



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 193 OF 2014

MANOAH SHEMBEKHO.....PLAINTIFF

VERSUS

SHANGO CHEMCHE

SHADRACK SHANGO

JOHN SHANGO

DAVID M. SHANGO.....DEFENDANTS

JUDGEMENT

The plaintiff avers that he is the sole absolute proprietor of the whole of the parcel of land known as N/KABRAS/MALAVA/3446. The plaintiff avers that the defendants, without the authority and/or permission of the plaintiff have trespassed, moved, occupied and started ploughing the parcel of land aforementioned. The plaintiff avers that the defendants act of occupying and ploughing the plaintiff's land aforementioned is unjustified and unlawful. The plaintiff claim as against the defendants therefore, is that a permanent injunction be issued to restrain the defendants, the defendant's agents and/or employees from interfering, in whatever manner, with the plaintiff's peaceful enjoyment of the parcel of land known as N/KABRAS/MALAVA/3446. The plaintiff further claims for an eviction order as against the defendants, the defendant's agents and/or employees. The plaintiff avers that despite demand and notice of intention to sue having been made the defendants have refused, failed and neglected to comply and still persist into such refusal, failure and/or neglect. The plaintiff prays for judgment as against the defendant for orders:-

1. A permanent injunction be issued to restrain the defendants, the defendant's agents and/or employees from interfering, in whatever manner, with the plaintiff's peaceful enjoyment of the parcel of land known as N/KABRAS/MALAVA/3446.
2. An eviction order as against the defendants, the defendant's agents and/or employees.
3. Costs.

The plaintiff testified in support of his claim. In his testimony in court the plaintiff maintained that he is the registered proprietor of the parcel of land known as N/KABRAS/MALAVA/3446 by producing the title deed (PEX1). The plaintiff further stated in his testimony that the defendants are forcefully occupying this suit land illegally since he has not given them permission to so occupying.

The plaintiff submitted that, his testimony was not controverted in anyway. Far from this it was consistent with what is in the plaint and witnesses statement. Considering the statement of defence as filed by the defendants, is a mere sham. It does not respond to the plaintiff's claim. In light of this the plaintiff has proved his case on the required standards and that the plaintiff's claim be allowed with costs.

The defendants in their statement of defence aver that they have no idea how the plaintiff got registered as proprietor of the suit land because the 1st defendant has never caused the charge by Agricultural Finance Co-operation (AFC) to be discharged. The defendants aver that the land in issue is the home of the 1st defendant in which the 2nd, 3rd and 4th defendants who are children of the 1st defendant live with their families and hence the defendants' occupation, and use of the suit land is not trespass or unlawful or unjustified or at all and the plaintiff is put to strict proof thereof. The defendants aver that the plaintiff has never set foot on the suit land hence the averments made in the plaint are made in total ignorance of the facts on the ground. The defendants without prejudice to the foregoing further aver that the alleged registration of the plaintiff as owner of the suit land is without the requisite legal foundation as the encumbrance that was on the land title NO. NORTH KABRAS/MALAVA/2415 was never lawfully removed by a discharge of charge duly executed and the original title deed returned to the 1st defendant to enable sub-division. The defendants further aver that the plaintiff is a mere trustee and agent of one JOEL

MOYALE PATRICK the plaintiff in KAKAMEGA CMCCC No. 462 of 2009 over the same land, who has transferred the land to the plaintiff herein merely to try to conceal his own illegal sub-division of NORTH KABRAS/MALAVA/2415 transfer and title to the resultant land parcel No. NORTH KABRAS/MALAVA/3446. The defendants further aver that the suit was hastily filed following hasty transfer of the suit land to the plaintiff and dishonest withdrawal of KAKAMEGA CMCCC NO. 462 of 2009 which in fact had been fixed for hearing at the instance of the 1st defendant herein. The defendants aver that the subdivision relied on that gave rise to the suit land was entirely fictitious as the 1st defendant did not participate in the process, and further consent of the Land Control Board and instrument of Transfer of Land were never filed in the District Land Registry to bring about lawful transfer of the suit land to JOEL MOYALE PATRICK who is now hiding behind the plaintiff herein to validate an unlawful alienation and transfer of the suit land. The defendants aver that the plaintiff being a person merely assisting one JOEL MOYALE PATRICK to conceal an illegal acquisition of the suit land, is not entitled to the orders of court sought the plaintiff. The 1st defendant avers that he shall bring a counter-claim against the plaintiff and the Land Registrar Kakamega, and one JOEL MOYALE PATRICK for declaratory orders and cancellation of sub-division of NORTH KABRAS/MALAVA/2415, and the registration of the plaintiff as proprietor of NORTH KABRAS/MALAVA/3446 for the attendant illegality aforesaid. The defendants pray for the plaintiff's suit to be dismissed with costs.

This court has carefully considered both the plaintiffs and the defendant's case and the pleadings therein. The plaintiff filed the suit on 8th October 2010 and accompanied by his verifying affidavit suing the defendant jointly and severally seeking for orders that the defendants by themselves or any other person on claiming as though the defendants be restrained by way of a permanent injunction from interfering in any manner with the plaintiff's peaceful enjoyment of the parcel of land known as N. KABRAS/MALAVA/3446. The plaintiff further seeks for an order that the defendants, their agents or employees be evicted from the aforementioned parcel of land.

The plaintiff filed statements of his witnesses namely LAZARO MUTIMBA, SAUL MARK NDANAI and JOEL MUYALE PATRICK all dated 4th December 2013 and filed on the same date. Thus the plaintiff's witnesses aforementioned did not testify in court for the reason that the proceedings were ex parte in nature after the defendants failed to attend court on 14th December 2017 and, therefore, only the plaintiff testified and closed his case. These witnesses were, however, present in court on this date. The plaintiff asked the court to consider the statement of the plaintiff's witnesses in arriving at its final decision in this case. The defendants filed their statements of defence dated 3rd May 2011 and filed on 4th May 2011 through their counsel on record.

The defendants in the statement of defence wondered how the plaintiff obtained title over the suit parcel of land. In their defence the defendants went further and indicated that they intended to bring up a counter-claim challenging the registration of the plaintiff as proprietor of the suit parcel of land. This is stated under paragraph 15 of the defendant's joint statement of defence filed on 4th May 2011. The defendants, however, did not file such a counter-claim up to the time pleadings were closed and the case fixed for hearing. Hence the court relied on the joint statement of defence in arriving at its final determination in this case. When this case came up for hearing on 14th December 2017 the plaintiff attended court with three (3) of his witnesses who had filed their witness statements. The defendants counsel, though duly served with the hearing notice did not attend court on that day. None of the four (4) defendants attended court on 14th December 2017 either. The court being satisfied that the defendants had been duly served to attend court on 14th December 2017 for the hearing of the case ordered that the case proceeds to hearing.

It is not in dispute that the plaintiff is the registered proprietor of LR. No. N. KABRAS/MALAVA/3446 and he has produced a copy of the title deed (PEX 1). 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 offered no oral evidence as they failed to 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. A permanent injunction be issued to restrain the defendants, the defendant's agents and/or employees from interfering, in whatever manner, with the plaintiff's peaceful enjoyment of the parcel of land known as N/KABRAS/MALAVA/3446.
2. The defendants, the defendant's agents and/or employees jointly and severally are given 3 (three) months from today's date to vacate the suit parcel better known N/KABRAS/MALAVA/3446 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