



REPUBLIC OF KENYA



KENYA LAW
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**Kebut v Karen Roses Limited (Environment and Land Case 28 of 2022)
[2023] KEELC 22105 (KLR) (6 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22105 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND CASE 28 OF 2022**

**L WAITHAKA, J
DECEMBER 6, 2023**

BETWEEN

KIPROTICH KEBUT PLAINTIFF

AND

KAREN ROSES LIMITED DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 3rd November 2021, the plaintiff herein instituted this suit seeking judgment against the defendant for:-
 - i. An order declaring the act of the defendant trespass as illegal and unlawful;
 - ii. An order of eviction and demolition of structures from the suit land;
 - iii. An order of permanent injunction restraining the defendant from constructing, selling, offering for sale, charging, re-entering, leasing and/or in any other way dealing with the parcel of land known as Baringo/Perkerra/671;
 - iv. An order directing the land registrar to cancel the title of land parcel number Baringo/Perkerra/671 and the same to revert back to Baringo/Perkerra/670.
 - v. General damages;
 - vi. Mesne profit
 - vii. costs
 - viii. Any other or further relief that the honourable court may deem just to grant.



2. The plaintiff's case as can be discerned from the plaint is that the parcel of land known as Baringo/Perkerra/670 (hereinafter referred to as the suit property) belonged to his father, Kipkemei Kipkebut (now deceased); that the suit property was subdivided by the defendant giving rise to the parcel of land known as Baringo/Perkerra/671 which parcel was registered in the name of the defendant and that the subdivision and transfer of the suit property was done fraudulently by the defendant.
3. The particulars of fraud levelled against the defendant are listed in paragraph 6 of the plaint thus:-
 1. using concealment to transfer the suit property to its name;
 2. transferring the suit property without succession process being carried out;
 3. transferring the suit property without a sale agreement;
 4. transferring the suit property without permission of the plaintiff and his family members;
 5. forcefully taking possession of the suit property.
4. Maintaining that the subdivision and transfer of the suit property was conducted without a succession process and that conveyancing was carried out without any order of the court, the plaintiff terms the actions of the defendants complained of as trespass to land and intermeddling with the estate of the deceased hence illegal and without any justification under the law.
5. It is the plaintiff's case that as a result of the defendant's illegal trespass, the heirs of the deceased's estate have been deprived of the utilization of the suit property hence entitled to damages.
6. On 25th January 2022, the defendant filed a statement of defence dated 24th January, 2021 denying the allegations levelled against it and stating that it acquired the suit property for valuable consideration from the deceased.
7. The defendant points out that the suit property is a subdivision of Baringo/Perkerra/186 and states that the deceased executed all transfer documents in its favour before he passed on.
8. It is the defendant's case, that all it did was to submit the executed transfer documents to the office of the land registrar for transfer of the land; that the portion of Baringo/Perkerra/186 sold to it could not form part of the deceased's estate so as to require succession as it was sold by the deceased and transfer documents executed by the deceased in his life time; that it took possession of the suit property in 1995 with permission of the deceased and that it has been in use and occupation of the suit property as a matter of right since that time.
9. Terming the plaintiff's demand that it vacates the suit property illegal and a violation of its rights as the absolute and indefeasible owner of the suit property, the defendant urges the court to dismiss the plaintiff's case with costs.
10. The defendant took out third party proceedings leading to filing of a statement of defence by the third party, Land Registrar, Koibatek.
11. Vide its statement of defence dated 26th September, 2022 and filed on the same day, the third party *inter alia* states that according to the records held in their office, the suit property is a subdivision of Baringo/Perkerra/186; that the parcel of land known as Baringo/Perkerra/186 was subdivided into Baringo/Perkerra/670 and 671 and the subdivisions registered in the name of Kipkemoi Arap Kipkebut on 26th January, 1999; that Baringo/Perkerra/671 was later registered in the name of the defendant, Karen Roses Ltd, on 26th January, 1999.



12. Arguing that no claim has been made against it to warrant judgment against it, the third party prays that the plaint, the defence and the third-party notice be dismissed.

