



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC NO. 169 OF 2017

JAMES L. LOUKOYANG.....PLAINTIFF

-V E R S U S-

ZAKARIA CHEBON.....DEFENDANT

JUDGEMENT

James L. Loukoyang herein referred to as the plaintiff filed his case on the 31st July 2024 against Zakaria Chebon herein referred to as the Defendant for the following prayers:

- a) That the Defendant be evicted under the supervision of the OCS Kinamba Police station.
- b) Damages for trespass at the monetary value equivalent to 75 bags of maize per year and 50 bags of beans per year with effect from 2009 up to the time vacant possession is given.
- c) Permanent injunction restraining the defendant whether by himself, his servants agents or otherwise however from entering into, taking possession of, growing crops or dealing in any manner with the property title number LAIKIPIA/UASO NAROK/1096.
- d) Costs and interest at court rate.

On the 21st April 2015 the matter was before Justice Sila Munyao where the plaintiff appeared before court and informed the court that there had been no defence entered by the Defendant.

A brief history of this matter is that on the 8th August 2014, the defendant was served with the summons to enter appearance, plead and verify affidavit, the plaintiff's list of Documents as well as the plaintiff's list of witnesses and his statement.

An affidavit of service dated 11th August 2014 was subsequently filed on the 8th September 2014. There having been no appearance entered by the Defendant, the plaintiff asked the court for a date for formal proof and the court gave the 5th October 2015 as a date for the hearing. The defendant was to be served with the said hearing Notice.

On the 5th October 2015, when the matter came up for hearing, the defendant's counsel appeared in court and together with the plaintiff's counsel consented to have the defendant put in his defence out of time but within seven (7) days with thrown away costs of ksh 12,500/=

Leave was subsequently granted to the defendant to file his defence out of time and serve the same within 14 days. There were further orders that he pays the court adjournment fees as well as costs to the plaintiff and in default the defence would be struck out.

The defendant's statement of defence, his statement and list of witness and document was subsequently filed on the 13th October 2015

Thereafter the defendant was invited to the registry to fix the matter for mention but on both dates, that is on the 4th November 2015 and 17th February 2017, the defendant did not appear. The plaintiff took the date *ex parte* and served the same to the defendant for hearing of the suit on the 1st March 2017. An affidavit of service dated 28th February 2017 was filed to that effect.

On the 1st March 2017 when the matter was placed before me for hearing, the plaintiff was present but there was no appearance for the defendant. Plaintiff's counsel informed the court that the hearing date had been served upon Messrs J.A Simiyu & Company Advocates for the defendant for the hearing of the suit scheduled for the 1st March 2017, only for the defendant or his advocates not to appear before court. The Plaintiff's counsel sought to proceed with the hearing notwithstanding non-appearance of the defendant and the court having satisfied itself that **that notice of hearing had been duly served** allowed the hearing to proceed **ex parte**.

Summary of the Plaintiff's case

The plaintiff's evidence was that he had been allocated, by the Department of settlement, **land parcel known as LAIKIPIA/UASO NAROK/1096** measuring 2 ¹/₂ acres and produced the allotment letter dated 3rd July 2000, as exhibit 1.

The plaintiff further testified that upon completion of the payment which was Ksh 2,500/= (receipt Exhibit 2) he was shown his land by the government surveyors on 20th July 2001, at the time, the area was still a forest.

On the 23rd December 2002, he obtained the title deed (exhibit 3) to the land.

Sometime in the year 2009, he was informed that someone had encroached on his land and when he took the initiative to go to the land to see for himself what was happening, he found that the intruder had upon entry into his land had destroyed the trees thereupon and had planted maize and beans instead.

That he inquired from his neighbors about the person, and was given the defendant's phone number. He also left his number with a neighbor, one William Chebulet to give it to the defendant so that they could discuss the issue at hand.

In the year 2014, the neighbors called him to tell him that the person was on his land, he quickly went there and found the defendant who then armed himself with a machete. The plaintiff was however able to calm him down, they talked and agreed to go to Nakuru Land office on the 22nd January 2014 to confirm ownership of the land. On the agreed day, the defendant did not show up.

He called the defendant on phone and re-scheduled the meeting to take place on the 11th February 2014 in Nanyuki, where the plaintiff had been referred to by the Nakuru Land's office on the premise that land matters had been devolved to the counties. The defendant did not show up again stating that he was busy.

On 13th February 2014 the plaintiff went to the chief's office Mututui in Nyahururu, where the piece of land is allocated, to seek help and subsequently wrote a letter to the Lands office inquiring about the ownership of the land. (Exh 6)

Since he could not access his land, he sought help from the police at Kwa Wanjiku police post but when they called the defendant, he threatened the plaintiff. Stating, and I quote:

'Nitamaliza huyo mtu, watcha atembea tembee na hizo documents anadai hiyo ni shamba Lake'

Loosely translated it meant;

'I will finish that person, Let him walk around with those documents claiming that that land is his'

The plaintiff was then referred to Ngarura police station where he reported his case vide OB No 1 of 2014. There being no assistance forthcoming, complained to the Deputy County Commander on the 15th July 2014.

On the 16th July 2014, he sought legal services and his counsel wrote a demand letter (exh 7) to the defendant but he did not vacate the land. Instead the plaintiff received a letter from the defendant's counsel by then Messrs Mirugi Kariuki and Co Advocates to the effect that the defendant had lived on the land since 1999 (exh 8) and had therefore acquired prescriptive rights on the land.

