



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 266 OF 2015

JOSEPHINE MUENI.....PLAINTIFF

VERSUS

PATRICK IHACHI.....DEFENDANT

JUDGEMENT

The plaintiff's case is that, he is the absolute registered proprietor of all that parcel of land known as KAKAMEGA/SHIVAKALA/2052 measuring approximately 0.7 hectares which was registered in her name on 17th of September, 2010 and issued with a title deed thereof on 5th of October, 2010. The plaintiff acquired the said suit property in 1976 as a bona fide purchaser for value. In or about 2009 the plaintiff's husband one Andrea Luyeku built for her a house on the suit property and started residing thereon with their servants. In or about 2010 the defendant forcefully took possession of the suit property and begun developing and cultivating it. On 22nd of January, 2011 the defendant without any colour of right or permission of the plaintiff trespassed onto the suit property and took away the plaintiff's household properties has prevented the plaintiff entry onto the suit property. The acts of trespass complained of above were duly reported to the police but no action was taken against the defendant with the result that to date the defendant continues to unlawfully trespass onto the suit property. The defendant has neglected, failed and or refused to stop acts of trespass on the suit property and to date persists with such acts hence this suit. The plaintiff as the absolute registered proprietor of the suit property is entitled to exclusive use and quiet enjoyment of the suit property. As a result of the matters aforesaid the plaintiff has suffered loss and damage. The plaintiff prays for judgment against the defendant for orders that;

- (a) The defendant be forthwith evicted from land Parcel No. KAKAMEGA/SHIVAKALA/2052.
- (b) The defendant to pay the plaintiff mesne profits as from the year 2010 upto the time of judgment.
- (c) Costs of this suit be provided for.

DW1 the defendant testified that, the plaintiff has had herself registered as the proprietor of parcel of land number KAKAMEGA/SHIVAKALA/2052 and denies that the registration was procedural, legal and / or lawful and puts the plaintiff to strict proof to the acquisition of the said Title. The defendant denies that the plaintiff acquired the suit property in 1976 as a bonafide purchaser for value, denies that her husband Andrea Luyeku built for her a house on the suit property and started residing therein with their servants. He denies the defendant forcefully look possession of the suit property and began developing and cultivating it, denies that he was without any colour of right or permission of the plaintiff trespassed on the suit property and took away the plaintiffs house hold properties, denies preventing the plaintiff entry to the said property and the plaintiff is put to strict proof thereof. The Defendant avers that he has been in actual occupation and utilization of the suit parcel of land since he was born to date which parcel of land was brought up on the same by his father ANDREALUYEKU whom the Plaintiff claims to be her husband as well. The Defendants avers that being the son of ADREA LUYEKU the initial registered owner of the suit land and having been born, brought up on and continue to occupy the said land without interruption the plaintiff is merely handling the said Title in trust for himself and the rest of the family members in total exclusion of the plaintiff who is not in occupation and/ or in use of the said land. The Defendant further avers that the plaintiff does not hold a good title to the parcel of land known as KAKAMEGA/ SHIVAKALA/ 2252 since she attained the said title secretly, illegally, fraudulently without due regard to the Defendant's interest therein.

The Defendant avers that owing to his quite, continuous, uninterrupted possession, occupation and use of the suit parcel of land he was born therein, the plaintiff's title was extinguished by law and ANDREA LUYEKU could not pass title to the plaintiff unilaterally. The Defendant avers that owing to the forgoing the plaintiff title is not good and as such is not entitled to claim the orders sought in the plaint as against the defendant and the plaintiff shall be put to strict proof thereof. The Defendant avers that the suit herein is bad in law, statutory time barred, incompetent, does not disclose any reasonable cause of action and the same should be dismissed with costs. The plaintiff's registration of as the proprietor of parcel of land number KAKAMEGA/SHIVAKALA/2052 was secretly, illegally, and fraudulently and her registration should be cancelled. The Defendant prays that the Plaintiffs suit against him be dismissed with costs and judgment be entered in his favour against the plaintiff for;

- a) A declaration that the acquisition of title no KAKAMEGA/ SHIVAKALA/2052 by the plaintiff as the proprietor thereof is illegal

and unlawful and should be cancelled.

This court has carefully considered the case and the submissions herein. 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.”*

Looking at the facts of this case, ownership of the said parcel of land has been passed on to the plaintiff. 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.”

It is a finding of fact that the plaintiff is the absolute registered proprietor of all that parcel of land known as KAKAMEGA/SHIVAKALA/2052 measuring approximately 0.7 hectares which was registered in her name on 17th of September, 2010 and issued with a title deed thereof on 5th of October, 2010. It is also a finding of fact that the plaintiff acquired the said suit property in 1976 as a bona fide purchaser for value. In or about 2009 the plaintiff's husband one Andrea Luyeku (PW2) built for her a house on the suit property and started residing thereon with their servants. In or about 2010 the defendant who is their stepson forcefully took possession of the suit property and begun developing and cultivating it. On 22nd of January, 2011 the defendant without any colour of right or permission of the plaintiff trespassed onto the suit property and took away the plaintiff's household properties and has prevented the plaintiff entry onto the suit property. The defendant has neglected, failed and or refused to stop acts of trespass on the suit property and to date persists with such acts hence this suit. It is not disputed that the defendant does not reside on this land but cultivates there. He lives on a different parcel of land as confirmed by his mother DW2. I find that, the Defendants have no right and interest recognized by the law in the subject matter. I find that he has failed to prove his counter claim and I dismiss it. The defendant has not proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The defendant is a trespasser. The issue of mesne profits have not been proved and the same will not be awarded. I find that the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. That the defendant either by himself, his agents, employees, heirs and/or assigns is to vacate the suit parcel L.R. NO. KAKAMEGA/SHIVAKALA/2052 within the next 3 (three) months from the dated of this judgement and in default eviction order to issue forthwith.
2. Each party to bear their own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE