



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO.103 OF 2016

PATRICK SHIMOKA.....PLAINTIFF

VERUS

MOSES MAINA OPATI.....DEFENDANT

JUDGEMENT

At all material times relevant to this suit, the plaintiff is the registered owner, absolute, of whole that land better known as L.R. No. BUTSOTSO/SHIKOTI/16383 measuring approximately 0.60 Ha and/or thereabouts. That sometimes in the year 2013, the defendant, willfully, unlawfully, without justifiable cause of action, permission, consent, any colour of right and/or otherwise trespassed and/or encroached on the plaintiff's parcel of land better known as L.R. NO.BUTSOTSO/SHIKOTI/16383.The plaintiff avers that the defendant has derived him constitutional rights of ownership on his private property. The plaintiff avers that consequently the defendant was arrested and charged before Kakamega Court vide Kakamega CMCC No.2718 of 2014.The plaintiff's claim against the defendant is for an order of eviction of the defendant by himself, his agents, servants and/or anybody acting and/or claiming for and on his behalf from the plaintiff's parcel of land better known as L.R. BUTSOTSO/SHIKOTI/16383.The plaintiff's claim against the defendant is also for an order of permanent injunction restraining the defendant by himself, his agents, servants and/or anybody acting and/or claiming for and on his behalf from interfering, trespassing, encroaching, disposing, alienating and/or otherwise obstructing the plaintiff's peaceful and quiet occupation of parcel of land better known as L.R. No. BUTSOTSO/SHIKOTI/16383.Reasons Wherefore the Plaintiff prays for judgment against the defendant as follows:

- a. An order of eviction of the Defendant by himself, his agents, servants and/or anybody acting and/or claiming for and on his behalf from the plaintiff's parcel of land better known as L.R.NO.BUTSOTSO/SHIKOTI/16383.
- b. An order of permanent injunction restraining the Defendant by himself, his agents, servants and/or anybody acting and/or claiming for and on his behalf from interfering, trespassing, encroaching, disposing, alienating and/or otherwise obstructing the plaintiff's peaceful and quiet occupation of parcel of land better known as L.R. NO.BUTSOTSO/SHIKOTI/16383.
- c. Costs of this suit.
- d. Any other relief this Honourable court may deem just and expedient.

PW1, Patrick Shimoka testified that he is residing at Ikonyero area of Kakamega Central Sub County within Kakamega County and is a farmer.On or about the 21st day of June 2013 he bought a parcel of land measuring approximately0.60 HA and/or thereabouts from the registered owner one Lucia Khatenje Muteheli. He followed the laid down procedures and acquired the registration on the land on 22.10.2013 and title deed issued to him on 13.11.2013 (PEX1).He later on discovered that the Defendant had wilfully, unlawfully, without justifiable cause of action permission, consent, any colour of right trespassed and/or encroached upon his land. The defendant has taken over the possession cultivation and residing in a dwelling house that the initial owner had constructed on the suit land.The defendant has deprived him his constitutional rights to ownership of his land.He therefore prays that the Defendant be evicted by himself, his agents, servants and/or anybody acting and/or claiming for and on his behalf from his parcel of land better known as L.R. NO.BUTSOTSO/SHIKOTI/16383. He also pray for permanent injunction against the defendant together with costs and interest on costs.

The defendant gave evidence that he bought the land from Everlyn Makokha in 2011 and produce a copy of a sale agreement DEX1. He never called any witness to corroborate his evidence.

This court has carefully considered the plaintiff's and the defendant's cases. 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”.

It is not in dispute that the plaintiff is the registered owner, absolute, of whole that land better known as L.R. No. BUTSOTSO/SHIKOTI/16383 measuring approximately 0.60 Ha and/or thereabouts. 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 as follows;

1. The defendant by himself, his agents, servants and/or anybody acting and/or claiming for and on his behalf is to vacate from the plaintiff’s parcel of land better known as L.R.NO.BUTSOTSO/SHIKOTI/16383 within the next three months from today’s date in default eviction notice to issue forthwith..
2. An order of permanent injunction restraining the Defendant by himself, his agents, servants and/or anybody acting and/or claiming for and on his behalf from interfering, trespassing, encroaching, disposing, alienating and/or otherwise obstructing the plaintiff’s peaceful and quiet occupation of parcel of land better known as L.R. NO.BUTSOTSO/SHIKOTI/16383.
3. 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