



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 207 OF 2013

DORICAS K. KIVATI.....PLAINTIFF

VERSUS

OLIVER I. AMUNGA

MISIKO S. AMUNGA.....DEFENDANTS

WYCLIFFE AMUNGA

JUDGEMENT

PW1, the plaintiff testified that in the year 1975 December, she was married to the late Shaphat Amunga of Shiuna area Shikute sub-location. That after her marriage her late husband demarcated his land and gave her six (6) acres with her children from land parcel number SOUTH KABRAS/LUKUNE/866 which the defendant have changed and registered in their names without her consent and without filing succession case in the High Court of Kenya. That the late Shaphat Amunga married her under Luhya customary law and they were blessed with four children, two (2) girls and two (2) boys. That during their marriage they stayed peacefully until the year 2003 when her late husband died. That after the death of her late husband the children of her co-wife came on the 1st day of May, 2004 at around 8.00 p.m. and burned her house and assaulted her. That on the same night she reported the matter to the area assistant chief and administration police of Ingaila Officers from Kabras Police Station came and the defendants, Oliver Indeku Amunga, Misiko Silvester Amunga and Wycliffe Amunga were arrested and prosecuted before Kakamega Chief Magistrate in Kakamega Criminal Case number 1353 of 2004 whereby they were convicted of the offence of arson. The plaintiff wants the court to assist her to get her six (6) acres of land parcel SOUTH KABRAS/LUKUMNE/866 compensation for the house hold good which were in the house and costs of the case. She produced the proceedings of Kakamega CMC Criminal Case Number 1353 of 2006 in support of her case.

PW2 testified that, the plaintiff herein is her neighbour and the second wife of the late Shapat Amunga and they married in the year 1975 December. That Amunga had four children with the plaintiff, two (2) girls and two (2) boys. That on the 21st day of May, 2004 at around 8.00 p.m. while he was in his house he heard people making a lot of noise and when he opened the door and looked outside he saw plaintiff's house was on fire. He run there and found the defendants burning the house and they were carrying pangas and runguns. That the plaintiff herein came out through the window with her grandchild and run away. The neighbours came there to see what the defendants had done. That the plaintiff went to the area assistant chief and to the A.P. Camp Ingavila for assistance and also went to Kabras Police Station. That after the plaintiff had reported the matter she proceeded to Marava District Hospital for treatment. That the 1st, 2nd and 3rd defendants were arrested and later the officers came and took photos of the house which was burnt. The plaintiff's house was burnt with everything inside. Nothing was salvaged from the

house. The defendants are the ones who burnt the plaintiff's house. They also evicted the plaintiff from her portion of six (6) acres. He asks that the court do assist the plaintiff to be compensated for the loss suffered and that she be given her six (6) acres of land parcel number SOUTH KABRAS/LUKUME/866.

The defendants were served but failed to attend court and the matter proceeded in their absence. In their defence, the defendants further jointly and severally state that the claim of Ksh. 421,550/= is untenable for want of specific particulars, is unjustified and thus unsustainable. The defendants jointly and severally pray that the suit be dismissed with costs.

This court has carefully considered both the plaintiff's and the defendants' defence and the submissions therein. The plaintiff's case is that on the 21st day of May, 2004 at Shihome village, Shikute sub location West Kabras location within Western Province the 1st, 2nd and 3rd defendants unlawfully set fire the plaintiff's dwelling house and all household goods valued at Ksh. 421,550/=. That the 1st, 2nd and 3rd defendants were charged before the Chief Magistrate court at Kakamega in Chief Magistrate Criminal Case No. 1353 of 2004 whereby they were tried and convicted for the offence of Arson contrary to section 3.2 (a) of the penal code on the 10th day of March, 2009. The plaintiff relied on the proceedings of the criminal case as part of her evidence. That both the 1st, 2nd and 3rd defendants forcefully evicted the plaintiff and her children from her portion of six acres of land parcel number SOUTH KABRAS/LUKUME/866 as a result of their criminal activities. The plaintiff's claim against both the 1st, 2nd and 3rd defendants for payment of compensation of Ksh. 421,550/= which she lost as a result of the criminal acts of both defendants. The plaintiff shall also claim from both the 1st, 2nd and 3rd defendants her share of six acres of land parcel number a SOUTH KABRAS/LUKUME/866 which they took over from her forcefully. The plaintiff avers that she was granted leave of the honourable court vide Kakamega High Court Miscellaneous Civil application number 41 of 2012 to file suit out of time against both the 1st, 2nd and 3rd defendants. The plaintiff prays for judgment against both defendants jointly and severally for the following orders. Compensation of Ksh. 412,550/=. Six (6) acres of land parcel number SOUTH KABRAS/LUKUME/866. The plaintiff produced the official search of the said parcel of land to show that the defendants are the registered owner of the same PEx2.

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.”

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.

Looking at the facts of this case it is not disputed that the defendants are the registered owners of the suit land. Be that as it may, no evidence has been adduced to prove the plaintiff's marriage to the said Shapat Amunga who is now deceased. No evidence that she has beneficial interest in his estate and if indeed this suit land was part of that estate. No death certificate was issued. No evidence of the damaged goods except for the evidence of PW2 who was a neighbour. **The plaintiff has failed to establish her case on a balance of probabilities that the defendants title was obtained by fraud or misrepresentation to which they were a party and/or the certificate of title has been acquired through a corrupt scheme. This case leaves a lot of doubt in my mind and the court cannot rely on court proceedings of an arson charge against the defendants. I find that the plaintiff has failed to prove her case on a balance of probabilities and I dismiss the same with costs.**

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 15TH DAY OF NOVEMBER 2017.

N.A. MATHEKA

JUDGE