



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 67 OF 2017

IN THE MATTER OF THE ESTATE

STANSLAUS SHIKOKOTI SHIBACHI.....PLAINTIFF

VERSUS

FERNANDES MUTOLA SHIVACHI.....DEFENDANT

JUDGEMENT

The plaintiff avers that the parties herein are siblings and sons of Lodofigo Shivachi Imboba who was the proprietor of L.R. No. Butsotso/Esumeyia/591 measuring approximately 3.3 Ha. That he is also the registered proprietor of L.R. No. Kakamega/Iguhu/129 measuring approximately 2 acres. That on the 5th day of March 2014 he sub divided plot 591 into 2 and transferred ownership thereof to his third son Chrispinus Imboba Shivachi (plot 4072 measuring approximately 1.8 Ha) and the plaintiff (4073 measuring approximately 1.8 Ha). That it had been agreed amongst the family that the defendant was to settle in plot 129 but he has declined to do so instead choosing to settle upon plot 4073 which belongs to the plaintiff and in the process preventing him from settling down with his family. The plaintiff prays for judgment against the defendant for:

1. Eviction from L.R. Butsotso/Esumeyia/4073.
2. Costs of the suit.

The defendant denies that on 5th March 2014 Imboba sub divided plot 591 into 2 portions and transferred the same to two(2) sons without considering the defendant. The defendant avers that they were born three(3) sons and their father is still alive and they were all allocated their shares in the suit land L.R. No. Butsotso/Esumeyia/591 and L.R. No. Kakamega/Iguhu/129 respectively and to that effect the defendant constructed a homestead on his portion of land comprised in the suit land under the instructions of his father Imboba to date. The defendant prays that the suit herein be dismissed with costs.

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. Butso/Esameyia/4073 and land parcel No. Butso/Esameyia/4072 is registered in the name of Chrispinus Imboba Shivachi. It is also a finding of fact that land parcel No. Kakamega/Iguhu/129 is registered in the name of PW2, one Lodofigo Shivachi Imboba. The plaintiff testified that the parties herein are siblings and sons of Lodofigo Shivachi Imboba who was the proprietor of L.R. No. Butso/Esameyia/591 measuring approximately 3.3 Ha. That he is also the registered proprietor of L.R. No. Kakamega/Iguhu/129 measuring approximately 2 acres. That on the 5th day of March 2014 he sub divided plot 591 into 2 and transferred ownership thereof to his third son Chrispinus Imboba Shivachi (plot 4072 measuring approximately 1.8 Ha) and the plaintiff (4073 measuring approximately 1.8 Ha). That it had been agreed amongst the family that the defendant was to settle in plot 129 but he has declined to do so instead choosing to settle upon plot 4073 which belongs to the plaintiff. The plaintiff produced the title deeds of the said suit parcels as exhibits. PW2 Lodofigo Shivachi Imboba corroborated the plaintiff's evidence. He maintained that the defendant is to move to the parcel of land allocated to him which is L.R. No. Kakamega/Iguhu/129. The defendant testified that he is the eldest son of Lodofigo Shivachi Imboba and he was born and brought up on the suit land. He has married and built his homestead there. I have also perused the documentary evidence adduced before this court and find that land parcel L.R. No. Kakamega/Iguhu/129 is registered in the name of Lodofigo Shivachi Imboba who is the father to the litigants. The plaintiff, PW1 resides in Nairobi. The plaintiff and PW2 have now decided that the defendant should move to land which does not belong to him. It is not disputed that he has lived on the suit land all his life and build his homestead there. They are asking him to demolish his homestead and move away. I find that he has beneficial interest on the suit land and moving him out would be disinheriting him. I find the litigants are family members and such matters ought to be settled through mediation. It is also curious to note that their father has transferred land to his other two sons but not to the defendant. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss the same with no orders as to costs as the parties are siblings.

It is so ordered.

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

N.A. MATHEKA

JUDGE