



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 98 OF 2016

BILLYSTROM ARONYA JIVETI.....PLAINTIFF

VERSUS

SCHOLASTICA KATAMBANI DEFENDANT

JUDGEMENT

This case is briefly that, the plaintiff is the registered owner of all that parcel of land known as KAKAMEGA/BUMBO/301 which he acquired as a gift from his father JOASH JIVETI BUSU on 28th April, 2008. The defendant is unlawfully occupying and using part of the plaintiff's land aforesaid measuring about ¼ an acre taking advantage of the plaintiff's absence from the country. It is the plaintiff's case that before his late father transferred the land to him, he had struck an oral consent for the defendant to move out of the land which had since been sold and join her mother in law Dinah Isiji Ngoizi in a parcel of land she had purchased using the proceeds of sale of the suit land that had been sold to the plaintiff's father aforesaid. The defendant after being allowed to move out of the land following their oral consent with the plaintiff's late father in the year 2008, she later changed her mind and has unlawfully and without the consent of the plaintiff remained on the land hence the plaintiff's action herein for her eviction from the land together with all persons claiming under her name who are on the land. The plaintiff prays for judgment against the defendant:-

(a) Eviction from L.R. KAKAMEGA/BUMBO/301.

(b) Costs.

It is the plaintiff's statement that, on 28th April, 2008 I became the registered proprietor of all that parcel of land known as Kakamega/Bumbo/301 pursuant to transfer of the same to him as a gift by his father JOASH JIVETI BUSU now deceased. That after transfer of the land to him, the defendant was to move out of it together with her mother-in-law Dinah Isiji Ngoizi who had sold and transferred the whole land to his late father but apparently only the said Dinah Isiji Ngoizi moved out of the land while the defendant herein without any colour of right remained on the land. That the defendant is unlawfully occupying and using about ¼ an acre of his land without his consent and hence his case herein for her eviction together with any other persons claiming under her to enable him utilize his entire land without any interference. That the defendant has all along taken advantage of his staying and working in the United States of America to advance her unlawful occupation of his land.

The plaintiff submitted that, that before his late father transferred the land to him, he struck an oral consent in 2008 for the defendant to move out of the land which had since been sold and join her mother in law Dinah Isiji Ngoizi in a parcel of land she had purchased using the proceeds of sale of the suit land that had been sold to the Plaintiff's father aforesaid. The defendant reneged on the oral consent and has unlawfully and without the consent of the Plaintiff remained on the land. The defendant had initially filed a claim for eviction of the defendant from his parcel vide Kakamega HCCC No. 66 of 2011; which was unfortunately dismissed for want of prosecution. This was due to his long absence from the country. At that time he was not served with a notice of dismissal. The defendant has been staying in U.S.A since the year 2002.

The plaintiff submits that, under section 26(1) of the Land Registration Act the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The plaintiff in his Evidence Affidavit in support of his claim which is adopted by the court testifies that he is the absolute registered proprietor of Land Parcel No. Kakamega/Bumbo/301. He produced a copy of an official search dated 7th June, 2016 which confirms the same. He also produced a title deed dated 28th April, 2008 to prove his ownership at the hearing of the suit through Hardly Songole Sinjaa whom he had granted the power of attorney. There is no evidence to the contrary and this can only lead to the inference that the defendant has no answer to the claim.

This court has considered the plaintiff's case and the submissions herein. The Plaintiff avers that the Defendant is unlawfully occupying and using around a quarter of an acre of the Plaintiff's land parcel number KAKAMEGA/BUMBO/301 which he acquired as a gift from his father Joash Jiveti Busu hence the cause of action for the reliefs sought against the Defendant. The Defendant was served with summons to

enter appearance together with the Plaintiff, witness statements and list of documents on 10th June 2016 as indicated on the Affidavit of service dated 20th June 2016 but failed to enter appearance. The defendant has been served with various notices and hearing notices to attend court but she has failed to attend. The defendant never filed a defence. It is not in dispute that the plaintiff is the registered proprietor of LR. No. KAKAMEGA/BUMBO/301 and he has produced a copy of the title deed (PEx 2). 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”.

The defendant offered no evidence as she failed to attend the hearing of the case despite being served. I find that, the plaintiff has proved his case on a balance of probabilities. The certificate of title issued by the Registrar upon registration (PEx2) has been taken by this court 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 has not been challenged as evidence of fraud or misrepresentation to which the person is proved to be a party or evidence that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme has not been adduced. I therefore grant the following orders;

1. The defendant, the defendant’s agents and/or employees jointly and severally are given 3 (three) months from today’s date to vacate the suit parcel better known KAKAMEGA/BUMBO/301 and in default eviction order to issue forthwith.
2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE