



**REPUBLIC OF KENYA**

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

**ELC NO. 148 OF 2013**

**EMILLY OMORA WASIKE )**

**MICHAEL BARASA EKESA )**

**CLEOPHAS WAFULA OMOKA )..... PLAINTIFFS**

**VERSUS**

**PATRICK JUMA WERE )**

**DANIEL OTUOMO )..... DEFENDANTS**

**JUDGMENT**

The 1<sup>st</sup> plaintiff is the beneficial owner of the original land parcel registration number BUNYALA/NAMIRAMA/225 that was allocated to her vide KAKAMEGA HCC SUCC. CAUSE NO. 439 OF 2001. The plaintiffs are registered owners of the whole of land parcels registration numbers BUNYALA/NAMIRAMA/1869 and BUNYALA/NAMIRAMA/1867 and 1868 respectively which came about as a result of subdivision of the above stated original parcel. The plaintiffs state that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have illegally and or unlawfully encroached into the plaintiffs' said parcels of land without the plaintiffs consent and/or permission. The plaintiffs further aver that the defendants have without any color of right or justification whatsoever occupied and/or put up temporary structures on the suit parcels, and continue using the land to the plaintiffs' detriment. It is the plaintiff's case that the 1<sup>st</sup> defendant herein has his own separate parcel which he refuses to occupy despite there being an order allocating them land parcel registration number KAKAMEGA/CHEKALINI/21 vide KAKAMEGA HCC SUCC. NO. 439 OF 2011. The plaintiffs state that the 2<sup>nd</sup> defendant occupies the suit parcels with permission of the 1<sup>st</sup> defendant who has no authority or capacity to allocate, dispose and or resettle any person on the parcel. That the defendants' continued use, occupation and encroachment on the plaintiffs land is an infringement of the plaintiff' right to quit enjoyment of their property. The plaintiffs' claim against the defendants is for an order of eviction of the defendants from land parcels registration numbers BUNYALA/NAMIRAMA/1869 and 1867 and 1868 respectively.

PWI stated that the 1<sup>st</sup> defendant herein is her brother. Her father Ezekiel Makhoha Were died, he was the registered proprietor of land parcels registration numbers KAKAMEGACHEKALINI/21 and BUNYALA/NAMIRAMA/225. The said parcels were subject matter to KAKAMEGA HCC SUCC. CAUSE NO. 439 OF 2001 wherein the grant was confirmed on 12<sup>th</sup> April, 2011 (PEx 4 copy of the confirmation of grant). She was given land parcel registration number BUNYALA/NAMIRAMA/2255 (PEx 3 copy of the title deed) upon confirmation because she was the only surviving child in her mother's house while the 1<sup>st</sup> defendant was allocated a share on land parcel registration no. KAKAMEGA/CHEKALINI/21.

That she later subdivided the land parcel registration number BUNYALA/NAMIRAMA/225 into three parcels namely BUNYALA/NAMIRAMA/1867, 1868 and 1869 which is allocated to her sons Michael Barasa Egesa, Cleophas Wafula Omoka and herself. PW2 Michael Barasa Egesa and PW3 Cleophas Wafula Omoka adopted the evidence of PW1.

That the 1<sup>st</sup> defendant brought in the 2<sup>nd</sup> defendant the suit of land parcels and they jointly occupy the said land. What is occupied by the defendants herein is part of land parcel numbers 1869 and 1867 and 1868 that bordered each other which parcels she and the 2<sup>nd</sup> plaintiff occupy. The 1<sup>st</sup> defendant has his own land which he refuses to occupy, he has on several occasions threatened that the 1<sup>st</sup> Plaintiff is not entitled to a share of the estate of her father. She now asks the court to issue an order of eviction of the defendants from the suit parcels. The plaintiffs relied in the case of Maher Unissa Karrim vs Edward Oluoch Odumbe Nairobi HCC No 91 of 2015 eKLR.

The 1<sup>st</sup> defendant failed to attend court despite having been served with the hearing date and the matter proceeded ex parte. In his statement of defence he denies having illegally or unlawfully encroached on any of the plaintiff's parcel of land and reiterates that he is legally staying and or working for gain on parcel No. BUNYALA/NAMIRAMA/225 which parcel legally devolved to him vide Succession Cause No. KAKAMEGA NO. 439 OF 2001. The case against the 2<sup>nd</sup> Defendant was withdrawn on the 3<sup>rd</sup> March 2016.

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 Deeds (PEx 1,2&3) 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 plaintiffs 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 plaintiffs are the lawfully registered owner of the suit parcel of land namely numbers BUNYALA/NAMIRAMA/1869 and 1867 and 1868. I therefore grant the following orders;

1. That the 1<sup>st</sup> defendant is given three (3) months to vacate the said suit parcels of land namely; BUNYALA/NAMIRAMA/1869 and 1867 and 1868 and in default he is to be evicted forthwith.
2. Costs of this case to be borne by the 1<sup>st</sup> Defendant.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26<sup>TH</sup> DAY OF JULY 2017.**

**N.A. MATHEKA**

**JUDGE**