



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 44 OF 2016

THOMAS MUSEVE LWENYI.....PLAINTIFF

VERSUS

ANNA SAKASA

DAVID SAKASA

MILLY SAKASA.....DEFENDANTS

JUDGEMENT

The plaintiff avers that the plaintiff is the sole absolute registered proprietor of the whole of that parcel of land known as Isukha/Lubao/95. The plaintiff avers that defendant, without the authority and/or permission of the plaintiff have trespassed, moved and grazed cattle on the cane crop thriving thereon, cut down trees and started ploughing the parcel of land aforementioned and have upon being served with the pleadings herein forcefully entered into and started occupying the semi-permanent house therein. The plaintiff avers that the defendants act of grazing cattle on the cane crop thriving thereon, cutting trees, ploughing the suit land and occupying the semi-permanent house thereon is unjustified and unlawful. The plaintiff further avers that the defendants have caused an unlawful restriction to be registered against the title for the suit land. The plaintiff's claim as against the defendants therefore, is for an eviction order and a permanent injunction issued to restrain the defendants, the defendants agents and/or employees from interfering in whatever manner, with the plaintiff's peaceful enjoyment of the parcel of land known as Isukha/Lubao/95. The plaintiff further claims for an order that the restriction registered against the suit parcel of land be removed forthwith for being unlawful. The plaintiff avers that there are no previous or present and pending proceedings in any court of law in between the parties over the same subject matter. The plaintiff prays for judgment as against the defendants jointly and severally for orders:-

- (a) An order of eviction and a permanent injunction be issued against the defendants to restrain the defendants, the defendants agents and/or employees from interfering in whatever manner, with the plaintiff's peaceful enjoyment of the parcel of land known as Isukha/Lubao/95.
- (b) An order that the restriction registered against the title to the suit parcel of land be removed forthwith for being unlawful.
- (c) Costs and interest.

PW2 confirms that she sold the land to PW1 which she inherited from her father through succession. Her mother is buried there and the defendants moved in in 2013 and destroyed her mother's house. The 1st defendnat is her step mother and 2nd and 3rd defendants are her step siblings. PW3 and PW4 corroborated her evidence

The 1st defendant testified that she bought land parcel registration number ISUKHA/LUBAO/95 jointly with her late husband Josephat Sakasa Ligare on 3rd June, 1974 and immediately after they took immediate vacant possession, ploughed, cultivated trees and crops thereon as a family since 1974. To the best of her knowledge land parcel registration number Isukha/Lubao/95 is her family land and she has extensively developed it to the best of her ability having bought it from the first registered owner Harun Masinde as at that time. She does not understand how the plaintiff herein acquired title to her land. She has been in use and peaceful occupation of the suit parcel since 1974, she was only surprised at the turn of events in the year 2013 when the plaintiff and his father accused her. DW2 states that the 1st defendant bought the land even though he was not a witness.

This court has carefully considered the evidence and submissions therein. The defendant was served but failed to attend court to give oral evidence. 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.”

It is a finding of fact that the plaintiff is the registered proprietor of the suit land. PW2 the seller testified that she obtained the land through a court order and sold it to the plaintiff. The defendants never challenged this court order but instead invaded the land in 2013 and destroyed her late mother’s house. I believe the plaintiff’s case. The defendants have failed to establish that they have been in occupation of the suit land from 1974. It has come out in evidence that the 1st defendant lives on a different piece of land with the 3rd defendant and it is only her son the 2nd defendant who is living on the suit land. I find that the defendants are illegally claiming the suit land and I see no evidence of fraud on the part of the plaintiff and his witnesses in his acquisition of the title. The defendants seem to have an issue with the paternity of PW2 and hence the feeling that she is not entitled to the said land. This issue is not for this court to determine. I find that she legally acquired the land from her mother who was the 1st defendant’s co wife and she chose to pass on the title to the plaintiff. The defendants inherited their own different parcel of land and have no right to the suit land. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

(d) That the defendants to vacate the suit parcel Kakamega/Sango/970, within the next 3 (three) months from the dated of this judgement and in default eviction order to issue forthwith and a permanent injunction be issued against the defendants to restrain the defendants, the defendants agents and/or employees from interfering in whatever manner, with the plaintiff’s peaceful enjoyment of the parcel of land known as Kakamega/Sango/970.

(e) An order that the restriction registered against the title to the suit parcel of land be removed forthwith for being unlawful.

(f) Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE