



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 8 OF 2015

PALASINA SIBIRO LUBEKA:::PLAINTIFF

VERSUS

THOMAS ANZEZE::: DEFENDANT

JUDGEMENT

The plaintiff's case is that at all times relevant to this suit since 13th August 2014 she is the registered proprietor of all that piece of land known as L.R. NORTH MARAGOLI/VIYALO/1654, having acquired the same through a public auction. The defendant and his family have willfully and without any justifiable reason whatsoever refused to move out of the plaintiff's above mentioned land. Despite the plaintiff effort to persuade the defendant to peacefully move out of land, the defendant has been adamant and has completely refused to move hence necessitating this suit. As a result of the defendant's continued forceful stay on the plaintiff's land the plaintiff is unable to develop and work on her land and has therefore been greatly inconvenienced. The plaintiff claim against the defendant is for his eviction together with all members of his family from the plaintiff's land LR NO. NORTH MARAGOLI/VIYALO/1654. The plaintiff prays for judgment against the defendant for eviction of the defendant from the suit land L.R. No. NORTH MARAGOLI/VIYALO/1654 and costs.

PW1, the plaintiff, testified that sometimes on the 9th October 2013 she read in the newspaper namely, The people, that land parcel No. NORTH/MARAGOLI/VIYALO/1654 measuring approximately 1.49 Ha belonging to one THOMAS ANZEZE MUSILA was being sold by public auction on 23rd October 2013 by Pambo Investments. She got interested in the said land and on the 23rd October 2013 at around 11.00 a.m. she was at Mbale Post Office ready for the auction. The auction began when she was at the venue among other people and she was declared the highest bidder and /or purchaser after she paid KSH. 1,005,000/= to settle the debt the said THOMAS ANZEZE MUSILA had in VIHIGA PMCC NO. 58 OF 2012. She signed the agreement and/ or memorandum of sale between M/S. Pambo Investments and herself on the same date. She proceeded to Vihiga court where the case was filed between TOROKASI A. MUDERA MUSILA VERSUS THOMAS ANZEZE and transfer documents were signed, then she proceeded to Vihiga Lands Office and processed the title deed into her names. That since she obtained the title deed on 13th August 2014 she has requested the said MR THOMAS ANZEZE MUSILA, the defendant herein to vacate the land but he has remained adamant and refuses to move and/or demolish his house hence she has come to this court for redress namely, for eviction, costs of the suit and interest.

PW2, Kalori Mwara Okwaro the Land Registrar Vihiga, gave evidence that in 1973 land registration No. KAKAMEGA/VIYALO/1 was in the name of Musera Jarenga. In 2002 it was transferred to the name of Thomas Anzere and divided into two namely, land registration No. NORTH MARAGOLI/VIYALO/1654 and land registration No. NORTH MARAGOLI/VIYALO/1655 through a court order PEx 8. In 2014 land registration No. NORTH MARAGOLI/VIYALO/1654 was transferred to the plaintiff again through

a court order PEx 9. He produced the green cards as PEx 10 (a,b,c).

PW3, Christopher TuweiKorir, the surveyor produced a copy of the registry map PEx 11 and confirmed that land registration No. KAKAMEGA/VIYALO/1 does not exist and has now been subdivided to land registration No. NORTH MARAGOLI/VIYALO/1654 and land registration No. NORTH MARAGOLI/VIYALO/1655.

DWI, the defendant, testified that, he does not own land registration No. NORTH MARAGOLI/VIYALO/1654 and that he owns land registration No. KAKAMEGA/VIYALO/1. . The defendant attaches the certified copy of the original title deed for proof marked TAM 1. The stated that he has had no dialogue over on this matter with the plaintiff. The defendant does not deserve an eviction from his lawful piece of land. He admits that the plaintiff in Vihiga Civil Case No. 58 of 2000 sued him and on a matter relating to this land that NORTH MARAGOLI/VIYALO/1654. The defendant states that he has a pending appeal at Kisumu, Court of Appeal No. 6 of 2014. The defendant prays for this case to be dismissed with costs.

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. NORTH MARAGOLI/VIYALO/1654, namely the Title Deed and Sale Agreement (PEx 4&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 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 find that the plaintiff has established her case on a balance of probabilities and it must succeed. From a copy of the registry map PEx 11 it is confirmed that land registration No. KAKAMEGA/VIYALO/1 does not exist and has now been subdivided to land registration No. NORTH MARAGOLI/VIYALO/1654 and land registration No. NORTH MARAGOLI/VIYALO/1655. The plaintiff has produced documentary evidence to show and prove ownership of the said land registration No. NORTH MARAGOLI/VIYALO/1654. I therefore make the following orders;

1. The defendant is given six (6) months to vacate and in default an eviction order to issue forthwith to him for the suit land L.R. NO. NORTH MARAGOLI/VIYALO/1654.
2. Cost of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH DAY OF SEPTEMBER 2017.

N.A. MATHEKA

JUDGE