At this point I must point out that there was no mention on adverse possession in the pleadings, nor was there a prayer for declaration of any prescriptive rights. As far as I am aware, prescription is a common law principle which is not legislated for in this country. By definition in English Law, it is the acquisition of rights by use or enjoyment during the time and in a manner fixed by law.

The plaintiff contended that the land was allocated by the government in the year 2000 wherein after, surveyors showed individual purchasers their parcels of land in the year 2001.

In 2015, the plaintiff testified that he managed to secure the map showing the location of the suit land which he produced in court as Exh 5.

The Plaintiff closed his case and direction was given that written submissions were to be filed on the 15th March 2017. A mention date for the 3rd April 2017 was taken to confirm compliance. The plaintiff filed his written submission on the 13th March 2017.

On the 3rd April 2017 the defendant filed a Notice of Motion under certificate of urgency seeking to set aside the proceedings and re-open the Plaintiff's case. Suffice to say, this application was never prosecuted.

The plaintiff's written submission was hinged on the evidence adduced.

While proving his case the plaintiff relied on section 24(a) of the **Land Registered Act 2012** which stipulates that;

'...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'

Reliance was made on the authority of **Peter Okiring Sausau vs. Charles Onguna Etiankoro & another [2015]** where the court held that

'That the title of the Plaintiff to the suit land has not been challenged successfully in accordance with the Law and he remains the registered proprietor of the suit land.....'

The written submission pointed out to the fact that the land claimed by the Defendant in his statement of defence was land parcel No.1175 Nochongoi Block 3 which was not the same as the suit land herein

ISSUES FOR DETERMINATION.

1. Whether the plaintiff is the registered proprietor of the suit land, LAIKIPIA/UASO NAROK/1096.
2. Whether the suit land LAIKIPIA/UASO NAROK/1096 was one and the same as land parcel No.1175 NOCHONGOI Block 3
3. Whether the Defendant has indeed trespass on the suit property
4. Whether the prayers sought should be issued.

ANALYSIS OF THE EVIDENCE

I have duly considered the evidence adduced before court by the plaintiff and find that the same was believable as it was backed by genius documents and was not contested as the defendant did not appear at the hearing either in person or through counsel.

The Plaintiff proved, through evidence of affidavits of service that the hearing notices and the pleadings had been served on, and acknowledged by the Defendant personally and subsequently by his Advocate.

The defendant, had filed his defence to the suit, essentially denying liability. It was therefore incumbent upon the plaintiff to prove his claim to the standard required by law.

From the documentary evidence, including copies of the Title deed of Land parcel LAIKIPIA/UASO NAROK/1096, (Exh 3) the plaintiff herein proved that he was the registered proprietor of the said parcel of land. His registration as owner of the suit land is a first registration.

The Plaintiff in addition, demonstrated ownership of the suit property by producing his letter of allotment as his exhibit 1 and the map where the property is situated as exhibit 5.

I also had the advantage of seeing and hearing the witness/ plaintiff testify and found that he was a credible witness confirming that he was indeed the duly registered proprietor of the suit property.

The provision of section 24(a) and 25(1) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows;

24. Interest conferred by registration Subject to this Act—

(a) 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; and

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

The production of these documents proved that the suit land LAIKIPIA/UASO NAROK/1096 was not one and the same as land parcel No.1175 Nochongoi Block 3

The other issue I must determine is whether the Plaintiff is entitled to compensation for the said dispossession and if so, what amount of compensation is reasonable. By virtue of being the registered proprietor of the suit property, the Plaintiff is entitled to be compensated for the loss of its property by the Defendant.

The Plaintiff wants this court to ask the Defendant to pay Damages for trespass at the monetary value equivalent to 75 bags of maize per year from 2009 to 2017 calculated at 600bags @ 2,500/= totaling to Ksh1,500,000 /=-

In addition the Plaintiff wants this court to ask the Defendant to pay compensation in terms of 50 bags of beans per year with effect from 2009 up to 2017 calculated at 400@ 4,800/= totaling to Ksh 1,920,000/=

I find that the Plaintiff is entitled to *mesne* profits to compensate him for the lost earnings from the suit property from the date the Defendant took possession thereof to the date of payment. I consider that the value arrived at to be reasonable and do hereby concede to the Plaintiff. The Defendant is ordered to pay the Plaintiff the sum of Kshs 3,420,000 million as compensation for damages and trespass.

The final issue for determination is whether the Defendant has indeed trespassed on the suit property and denied the Plaintiff access thereto. To prove that issue, the Plaintiff produced letters (Exh 6 and 7) written to the defendant to vacate the suit land which proved that indeed the Defendant has taken possession of the suit property. I am satisfied that the Plaintiff has proved that it was dispossessed of the suit property by the Defendant.

The court notes that this suit is undefended therefore the Plaintiff's evidence remains uncontroverted.

The upshot of the above is that Judgment is entered in favour of the Plaintiff as enumerated above. The costs of this suit shall also be borne by the Defendant.

Orders accordingly.

Dated and delivered at Nyahururu this 31st day of May 2017.

M.C. OUNDO

JUDGE OF ELC NYAHURURU