



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 282 OF 2017

GRACE A. MURIKI

SARAH CHISEKA MAKOKHA :::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

AGNETA WANGA AURA

CHRISTOPHER MANG’WANA AURA

SAMUEL AMWOMA AURA

ENOS MATUKU AURA :::::::::::::::::::::::::::::: DEFENDANTS

JUDGEMENT

That at all material times to this suit the 1st and 2nd plaintiffs are absolute registered owners respectively of all those portions of land known as Marama/Shinamwenyuli/2395 and 2397 all measuring approximately (0.08 Ha) zero decimal eight hectares which are adjacent to each other. That the aforesated parcels of land mentioned above were part of land parcel number Marama/Shinamwenyuli/957 which initially belonged to the plaintiff’s father the late Wamboye Matuku deceased and later registered in trust for the plaintiffs through their late cousin Richard Aura Nechio (deceased). That the plaintiffs aver that the title documents to the sued parcels were acquired after they sued the defendants herein by way of a citation case through Bungoma High Court Miscellaneous Civil Application Number 24 of 2001 as administrators of the estate of the said Richard Aura Nechio (deceased) and after successfully obtaining grant of letters of administration intestate through Butere court vide probate and administration succession cause number 178 of 2002 in respect of the said deceased after the defendants refused to take out the said letters as heirs. That the plaintiffs aver that before the demise of their father in 1968 he had established a homestead on the said land and was survived by two wives, a son and four daughters including the plaintiffs who were residing and farming on the said land up to date. That the plaintiffs also aver that the late Richard Aura Nechio deceased and his family members including the defendants herein who were also occupying the neighbouring land known as land parcel number Marama/Shinamwenyuli/950 had encroached and build some houses on land parcels numbers Marama/Shinamwenyuli/2395 and 2397(formerly Marama/Shinamwenyuli/967 and that the plaintiffs friends or mothers to wit Aesta Namatsi Wamboye and Fanis Okusimba Wamboye filed a suit against him to transfer back the said land to the plaintiffs family and at the same time give vacant possession to the plaintiff. That the said suit was filed in the Kakamega Chief Magistrate’s Court Civil Case number 336 of 1997 but the said suit abated after the demise of the said Richard Aura(deceased) in the year 2000 or thereabout. That it is the plaintiff’s case that the defendants have been in continuous, notorious and forceful occupation of land parcel number Marama/Shinamwenyuli/2397 and 2395 and that without the plaintiffs consent or without any reasonable cause and or colour of right the defendants, or heirs, servants and or authorized agents have refused to move out from the sued land and are now erecting, building, fencing off and cultivating on the same

The plaintiffs aver that the defendants or their authorized agents have destroyed the boundary between the sued parcels and land parcel number Marama/Shinamwenyuli/960 so as to look like one parcel. That the plaintiffs’ claim against the defendants jointly and severally is for an eviction order, a permanent injunction restraining them by themselves, their servants and or authorized agents from encroaching, interfering, dealing, fencing off, constructing on, or occupying the plaintiffs land or in any other way interfering with land parcels number Marama/Shinamwenyuli/2395 and 2397.

The defendants deny that the plaintiffs are the absolute registered owners of the parcel of land numbers Marama/Shinamwenyuli/2395 and 2397. The defendants deny that the title documents to the sued parcels of land were issued to the plaintiffs and in the alternative if they were issued which is denied then the same were acquired by fraudulent means. Alternatively, the defendants aver that having occupied and used the sued land openly and without interruption for more than twelve (12) years, were in effect acquired title by adverse possession. The defendants pray that this suit be dismissed with costs. DW1 testified that she has been living on the suit land from 1957 with her family. The late Richard Aura Nechio was her husband. The plaintiffs are her sisters in law but their father did not have land. The rest of the defendants are her sons. That their mother was buried on the said suit land and she did not have sons. DW2 the 4th defendant corroborated her evidence.

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 1st and 2nd plaintiffs are absolute registered owners of land known as Marama/Shinamwenyuli/2395 and 2397 respectively. That the plaintiffs aver that the title documents to the sued parcels were acquired after they sued the defendants herein by way of a citation case through Bungoma High Court Miscellaneous Civil Application Number 24 of 2001 as administrators of the estate of the said Richard Aura Nechio (deceased) and after successfully obtaining grant of letters of administration intestate through Butere court vide probate and administration succession cause number 178 of 2002 in respect of the said deceased after the defendants refused to take out the said letters as heirs. The 2nd plaintiff sold her land to one Dominic Waswa Ong’onga and in Kakamega ELC No. 93 of 2014 he was awarded the same by this court. I find that this court cannot now adjudicate over the same subject matter and the 2nd plaintiff cannot hold any title after selling the same to a third party. As for the 1st plaintiff I find that she was awarded the suit land by the court as per the confirmation of grant dated 17th May 2004 and produced as PEx6. The defense cannot stand and I reject it. It has come out in evidence that the late Richard Aura Nechio and his family members including the defendants herein were also occupying the neighbouring land known as land parcel number Marama/Shinamwenyuli/950 and have now encroached on the plaintiff’s land. It is clear from the evidence that transmission was through a court order. This court order was never challenged. The defendants pleaded fraud in their defence however, they did not prove the same. I find the 1st plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. The defendants, their agents, employees and legal representatives are to vacate the suit Land Parcel No. Marama/Shinamwenyuli/2395 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 defendants or their agents from entering, encroaching and interfering with the 1st plaintiff’s quiet possession of land parcel Marama/Shinamwenyuli/2395 the property of the 1st plaintiff.
3. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 17TH DECEMBER 2019.

N.A. MATHEKA

JUDGE