



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

E & L CASE NO. 119 OF 2016

FREDRICK KITHILI.....1ST PLAINTIFF

VERSUS

LEVI AMBEVA 1ST DEFENDANT

THE REGISTERED TRUSTEES, PENTECOSTAL CHRISTIAN

FELLOWSHIP VIYALO CHURCH.....2ND DEFENDANT

JUDGEMENT

The plaintiff is the sole registered proprietor of land parcel registration number NORTH/MARAGOLI/KEGONDI/1066 having lawfully purchased the same and is in use and occupation of the said parcel of land (PEx1 title deed, PEx2 official search and PEx3 land sale agreement). The plaintiff avers that the 1st defendant herein has without any colour of right, lawful authority and or without the consent of the plaintiff trespassed and or forcefully entered on the plaintiffs said parcel of land. The plaintiff avers further that the 1st defendant herein has without the plaintiff's consent caused the 2nd defendant herein to illegally and or unlawfully erect a semi-permanent structure on the plaintiff's said parcel of land. It is the plaintiff's case that the 2nd defendant herein has since September 2014 unlawfully trespassed on the plaintiffs land running affairs of the church to the detriment of the plaintiff. The plaintiff's efforts to have the defendants honourably move out of his parcel of land has been met by resistance by both parties prompting the plaintiff to file the suit herein. The plaintiff's claim against the defendants is for an order of eviction of the defendants from land parcel registration number NORTH/MARAGOLI/KEGONDI/1066 and an order for Permanent injunction restraining the defendants, their agents, followers and or congregation from entering, trespassing or in any manner whatsoever interfering with the tiffs peaceful use, occupation and enjoyment of his rights on land parcel registration number NORTH/MARAGOLI/KEGONDI/1066. PW2 the seller confirms selling the land to PW1.

PW2 who testified that the land belongs to the plaintiff and it is the 1st defendant who advised her get a new buyer because he could not complete the purchase price. PW2 further confirmed that the defendants have put up a church on the plaintiff's land.

Section 24(a) of the Land Registration Act states that the registration of a person as the proprietor of land shall vest in the person the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto.

Section 25(i)

The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of Court shall not be liable to be defeated except as provided by this Act.

The plaintiff submitted that he has exhibited evidence that he is the registered proprietor of the suit parcel and by the fact that he acquired title for valuable consideration, his rights are therefore indefeasible. It is Cristal clear that the defendants' rights on the suit parcel were extinguished immediately the plaintiff acquired ownership of the suit land. From the evidence adduced, the land parcel reg no. NORTH/MARAGOLI/KEGONDI/1066 is agricultural land defined by section 2 of the Land Control Act As (a) Land that is not within a municipality or township. Compulsory or incumbent for parties to the agreement between the defendant and PW1 to obtain consent of the Land control board within 6 months of execution of the said sale agreement. Section 6 of the Land Control Act.

Section 7 of the Land control Act provide that failure to obtain consent of Land control Board within 6 months of the date of agreement, the sale becomes void.

The defendants cannot therefore claim any inverts in the suit land because their transaction became null and void for lack of Land Control Board consent. They rely on the case of DANSON MUNIU NJERU -VRS- WILLIAM KAPTABEI KORIR & BROTHERS (2014) e KLR E.L NO170 OF 2012

In his evidence, the Defendant stated that vide an agreement dated 13th day of June, 2012, he bought a portion of land measuring

approximately 65ft x 65ft square and/or thereabouts from one ZILIPA MMBONE MKUNYA, then the registered owner, at a consideration of Kshs.80,000/- . The Defendant made a down payment of Kshs.45,000. The balance was then Kshs.35,000/=. The Defendant made a further payment of Kshs.2,000/= towards the purchase of the plot. It was further agreed albeit verbally that the balance of Kshs.33,000/= should remain with the Defendants until such time the seller would demand for it. The seller has never given the Defendant any notice demanding for the balance. This is why in their agreement it was left open as to the last date for the payment.

It was the Defendant's evidence that he was granted immediate vacant possession and immediately erected a tent for worship and church activities. The Defendant also dug a pit latrine for use by the worshippers.

