



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 441 OF 2014

THOMAS VAITAS IKOBWA.....PLAINTIFF

VERSUS

GEOFFREY ONGOYA OMURENDE.....DEFENDANT

JUDGEMENT

The plaintiff 's case is that, at all material times herein referred to the plaintiff is the sole absolute registered proprietor of that parcel of land known as S. KABRAS/CHESERO/1912. The plaintiff avers that the defendant, without any right of colour or authority and/or permission of the plaintiff, trespassed, moved and/or encroached onto the plaintiff's parcel of land aforementioned erected a house thereon and started occupying same. The plaintiff avers that the defendant's act of erecting a house and occupying the plaintiff's parcel of land aforementioned is unjustified and unlawful. The plaintiff's claim as against the defendant therefore is for an order of eviction and permanent injunction restraining the defendant, the defendant's agents and/or employees from interfering in whatever manner, with the plaintiff's peaceful enjoyment of the parcel of land known as S. Kabras/Chesero/1912. Tthe plaintiff prays for judgment in his favour as against the defendant for the following orders;

1. An order of eviction and permanent injunction restraining the defendant, the defendant's agents and/or employees from interfering in whatever manner, with the plaintiff's peaceful enjoyment of the parcel of land known as S. Kabras/Chesero/1912.
2. Cost of this suit.
3. Any other further relief the court may deem just to grant.

PW1 the plaintiff testified that, he is the absolute registered proprietor of the whole of that parcel of land known as S. Kabras/Chesero/1912. The defendant who is the registered proprietor of that parcel of land known as S. Kabras/Chesero/2625 which neighbours my parcel of land known as S. Kabras/Chesero/1912 has without any right of colour, my authority or permission trespassed onto my parcel of land under reference and erected a house thereon which he is now occupying. The defendant's act of erecting a house and occupying my parcel of land is unjustified and unlawful and the defendant should be forcefully evicted therefrom.

The defendant was served and failed to attend court on the hearing date to adduce oral evidence. In the statement of defence, the defendant avers that he is the registered owner of the parcel of land known as S. KABRAS/CHESERO/2625 which shares a common boundary on its upper part with the parcel of land known as S.KABRAS/CHESERO/1912. That he has erected 4 houses on land parcel NO. S. KABRAS/CHESERO/2625 and not on S. KABRAS/CHESERO/1912 as alleged in the plaint. That the dispute, if any, between him and the plaintiff is one of boundary and whose jurisdiction in determining

the same vests with the Land Registrar and not this honourable court and will raise the same as preliminary point of law. The defendant prays for the dismissal of this suit with costs.

I would first like to deal with the issue of jurisdiction of this court which has been raised by the defence. Article 162(2)(b) and 165(3)(a) of the Constitution of Kenya 2010 and Section 13 of the Environment and Land Court Act, 2011 the jurisdiction of the Environment and Land Court is to determination of disputes relating to environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, evaluations, mining, minerals and other natural resources, compulsory acquisition of land, land administration and management, public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and any other dispute relating to environment and land. I wish to refer to the case of **John Kimani Njenga v Margaret Wanjiru Kanyiri & others ELC No. 345 Of 2014** where it was held that the ELC Court had jurisdiction to hear and determine disputes, actions and proceedings concerning land. Indeed section 105 of the Land Act provides as follows;

“The Environment and land Court established under the Environment and land Court Act is vested with the exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act”

In the instant case the issue touches on the facts that the plaintiff is the registered proprietor of that parcel of land known as S. Kabras/Chesero/1912, where he alleges that the defendant has trespassed on the same. This is clearly a dispute concerning land. I find that this case falls squarely on this court’s jurisdiction and I will proceed to determine the matter.

This court has carefully considered both the plaintiff’s and defendant’s case. 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.

It is a finding of fact that, the plaintiff is the registered proprietor of that parcel of land known as S.

Kabras/Chesero/1912 whereas the defendant is the owner of that parcel of land known as S. Kabras/Chesero/2625. That the two parcels of land aforementioned boarder each other. It is the plaintiff's evidence that the defendant without the authority and/or permission of the plaintiff trespassed onto the plaintiff's parcel of land, erected a house thereon and the defendant is now occupying same. This evidence has not been challenged in court. I find that the defendant's act of erecting a house and occupying the plaintiff's parcel of land is unjustified and unlawful. I find that the plaintiff has established his case on a balance of probabilities and grant the following orders;

1. The defendant is given six (6) months to vacate and indefault eviction order to issue forthwith to him for the suit parcel of land known as S. Kabras/Chesero/1912.
2. A permanent injunction to issue restraining the defendant, the defendant's agents and/or employees from interfering in whatever manner, with the plaintiff's peaceful enjoyment of the parcel of land known as S. Kabras/Chesero/1912.
3. Cost of this suit to the plaintiff.

It is so ordered.

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

N.A. MATHEKA

JUDGE