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| Case Number: | Environment and Land Case 197 of 2014 |
| Date Delivered: | 22 Nov 2018 |
| Case Class: | Civil |
| Court: | Environment and Land Court at Kakamega |
| Case Action: | Judgment |
| Judge: | Nelly Awori Matheka |
| Citation: | Francis Shikuku Malala v Phaustine Wainingu & 3 others [2018] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | - |
| History Magistrates: | - |
| County: | Kakamega |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Plaint dismissed |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 197 OF 2014

FRANCIS SHIKUKU MALALAPLAINTIFF

VERSUS

PHAUSTINE WANINGU

DICKSON WASHALI

JUPA WANINGU

SUMBA WANINGUDEFENDANTS

JUDGEMENT

By a plaint dated 24th August 2007 the plaintiff avers that he is the absolute owner of L.R. NO. N. WANGA/LUNG' ANYIRO/1425 having bought it on 21/8/2003 and eventually acquired its title on 24/5/2004 from one William Wanzala Onyango. The defendants, who by the time the plaintiff was buying the land were occupying it have without any justifiable cause held on to it and refused to vacate despite several demands by the plaintiff to do so. The plaintiff's claim against all the defendants is for an order of eviction from L.R. NO. N. WANGA/LUNG' ANYIRO/1425 and a permanent injunction restraining them from going back to the land. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) An order of eviction from L.R. NO. N. WANGA/LUNG' ANYIRO/1425.
- (b) An order of permanent injunction restraining the defendants, their agents, servants, employees and/or any other person claiming through them from trespassing or interfering whatsoever with L.R. NO. N. WANGA/LUNG' ANYIRO/1425.
- (c) Costs of this suit.
- (d) Any other relief this court deems fit and just to grant.

PW2, William Wanzala Onyango confirms that he sold the suit land to the plaintiff. The 1st defendant's husband had offered to buy the land but never finished payment. PW1 produced the sale agreement and title deed PEx 1 and 2 to corroborate his evidence. PW2 states that he could give them another piece if they paid him the balance of the purchase price.

DW1, the 1st defendant stated that her husband bought the suit land from PW2. Her husband bought the entire parcel and he sued the said PW2 (DEx1 are the pleadings) and they had an award (DEx 2). DW2 the first defendant's son corroborated DW1's evidence.

This court has carefully considered the evidence and submissions therein. 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.”*

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.”

It is not in dispute that the plaintiff PW1, is the absolute owner of L.R. NO. N. WANGA/LUNG’ ANYIRO/1425 having bought it on 21/8/2003 and eventually acquired its title on 24/5/2004 from one William Wanzala Onyango PW2. It is also a finding of fact that the defendants have been in occupation of the said land since 1976 when the 1st defendnats husband entered into a sale agreement with PW2. Indeed there is a court order dated 26th June 2006 where the 1st defendnats husband was to get 7 acres and the plaintiff’s title was to be cancelled DEx2. The plainiff has attached a ruling of the said application award number 84 of 2004 where an application was dismissed and parties were ordered to comply with the orders of 26th June 2006. The plaintiff did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The plaintiff instead chose to file this suit for eviction.

In the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2014] eKLR, the court of Appeal held as follows;

“The 1st defendant had the right to appeal against the award of Borabu Land Disputes Tribunal to the appeals committee constituted for the province in which the land which was the subject matter of the dispute is situate. This is vide Section 8(1) of the Land Disputes Tribunals Act. He chose not to do so. Indeed he was even advised by the SRM’s court at Keroka to do so. He never took up the challenge. Incidentally, the plaintiff had counsel on record then. He also had a right to commence judicial review proceedings in the nature of certiorari to quash the award. Again he did not do so. I do not for once buy his excuse for the failure to do so on account of the ruling on the application to adopt the award as a judgment of the court being delivered on a date unknown to him and in his absence. And that by the time he became aware six months presumably in which he should have commenced judicial review proceedings in the nature of certiorari aforesaid had by then elapsed. I have looked at the proceedings of the Senior Resident Magistrate’s court at Keroka and in particular the order adopting the award as a judgment of the court dated 23rd May, 2008. It is apparent that the plaintiff had an advocate and though he was not present on that day, I doubt that the court would have allowed the application unless it was satisfied that the respondent’s counsel was duly served with the application and or a hearing notice and had failed to turn up.

It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime the 1st defendant’s rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”

I find that the said award was not set aside and still stands. As stated above, it is *trite law that a valid judgment of a court unless*

overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22ND DAY OF NOVEMBER 2018.

N.A. MATHEKA

JUDGE



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