



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 113 OF 2014

JARED OKANGA OPANDA.....PLAINTIFF

VERSUS

WASHINGTON INDUMULI.....DEFENDANT

JUDGEMENT

The plaintiff avers that he was at all material times leading to this case the registered owner of land parcel No. East Wanga/Isongo/2083. The plaintiff avers that in 2013 he discovered upon obtaining a search from the land offices that the defendant had fraudulently caused the transfer of the suit land into his name. The plaintiff avers that at no time did he cause the transfer of the suit land to the defendant. The plaintiff avers that the defendant has constructed a structure on the suit land. The plaintiff prays for eviction of the defendant's agents and cancellation of the defendant's name from the register. The plaintiff prays for judgment to be entered against the defendant for:

- a) Eviction of the defendant's agents and cancellation of the defendant's name from the register of land parcel No. East Wanga/Isongo/2083.
- b) Costs of the suit.

The defendant avers that the suit land was sold to him by the plaintiff on 4th September 1997 and full consideration was paid to him and thereafter he took the defendant to the land control board and obtained consent to transfer the same to him. The defendant avers that the plaintiff executed the transfer of land before an advocate and the transfer was duly registered and title issued to him on 24th February 1998 and since then the defendant has been and is still in occupation and use of the suit land. The defendant states that the plaintiff's claim is time barred and that the same be ordered struck out with costs. The defendant avers that at all material times he has been and still is the registered proprietor of L.R. No. East Wanga/Isongo/2083 whose title he acquired on 24th February 1998. The defendant avers that in the year 2008, the plaintiff unlawfully trespassed into the defendant's land and erected a temporary house where he is now living without the consent of the defendant. The defendant's claim against the plaintiff is for an order of eviction from the 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 defendant is the registered proprietor of Land Parcel No. East Wanga/Isongo/2083. The plaintiff produced a copy of the search certificate. PW1 the plaintiff's wife testified that the defendant gave the plaintiff a loan and which was to be refunded. He was to get land if the same was not paid back. The defendant took sugarcane as payment. However she claimed that her husband was drunk and gave him his ID card. PW2 and PW3 corroborated PW1's evidence. They stated that the defendant was to harvest sugar cane to get his money back and not take the land. DW1 the defendant testified that the plaintiff needed money to pay for his sick child in hospital and sold him the suit parcel of land. He produced the agreement DEx1, the search (DEx2), the minutes of the land control Board (DEx3), the consent (DEx4), transfer (DEx5) and the title (DEx6). The defendant testified that the plaintiff signed all the documents. I believe the defence. The defendant's title is indefeasible and can only be challenged if it is fraudulent scheme which the plaintiff has not done. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it. I find that the defendant has proved his counterclaim on a balance of probabilities and I grant the following orders;

1. The plaintiff, his servants, agents and relatives are to vacate the suit Land Parcel No. East Wanga/Isongo/2083 within the next six (6) months from the date of this judgement and in default eviction order to issue.
2. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DECEMBER 2019.

N.A. MATHEKA

JUDGE