



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 1 OF 2015

JAMES JALANGO OWAREPLAINTIFF

VERSUS

ISAACK OHARE.....DEFENDANT

JUDGEMENT

This case is briefly that, at all times the plaintiff is the proprietor of all that parcel of land known as WEST/BUNYORE/EMMULI/549. On or about the year 1989 the plaintiff entered into an agreement for the purchase of the aforesaid parcel of land for Kenya Shillings eleven thousand (Ksh. 11,000/=). The defendant herein paid Kenya Shillings nine thousand and has since breached the said contract by not paying the balance thereof. The defendant has continued to use the aforesaid land to date. Despite several and or continues demands that he pays the balance thereof the defendant herein has denied and or refused and or neglected to pay the balance thereof and continues in such refusal. The plaintiff avers that there is no other suit pending in a court of competent jurisdiction between the plaintiff and the defendant over the said subject matter. The plaintiff prays for judgment against the defendant for:-

- a. A declaration be made that the defendant has breached the said agreement and he together with his agents and or servants and or employees be permanently restrained from trespassing, cultivating and or using all that parcel of land known as WEST/BUNYORE/EMMULI/549.
- b. Mesne profits and costs of this suit.

PW2 testified that he witnessed the said sale agreement. He saw the defendant pay ksh. 9000/= only. The defendant was served but failed to attend court or file any papers in opposition.

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.WEST/BUNYORE/EMMULI/549 (PEx1). On or about the year 1989 the plaintiff entered into an agreement for the purchase of the aforesaid parcel of land for Kenya Shillings eleven thousand (Ksh. 11,000/=). The defendant herein paid Kenya Shillings nine thousand and has since breached the said contract by not paying the balance thereof. The defendant has continued to use the aforesaid land todate. His evidence has not been challenged. Mesne profits have not been proved and will not be awarded. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration be and is hereby made that the defendant has breached the said agreement and he together with his agents and or servants and or employees be and are hereby permanently retrained from trespassing, cultivating and or using all that parcel of land known as WEST/BUNYORE/EMMULI/549.

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