



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 661 OF 2014

GEORGE BISAHO IKOLOMANI.....PLAINTIFF

VERSUS

ALFRED IKAMBILI

DEFINA WILLIAM.....DEFENDANTS

JUDGEMENT

By a plaint dated 30th December 2014, the case is that, the plaintiff is the registered owner of all that parcel of land known as KAKAMEGA/SHIBUNAME/1083 measuring 0.32 Ha and which borders land parcel No. KAKAMEGA/SHIBUNAME/1105 occupied by the 1st defendant and KAKAMEGA/SHIBUNAME/1085 occupied by the 2nd defendant. The plaintiff avers that there existed a road of access between land parcels No. KAKAMEGA/SHIBUNAME/1085 leading to his land parcel No. KAKAMEGA/SHIBUNAME/1083. The defendants have without any justifiable cause closed the road of access leading to the plaintiff's land hence causing him mental anguish. The plaintiff's efforts to have the road of access re-opened have been violently resisted by the defendants. The plaintiff prays for judgment against the defendants jointly and severally, for the following:-

- (1) An order compelling the defendant to re-open the road of access between land parcels KAKAMEGA/SHIBUNAME/1105 and 1085 to all the plaintiff access to his land parcel KAKAMEGA/SHIBUNAME/1083.
- (2) The Kakamega District Land Registrar and District Surveyor to conduct the exercise.
- (3) Costs of this suit.
- (4) Any other relief.

The defendants in their defence allege that the plaintiff bought land from one Andrea Khayega who is now deceased and was a brother to the 1st defendant's father. The defendants allege that when the plaintiff bought his parcel of land he was to ask for the road of access from one Andrea Khayega who sold for him land. The defendants allege that the plaintiff took the matter to the D.O. Isulu who ordered the Assistant Lunenele sub-location to write a letter to the land registrar and land surveyor to carry survey create the access road but it appeared on the map there was no access road between L.R. NO. KAKAMEGA/SHIBUNAME/1083, 1105 and 1085. The land registrar advised the plaintiff to go and sit down together with the defendants as a family and agree if the defendants are willing to create the road of access for the plaintiff. The defendants avers that the plaintiff is using force to claim for the access road from the defendants who are not willing and ready to create the road of access since the plaintiff bought land from a different person.

This court has carefully considered the evidence and submissions therein. The defendants were served but failed to attend court and give oral evidence. 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.KAKAMEGA/SHIBUNAME/1083 measuring 0.32 Ha and which borders land parcel No. KAKAMEGA/SHIBUNAME/1105 occupied by the 1st defendant and KAKAMEGA/SHIBUNAME/1085 occupied by the 2nd defendant.It is the plaintiff’s evidence that the defendants have decided to close the only access road leading to his land hence denying him the right to have access to his land. As can be seen from the map presented in court there is an access road which stems from the side of the 1st defendant’s land and passes next to the 2nd defendant’s land (PEX2). The said access roads have been closed at the points of the said land and has forced the plaintiff to use footpaths and trespass through other people’s lands so as to access his land. The plaintiff’s evidence has not been challenged. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. An order compelling the defendant to re-open the road of access between land parcels KAKAMEGA/SHIBUNAME/1105 and 1085 to all the plaintiff access to his land parcel KAKAMEGA/SHIBUNAME/1083.
2. The Kakamega District Land Registrar and District Surveyor to conduct the exercise and file a report in court within the next 60 days from the date of this judgement.
3. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE