



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 173 OF 2017

RACHEL OKARO.....PLAINTIFF

VERSUS

ALICE MUHONJA MUSONYE.....DEFENDANT

JUDGEMENT

By a plaint dated 16th August 2012 the case is that, the plaintiff is the registered proprietor of L.R. NO. Isukha/Shirere/5636. That the defendant has interfered with the plaintiff's right to user of the said property to the extent that the plaintiff is unable to develop her investment. That despite demand and notice of intention to sue in default, the defendant has declined to grant the plaintiff free ingress into her property. The plaintiff prays for judgment against the defendant for:-

1. Permanent injunction to issue against the defendant and any or all persons claiming under her from accessing, utilizing or in any way interfering with the plaintiff's right of ownership over L.R. No. Isukha/Shirere/5636.
2. Costs of this suit.

PW2 confirms that she sold the said land to PW1. The defendant is her co wife and she obtained the land through succession from her deceased husband.

The defendant was served but failed to attend court to adduce oral evidence. In her written defence she denies any or lawful registration of the alleged parcel of land No. ISUKHA/SHIRERE/5636 (previously forming part of and or comprised in L.R. ISUKHA/SHIRERE/4698) into the plaintiffs names, and if any, the same was procured by and or fraudulent, unlawful, irregular means, and the resultant of a void process, rendering the alleged title void ab initio and the defendant further pleads non est factum to all the fraudulent transactions leading to the fraudulent and or void title as comprised in L.R. No. ISUKHA/SHIRERE/5636 and the plaintiff is thus put to strict proof of the contrary. The Defendant further avers that by virtue of the circumstances under which Title No. ISUKHA/SHIRERE/5646 (previously forming part of and or comprised in L.R. ISUKHA/SHIRERE/4698) was obtained and or procured, and the subsequent transactions involving and or facilitated by the plaintiff herein, the equitable remedies and or orders sought cannot be granted and she is thus put to strict proof of the contrary.

The defendant avers that at all material time herein the land parcel number ISUKHA/SHIRERE/5646 previously formed part of and or was comprised in L.R. ISUKHA/SHIRERE/4698, in the names of one Nathan Mmbwavi Benjamin Musonye, now deceased and whose estate remains unsucceeded and the defendant counter-claims in her capacity as a party sued here under as well as a dependant and beneficiary under the estate of the said deceased and the plaintiff is put to strict proof of the contrary. The defendant avers that on or about 8th September 2011, without any lawful, regular, valid and or due process, the plaintiff did create and or abetted the creation of a void and fraudulent interest in her favour arising from the estate of the said deceased Nathan Mmbwavi Musonye Benjamin, notwithstanding that the said estate remains unsucceeded to date. The defendant further avers that the said estate of the deceased aforesaid was to be succeeded and or administered by his 1st born son, one Moses Inganji Musonye and who upon commencement of the process, discovered loss of the original death certificate and the land title deed over L.R. ISUKHA/SHIRERE/4698, the mother title for ISUKHA/SHIRERE/5636 and which discovery was duly reported to the Area Chief for Bukhungu Location, one Fabian Shilako. The defendant further avers that upon further investigations over L.R. ISUKHA/SHIRERE/4698 she discovered the same had been closed and new titles namely L.R. No. ISUKHA/SHIRERE/5635 (allegedly in her favour) and L.R. No. ISUKHA/SHIRERE/5636 (alleged in favour of one Beatrice Sensus Musonye and later transferred in favour of the plaintiff) irregularly and fraudulently opened in its place, purportedly pursuant to distribution vide KAKAMEGA HC SUCC CAUSE NO.179 OF 2010 filed in the names of the defendant, without her consent and or knowledge and in which the defendant was never involved at any time whatsoever. Still further the Defendant avers that she has by separate summons sought to revoke the Grant of Letters of Administration of the estate of the deceased purportedly and apparently issued in her names without her knowledge and or involvement on grounds of fraud and to seek the same be issued to the rightfully proposed administrator, Moses Inganji Musonye. The Defendant further aver that the Plaintiff is non-merited to benefit and or receive the equitable remedy sought herein in view of her conduct as her hands as well as the resultants of her actions are tainted with filth, misconduct and fraud. The defendant prays for:-

(a) The dismissal of the plaintiffs' case herein.

(b) Judgment in her favour and an order for revocation/cancellation of title Nos. ISUKHA/SHIRERE/5635 and ISUKHA/SHIRERE/5636 herein against the plaintiff.

(c) The costs and interests of the suit herein.

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.”

The law is clear that, 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 – On the ground of fraud or misrepresentation to which the person is proved to be a party; or 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 testified that he is the registered owner of land parcel no. Isukha/Shirere/5636. She purchased the land from PW2 and obtained the title deed (PEX1). PW2 confirms that she sold the said land to PW1. The defendant is her co wife and she obtained the land through succession from her deceased husband. The defendant avers that upon investigations over L.R. ISUKHA/SHIRERE/4698 (their matrimonial land) she discovered the same had been closed and new titles namely L.R. No. ISUKHA/SHIRERE/5635 (allegedly in her favour) and L.R. No. ISUKHA/SHIRERE/5636 (alleged in favour of one Beatrice Sensus Musonye and later transferred in favour of the plaintiff) irregularly and fraudulently opened in its place, purportedly pursuant to distribution vide KAKAMEGA HC SUCC CAUSE NO.179 OF 2010 filed in the names of the defendant, without her consent and or knowledge and in which the defendant was never involved at any time whatsoever. I find that it is upto the defendant to pursue that matter in the succession cause if she feels dissatisfied. As it stands PW2 was awarded the said land through the court and the plaintiff is a bonafide purchaser in the absence of any evidence to the contrary. I find the defence and counterclaim frivolous, I reject it and I dismiss the counterclaim. I find that the defendant has continued to trespass onto the parcel of the land No. Isukha/Shirere/5636 and illegally continues to occupy the same thereby denying the plaintiff her peaceful and quiet enjoyment of the same. I find that the plaintiff has proved ownership of land parcel No. Isukha/Shirere/5636, which ownership is not contested, 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. I find that the plaintiff has proved her case on a balance of probabilities and grant the following orders;

1. Permanent injunction to issue against the defendant and any or all persons claiming under her from accessing, utilizing or in any way interfering with the plaintiff's right of ownership over L.R. No. Isukha/Shirere/5636.

2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE