



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 30 OF 2012

JACOB LUTOMIA IMBOTE PLAINTIFF

VERSUS

MORIS SHIVOKO OKOTSE DEFENDANT

JUDGEMENT

This case in summary is that, the plaintiff is the registered owner of land parcel number SOUTH KABRAS/SHAMBERERE/2012 measuring about 0.40 Ha. and hence entitled to possess and use the same without any interference from any other person. The plaintiff avers that he bought land parcel number SOUTH KABRAS/SHAMBERERE/2012 from TIMONA OSUNDWA SHITOSHE on the 24th day of April, 2010 and he was issued with a title deed for the same on the 19th day of July, 2012. The plaintiff further avers that the defendant has been interfering with his use of land parcel number SOUTH KABRAS/SHAMBERERE/2012 since the year 2011 despite having knowledge that the plaintiff had legally purchased the same from TIMONA OSUNDWA SHITOSHE. The plaintiff avers that the defendant has trespassed into the suit land and harvested his sugar cane on two occasions which compelled him to file Butali SRMCC No. 91 of 2011 and Butali SRMCC No. 120 of 2012 to restrain the defendant from receiving sugar cane proceeds in respect of sugar cane grown by the plaintiff in the suit land. The plaintiff avers that the defendant has hired people for purposes of cultivating his land parcel number SOUTH KABRAS/SHAMBERERE/2012 without his consent and or any legal authority. The plaintiff also avers that if the defendant is allowed to proceed with his plans, there may be an outbreak of violence between the defendant's workers and his workers. The plaintiff's claim against the defendant is for an order of permanent injunction restraining the defendant either by himself, or through his workers assigns and or representatives from entering, cultivating and or doing any development in his land parcel number SOUTH KABRAS/SHAMBERERE/2012. The plaintiff prays for judgment against the defendant for the following orders:-

- (i) Permanent injunction.
- (ii) Costs to this suit.

PW1 testified that, on the 24th day of April, 2010 he bought land parcel number SOUTH KABRAS/SHAMBERERE/2012 from Timona Osundwa Shitoshe. That Timona Osundwa Shitoshe and his surveyor processed the title deed and it was issued to him on the 19th day of July, 2012. That the defendant herein Moris Shivoko Okotse has been interfering with his use of the suit land despite having knowledge that he bought the same legally from Timona Osundwa Shitoshe. That the defendant has no claim over the parcel of land since he has his own separate parcel of land where he resides. That the defendant should be restrained from interfering with his use of the suit land. PW2 the said Timona Osundwa Shitoshe corroborated the plaintiff's evidence.

The defendant avers that the plaintiff bought the suit land from a stranger as the said Timona Osundwa has never been a registered owner of the suit land. The defendant avers that if the plaintiff has any title to the suit land then the same is tainted with fraud. The particulars of fraud are, causing the transfer of the suit land into his name from a deceased person without succession cause. The defendant avers that he has been using the suit land since the demise of his sister, Joyce Nyakoa and has planted sugarcane and other crops on the suit land. The defendant further avers that the plaintiff has never worked the suit land. The defendant's counterclaim is for cancellation of the plaintiff's name from the register as proprietor of the suit land. The land in issue was bought by his father from his brother Yeswa Imbefu. It has a common boundary with their land. He bought it and since his sister Joyce Nyakoa had been chased away by the husband he allowed her to stay on the land. She stayed there till her death in 2000. After her death he started using the land and he is using it to date. The plaintiff obtained title without succeeding the estate. This parcel of land was a family land and the deceased was given to hold in trust for us.

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.

The plaintiff evidence in brief is that on the 24th day of April, 2010 he bought land parcel number SOUTH KABRAS/SHAMBERERE/2012 from Timona Osundwa Shitoshe. That Timona Osundwa Shitoshe and his surveyor processed the title deed and it was issued to him on the 19th day of July, 2012. During the hearing the plaintiff gave his testimony and produced documents to confirm that he was the registered owner of land parcel number SOUTH KABRAS/SHAMBERERE/2012. That the plaintiff’s evidence was not challenged since the defendant did not adduce any evidence. The plaintiff being the registered owner of land parcel number SOUTH KABRAS/SHAMBERERE/2012 is entitled to occupy and use the same without any interference from any other person including the defendant.

I find that the plaintiff has proved ownership of land parcel No. SOUTH KABRAS/SHAMBERERE/2012, 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. The counterclaim has not been proved and I dismiss the same. I find that the plaintiff has proved his case on a balance of probabilities and grant the following orders;

1. A permanent injunction restraining the defendant either by himself, or through his workers assigns and or representatives from entering, cultivating and or doing any development in his land parcel number SOUTH KABRAS/SHAMBERERE/2012.
2. Costs of this suit be borne by the defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 11TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE