



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 201 OF 2017**

**FRANCIS ALUBISIA ACHESA.....PLAINTIFF**

**VERSUS**

**ISAAC MIHESO MASINDE.....DEFENDANT**

**JUDGEMENT**

The Plaintiff's case is that he is the registered owner/proprietor of L.P. No.ISUKHA/MUKHONJE/1415 having inherited the said parcel of land from his father after following the right procedure of filing succession and obtained title deed to that effect.The plaintiff further avers that he gave birth to the defendant out of wedlock who came to his home when he was already married and had his own family.The Plaintiff avers that the Defendant placed a caution on Land parcel No. ISUKHA/MUKHONJE/1415.The Plaintiff alleges that according to their customary laws, a child born out of wedlock and was not circumcised on his father's land is not welcomed to his father's land.The plaintiff further avers that he bought land at Rosterman which is L.P. NO. ISUKHA/SHIRERE/4285 measuring 0.5 acre for the defendant but the defendant has again refused to vacate the plaintiff's parcel of land.The Plaintiff avers that the defendant has even beaten him thrice and caused him injuries on the body. The Plaintiff avers that the defendant's intention is to kill him and take away his land by force.The Plaintiff avers that the defendant is colluding with the Chief Ilesi location to grab the above mentioned parcel of land.The Plaintiff avers that there are some buyers who need to be apportioned their shares of land but he is unable due to the said caution.The Plaintiff's prayer to court against the Defendant is for an order that the caution placed on the L.P. No. ISUICHA/MUKHONJE/1415 be removed lifted and or withdrawn. The plaintiff prays for Judgment to be entered against the defendant for:-

1. An order of that the caution placed on the L.P. No. ISUKHA/MUKHONJE/1415 be removed lifted and or withdrawn.
2. Costs
3. Relief/Remedy.

PW1 the plaintiff testified that, he is the registered owner/proprietor of land parcel No. Isukha/Mukhonje/1415. The defendant is his son whom he gave birth out of wedlock and he decided to come home when he was already married. According to Luhya customary law, a child who was not circumcised on his father's land after birth is not allowed to stay together with his father on the same land. He therefore decided to buy for him his own land at Kipkaren River but the defendant has refused to vacate his parcel of land. His family members also decided to buy for him land at Rosterman but the defendant has refused to vacate his parcel of land and therefore has decided to place a caution on land parcel No. ISUKHA/MUKHONJE/1415 yet he has no powers to do so since the plaintiff is the owner. He prays to this court is for an order that the caution placed land parcel No. ISUKHA/MIKHONJE/1415 be removed, lifted and or withdrawn.

DW1 the defendant testified that, the plaintiff herein Francis Alubisia Achesa is his biological father who sired him out of wedlock. In the year 2002 his father, Francis Alubisia Achesa come to get him from his uncle's home at Naitiri and settled him on land parcel No. Isukha/Mukhonje/1415 which is their ancestral land. His father settled him on a portion measuring approximately one acre which he tills in order to provide for his family. His father has sold the land to several buyers. He asked the defendant to vacate the land when he tried to caution him against selling the ancestral land as there will be no land left to sustain the family. He prays that the caution remains in force until the land is just a portioned to family members as the registered proprietor herein is hungry for money and may sell off everything.

This court has carefully considered the evidence and submissions therein. 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 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.*

It is not disputed that the Plaintiff in this case is the registered owner/proprietor of L.P. No.ISUKHA/MUKHONJE/1415 having inherited the said parcel of land from his father after following the right procedure of filing succession and he obtained title deed to that effect. It is not in dispute that the plaintiff gave birth to the defendant out of wedlock who came to his home when he was already married and had his own family. The Plaintiff avers that the Defendant placed a caution on L.P. No. ISUKHA/MUKHONJE/1415.The Plaintiff alleges that according to their customary laws, a child born out of wedlock and was not circumcised on his father’s land is not welcomed to his father’s land.The plaintiff further avers that he bought land at Rosterman which is L.P. NO. ISUKHA/SHIRERE/4285 measuring 0.5 acre for the defendant but the defendant has again refused to vacate the plaintiff’s parcel of land.The defendant states that it is the plaintiff, who went to get him from his uncle’s home at Naitiri and settled him on land parcel No. Isukha/Mukhonje/1415 which is an ancestral land in the year 2002.The defendant further states that the plaintiff is only interested in selling the land and that land parcel No. Isukha/Mukhonje/1415 is a sub-division of the initial land parcel No. Isukha/Mukhonje/569. I find that the plaintiff has a right to deal with the suit parcel of land as he deems fit as he has already bought the defendant an alternative parcel of land. In the circumstances of this case I find that, the plaintiff is entitled to the rights of a registered absolute proprietor of a parcel of land, which is exclusive, peaceful, unfettered and unimpeded possession, occupation and use thereof as stipulated in the Registration of Land Act. I find that the plaintiff has proved his case on a balance of probabilities and grant the following orders;

1. An order that the caution placed on the L.P. No. ISUKHA/MUKHONJE/1415 beremoved lifted and or withdrawn.
2. No orders as to costs

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24<sup>TH</sup> DAY OF JULY 2018.**

**N.A. MATHEKA**

**JUDGE**