



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L NO. 980 OF 2012

NJUGUNA MWAURA PLAINTIFF

VS

ROSEBELLA CHEPCHUMBA KEMBOI.....1ST DEFENDANT

SIMION KEMBOI.....2ND DEFENDANT

JUDGEMENT

(Suit for eviction and permanent injunction over land; plaintiff registered proprietor; 1st defendant having purchased land and settling on plaintiff's property; no lawful reason for 1st defendant to be on plaintiff's land; no evidence of encroachment against 2nd defendant; judgement entered for plaintiff against 1st defendant)

A. INTRODUCTION AND PLEADINGS

This suit was commenced by way of plaint filed on 11 December 2012. In the plaint, it is pleaded that the plaintiff is the registered proprietor of the land parcel Ngeria/Kesses Block 5 (Bayette)/38 (the suit land). It is pleaded that the 1st defendant is the registered proprietor of the land parcel Ngeria/Kesses Block 5 (Bayette)/ 36 having purchased the same from one Joseph Gitu, whereas the 2nd defendant is the registered proprietor of the land parcel Ngeria/Kesses Block 5 (Bayette)/37. The plaintiff has contended that the defendants have encroached into his land and now occupy a portion of it. In the suit, the plaintiff wants the defendants evicted from the suit land and for an order to permanently restrain them from the land.

The defendants filed a brief defence of five paragraphs drawn as follows :-

- 1. Save what is expressly admitted the defendants deny each and every allegation of fact and law contained in the plaint as if the same was specifically set out verbatim and traversed seriatim.*
- 2. The defendants aver that the plaint is bad in law and the same ought to be struck out.*
- 3. The defendant (sic) further avers that the claims for remedy of declaration and injunction are untenable and ought to be struck out with costs to the defendant (sic)*
- 4. Jurisdiction of this Honorable court is admitted.*
- 5. The defendants avers (sic) that the plaintiff is not entitled to the orders sought in the plaint.*

A reply to Defence was filed and thereafter pleadings having closed, the matter proceeded for hearing.

B. EVIDENCE OF THE PARTIES

The plaintiff testified as PW-1 and produced the title deed to the suit land, which is parcel Ngeria/Kesses Block 5 (Bayette)/38. He testified that the 1st defendant, Rosebella, purchased 3 acres out of the land parcel Ngeria/Kesses Block 5 (Bayette)/ 36, and that the defendant, is proprietor of the land parcel Ngeria/Kesses Block 5 (Bayette)/37. He testified that Rosebella, occupies 5 acres of his land (parcel No. 38), whereas the 2nd defendant, Kemboi, occupies 3 acres of his land. He stated that this was confirmed by a survey report. He testified that the land was initially comprised in a title L.R No. 1301 which was bought by a group. Later, the land was distributed, and that is how he got his title.

PW-2 was Simon Wario Gitu. He testified that his father, Joseph Wario Gitu, was the previous owner of the land parcel No. 36 but that he sold it. He sold 3 acres to Rosebella. He stated that he has tried to ask Rosebella to move to the parcel No. 36 in vain.

Rosebella on the other hand testified that she bought 3 acres of parcel No. 36. Before agreeing to purchase it, she was shown the land on the ground by a land broker. She paid Kshs. 360,000/= for it and occupied what the broker showed her as comprising the land parcel No. 36. It is later that the plaintiff came and informed her, that she was occupying the land parcel No. 38, and not land parcel No. 36. She believes the problem of occupation on the ground has been caused by lack of clarity in the surveys which preceded the issuance of titles.

DW-2 was one Charles Kipchumba Biwot Kibutia. He gave a history of the land, which is, that the parent title was LR No. 11130 that was purchased by two groups, Bayette and Wendani Farmers Co-operative Societies. In 1990 the land was sub-divided into the two societies, with Bayette FCS, taking 335 acres and Wendani FCS 320 acres. However, Bayette had contributed less than Wendani FCS in the purchase of the head title which he said has led to some disputes. When the land was surveyed it led to adjustments on the ground occupation.

DW-3 was Joseph Kipkoech Teigong. He testified that Kemboi has been resident on the land for 40 years whereas Rosebella has been in occupation for 8 years. He himself occupies ground that falls between Kemboi and the plaintiff. He testified that his parents were of the Wendani group although he occupies land in the Bayette area.

The 2nd defendant testified as DW-4. He testified that he owns the parcel No.37 and that he has been in occupation of where he resides since 1973. He insisted that he occupies his land parcel No. 37 and not parcel No. 38. He stated that he has buried his relatives on the said portion and has developed it. In cross-examination, he was challenged to produce title documents to the parcel No. 37, but he stated that he has not collected the title deed, because he was informed that his land is 3 acres, yet as far as he is concerned, he is entitled to 7 acres.

Mr. Miyienda for the plaintiff submitted that there is ample evidence that the defendants are in occupation of the plaintiff's land. Mr. Koros for the defendants on the other hand submitted that the defendants challenge that they occupy land that belongs to the plaintiff and submitted that the defendants contest the survey that led to the titles.

