



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 374 OF 2017

MUSAYA MAPESA.....PLAINTIFF

VERSUS

BOYI SITAVU

MAJONI SITAVU

NYONGESA SITAVU

BARASA SITAVU

BAKARI MAKOKHA

JOSEPH MATIMBA.....DEFENDANTS

JUDGEMENT

By a plaint dated 21st June 2010, this case is that, at all material times to this suit the plaintiff was and is the registered owner of land parcel No. N/KABRAS/KIVAYWA/306. The plaintiff avers that he obtained title deed on 13th day of May, 2009 through way of succession of his deceased brother one Luke Musee Mapesa, who died on 6th August, 2004. (Succession Cause No. 447 of 2007). The plaintiff avers that he got possession of the suit land immediately after his brother one Luke Musee Mapesa passed away in the year 2004 and became a sole proprietor. The plaintiff avers that the defendants herein without any justifiable cause or excuse entered the deceased's land after his death and utilizing it by cultivating, building temporary business structures thereto on the suit land herein. The plaintiff further avers that in the year 2010 he wrote and or issued to the defendant's a notice to vacate of which the defendants ignored. The plaintiff is thereby denied right of use by the defendants actions above. The plaintiff's avers that there have been proceedings from Land Disputes Tribunal over the suit land N/KABRAS/KIVAYWA/306 and he has never had any proceedings with the defendants over the same subject matter. The plaintiff's claim against the defendant's is for eviction from land parcel No. N/KABRAS/KIVAYWA/306. The plaintiff prays for judgment against the defendants for orders of:-

- a. Eviction of the defendants, their assigns agents and any other person from the plaintiff's parcel of land namely N/KABRAS/KIVAYWA/306.
- b. Costs of the suit.

The 1st defendant states that he bought (25 x 27ft) of land which was to be sub divided from parcel of land NO. N/KABRAS/KIVAYWA/306 from the then registered owner Luke Musee Mapesa at a consideration of Ksh. 1,500/= which he paid in full to the seller on the 28th day of June, 2001. That after the purchase transaction the 1st defendant gained vacant possession of the parcel he legally bought from Luke Musee Mapesa. That until the seller's death, he had not transferred the parcel to the 1st defendant herein on alleged health problems. That the 1st defendant is not aware of any succession cause having been instituted by the plaintiff herein and in any case there was, he had a right to be listed as beneficiary as a bon-fide purchaser. That the 1st defendant denies having been served with any vacation notice as alleged in the plaint. That the 1st defendant is legally occupying the (25x27ft) of land as a bona-fide purchaser and he has built a toilet on it.

The plaintiff withdrew the case against the 5th and 6th defendants as they are deceased. The 2nd to 4th defendants were served but failed to attend court or give any evidence. 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. N/KABRAS/KIVAYWA/306. The plaintiff avers that he obtained title deed on 13th day of May, 2009 through way of succession of his deceased brother one Luke Musee Mapesa, who died on 6th August, 2004. (Succession Cause No. 447 of 2007). The plaintiff avers that he got possession of the suit land immediately after his brother one Luke Musee Mapesa passed away in the year 2004 and became a sole proprietor. The plaintiff avers that the defendants herein without any justifiable cause or excuse entered the deceased’s land after his death and utilizing it by cultivating, building temporary business structures thereto on the suit land herein. The 1st defendant states that he bought (25 x 27ft) of land which was to be sub divided from parcel of land NO. N/KABRAS/KIVAYWA/306 from the then registered owner Luke Musee Mapesa at a consideration of Ksh. 1,500/= which he paid in full to the seller on the 28th day of June, 2001. He has not produced any documentary evidence to prove the same. He also did not call any witnesses. I find that the plaintiff has proved ownership of land parcel No. N/KABRAS/KIVAYWA/306, 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 his case on a balance of probabilities and grant the following orders;

1. The 1st to 4th defendants, their assigns or agents are to vacate the suit land, land parcel No. N/KABRAS/KIVAYWA/306 within the next 3 (three) months from the date of this judgement and in default an eviction order to issue forthwith.
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