The Defendant produced agreement dated 13th June, 2012 (DEx1). The Defendant also produced a letter dated 15th April, 2016 when he was summoned to appear at the assistant County Commissioner after the plaintiff had pulled down the pit latrine for the church. The Defendant equally constructed a semi-permanent church on the purchased plot and the plaintiff never raised any objection. The suit therefore came as a surprise to the Defendant. The Defendant has therefore proved that he has owned plot of 65ft x 65ft square out of that parcel of land better known as NORTH MARAGOLI/KEGONDI/1066 since the year 2012.

The defendant submitted that, one SABETI MUHONJA was never called to give her evidence before the Court. From the plaintiff's statement she was the seller but instead ZILIPA MMBONE who never signed on the sale agreement dated 19th August, 2013 purported to be the seller. The evidence of SABETI MUHONJA was crucial and would have assisted this court to arrive at a fair decision. It is the said SABETI MUHONJA who sold to the church her share in the parcel of land as confirmed in her letter dated 19th October, 2015. The Defendant has proved his case beyond reasonable doubt and prays that the counter-claim be allowed with costs.

In his defence and counter-claim the defendant denies having trespassed on the plaintiff's land parcel registration number NORTH/MARAGOLI/KEGONDI 1066. He however put up a counter claim seeking for transfer of a portion of land measuring 65ft x 65ft from parcel no. NORTH/ MARAGOLI/ KEGONDI/1066. This particular portion of land however was not bought from the plaintiff, neither is there an agreement for sale of land between the plaintiff and the defendant. The defendant has a claim against P W 2 who is not party to this suit.

But in any case the court makes its decision to the contrary, then the Defendant would in the alternative be praying for:-

- i. Full refund of Kshs.47,000/= being the purchase price paid
- ii. Kshs.45,000/= being the value of the pit latrine destroyed
- iii. Kshs. 120,000 being the value of the semi-permanent church hall
- iv. Kshs.25,000/= being the value of the present pit latrine.

This court has carefully considered both the plaintiff's and the defendant's evidence and submissions herein. The plaintiff filed this suit vide plaint dated 23rd day of June, 2016. The Defendant was served with summons to enter appearance, plead, verify affidavit, plaintiff's statement, plaintiff's list of documents and plaintiff's list of witnesses. The Defendant filed Defence and a counter - claim to the plaintiff's suit. The Defendant further filed list of documents, list of witnesses and the suit was set down for 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."

The plaintiff gave oral evidence and called one witness PW2 in support of his case. It was the plaintiff's case that he bought the parcel of land better known as L.R.NO. NORTH MARAGOLI/KEGONDI/1066 at consideration of Kshs. 300,000/= The plaintiff stated that he got registered on the parcel of land on 16/7/2015. The plaintiff stated that in the year, 2014, the Defendant's erected a semi-permanent structure for purposes of worship. The plaintiff produced agreement dated 19th day of August, 2013, official search for North MARAGOLI/KIGONDI/1066 and a copy of title deed for North MARAGOLI/KIGONDI/1066. The Defendant equally gave oral evidence but never called any witness. In the absence of proof of any fraud or irregularities or illegalities, as against the defendants, their title to the suit land is proper and lawful. 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. 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 plaintiff has proved his case on a balance of probabilities, the defendants counter-claim is displaced because the agreement is between the 1st defendant's and PW1 who is not party to this suit. The defendants have failed to prove their counter-claim against the plaintiff and it is our submission that the defendants' counter-claim be dismissed with costs. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendant is to vacate the said suit land parcel registration number NORTH/MARAGOLI/KEGONDI/1066 within the next 3 (three) months from the date of this judgement and indefault eviction notice to issue forthwith
2. An order for Permanent injunction restraining the defendants, their agents, followers and or congregation from entering, trespassing or in any manner whatsoever interfering with the plaintiffs peaceful use, occupation and enjoyment of his rights on land parcel registration number NORTH/MARAGOLI/KEGONDI/1066.
3. Costs of the suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 31ST DAY OF MAY 2018.

N.A. MATHEKA

JUDGE