



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA

ELC NO 370 OF 2014

FORMERLY HCCC NO. 1 OF 2003

ANTONY SISA MBAYAKIPLAINTIFF

VERSUS

PATRICK MAIKULADEFENDANT

JUDGMENT

The brief background of this case is that, the plaintiff is the registered absolute proprietor of the whole of that parcel of land known as BUNYALA/UDONGA/514 measuring 4.8 Ha in area or thereabout. That in 1997, the defendant unlawfully and without the plaintiff's consent entered and or trespassed onto land parcel no. BUNYALA/BUDONGA/514 erected structures thereon and started cultivating the same as a consequence of which the plaintiff has had continues to suffer great loss and damage, full particulars whereof are well within the defendants knowledge. The plaintiff claims against the defendant is for:

1. A declaration that the plaintiff is the lawfully registered proprietor of land parcel no. BUNYALA/BUDONGA/514.
2. An eviction order against the defendant his agent, servants, employees from land parcel no. BUNYALA/BUDONGA/514 and a permanent injunction restraining the defendant, his agents, servant, employees or any other person claiming through him once evicted from trespassing and/or laying claim to the land parcel no. BUNYALA/BUDONGA/514.
3. That the plaintiff has been deprived of the use and peaceful enjoyment of his land parcel no. BUNYALA/BUDONGA/514 from 1997 to date and claims mesnes profits of Ksh. 50,000/= per year from 1997 till the defendant vacates the suit land.

This matter was part heard way back on the 30th March, 2009 and on the 3rd of March 2016 the court gave directions that the proceeds from where it had reached and that the proceedings had been typed. On the 10th April 2017 the matter came for hearing before this court. The defendants Advocate was served but failed to attend court and the matter proceeded exparte. The Plaintiff's advocates closed the plaintiff's case and a date was given for delivery of judgment. This court has carefully considered the pleadings and the evidence given in this matter.

PWI, Anthony Sisia Mbayaki, gave evidence that he is the registered absolute proprietor of the whole of that parcel of land known as BUNYALA/UDONGA/514 measuring 4.8 Ha in area or thereabout. That he bought the said parcel of land known as BUNYALA/UDONGA/514 from one Enori Idakha now deceased in the 1994. He bought it for Kshs. 200,000/=. He went to the Lurambi Divisional land Control

Board who gave their consent. That he followed the proper procedure and the land was transferred to his name on the 24th November 1994 and the title deed issued on the 25th November 1994. He produced the green card as an exhibit in this case. He took possession of the land and started using it. That in 1997, the defendant unlawfully and without the plaintiff's consent entered and or trespassed onto land parcel no. BUNYALA/BUDONGA/514 erected structures thereon and started cultivating the same as a consequence of which the plaintiff has had continues to suffer great loss and damage. The defendant became violent and the Plaintiff has never used his land peacefully ever since. The Plaintiff came to land that the defendant is the grandson of the seller Onori Edokha and is not aware that the defendant bought any land around there. He denies forging any documents to acquire the land illegally. The police investigated the matter but he has never been convicted of any offence.

The defendant in his statement of defence stated that he is also a buyer of the said land parcel no. BUNYALA/BUDONGA/514. He bought the land in 1993 from the rightful proprietor, Onori Edokha. That the plaintiff obtained his title through fraud. The defendant failed to attend to give oral evidence or adduce any evidence of the alleged fraud.

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.”

Looking at the facts of this case, the Plaintiff has produced and/ or annexed documents in the pleadings in his assertion of ownership over the disputed parcel of land, namely the Title Deed and the Green Card showing the ownership and history of the said parcel of land. 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.

In the instant case, evidence adduced by the Plaintiff has not been challenged as evidence of the alleged fraud or misrepresentation on the part of the Plaintiff was not adduced in court. Nor any evidence that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

I therefore find that the Plaintiff is the lawfully registered owner of the suit parcel of land namely number BUNYALA/BUDONGA/514 and I grant the following prayers;

1. A declaration that the plaintiff is the lawfully registered proprietor of land parcel no. BUNYALA/BUDONGA/514.
2. The defendant, his agents, servant, employees or any other person claiming through him, is given 6 (six) months to vacate the suit land. Thereafter, an eviction order to issue against the defendant his agent, servants, employees from land parcel no. BUNYALA/BUDONGA/514 and a permanent injunction restraining the defendant, his agents, servant, employees or any other person claiming through him once evicted from trespassing and/or laying claim to the land parcel no. BUNYALA/BUDONGA/514.
3. Costs of this suit to the Plaintiff.

On the prayer that the plaintiff has been deprived of the use and peaceful enjoyment of his land parcel no. BUNYALA/BUDONGA/514 from 1997 to date and claims mesnes profits of Ksh. 50,000/= per year from 1997 till the defendant vacates the suit land, the same has not been proved and cannot be granted. This claim is dismissed.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 10TH DAY OF MAY 2017.

N.A. MATHEKA

JUDGE