



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 372 OF 2017**

**JOHN SEMBE NAMATSI .....PLAINTIFF**

**VERSUS**

**EMILY BULIBA NAIKA.....DEFENDANT**

**JUDGEMENT**

By a plaint dated 19<sup>th</sup> April 2012, the plaintiff avers that he is the registered proprietor of L.R. No. E/WANGA/ELUCHE/1248 having bought it from one Joseph Suchi Opanda and had it registered in his name on 7<sup>th</sup> November, 2004. The defendant, who by the time the plaintiff was buying the land had constructed a semi-permanent house and was using the land, has without any or any justifiable cause held on to it and refused to vacate despite several demands by the plaintiff to do so to his detriment. In the premises, the plaintiff avers that the defendant is a trespasser upon the said land. The plaintiff's claim against the defendant, her agents, servants, assignees or anybody claiming through her in whatsoever manner is for an order of eviction from L.R. NO. E/WANGA/ELUCHE/1248 and a permanent injunction restraining her, her agents, servants, assignees or anybody claiming through her in whatsoever manner from going back to the land. The plaintiff prays for judgment against the defendant, her agents, servants, assignees, or anybody claiming through her in whatsoever manner for:-

- a. An order of eviction from L.R. No. E/WANGA/ELUCHE/1248.
- b. An order of permanent injunction restraining the defendant, her agents, servants, assignees, or anybody claiming through her in whatsoever manner from going back and/or trespassing or interfering in whatever manner with L.R. NO. E/WANGA/ELUCHE/1248.
- c. Costs of the suit.
- d. Any other or further relief this court deems fit and just to grant.

PW2 confirms that he sold the suit land to the plaintiff. They had a dispute over the suit land with the defendant and the matter went upto the High Court where PW2 won the case. PW2 maintains that he welcomed the defendant onto the land when as they were cousins when she got divorced.

The defendant testified that the land belonged to her father and she returned there in 1994. She went to the tribunal and won the case and she was not satisfied with the High Court decision. That if indeed the plaintiff bought land parcel No. East/Wanga/Eluche/1248 from Joseph Suchi Opanda then the same was fraudulently transferred to him to defeat justice in view of the fact that the said parcel of land was a subject to a court case Provincial Land Dispute Tribunal No. 54 of 2004 in which the court gave judgment in favour of the defendant which judgment is still valid and has not been overturned. And therefore Joseph Suchi Opanda has no capacity pass over title to the plaintiff on a matter which the court has validated ownership of title to the defendant. The subject matter is land parcel No. East/Wanga/Eluche/1248 notwithstanding the current suit has been a subject matter of a case vide Provincial Land Disputes Appeal Committee 54 of 2004 and Kakamega Civil Appeal No. 73 of 2008 hence the present case is res judicata.

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 a finding of fact that the plaintiff is the registered proprietor of the suit land. PW2 the seller testified that he sold the land to the plaintiff and that the defendant was on the suit land by his invitation. It is also a finding of fact that the subject matter is land parcel No. East/Wanga/Eluche/1248 and the suit land has been a subject matter of a case vide Provincial Land Disputes Appeal Committee 54 of 2004 and Kakamega Civil Appeal No. 73 of 2008 between PW2 and the defendant. The defendant maintains that the tribunal awarded her the land but it is clear from the documents produced that that decision was overturned by the Court in Kakamega Civil Appeal No. 73 of 2008. The defendant did not appeal against that decision. I see no evidence that the plaintiff obtained the suit land through fraud or misrepresentation. I believe the plaintiff's case. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. That the defendant is to vacate the suit parcel L.R. NO. E/WANGA/ELUCHE/1248, within the next 6 (six) months from the date of this judgement and in default eviction order to issue forthwith.
2. An order of permanent injunction restraining the defendant, her agents, servants, assignees, or anybody claiming through her in whatsoever manner from going back and/or trespassing or interfering in whatever manner with L.R. NO. E/WANGA/ELUCHE/1248.
3. Costs of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 21<sup>ST</sup> DAY OF NOVEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**