



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 236 OF 2017**

**HENRY ASWENJE YESWA.....PLAINTIFF**

**VERSUS**

**STEPHEN MUSEVE.....DEFENDANT**

**JUDGEMENT**

The plaintiff avers that, on 12<sup>th</sup> August 2016, he bought a piece of land measuring 0.56 Ha from one Jesca Marenga. At all material times to this suit the plaintiff is the owner of land parcel No. South Kabras/Lukume/2525. That the said Jesca Marenga had also bought the same land from one Henry Mbatia who had not transferred title to her yet. That during the then sub division Henry Mbatia transferred it directly to the plaintiff with the consent of Jesca Marenga. In January 2017, the plaintiff visited the land and learnt that the defendant has started cultivating crops including sugarcane, maize and beans. The plaintiff's efforts to have the matter resolved by local administrators became fruitless when the defendant became hostile to the plaintiff who then sought for court's intervention in the matter hence commencement of this suit. The plaintiff's claim against the defendant is for an order of permanent injunction restraining the defendant, its servants, assigns and or agents from occupying, cultivating, ploughing and or in any other manner interfering with the plaintiff's legal occupation of the land parcel No. South Kabras/Lukume/2525. The plaintiff prays for judgment against the defendant for:

- a) An order of permanent injunction restraining the defendant, its servants, assigns and or agents from occupying, cultivating, ploughing and or in any other manner interfering with the plaintiff's legal occupation of the land parcel No. South Kabras/Lukume 2525.
- b) Costs
- c) Any other order this honourable court will deem just and expedient to grant.

The defendant states that it is not true that parcel No. South Kabras/Lukume/2525 belongs to the plaintiff as he has not shown how he acquired the said title deed as he is aware that no succession was done. That the defendant is not aware of an agreement dated 12<sup>th</sup> August 2016 between the plaintiff and one Jesca Namwaya Marenga for sale of their father's land measuring 0.5 Ha and that Jesca Namwaya Marenga was included as a beneficiary. The defendant avers that there is no sugarcane planted in their ancestral land belonging to the plaintiff and that he has only ploughed his portion of land and planted sugarcane since he is aware of any demarcation to create land parcel No. South Kabras/Lukume/2525 and the plaintiff should not be declared the rightful owner. The defendant counter claims for cancellation for title number South Kabras/Lukume/2525 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. South Kabras/Lukume/2525. The plaintiff produced the search certificates and sale agreement. the plaintiff testified that on 12<sup>th</sup> August 2016, he bought a piece of land measuring 0.56 Ha from one Jesca Marenga. That the said Jesca Marenga had also bought the same land from one Henry Mbatia who had not transferred title to her yet. That during the then sub division Henry Mbatia transferred it directly to the plaintiff with the consent of Jesca Marenga. His evidence has not been challenged. 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 defendant has not done. I find that the defendant has failed to prove his counterclaim on a balance of probabilities and I dismiss it. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. An order of permanent injunction restraining the defendant, its servants, assigns and or agents from occupying, cultivating, ploughing and or in any other manner interfering with the plaintiff’s legal occupation of the land parcel No. South Kabras/Lukume 2525.
2. Costs to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18<sup>TH</sup> DECEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**