Evidence

The Plaintiff's Case

13. When the case came up for hearing, the plaintiff who testified as P.W.1 relied on his witness statement recorded and signed on 3rd November 2021 after the same was adopted as his evidence in chief. He informed the court that the parcels of land known as Baringo/Perkerra/670 and 671 are resultant parcels of Baringo/Perkerra/186 through succession proceedings; that the subdivision was done by Karen Roses Limited on 26th January, 1999; that it is not possible that the subdivision was done by his father as he died on 5th July 1995. He produced the certificate of death for his father and the grant of letters ad litem issued to him authorizing him to sue on behalf of his father's estate as Pexbt 1 and 2 respectively.
14. The plaintiff further informed the court that after his father died, they went to Agricultural Finance Corporation (AFC) where the land had been charged to clear the loan and they were given title for land parcel Baringo/Per-kerra/670; that they conducted official search and discovered that Baringo/Perkerra/671 is registered in the defendant's name and that they have not filed succession proceedings for the estate of his father. He produced the title for 670 and 671 as Pexbt 3 and 4 respectively.
15. Maintaining that his father did not sell any part of the suit property, the plaintiff informed the court that the defendant uses parcels No. 671 for flower growing and urged the court to cancel the defendant's title and evict the defendant from the property.
16. Upon being cross examined by the defendant's counsel, the plaintiff admits that in his statement dated 3rd November 2021, he states that land parcel number 671 is a subdivision of parcel No. 670 but claimed that he meant that the two are subdivisions of 186. He also acknowledged that by the time his father died the original title was being held by AFC; and that they have neither sued AFC nor called it as a witness.
17. Claiming that the defendant took possession of parcel No. 671 in 2000, the plaintiff stated that it took long to file the case because they were trying to obtain documents to enable them file the case.
18. On whether he is aware that his father sold land to the defendant and executed transfer documents in its favour, he stated that he is not aware of those facts.
19. As to why they have not involved AFC in this case, he stated that he has no reason. As to why they are not seeking cancellation of title for parcel No. 670 he stated that he does not see anything wrong with that title.
20. He maintained that his father's parcel was 186 but he does not have any documents to that effect.
21. He further stated that the parcel had been used to obtain a loan from AFC and that he paid the loan but he had no documents capable of proving that fact.
22. He could not tell whether the parcel that was used to secure the loan was 186; that they did not register any caution in lands office on parcel number 671; that they have a problem with the manner the land registrar issued the two titles although they did not sue the land registrar.
23. In re-examination, he stated that parcels number 670 and 671 are resultant parcels of 186.



The Defendant's Case

24. D.W.1, Peter Kamuren, the General Manager of the defendant relied on his statement recorded and signed on 24th January, 2022 after it was admitted as his evidence in chief.
25. He informed the court that Baringo/Perkerra 671 is registered in the name of the defendant; that Baringo/Per-kerra/671 is a subdivision of parcel No. 186; that the defendant bought it from the deceased in 1995 and that the defendant applied for subdivision and transfer in 1995. Further, that although the title was issued in 1999 after the deceased had passed on, the deceased had executed the transfer documents long before he passed on.
26. He termed the plaintiff's contention that there was fraud in registration of parcel number 670 false and stated that the suit has been brought in bad faith.
27. He acknowledged that the defendant has not produced the sale agreement and transfer documents and stated that this was so because the transaction was executed over 20 years ago.
28. He informed the court that the defendant took possession of parcel No. 671 in 1995 and began utilizing it immediately; that the defendant has a green house in the suit property where it grows roses for export; that the plaintiff has never interfered with their possession of the suit property and urged the court to dismiss the plaintiff's case.
29. In cross examination, he admitted that he has not produced the defendant's certificate of incorporation, sale agreement executed between the defendant and the deceased; consent to subdivide the land, land rates payment receipts, evidence of payment of stamp duty. He also admitted that Dextb1 shows that the deceased was registered as proprietor of parcel No. 671 in 1999 yet he died on 5th July 1995. He admitted that it was not possible for the deceased to have signed the transfer document but asserted that the deceased had signed the transfer documents before he died in 1995.
30. He stated that he has no document showing how much the defendant paid for the suit parcel.
31. Upon being cross examined by counsel for the third party, he stated that the Land Registrar was aware of the transaction to the extent that he/she issued the title deeds for the parcels No. 670 and 671 upon subdivision of parcel No. 186.
32. He maintained that the deceased made the application for transfer in 1995 and that the defendant presented the documents to the Land Registrar who issued title deed in 1999.
33. On availability of the transfer documents, he stated that given time he can obtain them from their archives or the lands office.
34. He could not tell whether the defendant brought to the attention of the Land Registrar that the seller had passed on when it presented the transfer documents to him.
35. D.W.1 further stated that although they sued the Land Registrar they have no claim against him. He also acknowledged that they did not make any attempt to obtain documents from the land's office.
36. In re-examination, he stated that the defendant in this case is Karen Roses Limited whose title was issued by the Land Registrar.
37. At close of hearing, the parties to the suit (plaintiff and defendant) filed submissions, which submissions I have read and considered.



