



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 602 OF 2014

KEYA LUVALE.....PLAINTIFF

VERSUS

STEPHEN OMUSEBE.....DEFENDANT

JUDGEMENT

The plaintiff avers that he is the registered owner of land parcel No. Kabras/Lukume/2524. The plaintiff avers that on 7th July 2013 the defendant was allowed onto the suit land after leaving in 1997 for the sole purpose of facilitating the burial of the mother. The plaintiff avers that the defendant who has his parcel of land elsewhere has without further consent invited part of his family on the suit land and is illegally in occupation of about $\frac{3}{4}$ of an acre of the suit land. The plaintiff's prayer is for the eviction of the defendant and a permanent injunction restraining the defendant from interfering with the plaintiff's use and occupation of the suit land. The plaintiff avers that the defendant caused to be destroyed his sugarcane valued at Ksh. 24,630/= and he is facing criminal charges for the same. The plaintiff claims Ksh. 24,360/= with interest at court rates. The plaintiff prays for judgment to be entered against the defendant for;

- (a) Eviction and permanent injunction.
- (b) Ksh. 24,360/=.
- (c) Costs of the suit.
- (d) Interest on (b) and (c) above at court rates.

The defendant avers that he has never lived outside the suit land as the suit land belongs to his father one Henry Mbatia and the same is measuring 12.0Ha and therefore the claim by the plaintiff that he was allowed to enter the suit land is null and void and that the defendant is not occupying three quarters of an acre which belongs to the plaintiff. The defendant avers that he cannot be evicted from the ancestral land where he stays instead the plaintiff is to be restrained from interfering with the defendant's piece of land and further avers that he has never been charged in any criminal matter relating to the destruction of sugarcane valued at Ksh. 24,630/= in any court in Kenya. The defendant counter claims for cancellation for title Number South Kabras/Lukume/2524 which the plaintiff acquired illegally.

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 Land parcel No. Kabras/Lukume/2524. The plaintiff produced the search certificate and sale agreements of which the defendant was a witness. The plaintiff avers that on 7th July 2013 the defendant was allowed onto the suit land after leaving in 1997 for the sole purpose of facilitating the burial of the mother (PEx 3 is the burial agreement of which the defendant signed). I believe the plaintiff. I believe the plaintiff avers that the defendant who has his parcel of land elsewhere has without further consent invited part of his family on the suit land and is illegally in occupation of about ¾ of an acre of the suit land. The plaintiff's prayer is for the eviction of the defendant and a permanent injunction restraining the defendant from interfering with the plaintiff's use and occupation of the suit land. The plaintiff avers that the defendant caused to be destroyed his sugarcane valued at Ksh. 24,630/= and he is facing criminal charges for the same. PW2 and PW3 corroborated his evidence. The defendant failed to attend court to give oral evidence and prove his counterclaim. The plaintiff title is indefeasible and can only be challenged if it is fraudulent scheme which the defendants have not done. I find that the defendant has failed to prove his counterclaim on a balance of probabilities and I dismiss it. The claim of destroyed sugarcane valued at Ksh. 24,630/= has not been proved and the same will not be awarded. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendant, his agents, employees and legal representatives are to vacate the suit Land Parcel No. Kisa/Wambilishe/673 within the next six (6) months from the date of this judgement and in default eviction order to issue.
2. A permanent injunction restraining the defendant or his agents from entering, encroaching and interfering with the plaintiff's quiet possession of land parcel Kisa/Wambilishe/673 the property of the plaintiff.
3. Each party to bear its own costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE