



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 495 OF 2014

LABAN AHAZA KIFORO A.K.A. ABAN AHAZA KIFOLO.....PLAINTIFF

VERSUS

ERASTUS SAGALA.....DEFENDANT

JUDGEMENT

By a plaint dated 22nd July 2011, the plaintiff avers that he is the registered owner of land parcel no. N. Maragoli/Kisatiru/1007 which share a common boundary with land parcel No. N. Maragoli/Kisatiru/1008 in the name of the defendant. The plaintiff avers that the defendant has without any colour of right encroached on 1.6 metres comprised in the above title and caused to be erected thereon a structure. The plaintiff avers that on 7th February, 2011 the Land Registrar after visiting the site made a report that indeed the defendant had encroached on 1.6 metres of the plaintiff's land. Wherefore the plaintiff prays for judgment against the defendant for;

- (a) Eviction and demolition of any structure by the defendant occupying 1.6 metres of land parcel No. N. Maragoli/Kisatiru/1007.
- (b) Costs of the suit.

The defendant states that the first boundary between land parcel No. was NORTH MARAGOLI/KISATIRU/1008 and land parcel no. NORTH MARAGOLI/KISATIRU/1007 was created by the land committee together with the land adjudication committee in 1966 and whereas the boundary referred to is on the map. The defendant also states that the District Lands Registrar determined the instant boundary issue without according the defendant a hearing and thus the defendant was condemned unheard. The defendant states that he has issued a notice of intention to appeal against the decision of the District Land Registrar, to the Chief Land Registrar. The defendant prays that the plaintiff's suit be dismissed with costs to the defendant.

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. Maragoli/Kisatiru/1007 which share a common boundary with land parcel No. N. Maragoli/Kisatiru/1008 in the name of the defendant. The plaintiff avers that the defendant has without any colour of right encroached on 1.6 metres comprised in the above title and caused to be erected thereon a structure. The plaintiff avers that on 7th February, 2011 the Land Registrar after visiting the site made a report that indeed the defendant had encroached on 1.6 metres of the plaintiff's land. The defendant states in his defence that the District Lands Registrar determined the instant boundary issue without according the defendant a hearing and thus the defendant was condemned unheard. The defendant states that he has issued a notice of intention to appeal against the decision of the District Land Registrar, to the Chief Land Registrar. However, from 2012 when the defence was filed the defendant has never appealed. I find the defence frivolous and I reject it. I find that the defendant has continued to trespass onto the parcel of the land N. Maragoli/Kisatiru/1007 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. N. Maragoli/Kisatiru/1007, 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 his case on a balance of probabilities and grant the following orders;

1. The defendant, is to vacate and demolish any structure on the suit land, land parcel No. N. Maragoli/Kisatiru/1007 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 20TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE