



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 333 OF 2014**

**JOLAS NICHOLAS MANYASI.....PLAINTIFF**

**VERSUS**

**BENSON MASINI TIMBWA.....DEFENDANT**

**JUDGEMENT**

Briefly the case is that, at all material times to this suit, the plaintiff has been and still is the registered owner of L.R. NO. W/Bunyore/Esaba/1452. Sometime in January, 2008 the Defendant, without the permission, knowledge and/or authority of the plaintiff, who is the registered owner of land L.R. No. W/BUNYORE/ESABA/1452 encroached and/or trespassed onto the said plot and erected a structure thereon and thereafter began using a substantial portion of the said land thereby depriving the plaintiff of the usage of the same and bringing into question ownership thereof. As a result of the trespass and/or unlawful occupation of the suit plot by the defendant, the plaintiff has been prevented from constructing on and/or been deprived and/or denied the use of the suit plot, thereby losing out on reasonable income. Consequently, the plaintiff has suffered loss and therefore claims damages and/or mesne profits. The plaintiff's claim as against the defendant is for a declaration that the plaintiff is the lawful owner of the suit land, an order of eviction, a permanent injunction restraining the defendant from interfering, cultivating, constructing and/or in any other way dealing with the disputed suit plot, whatsoever and/or howsoever, and for mesne profits. The plaintiff avers that there are no pending proceedings between him and the defendant and neither have there been any other previous proceedings between himself (plaintiff) and the defendant, concerning the same subject matter, in any other court. The plaintiff prays that the honourable court be pleased to enter judgment against the defendant in the following terms.

- (a) A declaration that L.R. NO. W/BUNYORE/ESABA/1452 belongs to and vests unto the plaintiff.
- (b) A permanent injunction to issue restraining the defendant, by himself, agents, servants and/or any other persons claiming through him from interfering with the plaintiff's ownership and or usage of L.R. NO. W/BUNYORE/ESABA/1452. Besides, the plaintiff seeks for declaration that he is the lawful owner of the suit land, an order of Eviction, a permanent injunction restraining the defendant from interfering, cultivating, construction and/or in any other way dealing with the disputed suit plot.
- (c) Mesne profits.
- (d) Costs of this suit be borne by the defendant.
- (e) Such further and/or other relief as the honourable court may deem fit and expedient so to grant.

The defendant denies in toto that the plaintiff is the registered owner of L.R. NO. WEST BUNYORE/ESABA/1452 and shall demand strict proof to the contrary. In reply to paragraph 4 of the plaint, the defendant aver that he did not trespass or encroach on the land in question in 2008 and/or other date. The defendant avers that he is the proprietor of the land in question having purchased the said from one John Teyieh Indimuli in 1993 at a consideration of Ksh. 35,000 and the said seller gave vacant possession and occupation immediately in 1993 and the defendant has been in actual occupation and possession and therefore the defendant's action of utilizing the land in question cannot amount to trespass or encroachment. The defendant avers that he has been and still is in possession, occupation and usage of the land in question from 1994 to date, which is a period of over 12 years and has thus acquired titles by virtue of adverse possession and the defendant shall demand strict proof to the contrary. The defendant further aver that that the defendant having acquired title by virtue of adverse possession, the plaintiff do not have good title to the said land as no person could transfer any interest in the said land to the plaintiff either by way of sale or gift as such interest, if any has expired by effluxion of time. The defendant further avers that the plaintiff is not a purchaser for value without notice. The defendant further aver that the registration of the plaintiff as the sole proprietor of the land in question was obtained fraudulently and the defendant shall demand strict proof to the contrary. Particulars of fraud are purporting to purchase the land in question when he knew or ought to have known that the same had been sold to the defendant. Unlawfully conspiring with one John Teyieh Indimuli, who had sold the land to the defendant to unlawfully cause the said land to be transferred from the seller to the plaintiff when he knew or ought to have known that the same amounted to fraud. Forging, making, uttering and publishing a document in conjunction with one John Teyieh Indimuli to the effect that money has been refunded to one Benson Masini Timbwa, when he and the seller knew or ought to have known that no such refund was made to the defendant at all. Secretly and deceitfully purporting to purchase the land in question when he knew or ought to have known that the defendant was in actual possession and occupation. Forging, making uttering and publishing sale agreements. It is the

defendant's submission that the plaintiff has not proved his case on a balance of probability and as such the relief sought by him are not obtainable.

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.”*

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 plaintiff evidence in brief is that he entered into a sale agreement with one John Teyie Indimuli in 1990 (PEX1). The plaintiff then paid the balance in 2007 (PEX2). The defendant case is that he purchased the said land from John Tayie Indimuli at a consideration of Ksh. 35,000, which he paid in full. He moved into the said land and started using it; he built a toilet in it and planted trees. The purchase was done in 1993. The defendant has used the land since 1993 to-date for a period over 12 years. The defendant had acquired the land in question by adverse possession and therefore there could be no rights to be passed over to the plaintiff by PW2, as at 2007. PW2 admitted he sold the land to the defendant who breached the contract because he never paid the full purchase price. He also stated that he sold the land to the plaintiff at a later stage. PW1 and PW2 went to the land control board and the transfer was executed (PEX3). He obtained the title thereafter (PEX 4). In 2008 the defendant moved into the land and built a toilet.

I find that the plaintiff has proved ownership of land parcel No. W/BUNYORE/ESABA/1452, which ownership was not obtained by fraud, 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. Mesne profits have not been proved and the same will not be awarded. I find that the plaintiff has proved his case on a balance of probabilities and grant the following orders;

1. A declaration that LR. NO. W/BUNYORE/ESABA/1452 belongs to and vests unto the plaintiff.
2. A permanent injunction to issue restraining the defendant, by himself, agents, servants and/or any other persons claiming through him from interfering with the plaintiff's ownership and or usage of LR. NO. W/BUNYORE/ESABA/1452.
3. The defendant is to vacate the said suit land namely LR. NO. W/BUNYORE/ESABA/1452 within the next three (3) months from the date of this judgement and in default an eviction order to issue forthwith.
4. Costs of this suit be borne by the defendant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 11<sup>TH</sup> DAY OF JULY 2018.**

**N.A. MATHEKA**

**JUDGE**