



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 254 OF 2012**

**CRESCENTIA ANN OBWOLO.....PLAINTIFF**

**VERSUS**

**CALLISTO O. MASAKHALA.....DEFENDANT**

**JUDGMENT**

PW1, the plaintiff stated in her evidence that she is the registered proprietor of land parcel registration number N. WANGA/LUNG'ANYIRO/158 having purchased the same for valuable consideration from one FRANCIS NYANGWESO MASAKHALIA in 1982. The defendant alleges to be a nephew of the said deceased and heir thereof. The plaintiff avers that as an absolute proprietor she has rights to enjoy quiet enjoyment, possession and use of the suit property. The defendant has without any colour of right or lawful excuse encroached on the suit property and is committing acts of wastage thereon. The plaintiff's prayer against the defendant is for an order of eviction of the defendant from the suit property. The defendant's claim at Mumias Land Disputes Tribunal No. 16 of 2010 was dismissed. The plaintiff produced the title deed and official search as exhibits to prove ownership. The plaintiff prays for judgment against the defendant for:-

- i. Eviction.
- ii. Costs and
- iii. Interest.

PW2, the assistant Chief at the material time confirmed in evidence that the Plaintiff did buy the land Francis Nyangweso Masakhalia in 1982.

The defendant was served and failed to attend court to give evidence. His defence is a mere denial. The defence states that the defendant lodged an appeal being High Court Appeal no. 99B of 2011 at the High Court Registry Kakamega against the adoption of Mumias land dispute Tribunal No. 16 of 2010 vide Mumias SRM Miscellaneous Award No. 27 of 2010 and the Kakamega High Court Appeal No. 99B of 2011 is still pending hearing and determination on merit.

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 documents in the pleadings in her assertion of ownership over the disputed parcel of land, namely the Title Deed and the Official Search showing the ownership 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 any 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 N. WANGA/LUNG’ANYIRO/158 and I grant the following prayers;

1. 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. N. WANGA/LUNG’ANYIRO/158 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. N. WANGA/LUNG’ANYIRO/158.

2. Costs of this suit to the Plaintiff.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> DAY OF JUNE 2017.**

**N.A. MATHEKA**

**JUDGE**