



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 135 OF 2013**

**THOMAS MMBWAVI MTONGOI.....PLAINTIFF**

**VERSUS**

**FRANCIS OBINGA OTIENDE.....DEFENDANT**

**JUDGEMENT**

This case summary is that, the plaintiff is the registered owner of land parcel number Isukha/Shirere/1495 measuring about 1.40 Ha. Therefore, he is entitled to possess and use the same without any interference from any other person. The plaintiff avers that he bought land parcel number Isukha/Shirere/1495 from Charles Musebe Olukhaba through an auction as per the court order in Kakamega RMCC No. 104 of 1980. The plaintiff avers that before he could cause the same to be transferred in his name, the defendant fraudulently caused the subdivision of the land into two portions 2016 and 2017 and caused on portion land parcel number Isukha/Shirere/2017 to be registered in his name and the other portion land parcel number Isukha/Shirere/2016 into the plaintiff's name. The plaintiff's claim against the defendant is for an order of permanent injunction restraining the defendant either by himself, or through his workers or representatives from interfering in any way in his land parcel number Isukha/Shirere/1495. The plaintiff prays for judgment against the defendant for the following orders:-

- i. That titles land parcel number Isukha/Shirere/2016 and Isukha/Shirere/2017 be cancelled and land parcel number Isukha/Shirere/1495 be reinstated.
- ii. That a permanent injunction order be issued against the defendant restraining him, his agents and or his employees from interfering in whatever manner with the plaintiff's peaceful enjoyment of the land parcel formerly known as number Isukha/Shirere/1495
- iii. Costs to this suit.

DW1, the defendant testified that he bought the suit land from Charles Musebe Olukhaba in 1979 and obtained the title in 1981 (DEX 1 is a copy of the title deed of Isukha/Shirere/2017) after all the necessary consents were obtained (DEX 3). According to the defendant this is a boundary dispute and his counter-claim is that the boundary be reinstated between land parcel number Isukha/Shirere/2016 and Isukha/Shirere/2017. The defendant avers that he has been using the suit land since 1981.

This court has carefully considered the evidence and submissions therein. Though 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 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 the plaintiff's evidence that he bought land parcel number Isukha/Shirere/1495 from Charles Musebe Olukhaba through an auction as per the court order in Kakamega RMCC No. 104 of 1980. The plaintiff avers that before he could cause the same to be transferred in his name, the defendant fraudulently caused the subdivision of the land into two portions 2016 and 2017 and caused on portion land parcel number Isukha/Shirere/2017 to be registered in his name and the other portion land parcel number Isukha/Shirere/2016 into the plaintiff's name. He produced the notification of sale dated 29<sup>th</sup> January 1981 (PEX 1) Copy of the green card (PEX2), auctioneers letter dated 15<sup>th</sup> June 1981 saying they had sold the suit land for kshs 6200/= (PEX3), a note from the auctioneers which is unsigned stating that the plaintiff was now the legal owner (PEX4).

Be that as it may, the defendant, testified that he bought the suit land from Charles Musebe Olukhaba in 1979 and produced the sale agreement dated 3<sup>rd</sup> December 1979 (DEX 2) and obtained the title in 1981 (DEX 1 is a copy of the title deed of Isukha/Shirere/2017 issued on the 23<sup>rd</sup> September 1986) after all the necessary consents were obtained, (letter of consent dated 10<sup>th</sup> January 1980 DEX 3). According to the defendant this is a boundary dispute and his counterclaim is that the boundary be reinstated between land parcel number Isukha/Shirere/2016 and Isukha/Shirere/2017. It is clear from the documents produced by both parties that by the time the plaintiff was buying the land parcel number Isukha/Shirere/1495 at an auction the same was not available as the defendant had bought part of it way back in 1979 and consent obtained in 1980 hence the subsequent registration. The defendant avers that he has been using the suit land since 1981 and this is not disputed.

I find that the defendant's ownership of land parcel No. Isukha/Shirere/2017 was not obtained by fraud, the defendant is entitled to the rights of a registered absolute proprietor of a parcel of land No. Isukha/Shirere/2017, 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 failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25<sup>TH</sup> DAY OF JULY 2018.**

**N.A. MATHEKA**

**JUDGE**