



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC NO. 408 OF 2017

ZAKAYO KWENDO AGOI.....PLAINTIFF

VERSUS

BENSON OCHUNGA AMBOKO.....DEFENDANT

JUDGEMENT

The plaintiff's case is that, the registered proprietor of Land parcel W/BUNYORE/EMBALI/2600. The defendant herein sold and transferred land parcel W/BUNYORE/EMBALI/2600 to the plaintiff on in 1989. The defendant has without any colour of right entered upon, trespassed upon the plaintiff's parcel of land, uprooted beacons demarcating the parcel of land and planted crops. The plaintiff's claim against the defendant is for an order of permanent injunction restraining the defendant, his agents, servants or assignees from entering upon, tilting or in any manner dealing or interfering with the plaintiff's parcel W/BUNYORE/EMBALI/2600. The plaintiff avers that there is no suit pending in any court between the parties herein over the same subject matter and that this suit relates to the plaintiff herein. The plaintiff prays for judgment against the defendant.

- (a) An order of permanent injunction restraining the defendant either by himself, his agents, servants or assignees from entering upon, trespassing, working on, tilting or in any manner dealing or interfering with the plaintiff's parcel of land NO. W/BUNYORE/EMBALI/2600.
- (b) Any other relief this honourable court deems just and expedient.
- (c) Costs of this suit.

PW1 the plaintiff gave evidence that, he is the registered proprietor of Land parcel W/BUNYORE/EMBALI/2600. The defendant herein sold and transferred land parcel W/BUNYORE/EMBALI/2600 to the plaintiff on in 1989. The defendant has without any colour of right entered upon, trespassed upon the plaintiff's parcel of land, uprooted beacons demarcating the parcel of land and planted crops. He produced the land title deed, the land sale agreement, the land official search and the consent letter PEx 1 to 4 as evidence in court. The defendant never entered appearance nor did he file any defence or 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.”

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. **Hon Justice Munyao Sila** 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”.

The defendant has offered no defence and he did not attend the hearing of the case despite being served. I find that, the plaintiff has proved his case on a balance of probabilities. The certificate of title issued by the Registrar upon registration (PEX1) has been taken by this court 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 has not been challenged as evidence of fraud or misrepresentation to which the person is proved to be a party or evidence that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme has not been adduced. I therefore grant the following orders;

1. An order of permanent injunction restraining the defendant either by himself, his agents, servants or assignees from entering upon, trespassing, working on, tilting or in any manner dealing or interfering with the plaintiff’s parcel of land NO. W/BUNYORE/EMBALI/2600.
2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 8TH DAY OF FEBRUARY 2018.

N.A. MATHEKA

JUDGE