



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 72 OF 2014**

**YUSUF O. CHITUWI.....PLAINTIFF**

**VERSUS**

**SILVANUS LUKOKO WERE.....DEFENDANT**

**JUDGEMENT**

The plaintiff avers that, at all material times he is the proprietor of land parcel number Marama/Shirotsa/1632 which land borders land parcel number Marama/Shirotsa/995 which is registered under the name of the defendant. The plaintiff avers that the defendant in the year 2007 destroyed the boundary between their respective land parcels and excised  $\frac{1}{4}$  of an acre of his land parcel number Marama/Shirotsa/1632. The plaintiff avers that the defendant's action amounted to trespass and unlawful encroachment of his land as a result he has suffered loss and damages. The plaintiff avers that the defendant has refused to stop trespassing into his land despite the Land Registrar advising him to do so. That the defendant continues to trespass and encroach into the plaintiff's land and shall pray for injunction orders to stop him such that he can stop encroaching into his land. The plaintiff seeks orders of eviction against the defendant to evict him from the illegally occupied land. The plaintiff avers that the defendant has been using the disputed portion to plant maize and prays for mesne profits from 2007 till the defendant leaves his land. The plaintiff avers that his loss of user of the land is making him lose the equivalent of Kenya Shillings 3,000/= per year which he could legally lease the portion. The plaintiff prays for the following orders:

- (i) Eviction orders against the defendant to evict him, his agents, employees and legal representatives from that portion of land comprising title number Marama/Shirotsa/1632.
- (ii) Mesne profits.
- (iii) Costs of this suit.
- (iv) Any other order deemed just and fit.

The defendant stated that he is the registered owner of land parcel No. Marama/Shirotsa/995. He bought the said parcel of land from one Omusina Obiero. Omusina Obiero who was the registered owner of land parcel No. Marama/Shirotsa/944. The said parcel No. Marama/Shirotsa/944 was subdivided into two portions. These were Marama/Shirotsa/994 and 995. The said Omusina Obiero then fixed/planted the boundary features separating land parcel No. Marama/Shirotsa/994 and 995 on 11<sup>th</sup> December 1986. These boundary features are still intact to date. That he is not aware whether land parcel No. Marama/Shirotsa/994 has been subdivided. The plaintiff is a stranger to him as he has never had any dealings with the plaintiff over the suit parcels of land. That the said Omusina Obiero passed on in 1987 and land parcel No. Marama/Shirotsa/994 was sold to Doricus Njeri and they have never had issues on boundary with her. That the plaintiff has never complained to him before this suit over any encroachment. That he has never been summoned by the land registrar over any dispute on boundary in respect of Marama/Shirotsa/1632 and 995. The visit by Land Registrar on the alleged disputed site, if it ever occurred, but which is denied, was without any notice to him. He is not utilizing  $\frac{1}{4}$  an acre or any part of land parcel No. Marama/Shirotsa/1632 as alleged or at all and hence the questions of eviction and mesne profits do not arise.

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. Marama/Shirotsa/1632 which land borders land parcel number Marama/Shirotsa/995 which is registered under the name of the defendant. The plaintiff avers that the defendant in the year 2007 destroyed the boundary between their respective land parcels and excised  $\frac{1}{4}$  of an acre of his land parcel number Marama/Shirotsa/1632. The plaintiff avers that the defendant’s action amounted to trespass and unlawful encroachment of his land as a result he has suffered loss and damages. The plaintiff produced a report from the Land Registrar PEX6 confirming the encroachment. The defence is a mere denial. The plaintiff title is indefeasible and can only be challenged if it was obtained through a fraudulent scheme which the defendants have not proved. The claim of mesne profits 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 defendants, his agents, employees and legal representatives are to vacate the suit Land Parcel No. Marama/Shirotsa/1632 within the next six (6) months from the date of this judgement and in default eviction order to issue.

2. Costs of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28<sup>TH</sup> NOVEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**