



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 210 OF 2015

ANTONY SHILAHO MAGOTSI.....PLAINTIFF

VERSUS

BERENETTA MUCHITI

HENRY MUSILWA

AYUB AMBANI

BONI MUTESHI.....DEFENDANTS

JUDGEMENT

At all material times herein referred the plaintiff as the sole registered proprietor of that whole of the land parcel better known as ISUKHA/MUKULUSU/1266 measuring 0.20 ha. The plaintiff avers that he acquired the said land parcel for valuable consideration from one Zakaria Chibondo Murwa who is the husband to the 1st defendant and the father of the 2nd, 3rd and 4th defendants. The plaintiff avers that he has been enjoying the proprietary rights over the suit land. The plaintiff further avers that in early 2015, the defendant without any colour of right whatsoever trespassed onto the said suit land and started tilling the same. The plaintiff avers that his attempts to stop the defendants proved futile as they persisted in their transgressions. Despite demand and notice of intention to sue having been issued the defendants have refused, ignored and/or declined to comply. The plaintiff prays for judgment against the defendant jointly and severally for:

- 1) Permanent injunction restraining the defendant by themselves and/or through servants, agents and employees from in any whatsoever interfering, entering and/or tilting the suit land
- 2) Costs of this suit and interests herein

PW1, Antony Shilaho testified that, he resides at Shitaho village in Mahiakalo sub location. That on or about the 3rd October 2013, he bought a portion of land measuring ½ an acre hived from L.R. No.KAKAMEGA/MUKULUSU/43 (PEx1 is a copy of the title deed and PEx2 the sale agreement). That the said land was purchased from Zakaria Chibondo Murwa and the purchase price was fully paid. Thereafter he managed to do sub division and new number viz LR NO.KAKAMEGA/MUKULUSU/1266 emerged. In the year 2005 when he was preparing the said land for planting, he was surprised to find out that the family of Chibondo Murwa have involved the same and started tilling it without his consent. He reported the matter to Kakamega police station of which he was referred to Shinyalu police station. The culprits were arrested and later on released without preferring in charges against them.

PW2, Zachariah Chibondo Murwa testified that, he is a resident of Mukulusu sub location. He is the proprietor of L.R. NO.ISUKHA/MUKULUSU/632, ISUKHA/MUKULUSU/315 and ISUKHA/MUKULUSU/45. He resides on LR NO.ISUKHA/MUKUUSU/632 of which he purchased. There after he bequeathed the same to his son one Ayub Ambani and one Isaac Andaye. He was bequeathed LR NO.ISUKHA/SHISWA/315 by his late father of which he bequeathed to his other two ones one Francis Ashibira and one Henry Musirwa. His other land L.R. ISUKHA/MUKULUSU/45 was his personal land and he had sold a ½ an acre to one Antony Shilaho. Now his family members i.e. wife, one Berenetta Muchiti and his sons one Henry Musilwa, Ayub Ambani and Boni Muteshi are encroaching over the portion of land he had sold to Antony Shilaho and they have started cultivating the same without his consent.

The defendants were served but failed to enter a defence or attend the hearing and the matter proceeded ex parte. This court has carefully considered the plaintiff's case. 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 Silain** 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 brought this suit land on or about the 3rd October 2013, a portion of land measuring ½ an acre hived from L.R. No. KAKAMEGA/MUKULUSU/43 (PEx1 is a copy of the title deed and PEx2 the sale agreement and mutation forms). That the said land was purchased from Zakaria Chibondo Murwa and the purchase price was fully paid. Thereafter he managed to do sub division and new number viz LR NO.ISUKHA/MUKULUSU/1266 emerged. In the year 2005 when he was preparing the said land for planting, he was surprised to find out that the family of Chibondo Murwa have involved the same and started tilling it without his consent. He reported the matter to Kakamega police station of which he was referred to Shinyalu police station. The culprits were arrested and later on released without preferring in charges against them. The seller PW2 confirms selling this portion to PW1. There was no defence to consider. I find that the plaintiff is the named proprietor of the land and is the absolute and indefeasible owner and his title has not been challenged. There is no evidence of fraud or misrepresentation or that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. I find that the plaintiff has proved his case on a balance of probabilities and I enter judgment against the defendant jointly and severally as follows;

1) Permanent injunction restraining the defendant by themselves and/or through servants, agents and employees from in any whatsoever interfering, entering and/or tilting the suit land better known as ISUKHA/MUKULUSU/1266.

2) Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 17TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE