



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 336 OF 2014

TITUS WETESA PLAINTIFF

VERSUS

NORA AKOKHA KULECHO

BUTALI SUGAR CO. LTD..... DEFENDANTS

JUDGEMENT

The Plaintiff states that he bought a portion measuring three (3) acres out of the parcel of land known as Kakamega/Malava/1649 from Chirangosi Kanusu, this was by way of paying loan that Chirangosi Kanusu and one acre out of Kakamega/Malava/1648 from Sungura Kulecho were to pay Agricultural Finance Co-operation (AFC) Kakamega office. The Plaintiff states that he bought this land in 1995 when the Plaintiff immediately took possession and started to develop the same. The Plaintiff avers that he obtained title to the purchased land in 1996 when the Plaintiff obtained title to the purchased portion as N.Kabras/Malava/2358. The Plaintiff avers that the parcel of land known as Kakamega/Malava/1649 and 1648 were created out of the parcel of land known as Kakamega/Malava/1206. The Plaintiff avers that the 1st Defendant filed a dispute at the Kabras Division Land Disputes Tribunal and as a result the titles created including Plaintiff's Kakamega/Malava/2358 were cancelled and title no. Kakamega/Malava/1206 restored. The Plaintiff avers that he was not a party to the tribunal proceedings and that the decision to cancel his title was unjustified and unlawful. The Plaintiff avers that further that the 1st Defendant then transferred the whole of that parcel of land known as Kakamega/Malava/1206 to the 2nd defendant. The Plaintiff avers that the 1st Defendant then commenced evictions proceedings in respect of which the Plaintiff obtained an order of stay. The Plaintiff avers that the order cancelling the registration of the parcel of land known as Kakamega/Malava/2358 was unlawful and unjustified and the same ought to be re-stored/reinstated. The Plaintiff further prays for an order that the 1st Defendant had no capacity to transfer the parcel of land known as Kakamega/Malava/1206 and further that the 2nd Defendant did not obtain a good title in the circumstances. The Plaintiff further prays that the title parcel of land known as Kakamega/Malava/2358 be re- instated in the name of the plaintiff.

The Plaintiff prays orders;-

- a) That the order cancelling the registration of the parcel of land known as Kakamega/Malava/2358 was unlawful and unjustified and the same ought to be re-stored/reinstated.
- b) That the 1st Defendant had no capacity to transfer the parcel of land known as Kakamega/Malava/1206 and further that the 2nd Defendant did not obtain a good title in the circumstances.
- c) That the title parcel of land known as Kakamega/Malava/2358 be re-instated in the name of the Plaintiff.
- d) Costs of this suit.
- e) Any other relief this honourable court may deem just to grant.

This court has carefully considered the evidence and submissions therein. The defendants were served but failed to attend court and the hearing proceeded ex parte. 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 bought a portion measuring three (3) acres out of the parcel of land known as Kakamega/Malava/1649 from Chirangosi Kanusu, this was by way of paying loan that Chirangosi Kanusu and one acre out of Kakamega/Malava/1648 from Sungura Kulecho were to pay Agricultural Finance Co-operation (AFC) Kakamega office. The Plaintiff states that he bought this land in 1995 when the Plaintiff immediately took possession and started to develop the same. The Plaintiff avers that he obtained title to the purchased land in 1996 when the Plaintiff obtained title to the purchased portion as N. Kabras/Malava/2358. The Plaintiff avers that the parcel of land known as Kakamega/Malava/1649 and 1648 were created out of the parcel of land known as Kakamega/Malava/1206. The Plaintiff avers that the 1st Defendant filed a dispute at the Kabras Division Land Disputes Tribunal and as a result the titles created including Plaintiff's Kakamega/Malava/2358 were cancelled and title no. Kakamega/Malava/1206 restored. The Plaintiff avers that he was not a party to the tribunal proceedings and that the decision to cancel his title was unjustified and unlawful. The Plaintiff avers that further that the 1st Defendant then transferred the whole of that parcel of land known as Kakamega/Malava/1206 to the 2nd defendant.

The 2nd defendant in their statement of defence avers that it bought the said parcel of land from the 1st defendant lawfully and paid a consideration of Ksh. 4 million. The 2nd defendant further avers that with due diligence, it conducted a search which revealed that the first defendant was the registered owner of land parcel No. KAKAMEGA/MALAVA/1206. The 2nd defendant further states that upon conducting a search in respect of the suit land, the title of the suit land was clear of encumbrances and it proceeded to buy the same. The 2nd defendant avers that it was an innocent purchaser for value without notice and its interest in the land cannot be defeated by any third party claim such as the plaintiff's. Save what is expressly admitted the defendant denies each and every allegation of law and fact pleaded on the plaint as if each were specifically set out and traversed seriatim.

The plaintiff in the counterclaim is a limited liability company duly registered under the relevant act and it is the registered owner of all that parcel of land comprised in title No. Kakamega/Malava/1206. The plaintiff in the counterclaim avers that upon purchase of the suit land, the same was vacant and while it was preparing to plough the whole land, the defendant unlawfully invaded the land and put up temporary structures on or about the month of April, 2012. The plaintiff in the counterclaim avers that the defendant current occupation of its land is unlawful and that the defendant's acts of trespass have interfered with its use of the land and it now prays that the defendant, its agents, family members or any other person introduced to the land by him be evicted from the suit land and for a permanent injunction restraining the defendant, as agents and or family members claiming under him jointly and severally from interfering with the suit land in any manner whatsoever. The plaintiff in the counterclaim offered no oral evidence.

The plaintiff (in the plaint) has not produced any proof of purchase of the suit land. There is no sale agreement. The search produced merely stated that the title has been cancelled by the Magistrate's Court Kakamega. There is nothing to show that the alleged ownership by the plaintiff of the suit land was obtained procedurally. The plaintiff has failed to prove his case on a balance of probabilities and I dismiss his case. The counterclaim was not proved and the same is dismissed. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE