



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 318 OF 2017

STEPHEN SARAMBA VIRAGHI.....PLAINTIFF

VERSUS

HILLARY SAVARI

WALTER MUDAKI.....DEFENDANTS

JUDGEMENT

The plaintiff is the beneficial and/or registered owner of that parcel of land known as Kakamega/Bugonda/2163 following his succession of the estate of Shem Virachi alias Shem Vilachi, his late father who owned land Title No. Kakamega/Bugonda/2163 measuring more or less (0.04 Ha) Hectares vide succession cause number Hamisi SPM Court No. 26 of 2003 and Kakamega HC Succession Cause No. 861 of 2013. Before his demise on 25th June, 2000, the said Shem Vilachi had built a permanent structure on the said piece of land Title No. Kakamega/Bugonda/2163. As the beneficial and/or registered owner of the said parcel of land and as a son of the said Shem Vilachi, the plaintiff is and has at all the material times been entitled to possession and ownership of the said piece of land Title No. Kakamega/Bugonda/2163. The plaintiff states that the 1st and 2nd defendant without consent of the plaintiff and without any color of right entered upon the said property and took possession of it and commenced, together with family, residence and use of the said permanent house thereon. The said acts amount to a trespass by the 1st and 2nd defendant and the trespass is continuing. By reason of the matters aforesaid, the plaintiff has been deprived of the use and enjoyment of the said property and has thereby suffered loss and damage for which he holds the 1st and 2nd defendant liable. That further, the plaintiff has hereby incurred expenses and suffered loss for which he hereby claims.

The plaintiff prays for a permanent injunction against the 1st and 2nd defendants, and or any other third parties by themselves, their servants, agents or assignees to stop interfering, entering upon occupying, remaining or continuing in occupation and or trespassing on the said parcel of land known as Kakamega/Bugonda/2163. The plaintiff also prays for an order of eviction against the 1st and 2nd defendants and or any other third parties by themselves, their servants, agents or assignees from that parcel of land known as Kakamega/Bugonda/2163.

The plaintiff PW1, testified that he is the beneficial and/or registered owner of that parcel of land known as KAKAMEGA/BUGONDA/2163 following his succession of the estate of SHEM VIRACHI alias SHEM VILACHI, his late father who owned the said parcel of land vide succession cause number Hamisi SPM Court no. 26 of 2003 and Kakamega HC Succession cause no. 861 Of 3013. The plaintiff states that the 1st and 2nd Defendant without consent of the Plaintiff and without any color of right entered upon the said property and took possession of it and commenced, together with family, residing and using of the said permanent house thereon.

Your honour, PW1 in his testimony and statement stated that the defendants were in occupation of the land without his actual nor implied consent. Entry into someone's land who is the registered proprietor without that person's consent is trespass therefore the defendants current occupation of parcel of land known as KAKAMEGA/BUGONDA/2163 amount to an offence of trespass.

1. Whether acts of the defendants have injured the plaintiff PW1 in his evidence showed that the defendants were in actual occupation of the land known as KAKAMEGA/BUGONDA/2163 and his efforts to have them vacate were futile. This has denied the plaintiff as the registered owner of the land known as KAKAMEGA/BUGONDA/2163 use of the same thereby injuring his right as the registered owner.

The plaintiff shall wish to rely on the following provisions of the law.

Constitution of Kenya 2010 Article 40 states

“Every person has the right, either individually or in association with others, to acquire and own property. Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description.”

Trespass Act Section 3 states

“Any person, who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. Where any person is charged with an offence under this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”

Registration of Titles Act Section 23(1) of the said Act deals with indefeasibility of title

“the certificate of titles issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party

He relied on the case of HCCC 337 OF 2011 MACHAKOS LA NYAVU GARDENS LIMITED V WILSON MUNGUTI MBITHI & 2 OTHERS

It is common ground that the plaintiff has title to the suit premises. I think and as correctly observed by counsel for the plaintiff; this court should take the same as conclusive evidence that the plaintiff is the proprietor of the suit premises. There is a history as to how the plaintiff came into possession thereof. No fraud or misrepresentation has been alleged or proved. To this extent the plaintiff's title is valid and incontrovertible and cannot be impugned. I would therefore hold and determine on the evidence before me that the plaintiff is the lawful and undisputed proprietor of the suit premises by virtue of the title issued to it. Accordingly the title is not liable to impeachment and it is indefeasible under section 23(1) of the Registration of Titles Act.

CHARLES OGEJO OCHIENG VS GEOFFREY OKUMU [1995]

“Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass.”

The defendant was served but failed to attend court or oppose this suit in any way and failed to enter appearance despite being properly served. 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 who testified in court together with his written statement stated that he was the registered owner of parcel of land known as KAKAMEGA/BUGONDA/2163. He testified that he acquired the land following his succession of the estate of SHEM VIRACHI alias SHEM VILACHI, his late father who owned land Title No. KAKAMEGA/BUGONDA/2163 measuring more or less (0.04 Ha) Hectares vide succession cause number Hamisi SPM Court no. 26 of 2003 and Kakamega HC Succession cause no. 861 of 2013. The plaintiff produced in court a certificate of confirmation of grant of the estate of SHEM VIRACHI alias SHEM VILACHI to further support this claim. To show that he was the registered owner, the plaintiff produced a title deed of land known as KAKAMEGA/BUGONDA/2163 and an Official search showing him STEPHEN SARAMBA VIRACHI being the registered owner of the said parcel of land (PEx1.2&3). 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.

I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that the plaintiff is the lawful owner to the suit property.
2. A permanent injunction restraining the 1st and 2nd defendant and or any other third parties by themselves and or his servants and or agents from entering upon, occupying, constructing and or in any other manner whatsoever from dealing with and or interfering with and or remaining on or continuing in occupation of that parcel of land known as Kakamega/Bugonda/2163.
3. The 1st and 2nd defendants or any other third parties by themselves and or their servants is to vacate the said suit land parcel registration number Kakamega/Bugonda/2163 within the next 3 (three) months from the date of this judgment and in default eviction notice to issue forthwith
4. Costs of this case 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