



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

ELC NO.171 OF 2014

KIPLANGAT SHELISHELI MUTARAKWA.....PLAINTIFF

VERSUS

JOSEPH ROTICH KONES.....DEFENDANT

JUDGMENT

(Suit by plaintiff to recover land occupied by the defendant; plaintiff being the registered proprietor; defendant being a chief and using the land; defendant in his pleadings claiming that the land is Government land and that it is the plaintiff who has encroached into it and that the plaintiff's title was fraudulently acquired; plaintiff producing his title deed and official search to prove ownership; no evidence tendered by the defendant; no evidence that the plaintiff's title was wrongfully acquired; judgment entered for the plaintiff; defendant ordered to vacate the suit land or be evicted; orders of permanent injunction against the defendant issued).

1. This suit was commenced through a plaint which was filed on 23 July 2014. In the plaint, the plaintiff has pleaded that he is the registered proprietor of the land parcel Nakuru/Nessuit Settlement Scheme/1853 measuring approximately 2.83 Ha (hereinafter referred to as "the suit land"). He pleaded that without any reason, the defendant invaded the said land which invasion he reported to Njoro Police Station, but he got no help. He has pleaded that the defendant has been illegally leasing out 5 acres of the land alongside a 3 acre Government reserve adjacent to the land. In the suit, the plaintiff has sought for orders that he is the registered proprietor of the suit land and a permanent injunction to restrain the defendant from the suit property.

2. The defendant's defence was filed through the State Law Office and it is averred that the plaintiff has no claim over the suit land. It is pleaded that the land was set aside by the area leaders as a proposed site to build a police station. It is pleaded that the defendant was only performing his administrative duties and was not misusing his powers in any way. It is also contended that if the plaintiff holds title, the same was acquired fraudulently or illegally. The defendant further pleaded that it is the plaintiff who has encroached into the suit land without any colour of right.

3. Only the plaintiff testified and he stated inter alia that the defendant is the Chief of Nessuit Location. He testified that the defendant has taken over his land and now leases it out to people that he does not know. He testified that at the moment he only occupies 1/4 acre of the land which is where he has developed and lives with his family. He produced the title deed as an exhibit to prove ownership of the land. He also produced a letter from the Lands office to demonstrate that the land belongs to him. He denied that the land is owned by the Government or that there is any Government activity on the land. Mr. Ondieki, learned counsel for the defendant did not cross-examine the plaintiff and neither did the defendant testify or avail any evidence.

4. I have no reason to doubt the plaintiff's evidence. The defendant in its defence seemed to justify its actions by claiming that the land is Government land set aside for purposes of building a police station. I have no such evidence. What I have is evidence that it is the plaintiff who is the registered proprietor of the suit property. The plaintiff produced a title deed to the suit land accompanied by an official search and these documents show that the plaintiff became registered as proprietor of the suit land on 23 June 1997. The fact that the plaintiff holds title is prima facie evidence that he is the proprietor of the suit land as provided for under Section 26 of the Land Registration Act, Act No. 3 of 2012, which is drawn as follows :-

Certificate of title to be held as conclusive evidence of proprietorship.

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

5. Nothing has been presented by the defendant to prove that the plaintiff's title is unlawful or that it was fraudulently acquired. Thus, from the evidence that has been presented before me, I have no difficulty in holding that the plaintiff's title is a good title which deserves protection. As title holder, it is only the plaintiff who is vested with proprietary rights over the suit property. Section 24 of the Land Registration Act, Act No. 3 of 2012, which is drawn as follows, applies:-

Interest conferred by registration.

24. Subject to this Act— (a) 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; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

6. It is therefore only the plaintiff who is vested with proprietary rights over the suit land and not the defendant. It is a violation of the plaintiff's proprietary rights for the defendant to purport to use the land either for his benefit or for the benefit of others or purport to attempt to use it as property belonging to the Government. The defendant has no right to be on the property, or to lease it out, or to use it in any way.

7. I now make the following final orders :-

(i) That as between the plaintiff and the defendant, it is hereby declared that it is the plaintiff who is the proprietor of the land parcel Nakuru/Nessuit Settlement Scheme/1853 and the defendant has no right to be upon the said land or to utilize it in any way, either for his own benefit, or the benefit of any other person or entity.

(ii) That the defendant is hereby ordered to remove himself and/or his servants agents from the land parcel Nakuru/Nessuit Settlement Scheme/1853 and to do so no later than 15 days from the date of service of this judgment and/or decree and in default an order of eviction to issue.

(iii) That on expiry of the 15 days window noted above, an order of permanent injunction is hereby issued to the defendant and/or his servants/agents stopping them from entering, being upon, utilizing, leasing, or in any other way, using the land parcel Nakuru/Nessuit Settlement Scheme/1853 or interfering with the plaintiff's quiet possession and occupation of the same.

(iv) That the plaintiff shall have the costs of this suit.

8. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 10th day of July 2018.

JUSTICE MUNYAO SILA

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In presence of: -

Mr. Ogeto for the plaintiff.

No appearance on the part of the State Law Office for the defendant.

Court Assistant: Nelima Janepher.

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