



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 308 OF 2017

THEODORE ANDREW OCHIENG.....PLAINTIFF

VERSUS

DAVID SHIUNDU MASIEYI.....DEFENDANT

JUDGEMENT

It is the plaintiff's case that, on or about 22/12/2015 the plaintiff entered into a land sale agreement with the defendant for the purchase of land parcel number N/Wanga/Kholera/2133 measuring 2.3 Ha inclusive of all development thereof at an agreed consideration of Ksh. 1,900,000/= (One million Nine Hundred thousand Shillings) only. The plaintiff avers that the full consideration was paid in full and the defendant acknowledged receipt thereof as follows:-

a. 22/12/2015	-	Ksh. 950,000/=
b. 07/01/2016	-	Ksh. 100,000/=
c. 08/04/2016	-	<u>Ksh. 850,000/=</u>
Total	-	Ksh. 1,900,000/=

The plaintiff avers that he consequently acquired title to and as the absolute proprietor of land parcel number N/WANGA/KHOLELA/2133. It was an express term of the agreement that the plaintiff would take immediate possession of the purchased land after full payment of the agreed consideration. The plaintiff avers that the defendant expressly undertook and/or committed himself to give possession to the purchaser in the month of December, 2016. The plaintiff has on numerous occasions requesting and pleaded with the defendant to vacate the suit land but the defendant has refused and/or otherwise failed to vacate and continue in such refusal thus necessitating this suit. The plaintiff avers that the defendant has threatened and intend, unless threatened by this honourable court, to continue or remain in illegal occupation of the suit land and/or trespass thereon. The plaintiff prays for judgment against the defendant for:-

- a. A declaration that the plaintiff being the registered owner of Land Parcel No. N/Wanga/Kholera/2133 is entitled to exclusive, peaceful, quiet and unimpeded possession, occupation and use thereof and to issue an order that the defendant, his relatives agents, servants, employees and/or and other person claiming through them be evicted from the said parcel of land.
- b. Costs of the suit and interest thereon.
- c. Any other relief deemed for by the court.

The defendant avers that he entered into the agreement with the plaintiff for sale of 5 ¼ acres from the parcel of land known as N/WANGA/KHOLELA/2133 whole measuring 7 acres in the year 2015. Pretending that the defendant sold him the entire parcel of land at the sum of Ksh. 1,900,000/= a fact that he knows to be false. Pretending that he purchased the defendants land comprised in the number N/Wanga/Kholera/2133 and transferring the same in his names without a land control board consent. The defendant prays that the plaintiff's claim against the defendant be dismissed with costs, with an order directing the land registrar to cancel and revoke the registration of land parcel number N/Wanga/Kholera/2133 from the names of the plaintiff to the deceased names Wilson MasieyiKulundu.

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 MakeriNyangw'ra –vs- Stephen MungaiNjuguna& Another(2013)eKLRwhere 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. HonJustice MunyaoSila 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 not in dispute that land parcel No. N/Wanga/Kholera/2133 is registered in the name of the plaintiff herein. The PW1 who produced a power of attorney from the plaintiff (PEx1) testified that the plaintiff purchased land parcel number N/Wanga/Kholera/2133 measuring 2.3 Ha inclusive of all development thereof at an agreed consideration of Ksh. 1,900,000/= (One million Nine Hundred thousand Shillings) only from the defendant and paid in full. He produced the agreement PEx2, copies of the cheques to prove payment PEx3, copy of the title deed PEx4 and the search PEx5. The defendant admits that he did enter into the sale agreement and was paid the purchase price. However, he states that the surveyor has not demarcated the parcel of land said to have been purchased. I have perused the documents produced as evidence in this matter. The sale agreement PEx1 clearly states that the land to be purchased is 2.3 HA at a consideration of Ksh. 1,900,000/= (One million Nine Hundred thousand Shillings) only. The green card produced as DEx1 clearly shows that the land is land parcel number N/Wanga/Kholera/2133 measuring 2.3 Ha. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that the plaintiff being the registered owner of Land Parcel No. N/Wanga/Kholera/2133 is entitled to exclusive, peaceful, quiet and unimpeded possession, occupation and use thereof
2. The defendant his relatives agents, servants, employees and/or and other person claiming through them is to vacate from parcel of Land Parcel No. N/Wanga/Kholera/2133 within the next 6 (six) months and in default eviction order to issue forthwith.
3. Costs of the suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE