



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 97 OF 2014

PETER MAKONGO AMWAYIPLAINTIFF

VERSUS

ISAAC SIVITARI.....DEFENDANT

BETRICE NGESA.....INTERESTED PARTY

JUDGEMENT

By an amended plaint dated 4th November 2016, the plaintiff is the sole absolute owner of land parcel No. LR No. Isukha/Lubao/1112 measuring 0.84 ha. That at all material time to this suit, the plaintiff was the registered owner of land parcel No. LR No. Isukha/Lubao/112 measuring 0.84 Ha. That the plaintiff avers that on the 3rd day of January 2010, the defendant without the plaintiff's consent trespassed on the plaintiff's aforesaid parcel of land erected temporary structures forcefully and has continued to occupy the aforesaid parcel of land erected temporary structure denying him quiet enjoyment of his land parcel No. Isukha/Lubao/1112. That on the 3rd day of January 2010, the defendant and the interested party without any color of right trespassed on the plaintiff's aforesaid parcel of land erected temporary structures forcefully denying him the right to quiet enjoyment of the said land. That the defendant and the interested party have no beneficial interest or purchase interest in land parcel No. Isukha/Lubao/1112 and they have infringed on the plaintiff's enjoyment of the land. That the plaintiff's claim against the defendant is for eviction order and an injunction to be restrained from interfering with the plaintiffs use and occupation of LR No. Isukha/Lubao/1112. The plaintiff prays for judgment against the defendants for orders as follows:

1. An eviction order against the defendant, his family, servants, agents or any other person claiming on his behalf from and thereafter an injunction restraining them from trespassing, encroaching whatsoever on land parcel No. Isukha/Lubao/1112.
2. Declaration for ownership of land.
3. Permanent injunction
4. Costs of the suit.

The defendants state that they did indeed purchase the said land from the deceased. In the alternative the defendants state that the registration of the plaintiff as the sole proprietor of Isukha/Lubao/1112 is irregular, null and void and such the plaintiff's name as the absolute registered proprietor of the suit property should be nullified and cancelled from the register. The defendants further state without prejudice to the foregoing that if the plaintiff is the registered proprietor of the suit property then such proprietorship is subject to other beneficiaries entitled to the suit property including the defendants and that the plaintiff is thus holding the suit property in trust for the defendants and other beneficiaries of the estate of Atanus Amwayi Lwire who are entitled to the suit property. The defendants further state that they have jointly and severally acquired a portion of the suit property as bona fide purchasers for value from one Anjelina Achitsa Khagali and the original proprietor of the suit property the late Atanas Amwayi Lwire who has a beneficial interest in the suit property. The defendants pray that this honourable court dismisses this suit with costs to the defendants.

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. Isukha/Lubao/1112. The plaintiff testified that, he acquired the suit land through succession of the estate of one Atanas Amwayi Lwire his father (PEX1 is the title deed and PEX2 the search). The defendants entered the land claiming to be purchasers in 2010 and he now seeks their eviction. He obtained his title in 2012. His mother he stated is still alive and they live together in the neighbourhood. PW2 the plaintiff's mother testified that the plaintiff inherited the land from his father. PW3 a neighbour and PW4 the plaintiff's sister confirm that the plaintiff inherited the land. The defendant and interested party testified that they bought the land from one Anjelina Achitsa Khagali who has a beneficial interest in the suit property as she inherited the same from the late Atanas Amwayi Lwire who was her father in law. They produced the sale agreements DEX2 and DEX3. They took possession and are occupying their portions to date. The interested party's sale agreement is dated 1998 and the defendant's 2010. They are both witnessed by the Assistant Chief Buyangu Sub location. The defendant has produced a further agreement DEX5 where the plaintiff has signed as the administrator of the suit land and promises to surrender the title by 4th May 2013. This was also witnessed by the Assistant Chief and he received kshs. 30,000/= as costs for getting the title deed of the suit land belonging to his brother Julius Khagali Amwayi who was the husband to Anjelina Achitsa Khagali. DEX6 is a copy of a letter of consent transferring the suit land from Atanas Amwayi Lwire to Anjelina Achitsa Khagali. DW3 a neighbour who is the plaintiff's relatives confirmed to the court that the defendant and the interested party reside on the suit land. The defendant and the interested party are bonafide purchasers for value and are in occupation of the suit land. The plaintiff's title has been challenged as he obtained the same through succession knowing very well the suit land was occupied by buyers. I find the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE