



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 75 OF 2013

ELIZABETH OCHANDA AKOYA PLAINTIFF

VERSUS

JUSTUS MUTONYI NASHON DEFENDANT

JUDGEMENT

In the plaint dated 7th March 2013 the plaintiff alleges that the defendant is her brother-in-law. The plaintiff further alleges that the L.P. NO. KAKAMEGA/CHEKALINI/773. The plaintiff avers that she carried out succession of the deceased husband's L.P. NO. KAKAMEGA/CHEKALINI/773 and was issued with a grant which was later confirmed. The plaintiff further avers that she processed land documents and was issued with a title deed for the L.P. NO. KAKAMEGA/CHEKALINI/773. The plaintiff alleges that she is the proprietor/owner/title holder of the L.P. NO. KAKAMEGA/CHEKALINI/773. The plaintiff further alleges that the defendant encroached into her L.P. NO. KAKAMEGA/CHEKALINI/773 and contracted leased the land parcel to another person who is cultivating the same and planting sugarcane without her consent. The plaintiff alleges that she has warned the defendant in several occasions not to lease/contract his and or interfere with her land parcel but in vain. The defendant is adamant and has declined/refused to stop leasing his land parcel. The plaintiff's prayer to court is for an order of injunction restraining the defendant, his agents, servants, employees and or anybody acting for and on behalf from encroaching, demarcating, constructing, leasing, ploughing/filling, cultivating, construction and or dealing in any manner with the L.P. NO. KAKAMEGA/CHEKALINI/773. The plaintiff prays for judgment to be entered against the defendant for:-

- (a) An order of permanent injunction.
- (b) Costs
- (c) Relief/remedy this Hon. Court may deem fit and just to grant.

PW1 produced the search certificate, title and confirmation of grant (PEx 1, 2 & 3) as documentary evidence to corroborate her evidence. PW2, a neighbor corroborated the plaintiff's evidence.

The defendant was served and failed to attend court to adduce any evidence. In his statement of defence the defendant avers that the plaintiff is not an administrator to the estate touching on land parcel NO. KAKAMEGA/CHEKALINI/773. The defendant further aver that the suit has been wrongly instituted in this court since this honourable court has no jurisdiction to hear and/or determine this suit and shall at opportune time raise a preliminary objection to have the suit dismissed with costs. The defendant avers that the suit subject matter has no title deed and the plaintiff has no legal claim of its ownership. The defendant has not encroached upon the suit subject matter but to the contrary is entitled to 2 acres of suit subject matter. That the suit subject matter emanates from original parcel of land namely KAKAMEGA/CHEKALINI/364 which was subdivided into several portions and was subject of KAKAMEGA HCCC NO. 90 OF 2000, Kakamega CM MISC. CASE NO. 79 of 2000 between the defendant and the late husband to the plaintiff. That the upshot of the above cases was that the original land parcel number namely KAKAMEGA/CHEKALINI/364 was to be divided between the plaintiff's husband and the defendant into two equal portions which has not been released to date. That a portion of the said original land parcel belonging to the defendant's late father, the same being KAKAMEGA/CHEKALINI/772 measuring about 2 acres was sold to one James Asamba by the plaintiff's late husband namely Raphael Okaya Ochanda. The defendant presently occupies a portion of land measuring 6.5 acres being Kakamega/Chekalini/771 and is yet to release 2 acres from the suit subject matter. The defendant's claim against the plaintiff is for an order to issue vesting a portion of 2 acres of land in him from the land parcel number KAKAMEGA/CHEKALINI/773 since the defendant is only occupying a portion of 6.5 acres in land parcel number KAKAMEGA/CHEKALINI/771.

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 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 not in dispute that the plaintiff is the registered owner of L.P. NO. KAKAMEGA/CHEKALINI/773. She produced the title, search and confirmation of grant of the said suit land. The defendant has offered no defence to be considered. I see no evidence that the title was obtained by fraud or through corrupt means. I find that the plaintiff has proved her case on a balance of probabilities and grant the following orders;

1. A permanent injunction restraining the defendant, his agents, servants, employees and or anybody acting for and on behalf from encroaching, demarcating, constructing, leasing, ploughing/filling, cultivating, construction and or dealing in any manner with the L.P. NO. KAKAMEGA/CHEKALINI/773.
2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22ND DAY OF NOVEMBER 2018.

N.A. MATHEKA

JUDGE