



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 377 OF 2013

JOTHAM MAYODI MIGEZE.....PLAINTIFF

VERSUS

HERBERT JUMBA

SHABAN IHORANI.....DEFENDANTS

JUDGEMENT

This case is that, the plaintiff has been and is the absolute property owner of land parcel known as KAKAMEGA/LYADUYWA/418 over which he holds a title deed. The defendants have willful and without any colour of right encroached into and are illegally occupying a part of the plaintiff's portion of land parcel known as KAKAMEGA/LYADUYWA/418. That by reason of the defendants acts of encroachment, the plaintiff has suffered loss, damage and injury which persists. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) An order evicting them from the portion of land parcel KAKAMEGA/LYADUYWA/418 together with a further order permanently entering, remaining on the aforesaid portion of land or interfering with the same in any manner complained or whatsoever.
- (b) Costs of this suit.

From the evidence of plaintiff (PW1) at the hearing, he stated that he has title to the land which bears his name. He produced the said title in court to prove the same. There is no evidence tendered to refute the same. From the foregoing the plaintiff submitted that, he has proved ownership to land parcel Kakamega/Lyadywa/418. Since he is the registered proprietor. No evidence has been adduced to prove otherwise and or contest the title held by the plaintiff. In the plaintiff statement which was filed in court on 20th December 2013, he adopted as his evidence in court, the plaintiff avers that the said defendants have encroached on his parcel of land and have occupied and are in continuous use of it. The plaintiff is seeking a remedy as provided in law for trespass which is a permanent injunction restraining the defendants from entering his parcel of land.

This court has carefully considered the evidence and the submissions herein. By plaint dated 20th December 2013, the plaintiff instituted proceedings against the defendants jointly and generally for an order of eviction and permanent injunction from land Parcel. KAKAMEGA/LYADUYWA/418 and costs of this suit. Neither the 1st and 2nd defendants entered appearance in the matter and or file defence despite having been served with the summons. The case proceeded to hearing on the 4th day of July, 2018. At the hearing the plaintiff testified in his evidence he averred that he is the registered sole proprietor of the suit land and to this he produced a copy of title deed showing that indeed he is the registered proprietor of the suit land. The copy of title indeed had his name registered as proprietor. He went further to produce an official search to land parcel KAKAMEGA/LYADUYWA/418 which search was produced. The plaintiff also stated in his testimony that he had earlier tried to solve the matter amicable through the Land Registrar. The defendants were summoned to try solve the dispute. He went further to produce minutes of the Land Registrar's meeting (PEx 4). He further produced a demand letter and notice of intention to sue from his advocates on the defendants which went unreplied.

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.”*

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 defendant adduced no evidence. I find that no evidence has been adduced to show that the plaintiff obtained the title illegally, unprocedurally or through a corrupt scheme. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

- 1 That the defendants either by themselves, their agents, employees, heirs and/or assigns are to vacate the suit parcel KAKAMEGA/LYADUYWA/418 within the next 3 (three) months from the dated of this judgement and in default eviction order to issue forthwith.
2. Costs of the suit be borne by the defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE