



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 42 OF 2013**

**JUSTUS SHILULI IMBWAGA**

**ESTERI MIKALITSI.....PLAINTIFFS**

**VERSUS**

**SOLOMON AHINDUKHA**

**SILVANUS HUNTER ACHESA..... DEFENDANTS**

**JUDGEMENT**

This case is that, the plaintiffs are the absolute property owners of land parcel known as ISUKHA/MUKHONJE/1009 over which they hold a title deed. The defendants have willful and without any colour of right encroached into and are illegally occupying a part of the plaintiff's portion of land parcel known as ISUKHA/MUKHONJE/1009. That by reason of the defendants' acts of encroachment, the plaintiff has suffered loss, damage and injury which persists. The plaintiff prays for judgment against the defendants jointly and severally for:-

(a) A permanent injunction restraining the defendants from using, wasting and/or dealing with land parcel ISUKHA/MUKHONJE/1009 in any manner.

(b) Costs of this suit.

The 1<sup>st</sup> defendant testified that he is the registered proprietor of land parcel ISUKHA/MUKHONJE/1191 and he has not encroached on the plaintiffs' land. DW1 produced a surveyor's report which stated that the plaintiffs' house is on property land parcel ISUKHA/MUKHONJE/1191 belonging to the defendants.

This court has carefully considered the evidence and the submissions herein. At the hearing the plaintiff testified in his evidence he averred that they are the registered sole proprietors of the suit land parcel known as ISUKHA/MUKHONJE/1009 and to this he produced a copy of title deed showing that indeed he is the registered proprietor of the suit land. That the defendant has encroached on his land. The 1<sup>st</sup> defendant as stated above testified that he is the registered proprietor of land parcel ISUKHA/MUKHONJE/1191 and he has not encroached on the plaintiffs' land. DW1 produced a surveyor's report which stated that his house is on his property land parcel ISUKHA/MUKHONJE/1191.

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.”*

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”.*

The plaintiff has produced no evidence to prove this encroachment and the defendant have produced a surveyors report dated 13<sup>th</sup> June 2014 after this suit was filed stating that the plaintiffs' house was on the defendants' land parcel ISUKHA/MUKHONJE/1191. The report stated that the boundaries between land parcel ISUKHA/MUKHONJE/1009 land parcel ISUKHA/MUKHONJE/1191 were intact. I find that the plaintiffs have failed to prove their case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> DAY OF NOVEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**