



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 271 OF 2015**

**OBED MACHANGA ESIERA .....PLAINTIFF**

**VERSUS**

**TIMOTHY MACHANGA MILIZA .....DEFENDANT**

**JUDGEMENT**

By a plaint dated 24<sup>th</sup> August 2015, the plaintiff is the registered owner of the whole of that parcel of land known as North Maragoli/Kedoli/1105 measuring 1.43 Ha. The plaintiff avers that on 1<sup>st</sup> day of March 2014, the defendant has without any colour of right trespassed onto his land parcel No. North Maragoli/Kedoli/1105 and has unlawfully fenced off a portion which the plaintiff cultivates without his consent and the plaintiff has and continues to suffer great economic loss for which he holds the defendant liable. The defendant's unlawful actions have denied the plaintiff his legal right of possession and peaceful use of his parcel of land thereby occasioning the plaintiff great loss and damage. Further the plaintiff avers that attempts to have the defendant peacefully vacate land parcel No. North Maragoli/Kedoli/1105 has been met with great hostility from the defendant necessitating this suit. The plaintiff prays for judgement against the defendant for:-

1. An eviction order from Land Parcel No. North Maragoli/Kedoli/1105.
2. An order of permanent injunction restraining the defendant, his agents, servants, employees or anybody claiming through him from trespassing, laying claim, tilling, cultivating or in any way interfering with the plaintiff's land parcel number North Maragoli/Kedoli/1105.
3. Costs of this suit.
4. Any other relief this honourable court deems fit to grant.

The defendant in his defence stated that, he is the 7<sup>th</sup> born of his deceased father Reuben Machanga Esiera. His father married his mother as the only wife in 1937 they were blessed with 15 issues. The defendant's father before his death had sub divided his land and allocated every son of the family where his part of inheritance is and that is why the defendant's house is erected rightfully on his land since 1982. In 1982 his father in the presence of his eldest son and James Ambasi (deceased) showed and laid a foundation for him as part of his inheritance where he constructed a permanent house. The defendant has lived on this land upto now. That the defendant's family land was initially known as LR North Maragoli/Kedoli/128. His late father had divided the land into three sections, shopping centre, development plot and tilling land. His dying wishes were for him be the custodian of the family land and that is why his part of inheritance was where he was allocated by his father. That when defendant late father allocated every son including the plaintiff part of their inheritance in Lugari Matunda, the plaintiff through her mother was given Bukhayo/Ebusibwao/1057 in Busia. The defendant has stayed on the land since he was born and constructed the house in 1982 according to the wishes of his deceased father. The plaintiff came to occupy the land in 2000 just by being his step brother but his mother whom he purports was married to the defendant's father has never stayed and even cultivated on the suit land.

This court has carefully considered the evidence and submissions therein. The defendant was served but failed to attend court during the hearing. 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. North Maragoli/Kedoli/1105. The plaintiff is a joint owner together with his mother one Prisiga Tsisiga Ambasi having been so registered on the 3<sup>rd</sup> November 1986 (PEx1 is a copy of the title deed). The plaintiff testified that the defendant is his step brother and has encroached on his land when his own land is land parcel No. North Maragoli/Kedoli/1106 which shares a boundary. They had the dispute resolved at the local administration in 2008 when was decided that the defendant moves back to his land parcel No. North Maragoli/Kedoli/1106 (PEx4 are the proceedings of the said meeting. PW2 was present at this meeting and confirmed the same. This evidence has not been challenged. The plaintiff’s title is indefeasible and can only be challenged if it is fraudulent scheme which the defendant have failed to prove. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendant, his servants, agents and relatives are to vacate the suit Land Parcel No. North Maragoli/Kedoli/1105 within the next six (6) months from the date of this judgement and in default eviction order to issue.
2. An order of permanent injunction restraining the defendant, his agents, servants, employees or anybody claiming through him from trespassing, laying claim, tilling, cultivating or in any way interfering with the plaintiff’s land parcel number North Maragoli/Kedoli/1105.
3. Each party to bear its own costs.

It is so ordered.

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

**N.A. MATHEKA**

**JUDGE**