Analysis and determination

38. From the pleadings filed in this case, the evidence and submissions, I find the issues for the court's determination are:-
- i. Whether in view of the incongruity between the plaintiff's pleaded case and the evidence produced in support thereof, the plaintiff can sustain his pleaded case?
 - ii. Subject to the outcome of (i) above what order(s) should the court make?
39. On whether in view of the incongruity between the plaintiff's pleaded case and the evidence produced in support thereof, the plaintiff can sustain his pleaded case, in the defendant's submissions, it pointed out that the plaintiff pleaded that the parcel of land known as Baringo/Perkerra/671 is a product of subdivision of Baringo/Perkerra/670 and that whereas he led evidence to the effect that the parcel of land known as Baringo/Perkerra/671 is a product of subdivision of Baringo/Perkerra/186, he never bothered to amend his plaint to reflect that factual situation.
40. Based on the legal truism that parties are bound by their pleadings, the defendant submits that it does not help that the plaintiff wanted to change his pleaded position during hearing.
41. I have carefully considered the plaintiff's pleaded case vis-a-vis the evidence tendered in support thereof. Whereas the plaintiff had pleaded that the parcel of land known as Baringo/Perkerra/671 is a subdivision of Baringo/Perkerra/670, he produced evidence at variance with his pleaded case to wit that Baringo/Perkerra/671 is a subdivision of Baringo/Perkerra/186.
42. Whereas from the totality of the evidence given by all the parties in the case, it is true that the parcel of land known as Baringo/Perkerra/671 is a subdivision of Baringo/Perkerra/186, a question of law arises namely whether the plaintiff can sustain his case yet his pleaded case is at variance with the evidence he tendered in respect thereof.
43. In answering that question, I am guided by the decision of the Supreme Court in the case of [*Raila Amolo Odinga & Another v. IEBC & 2 others*](#) (2017)e KLR where the court stated:-
- “In absence of pleadings, evidence if any, produced by the parties, cannot be considered.”
44. The court further stated:-
- “It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”
45. In the case of [*David Sironga Ole Tukai v. Francis Arap Muge & 2 others*](#) (2014)e KLR it was stated:-
- “In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at



the trial as each knows the other's case is pleaded. ...The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon specific matters in dispute, which parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. a decision given on a claim or defence not pleaded amounts to a determination without hearing the parties and leads to denial of justice.”

46. In applying the legal position espoused in the above cited authorities to the circumstances of this case where the plaintiff based his claim on alleged unlawful subdivision of the parcel of land known as 670 and led no evidence capable of supporting his pleaded case, as it turned out that land parcel 671 is not a subdivision of 670 as alleged but 186, it is the considered view of this court that the plaintiff cannot sustain his case as it not supported by the evidence he presented in court.
47. The foregoing being the view of the court and despite their having been a meeting of minds between the plaintiff and the defendant that the plaintiff's claim ought to have been based on the parcel of land known as 186 as opposed to 670, since the plaintiff did not amend his pleaded case, this court lacks any basis for determining the case based on parcel number 186 as that property is not mentioned anywhere in the pleadings and the defendant is not accused of having done anything wrong in respect thereof.
48. Without going to the merits of the case advanced by the plaintiff regarding the alleged illegal acquisition of parcel number 671 by the defendant, it is curious that the plaintiff who claims to have been aware of the alleged illegal trespass to the property in 2000, never took any action against the defendant for over 20 years. It is also curious that the plaintiff did not bother to join AFC to this case given that the original title for parcel No. 186 from which parcel No. 671 was created was charged to it.
49. The evidence by the plaintiff that he obtained title for parcel No. 670 from AFC suggests that the AFC which allegedly held title for parcel No. 186 was involved in the transfer of parcel No. 186. How else, would they come into possession with parcel No. 670, which was registered way after the plaintiff's father had passed on.
50. It is the view of this court that AFC was a necessary party in this suit for purpose of unraveling the circumstances upon which parcel number 186 was subdivided and one of the subdivisions therefrom to wit 671 registered in the name of the defendant.
51. Whilst there are issues touching on the circumstances upon which the defendant obtained title to parcel number 671, on account of the unprocedural departure from his pleaded case, I find and hold that the plaintiff's case as pleaded is unmaintainable. Consequently, I dismiss it with costs to the defendant.
52. Orders accordingly.

JUDGMENT READ, DELIVERED, DATED AND SIGNED AT ITEN THIS 6TH DAY OF DECEMBER, 2023.

L. N. WAITHAKA

JUDGE

Judgement delivered virtually in the presence of:-

Ms Kinyanjui holding brief for Mr. Mathai for the plaintiff

Ms Odeyo for the 3rd party

Mr Maiyo for the defendants

