



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 536 OF 2014

CHARLES AURA RATIALA.....PLAINTIFF

VERSUS

JONATHAN MACHEMBE OMUNE.....DEFENDANT

JUDGEMENT

The plaintiff's case is that he bought a portion of land measuring 0.09 ha from the land parcel NO. MARAMA/INAYA/595 belonging to Mr. Joab Omune Alfred Mukabana on the 25th day of 2009. The witnesses of the buying process were among them was the mother of the defendant Mrs. Salome Omune and Jonathan MACHEMBE OMUNE the son who is the defendant/respondent herein. The defendant knows very well where he is supposed to be but he just decides to be adamant. He does not have any problem with his seller Mr. Joab Omune Mukabana (PW2) but it is only the defendant who has decided to stay in his parcel of land mentioned above, his request is for this honourable court to assist him and or grant him the eviction orders so that he can evict him out of land parcel No. Marama/Inaya/1368 which he obtained his title deed on 13th March, 2009 (PEX3).

The defendant submitted that, the suit land being part of his grandfather's family who was the original registered proprietor of the L.P. No. MARAMA/INAYA/595, who unselfishly allocated some land to his children as their inheritance and his father inclusive who did not buy the disputed portion of land but was allocated to him by his father and he too requires that he gets a share of his grandfather's land. The dispute started after his father whom he allowed to sell the first part of the land (50 x 100) whereby he accompanied him to the area assistant chief who made the instrument of the agreement. Whereby in part of the Land Selling Agreement read that Charles Aura Ratiala ID/No. 1230383 to buy a plot measuring (100 x 50) at a consideration price of Ksh. 250,000/= (Two hundred and fifty thousand only) and his father one Joab Omune Mukabana made a commitment that said "and I have received Ksh. 15,000/= (fifteen thousand only) on 25/2/2009 for sure this is what I saw being paid." My father JOAB OMUNE MUKABANA went on making the commitment saying that "the remaining balance of Kshs. 235,000/- (Two hundred and thirty five thousands) to go along way to buying a piece of land for my sons – 1st son JONATHAN MACHEMBE, 2nd son JAVAN ANYANGA, 3rd EDGA MBAYI" and the last point our father said was "I promise to remain co-operative during this time." But 7 years now they have never seen the land that was to be bought, for their father has never shown them anything like an agreement of a land he bought for them. They came to learn that the second plot measuring (100x50) to add to the first plot measuring 100 x 50) to bring the total measurements of that plaintiff's plot to (100 x 100), when he was summoned at the Assistant Chiefs office to receive orders that his father had written an Authority note that he the defendant JONATHAN MACHEMBE OMUNE should shift from the plot of the Plaintiff MR. CHARLES AURA RATIALA measuring (100 x 100). But the same authority letter did not state clearly to him where to move to.

This court has carefully considered both the plaintiff's and the defendant's evidence and submissions therein. The plaintiff's case is that, At all material time in this case the plaintiff was and is the registered proprietor of parcel No. MARAMA/INAYA 1368 measuring approximately 0.09 ha with clear boundaries demarcated thereon which the plaintiff bought from Joab Omune Alfred Mukabana on 25th February, 2009. The plaintiff avers that the defendant who is a son of Joab Omune Alfred Mukabana have without any probable cause and or justification trespassed onto the plaintiff parcel of land No. MARAMA/INAYA/1368 and constructed thereon structures and the plaintiff's efforts to stop aforesaid illegal actions has borne no fruits. The plaintiff avers that he has on several occasions approached and pleaded with the defendant to vacate the said parcel of land No. MARAMA/INAYA/1368 without success. The plaintiff further avers that he has on numerous occasions implored the local administrators to remove the defendant from the plaintiff land but has failed and ignored by the defendant. The plaintiff avers that despite demand and notices to sue issued against the defendant he has ignored, refused and/or neglected and instead the defendant has issued and/or caused threats to the plaintiff's. By reason of the aforesaid the plaintiff has suffered loss and damage and holds defendant liable. The plaintiff's claim against all the defendant for an order of eviction and permanent injunction so that the defendant should move to his father's land parcel No. MARAMA/INAYA/1365. The plaintiff prays for judgment against the defendant for;

(i) An order of eviction against the defendant herein from parcel of land No. MARAMA/INAYA/1368 as well as an order permanent injunction restraining the defendant from ever laying claim, trespassing and/or interfering with the plaintiff peaceful occupation in respect of parcel of land No. MARAMA/INAYA/1368 and be ordered to move to his father's land parcel No. MARAMA/INAYA/1365.

(ii) Costs and interest.

(iii) Any other relief the court may deem fit to grant.

The defendant testimony is that, the suit land being part of his grandfather's family who was the original registered proprietor of the L.P. No. MARAMA/INAYA/595, who unselfishly allocated some land to his children as their inheritance and his father inclusive who did not buy the disputed portion of land but was allocated to him by his father and he too requires that he gets a share of his grandfather's land. 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.”

Looking at the facts of this case, ownership of the said parcel of land has been passed on to the plaintiff. 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 defendant has not able to proof any fraud or misrepresentation in court. PW2 submitted that, he sold the plot at Shikwata village out of land parcel MARAMA/INAYA/595 which land was by then registered in his father's name Alfred Mukabana Malika. The plot he sold to Charles Aura was measuring 100 ft by 100 ft at an agreed purchase price of Ksh. 280,000/= which he fully paid him. That to ensure the buyer obtains title to the purchased portion, he commenced succession proceedings whereby vide kakamega HCC Succ. No. 111 of 2001. The purchaser Charles Aura had bought 100 by 50 ft and he also added him another 50ft to make a total of 100 by 100ft. The 50 feet he added him from another purchaser who had bought land from him but had failed to pay, so he refunded him what he had been . After filing succession cause they sub-divided the land so that each beneficiary gets his share including his brothers and the purchasers including Charles Aura. Charles Aura got registered as owner of land parcel MARAMA/INAYA/1368 while his remaining portion was registered in his names as MARAMA/INAYA/1365. Out of the purchase price he received from Charles Aura, he used the same money to buy one acre out of land parcel MARAMA/INAYA/519 from one Wilson Obadia Ndakala. He bought this land of one acre on plot No. 519 so that his son Jonathan Macheembe Omune moves to this land. He has refused to shift to this land and has insisted to staying on land parcel MARAMA/INAYA/1368 which is registered in the names of Charles Aura. He is supposed to vacate the land but instead has become violent. I find that the defence must fail. 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 suit land namely suit property herein L.R. MARAMA/INAYA/1368 within the next three (3) months from the date of this judgement and in default to be evicted forcefully.
2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH DAY OF JUNE 2018.

N.A. MATHEKA

JUDGE