



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1021 OF 2016

FRANCIS MOSE KEBASOPLAINTIFF

VERSUS

HARRISON MOKAYA KEBASODEFENDANT

J U D G M E N T

1. The plaintiff has sued the defendant as the personal legal representative of the Estate of Prisca Moraa Kebaso. By the amended plaint dated 6th July 2018 filed in court on 17th July 2018 the Plaintiff prays for judgment against the defendant for:

(a) A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation and user of all that piece of land known as LR. NO. MATUTU SETTLEMENT SCHEME/620.

(b) A declaration that the Defendant whether by himself or his servants agents assigns or otherwise howsoever is unlawfully and wrongfully in occupation possession and user of the suit property and is accordingly trespasser on the same.

(c) A permanent injunction restraining forever the Defendant whether by himself or his servants agents assignees or otherwise howsoever from remaining on or continuing in occupation possession or user of the suit property.

(d) Eviction from and/or surrender of vacant possession of the suit property.

(e) Costs of this together with interest thereon at Court rates.

(f) Any other or further relief(s) as this Honourable Court may deem appropriate to grant in the circumstances of this suit.

2. The plaintiff vide the amended plaint avers that following succession in Kisii High Court Succession Cause No. 104 of 1999 the assets of Kebaso Onsongo (deceased) was divided amongst his three houses and that Prisca Moraa Kebaso's house was allocated LR Matutu Settlement scheme/620 while the house of Sabiri Nyabonyi Omoso (deceased) which the defendant represented was allocated LR No. Matutu Settlement Scheme/621. The Plaintiff averred that the defendant has invaded the plaintiff's land parcel Matutu Settlement Scheme/620 and have denied the Plaintiff peaceful and exclusive possession of the suit property necessitating the institution of the present suit. The defendant filed a statement of defence dated 8th November 2012 and denied the contents of the plaint. The defendant averred that he had occupied and possessed the suit land for a period of over 40 years having been allowed to occupy and utilise the land by his late father. The defendant thus averred he was entitled to the suit land. The defendant denied that the plaintiff had ever occupied the land and sought the dismissal of the plaintiff's suit.

3. The plaintiff was substituted with the leave of the court on 5th July 2018 and was granted leave to amend the plaint which he amended and filed on 17th July 2018. The defendant's advocates on record M/s Sonye J. Ondari & Co. Advocates on 5th July 2018 filed a Notice to cease to act for the defendant and henceforth the defendant was served with court process directly. The suit was fixed for hearing on 26th June 2019 and the defendant though served with a hearing notice did not appear and the court allowed the plaintiff to proceed with the hearing ex parte when the plaintiff and his brother Japheth Ontingo Kebaso testified in support of the plaintiff's case.

4. The plaintiff testified that his deceased father Kebaso Onsongo had 3 wives, Teresia Kemunto, Prisca Moraa and Sabiri Nyabonyi. He testified that following succession proceedings in Kisii High Court Succession Cause No. 104 of 1999 his late father's two properties Kitutu East/Kebirichi/795 and Matutu Settlement Scheme/154 were each subdivided amongst the 3 houses equally and that in regard to land parcel Matutu Settlement Scheme/154 his mother Prisca Moraa got land parcel Matutu Settlement Scheme/620 while the defendant's mother Sabiri Nyabonyi Omoso got land parcel Kitutu Settlement Scheme/621. The plaintiff testified that his step brother, the defendant herein rather than occupy the portion allocated to his mother moved into land parcel 620 and constructed a semi-permanent house thereon and has prevented the plaintiff and his brothers from occupying and utilising the land that was allocated to their mother.

5. The plaintiff further testified that the defendant was entitled to get his land from the portion given to his mother and not from the portion belonging to the plaintiff's mother. The plaintiff relied on the witness statement that he had made and the bundle of documents he had filed in support of the plaintiff's case. PW2 gave evidence that was materially similar to the evidence adduced by the plaintiff (PW1) reiterating that the defendant had wrongfully encroached onto land parcel Matutu Settlement Scheme/620 when he was only entitled to occupy and utilise land parcel 621 which had been given to his mother (defendant's). The witness stated attempts to have the matter amicably resolved had proved futile as the defendant had refused to co-operate.

6. I have reviewed the pleadings and the evidence adduced by the plaintiff in support of the plaintiff's case in the absence of the defendant who did not appear for the hearing of the case in spite of having been served. On the basis of the evidence I am satisfied that the plaintiff and the defendant are step brothers being the sons of Kebaso Onsongo (deceased) albeit from different mothers. The plaintiff was the deceased son from the 2nd wife (Prisca Moraa) and the defendant the deceased son from the 3rd wife (Sabiri Nyabonyi Omoso). There is clear evidence that the deceased properties were equally subdivided amongst his 3 houses as per the copy of Certificate of Confirmation of Grant issued on 16th October 2000 in Kisii High Court Succession Cause No. 104 of 1999 attached to the plaintiff's bundle of documents. There is further evidence that land parcel Matutu Settlement Scheme/620 was given to Prisca Moraa Kebaso following the succession cause and consequent partition of land parcel Matutu Settlement Scheme/154 as per the copy of title deed dated 5th June 2002 attached to the plaintiff's bundle of documents. The Mutation form in respect of land parcel Nyamira/Matutu Settlement Scheme/154 shows that the land was subdivided into 3 equal portions namely parcels 619, 620 and 621 in conformity with the Certificate of Confirmation of Grant. Once the subdivision was effected each of the houses (wives and their children) were expected to occupy and utilise the portions given to them.

7. The plaintiff stated that the defendant moved from parcel 621 which was allocated to his mother and constructed a house on land parcel 620 thereby denying the plaintiff and his brothers the right to utilise their land. The defendant cannot have any justifiable reason to continue occupying land parcel 620 that was lawfully given to the plaintiff's mother pursuant to the succession proceedings. It is the plaintiff and his other siblings who have the right to occupy and use the land.

8. On the basis of the evidence adduced, I am satisfied the plaintiff has proved his case on a balance of probabilities and he is entitled to judgment. I accordingly enter judgment in favour of the plaintiff on the following terms.

(i) That the plaintiff is entitled to exclusive and unimpeded right of possession and occupation and use of land parcel Matutu Settlement Scheme/ 620.

(ii) That the defendant is in unlawful occupation, possession and use of the suit property and he is hereby ordered to vacate and deliver vacant possession of the same to the plaintiff within 60 days from the date of being served with the decree herein.

(iii) That in default of compliance with (ii) above, the plaintiff shall be entitled to an order for the forcible eviction of the defendant, his servants and agents on application.

(iv) The costs of the suit are awarded to the plaintiff.

RULING DATED AND SIGNED AT NAKURU THIS 9TH DAY OF OCTOBER 2019.

J. M. MUTUNGI

JUDGE

RULING DELIVERED AT KISII THIS 23RD DAY OF OCTOBER 2019.

J ONYANGO

JUDGE