



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 59 OF 2016

LIVINGSTONE ALUVANZE ISAJI.....PLAINTIFF

VERSUS

ELIZABETH NAMWAYA BULINYA

MARTINE WEKESA BULINYA.....DEFENDANT

JUDGEMENT

The plaintiff case is that he is the sole absolute registered proprietor of the land parcel known as KAKAMEGA/MOI'S BRIDGE/1381 measuring approximately 0.41 Hectares. The plaintiff became so registered after purchasing the suit land for valuable consideration without notice of any adverse binding interests. The plaintiff avers that as a proprietor of land he is entitled to enjoy and exercise proprietorship rights and interests devoid of interference from any persons and is entitled to exclude any such persons who interfere with the exercise of his proprietorship rights under the law. The plaintiff avers that the defendants have trespassed and continue to remain on the suit land without his authority and have persisted in carrying out acts of waste and damage to the suit land which militate against the plaintiff's occupancy and user of the suit land. The plaintiff avers that the defendants in furtherance of their unlawful acts of trespass have carried out funeral and burial arrangements in respect of the late Metrine Nangekhe-deceased with the intention of interring her corpse into the suit land on or about the 23rd April, 2016 which act (s) of the defendants are a flagrant breach of the plaintiff's proprietary interests. The plaintiff thus seeks a declaration that the acts of trespass by the defendants, the carrying out of funeral arrangements and interment of the late Metrine Nangekhe-deceased into the land parcel known as KAKAMEGA/MOI'S BRIDGE/1381 are unlawful and a nullity and militate against the plaintiff's proprietary interests as provided by the law. The plaintiff prays for an order of eviction to issue against the defendants jointly and severally to remove them together with their servants and or agents or any other persons placed there on by them from the land parcel known as KAKAMEGA/MOI'S BRIDGE/1381. The plaintiff also prays for an injunction to restrain the defendants whether by themselves, their servants and/or agents from trespassing, making funeral arrangements, and interring the late Metrine Nangekhe-deceased or any other person(s) into the land parcel known as KAKAMEGA/MOI'S BRIDGE/1381 or carrying out any acts inconsistent with the plaintiff's proprietary interests.

The plaintiff prays for judgment against the defendants jointly and severally for:-

1. A declaration that the acts of trespass by the defendants, the carrying out of funeral arrangements and intended interment of the late Metrine Nangekhe-deceased into the land parcel known as KAKAMEGA/MOI'S BRIDGE/1381 are unlawful and a nullity and militate against the plaintiff's proprietary interests as provided by the law coupled with an order of eviction to issue against the defendants jointly and severally to remove them together with their servants and or agents or any

other persons placed there on by them from the land parcel known as KAKAMEGA/MOI'S BRIDGE/1381.

2. An injunction do issue to restrain the defendants whether by themselves, their servants and/or agents from trespassing, making funeral arrangements, and interring the late Metrine Nangekhe-deceased or any other person (s) into the land parcel known as KAKAMEGA/MOI'S BRIDGE/1381 or carrying out any acts inconsistent with the plaintiff's proprietary interests.

3. Costs and interests.

4. Any other relief the honourable court may deem fit to grant.

PW1, LIVINGSTONE ALUVANZE ISAJI testified that he is the sole absolute registered proprietor of the land parcel known as KAKAMEGA/MOI'S BRIDGE/1381 which measures approximately 0.41 hectares (PEx 2 is the title deed). He purchased the suit land from the previous registered proprietor namely CHRISTOPHER BULINYA WABUGE on 2nd April, 2014 for valuable consideration by paying a sum of Ksh. 600,000/= and entered into a valid sale agreement (PEx1 is the sale agreement). The land was sold free of any encumbrances and he was granted the right to take exclusive possession. The defendants are trespassers on the suit land and have erected structures thereon. He has issued demand to the defendants to vacate to no avail (PEx 4 & 3 are the demand letters). He learnt that the defendants in furtherance of their acts of trespass have carried out funeral arrangements of the late Metrine Nangekhe-deceased on the suit land and have interred the body into the suit land on or about the 23rd April, 2016. The acts of interring the deceased and even carrying out funeral arrangements on his land are unlawful and militate against his proprietary interests. He stands to suffer irreparable harm as the burial of a person whom he has not authorized on his land shall have traumatizing long term effects which no amount of monetary compensation can remedy. That the defendants have no legal interest that is superior to his as he is a purchaser for value and he holds a valid title deed to the suit land. The defendants by the acts of trespass are infringing on his property rights that are enshrined as Fundamental Rights in article 40 of the Constitution of Kenya, 2010. That it is indeed necessary that the defendants be ejected from his land to enable him to exercise his proprietary rights without any hindrance whatsoever. That it is indeed necessary that the defendants be restrained from continuing to interfere with his proprietary interests on the suit land. The defendants never entered appearance nor did they file defence or attend court during the hearing.

It is not in dispute that the plaintiff is the registered proprietor of LR. No. KAKAMEGA/MOI'S BRIDGE/1381 and he has produced a copy of the title deed PEx 2. 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 defendants have offered no defence and they did not attend the hearing of the case despite being served. The court noted that the defendants in furtherance of their acts of trespass they have carried out funeral arrangements of the late Metrine Nangekhe-deceased on the suit land and have interred the body into the suit land on or about the 23rd April, 2016. I find that, the plaintiff has proved his case on a balance of probabilities. The certificate of title issued by the Registrar upon registration (PEX2) 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. A declaration that the acts of trespass by the defendants, the carrying out of funeral arrangements and interment of the late Metrine Nangekhe-deceased into the land parcel known as KAKAMEGA/MOI'S BRIDGE/1381 are unlawful and a nullity.
2. The defendants jointly and severally together with their servants and or agents or any other persons are given 3 (three) months from today's date to vacate the suit parcel better known KAKAMEGA/MOI'S BRIDGE/1381 and in default eviction order to issue forthwith.
3. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 6TH DAY OF MARCH 2018.

N.A. MATHEKA

JUDGE