



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 265 OF 2017

MARKO OKERE OBUNGE :::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

ANDREW ODHIAMBO SHIKAWA ::::::::::::::: DEFENDANT

JUDGEMENT

This case is briefly that, at all material times the plaintiff is the registered owner of land parcel NO. NORTH/WANGA/INDANGALASIA/320 whereas the defendant is the son of the LATE GABRIEL SHIKAWA LUCHIRI (year of death 1992) who is the registered owner of land comprised in Title NO. NORTH/WANG/INDANGALASIA/230. That on diverse dates in the year 1994 the defendant without any reasons or legal justifiable cause encroached and/or trespassed upon the plaintiff's parcel of land and annexed, acquired and/or occupied approximately one acre whereupon which he is ploughing and planting food crops. The defendant's illegal actions have deprived the plaintiff his right of quiet possession, usage and/or utilization of the said suit land. The plaintiff's claim is for a permanent injunction restraining the defendant by himself, agents assignees or by whomsoever from occupying, ploughing and/or doing anything on the plaintiff's parcel of land.

PW1 testified that, he is the proprietor of land parcel NORTH/WANGA/INDANGALASIA/320. He is neighbours with ANDREW ODHIAMBO SHIKAWA who is the son of the late GABRIEL SHIKAWA LUCHIRI who is the registered owner of land parcel NO. NORTH/WANG/INDANGALASIA/230. His neighbour ANDREW ODHIAMBO SHIKAWA has trespassed encroached into his land by uprooting boundary without his knowledge. Efforts by the Land Registrar to resolve the matter has been futile.

The defendant was served but failed to attend court or file any papers and the matter proceeded *ex parte*. Interlocutory judgement was entered in this matter on the 24th August 2017 and the matter proceeded to formal proof. 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 his assertion of ownership over the disputed parcel of land L.R. NORTH/WANGA/INDANGALASIA/320 namely the Title Deed 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 proved his case on a balance of probabilities and grant the following orders;

1. A permanent injunction be issued restraining the defendant by himself, agents assignees or by whomsoever from occupying, ploughing and/or doing anything on the plaintiff’s parcel of land namely, land parcel No. NORTH/WANGA/INDANGALASIA/320
2. Costs of this suit to the plaintiff

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14TH DAY OF NOVEMBER 2017.

N.A. MATHEKA

JUDGE