNTY SURVEYOR

COUNTY LAND REGISTRAR KAKAMEGA

THE HON. ATTORNEY GENERAL

EVANS MASINDE.....DEFENDANTS

JUDGEMENT

At all material times to this suit the plaintiff is the registered proprietor of land parcel Kakamega/Lumakanda/2484, 2485 and 2130. While the 1st defendant is the registered proprietor of land parcel 2122. The plaintiff avers that land parcels Kakamega/Lumakanda/2122, 2123 and 2124 were created after the sub-division of land parcel 2039 and upon the said sub-division a road access was created as can be shown on the original mutation forms for the said parcel. The plaintiff avers that the owners of the aforesaid parcels including the 1st defendant have overtime encroached on the said access by erecting buildings thereon thereby blocking accesses to the same. It is the plaintiff case that the 1st defendant through collusion with the 2nd and 3rd defendant and using quack lawyers have forcefully attempted to create an access road through the plaintiff's parcel to the aforementioned Kakamega/Lumakanda/21-2124. The acts of the defendants jointly and severally is meant to encroach on the plaintiff's land and create an access road where there is none and deprive the plaintiff of his quite use and enjoyment of his parcel. The plaintiff prayer against the descendants jointly and severally is for an order of permanent injunction directed against them from creating a road of access through the plaintiff's parcel of land aforesaid or in any way or manner interfere with the plaintiff quite use and enjoyment of his land. The plaintiff prays for judgment against the defendants for:-

- (a) Permanent injunction.
- (b) Cost of this suit.
- (c) Interests.

The 1st defendant concurs that she is the absolute lawful owner of parcel of land No. Kakamega/Lumakanda/2122 measuring approximately 0.30 hectares or thereabout wit clear demarcated boundaries and a road of access thereto. The 1st defendant without denying that land parcels Kakamega/Lumakanda/2122, 2123 and 2124 were created after the sub division of land parcel 2039, and upon the said sub-division a road of access was created denies that the same can be shown on the original mutation forms. The 1st defendant denies that she has overtime encroached on the said access by erecting buildings thereon thereby blocking accesses. The defendant avers that the plaintiff suit does not disclose any reasonable cause of action. The defendant counterclaims that, the plaintiff be ordered to reopen the road of access to the 1st defendant's parcel of land No. Kakamega/Lumakanda/2122 which has been in existence since 1995. The 2nd defendant and the 3rd defendant do enforce the same in the event the plaintiff does not voluntarily reopen the said road of access. That the plaintiff be restrained from ploughing, planting crops, fencing and/or interfering with the 1st defendant's usage of the road of access to her parcel of land No. Kakamega/Lumakanda/2122.

This court has carefully considered the evidence and submissions therein. Counsel for the plaintiff withdrew the plaintiff's case and the

matter proceeded on the counterclaim. 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 Land parcel No. Kakamega/Lumakanda/2484, 2485 and 2130 and the 1st defendant is the registered proprietor of land parcel 2122. The 1st defendant testified that the plaintiff has blocked the road of access to the 1st defendant's parcel of land No. Kakamega/Lumakanda/2122 which has been in existence since 1995. She produced the mutation form DEX2 to show the same was surveyed. She also produced a letter form the Land Registrar advising the plaintiff to reopen the road. The plaintiff never gave any evidence to rebut the same. The plaintiff has failed to prove her case on a balance of probabilities and I dismiss it. I find the 1st defendant has proved her case on a balance of probabilities and I grant the following orders;

1. The plaintiff is ordered to reopen the road of access to the 1st defendant's parcel of land No. Kakamega/Lumakanda/2122 which has been in existence since 1995. The 2nd defendant and the 3rd defendant do enforce the same in the event the plaintiff does not voluntarily reopen the said road of access.
2. That the plaintiff be restrained from ploughing, planting crops, fencing and/or interfering with the 1st defendant's usage of the road of access to her parcel of land No. Kakamega/Lumakanda/2122.
3. Costs of this suit to the 1st defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE