



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

**ELC NO. 323 OF 2014**

**GODFREY MUNYENDO ONYALLA.....PLAINTIFF**

**VERSUS**

**CHRISTOPHER OPAKA.....DEFENDANT**

**JUDGMENT**

The plaintiff case is that, at all material times he was the registered proprietor of L.R. NO. NORTH/WANGA/KHOLERA/3806 measuring 0.05 Hectare or thereabout. The defendant has without the consent and or permission from the plaintiff unlawfully entered on to L.R. NO. NORTH/WANGA/KHOLERA/3806 and taken possession thereof and built thereon illegal structure thereby interfering with the plaintiff's quiet enjoyment of the suit land and in outright contravention of the provisions of the law. The plaintiff's claim against the defendant is for a demolition and eviction order directed against the defendant whether by himself, his agents, employees, servants and any other persons claiming through the plaintiff to surrender vacant possession of L.R. NO. NORTH/WANGA/KHOLERA/3806. The plaintiff prays for judgment against the defendant for:-

1. An order directing the defendant whether by himself, his agents, employee, servants and or any other person claiming through the defendant to surrender vacant possession of L.R. NO. NORTH/WANGA/KHOLERA/3806 to the plaintiff and to remove all the illegal structure therefrom immediately and in default an eviction and demolition order to issue forthwith against the defendant, his agent, employees, servants and any other person claiming through the defendant.
2. A permanent injunction restraining the defendant by himself, his agents, employees, servants and any other person claiming through the defendant from interfering with the plaintiff proprietary rights as by law provided.
3. Any other relief court deems fit to grant.
4. Costs of this suit.

PW1's case is that, on the 12<sup>th</sup> January, 2010 he entered into a sale of land agreement with one Mr. John Omumia Wabwire who was the sole proprietor of the said parcel N/WANGA/KHOLERA/3806 measuring approximately 0.05 Ha. The agreed consideration was Ksh. 600,000/= which sum was paid in full (PEX 2 Sale Agreement). That he caused the land to be registered in his name and he is the sole registered proprietor of the said land (PEX 1 Title Deed). That the Defendant has without any colour of right moved upon his land and erected a structure thereon which is an infringement to his proprietary rights.

DWI, the defendant stated that, on or about 24<sup>th</sup> May 2006 while at the firm of Otsiula B.O. & Co Advocates, he bought land parcel NO. N/WANGA/KHOLERA/1537 from Ali Makokha of ID no. 10494485. That the said parcel No. N/WANGA/KHOLERA/1537 was registered in the name of Wabwire Mang'oli Wekesa who then sold this parcel of land to the late Thomas Mulaa Obwayo. After Thomas Mulaa Obwayo's death, his sons through Pancras Wabwire Wekesa sold the same parcel of land to one Ali Juma Makokha who then sold the same to the Defendant (DEx 1&2 Sale Agreements). That Pancras Wabwire Wekesa was the administrator then and had to file succession and then transfer the same parcel of land to him. That on or about the 16<sup>th</sup> July, 2012 he was surprised to learn that the said parcel of land had been sub divided and new numbers had been issued when he was served with a notice to vacate from the same (DEx3 Green Card). The Defendant went to enquire from the family of Wabwire Mangoli Wekesa the 1<sup>st</sup> registered owner of the suit land where he was told that succession had not yet been done and any transaction having been done of the same suit land was fraudulent. The defendant's counter claim is that the plaintiff's title having been obtained by fraud the titles number N/WANGA/KHOLERA/3806 and 3807 be cancelled and the same reverts back to title number N/WANGA/KHOLERA/1537 in the names of Wabwire Mangoli Wekesa pending succession proceedings of the estate of parcel N/WANGA/KHOLERA/3806

DW2 Pancras Wabwire Wekesa stated that the plaintiff in this suit is his immediate neighbour since he purchased a plot from his brother Benjamin Oduor Wabwire. The defendant is also his immediate neighbour since he is the third buyer of the plot which his father had sold to another person, the late Thomas Mulaa Obwayo being the first buyer. That the same plot was sold to the 2<sup>nd</sup> buyer, the late Ali Juma Makokha by Thomas' sons namely Erick Wesa Mulaa and Henry Mulaa with the consent of their mother. That later on, the late Ali Juma Makokha before his death sold the said suit plot to one Christopher Opaka the defendant herein in this suit. That it was to his astonishment to find out that the said plot had been sold to the plaintiff herein. The said plot had been sold by his late father which he was aware that the same is presently owned by the defendant herein. That he therefore states that the sale as between the plaintiff and his brother, John Omumia Wabwire is null and void and it should be cancelled by the order of this court and leave the plot to the rightful owner, the defendant herein.

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 L.R. NO. NORTH/WANGA/KHOLERA/3806, namely the Title Deed and Sale Agreement (DEx 1&2) 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. The defendant merely alleged the same. Indeed the green card adduced by the Defence (DEx 3), clearly shows the land belonged to JOHN OMUMIA WABWIRE and then moved on to the plaintiff. I find that the defendant has failed to prove his counter claim and I dismiss it with costs. I find that the Plaintiff has proved his case and grant the following orders;

1. That the defendant whether by himself, his agents, employee, servants and or any other person claiming through the defendant to surrender vacant possession of L.R. NO. NORTH/WANGA/KHOLERA/3806 to the plaintiff and to remove all the illegal structures therefrom within the next six (6) months and in default an eviction and demolition order to issue forthwith against the defendant, his agent, employees, servants and any other person claiming through the defendant.
2. A permanent injunction restraining the defendant by himself, his agents, employees, servants and any other person claiming through the defendant from interfering with the plaintiff proprietarily rights as by law provided.
3. Costs of this suit to the plaintiff.

Orders accordingly.

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

**N.A. MATHEKA**

**JUDGE**