C. DECISION

I have considered the pleadings, evidence and submissions of counsel. The case of the plaintiff is simple; that the defendants are occupying his land and he wants them evicted. The 1st defendant's case is that 3 acres of the land parcel No. 36 was sold to her and she occupies ground which she believes falls within the parcel No. 36, which is what she purchased, and not parcel No. 38 which is owned by the plaintiff. The 2nd defendant on the other hand is of opinion that he occupies the land parcel No. 37 which he says belongs to him and that in any event, he has been in occupation of the ground for a period of 40 or so years.

When I first considered this matter, I was of the view that the issue is probably a boundary dispute. I

therefore ordered the District Surveyor, Uasin Gishu, to proceed and identify the parcels on the ground and make a report on their occupation. I directed that costs of the exercise be shared (of which the plaintiff has contended that he paid in full without input from the defendants, an issue that I will revisit later). The surveyor went to the ground and established the boundaries. This however did not resolve the dispute and that is why the matter had to proceed for hearing.

I also later commissioned the District Surveyor, Uasin Gishu, to revisit the disputed land and make a report of the occupation on the ground. A report was filed which revealed the following points, which I consider relevant, to this dispute:-

(a) That the land parcels No. 36, 37 and 38 are clearly marked on the ground.

(b) That the land parcel No. 38 (the suit land) measures 3.18 ha.

(c) That Rosebella Kemboi (1st defendant) occupies 0.0516 Hectares of the parcel No. 38 and a road reserve.

(d) That Simeon Kemboi (2nd defendant), does not occupy any part of parcel No. 38. He however occupies a part of parcel No. 50 and a road reserve.

(e) That there are other occupants of the suit land, being Elijah Kemboi (0.0031 Ha), Pauline Rotich (0.0382 Ha), Monica Rotich (0.011 Ha), Elijah Lagat (0.0601 Ha), and Julius Kemboi (0.009 Ha).

The report is however not clear on whether the defendants, or the above other occupants, cultivate any portion of the suit land. Neither does it contain any information on whether the occupants have any relation or affiliation with the defendants. In his submissions in relation to the surveyor's report, Mr. Koros for the defendants submitted that the report does not demonstrate that the parents and children of the 2nd defendant were buried on the suit land and that other developments such as trees are also not captured. To me, this is neither here nor there, because the defendants have not laid any claim over the suit land. Their defence, which I set out in full at the beginning of this judgment, is a mere denial.

In my view, the evidence tabled, demonstrates that the 1st defendant occupies a portion of the plaintiff's land. Her argument that this is the ground that she was shown when purchasing the land parcel No. 36, cannot be an excuse to occupy the plaintiff's land. She needs to find her 3 acres in the parcel No. 36 and not occupy a different parcel of land. She has no valid reason for occupying the plaintiff's land and she needs to vacate it.

The 2nd defendant, at least from the surveyor's report, does not reside on the suit land. But it is not clear whether or not he cultivates the said land. If he does, then he has no business doing so and must cease forthwith.

There are other occupants of the suit land, but they are not parties to this suit, and therefore I cannot make any orders against them. No evidence has been led that they occupy the land as servants/agents and/or assigns of either of the defendants. If the plaintiff wants them out of the suit land, then he needs to file a separate case against them so that they may have an opportunity to respond to the claim.

In his report, the surveyor has stated categorically, that the boundaries of the plaintiff's land are clearly marked on the ground. The defendants must be deemed to know these boundaries, and have no option but to keep away from the same, for they have not demonstrated to me, that they have any rights over the plaintiff's land. The plaintiff sought an order of permanent injunction against the defendants to restrain the defendants from interfering with his land. I see no reason why I should deny him this order. The defendants are hereby permanently restrained from being upon, utilizing or in any other way dealing with the suit land.

The plaintiff also sought an order of eviction against the defendants. From the evidence tabled, only the 1st defendant is in actual occupation of the suit land. I order her to vacate the suit land within the next 30

days, and if she does not do so, the plaintiff is at liberty to apply for her eviction.

The only issue left is costs. I will make no order as to costs against the 2nd defendant but the 1st defendant must bear the costs hereof. She will also bear the full survey fees which should be factored in on costs.

I now make the following final orders :-

(1) As against the defendants, the plaintiff is hereby declared to be the lawful owner and proprietor of the land parcel Ngeria/Kesses Block 5 (Bayete)/38.

(2) An order of permanent injunction is hereby issued restraining the defendants and/or their representatives and/or assigns, from entering, being upon, utilizing or in any other way dealing with the property Ngeria/Kesses Block 5 (Bayete)/38.

(3) The 1st defendant is hereby ordered to vacate the land parcel Ngeria/Kesses Block 5 (Bayete)/38 within 30 days from the date hereof in default of which the plaintiff is at liberty to apply for an order of eviction.

(4) There are no orders as to costs for or as against the 2nd defendant, but the 1st defendant shall bear the plaintiff's costs, alongside the costs incurred in the survey exercise ordered by this Honorable Court.

Judgement accordingly.

DATED and DELIVERED at ELDORET this 30th day of JANUARY 2015.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence: