



REPUBLIC OF KENYA



KENYA LAW

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**Kwena v Biwott (Environment & Land Case 89 of 2016)
[2023] KEELC 17507 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 89 OF 2016**

EO OBAGA, J

MAY 25, 2023

BETWEEN

FRANCIS PETER OTSUNE KWENA PLAINTIFF

AND

JULIUS KIPKORIR BIWOTT' DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff filed an amended plaint on October 18, 2019 in which he sought the following reliefs from the Defendant: -
 - a. The Plaintiff's claim against the Defendant is for a permanent injunction restraining him personally, his agents, assigns or workers from entering LR Eldoret Municipality Block 20 (Kapyemit) 111 and or interfering with the same in any manner whatsoever.
 - b. The plaintiff also claims mesne profits of Kshs 10,000 per month from the month of July 2015 till date of judgement following the Defendant's obstruction to the Plaintiff in utilizing his land.
 - c. Costs of this suit.
 - d. Interest.
 - e. Damages for lodging a wrongful caution.
 - f. Any other relief this honourable court deems fit to grant.
2. The Defendant filed a defence and raised a counter –claim in which he sought the following reliefs: -
 1. Cancellation of the title issued to the Plaintiff.



Plaintiff's Case;

3. The Plaintiff testified that in 1981 he and his friends namely Henry Oyo Opongo, Alloys Ondigo, John Wandulu and Pontianos Kwena came together and decided to purchase one acre which was comprised in LR No 11036 which was commonly known as Kapyemit Farm. It was agreed that Henry Oyo Opongo was to sign the sale agreement on behalf of the other partners.
4. On 11/7/1981 a sale agreement was signed by Henry Oyo Opongo on behalf of the other partners. The vendor was Joseph Kipkemboi Talam. Kshs 4,200 was paid for the one acre which was purchased.
5. It was later agreed that the title was to be processed in the name of the Plaintiff. The title was issued on 6/8/2015 in the Plaintiff's name who was to hold it in trust for the other partners. The purchasers took possession and cultivated the land which was later known as Eldoret Municipality Block 20 (Kapyemit)/111 (suit property). It is Alloys Ondigo who was cultivating the land until he died in 2022.
6. In the year 2015, the Defendant caused a caution to be registered against the title claiming beneficiary interest. The Defendant then moved to the suit property and fenced it. He put up a structure on it but the plaintiff in the company of the area chief went and demolished the fence and the structures which had been put up by the Defendant. It's on this basis that the plaintiff moved to court and filed this case.
7. The Plaintiff called PW2 Shadrack Kipkemboi Ruto as a witness. This witness was the secretary of Kapyemit Farm. He testified that he was present when the Plaintiff through Henry Oyo Opongo and his other partners entered into an agreement for the purchase of the suit property. This witness signed the agreement as a witness. The witness knew all the land owners at Kapyemit Farm. This witness testified that the Defendant stays on the same farm in a different plot owned by his father.
8. The Plaintiff's other partner was called as PW3. He testified that they purchased the suit property as partners and they agreed that the Plaintiff be registered in trust for the other partners.

Defendant's Case;

9. The Defendant did not come to court to testify. When he was supposed to testify on March 23, 2022, he was not present. His lawyer told the court that he was away as he had been operated. There were two of his witnesses who were present and they testified. The Defendant was given another date to come to court. This was on October 19, 2023. He did not come to court. The case was adjourned to February 28, 2023. The Defendant was not in court. The court was informed that he was out of town. The application for adjournment was opposed by Plaintiff's counsel. The court declined to adjourn and the Defendant's Case was closed without his evidence.
10. The witnesses who testified on behalf of the Defendant were DW1 Paul Kipkosgei Terer and DW2 Kiprotich Arap Yego. DW1 testified that he is the Defendant's neighbour. He stated that the Defendant is son to Tenai. The Defendant is grandson to Tapkil Koech who owned three acres. Tapkil Koech sold 2 acres to him and remained with one acre. He claimed that the Defendant is the one who was residing on the one acre until when the area chief came and demolished his houses. He stated that he does not know the Plaintiff and that no one stays on the suit property.
11. DW2 Kiprotich Arap Yego testified that he is a neighbour of the Defendant and that they are related. The witness and the Defendant's grandmother purchased land at Kapyemit Farm in 1969. He stated that the Defendant's grandmother had 3 acres. She sold two acres and remained with one acre which has since been grabbed.



12. DW2 testified that he knew the vendor who sold land to the Plaintiff. The vendor used to have land at Kapyemit Farm but he sold it and moved away. He stated that he also knew the area chief who is a fraudulent person and at some time stole a cow from him. He traced the cow to the chief's home and he reported the matter to police but police did not assist him. The cow died at the Chief's home. This witness stated that the chief colludes with fraudsters who steal people's land. He stated that PW2 Shadrack Ruto defrauded him of his one acre. He stated that the person who sold land to the plaintiff had no authority to do so and that it is PW2 who facilitated the Plaintiff to get title.

Analysis and Determination;

13. The parties were directed to file written submissions. The plaintiff was given 14 days to file and serve written submissions with effect from February 28, 2023. The Defendant was to file written submissions within 14 days of being served with submissions by the plaintiff. The plaintiff filed his submissions on March 17, 2023. The Defendant did not file any submissions and if any were filed, then the same are not in the file as at April 20, 2023 when writing this judgement.
14. I have considered the submissions by the Plaintiff and the evidence adduced herein. The main issue for determination is who is the lawful owner of the suit property. The other issue is whether the Plaintiff and the Defendant are entitled to the reliefs which they are seeking. The last one is which order should be made on costs.

Who Is The Lawful Owner Of The Suit Property?

15. The Plaintiff is the registered owner of the suit property. The Plaintiff explained on how he came to be registered as owner of the suit property. A sale agreement was produced by PW2 as exhibit 2. This agreement clearly shows that Henry Oyo Opongo was purchasing the suit property with his other partners.
16. In his evidence, PW2 who was secretary of Kapyemit Farm and who witnessed the agreement listed the partners in his witness statement as Henry Oloo, Alloys Ondigo, John Wandulu and Pontianos Kwena. The witness' evidence was corroborated by that of PW3 who was one of the partners. He stated that they agreed that title was to be processed in the name of the Plaintiff who was one of the partners.
17. Section 26(1) of the [Land Registration Act](#) states as follows:-

“The Registrar may, on the application of the proprietors of contiguous parcels who are desirous of changing the layout of their parcels, and with the consent in writing of all other persons in whose names any right or interest in the parcels is registered and of any cautioner, cancel the registers relating to those parcels and prepare new registers in accordance with the revised layout: Provided that, where in the opinion of the Registrar a proposed reparation involves substantial changes of ownership which should be effected by transfers without invoking this section, he may in his discretion refuse to effect the reparation.”
18. It is important to note that the Defendant never testified. His two witnesses merely stated that the title in the name of the plaintiff was fraudulently procured through assistance of PW2 and the area chief Ms Rukia. There were no particulars of fraud listed in either the defence or the Defendant's counter claim.



19. In the case of *Kibiro Wafuro Makumi Vs Francis Macharia & another* (2018) eKLR, the Court cited the case of *Wallingford Vs Mutual Society* (1880), *Garden Neptune Vs Occident* (1989), *Lawrence Vs Lord Norrrys* (1880) and *Darry Vs Garret* (1978) 7 Ch D at 489 where the Court stated as follows: -

“Where fraud is intended to be charged, there must be clear and distinct allegation of fraud upon the pleadings and though it is not necessary that the word fraud should be used, the facts must be so stated as to show directly that fraud is charged. The statement of Claim must contain precise and full allegations of facts and circumstances leading to reasonable inference that the fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from facts pleaded and accordingly fraudulent conduct must be distinctly and as distinctly proved.

Generally allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”

20. The Defendant’s witnesses claimed that the suit property used to belong to the grandmother of the Defendant Tapkil Koech. There was no evidence adduced to confirm this. The two witnesses who testified struck me as witnesses who had personal vendetta against the area chief and PW2. Dw2 even claimed that at one time the chief stole his cow which he traced to the chief’s compound. He also claimed that PW2 had defrauded him of his one acre. These witnesses were not credible witnesses.
21. The Defendant did not come to testify on his counter-claim. In the absence of any evidence to show that the title in the name of the Plaintiff was obtained fraudulently, I find that the Plaintiff is the lawful owner of the suit property.

Whether the Plaintiff and the Defendant are entitled to their respective claims;

Injunction;

22. The evidence adduced by the Plaintiff is that in 2015 the Defendant trespassed to the suit property in July 2015. He fenced the land and started ploughing it after putting up a temporary structure on it. The Plaintiff with assistance of the local administration removed him in the month of December, 2015. This therefore shows that the Plaintiff is entitled to a permanent injunction to stop the Defendant from ever attempting to interfere with the suit property.

Mesne profits;

23. The Plaintiff is seeking mesne profits in the sum of Kshs 10,000/= per month from July 2015 until the date of judgement. Section 2 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines mesne profits as follows: -

““mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

24. The evidence on record is that there is no one who is currently on the suit property. The Defendant was removed from the suit property in December, 2015. There is no evidence that he has ever gone back to the suit property. There is also no evidence to show that the Plaintiff or his partners have ever tried to go to the suit property and have been prevented from taking possession. There is therefore no basis upon which the court can award mesne profits.



Damages for wrongful placement of caution;

25. There is no doubt that the Defendant placed a caution against the title to the suit property on November 27, 2015 claiming beneficiary interest. Placement of a caution is a legal process which protects the interest of a cautioner. There are lawful ways of removing a caution. It can either be removed by the cautioner, or by the Registrar upon giving notice to the cautioner and by the order of the court.
26. There is no evidence that the Plaintiff or any of his partners have ever sought to have the caution removed or that they have at any time wanted to use title as a collateral. In the absence of this evidence, there is no basis for claiming damages from the Defendant for cautioning the land.

Cancellation of title to the suit property;

27. The Defendant prayed for cancellation of title to the suit property in his counter-claim. As I have stated hereinabove, there was no evidence of fraud alleged or proved. The title was not obtained through a corrupt scheme. This being the case, there is no basis upon which an order of cancellation of title can be made.

Disposition;

28. From the above analysis, it is clear that the Plaintiff has proved his case on a balance of probabilities. I enter judgement for the Plaintiff against the Defendant as follows: -
- a. A permanent injunction against the Defendant personally, his agents, assigns or workers from entering LR No Eldoret Municipality Block 20 (Kapyemit)/111 and or interfering with it in any manner whatsoever.
 - b. An order directing the Land Registrar Uasin Gishu to remove the caution lodged by the Defendant against title No Eldoret Municipality Block 20 (Kapyemit)/111.
 - c. Costs of this suit to be paid by the Defendant.
29. On the other hand, I find that the Defendant has failed to prove his counter-claim. The counter-claim is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 25TH DAY OF MAY, 2023.

E. O. OBAGA

JUDGE

In the virtual absence of parties who were aware of the date of delivery of judgement.

Court Assistant –Laban

E. O. OBAGA

JUDGE

25th MAY, 2023

