



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**ELC NO. 420 OF 2013**

**DANIEL KIMELI KIPRONO.....1<sup>ST</sup> PLAINTIFF**

**JULIUS RONO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HOSEA KIPKORIR BUSIENEI.....1<sup>ST</sup> DEFENDANT**

**MATAYO BUSIENEI..... 2<sup>ND</sup> DEFENDANT**

**NGETICH A.J.A T/A**

**RONBOY AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. In the plaint dated **23<sup>rd</sup> August, 2013** and filed in court on the same date, the plaintiffs seek the following prayers:

*(a) A permanent injunction against the Defendants agents, assigns and/or servants and /or any person acting on their instructions or whatsoever from interfering, trespassing, threatening to evict, evicting and/or in any manner interfering with the plaintiffs quite possession of parcel No. **TURBO WEST/OSORONGAI/BLOCK 1(CHEPTERWAI)3***

*(b) An order and/or a declaration that the eviction and the destruction undertaken by the Defendants was illegal, null and void ab initio.*

*(c) An order for payment of damages by the defendants for the loss suffered and compensation and/or restitution of the plaintiffs' homestead in the state in which it was before the illegal destruction and/or demolition.*

*(d) An order for costs.*

2. The plaintiffs aver that they are the sons and administrators to the estate of Moses Kiprono Bett, who is the proprietor of **TURBO WEST/OSORONGAI BLOCK 1(CHEPTERWAI)3**, the suit property, measuring 101.6 acres where they live. That the suit property was a subdivision from land parcel L.R No. 4793/2, which had been purchased in 1963 by the late Moses Kiprono Bett, Kipkemboi Arap Busienei and Martin Kiptui. That the three had then subdivided the land into Turbo West/Osorondai Block 1 (Cheterwai)1 to 3, and each of the three was registered with their respective portions. That a dispute arose over the boundaries and/or acreage between Mr. Kipkemboi Arap Busienei and Moses Kiprono Bett which resulted in a suit in Eldoret HCCC No. 61 of 1997. That both parties died when the suit was still pending and after one year, the said suit abated. The plaintiffs, further aver that on or about the 17<sup>th</sup> July 2013, the defendants and police officers raided their homestead on parcel No. **TURBO WEST/ OSORONGAI BLOCK 1(CHEPTERWAI)3** and proceeded to wrongfully and unlawfully demolish houses and destroyed property worth Kshs. 2,100,000 without any legal right or court order, prompting this suit.

3. The suit is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants through their filed statement of defence dated and filed on the 9<sup>th</sup> September 2013. They aver that their father owned, occupied and possessed land parcel No. **TURBO WEST/OSORONGAI BLOCK 1(CHEPTERWAI)1**. That the plaintiffs had encroached and trespassed on the said parcel, and that the eviction was pursuant to an order issued in Eldoret CMC award No. 1 of 2002, and not Eldoret HCCC No. 61 of 1997, which case was withdrawn. That the orders had been issued in **Eldoret CMC No. 1 of 2002** in favour of the Kipkemboi Busienei, by the time of his death on 3<sup>rd</sup> March, 2013, that the plaintiffs' claim is res judicata having already been determined by the court in **Eldoret CMC Award No. 1 of 2002**. That pursuant to the award in that case, a survey was carried out on the said land and the surveyors' verdict was that the plaintiffs were living on the land of the defendants' late father. That the plaintiffs have been evicted and the boundaries should remain as drawn. That no property of Kshs. 2,100,000 or any sum was destroyed during the eviction, and the plaintiffs are therefore not entitled to any damages.

4. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiff testified on the 5<sup>th</sup> October, 2017 as PW1 and PW2 respectively. It is their case that they have lived on the suit land from 1963 with their late father who died in 1999. That they have been appointed as administrators of the estate of their late father. That on the 17<sup>th</sup> July, 2013, their seven (7) semi-permanent houses on the suit land, each valued kshs. 300,000 were destroyed by the defendants at 5.00am unlawfully. That the defendants left them with a court order issued in Eldoret CMC Award No. 1 of 2002, between Kipkemboi Busienei versus Maritim Kiptui, over land parcel Turbo West/Osorongai Block 1(Cheperwai)1, in which neither their late father nor themselves parties.

5. That though the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their statement of defence and had counsel on record, they did not tender evidence in support of their defence on the scheduled hearing dates. The court has taken note of their application dated the 19<sup>th</sup> October, 2017, that granted their prayer to have the case reopened through the ruling of the 28<sup>th</sup> June, 2018, and another dated the 5<sup>th</sup> September, 2019 seeking to cross examine the plaintiffs that was rejected in the ruling of the 5<sup>th</sup> September, 2019. There is also another application dated the 23<sup>rd</sup> March, 2021 seeking for what had already been dealt with through the earlier two applications, and was dismissed vide the ruling of the 8<sup>th</sup> December, 2021.

6. That pursuant to the directions on filing and exchanging submissions issued on the 5<sup>th</sup> October, 2017, 28<sup>th</sup> September, 2020 and 22<sup>nd</sup> March, 2021, the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not file their submissions. The counsel for the plaintiffs filed their submissions dated the 19<sup>th</sup> October 2017, on the 29<sup>th</sup> October, 2017.

7. The following are the issues for the court's determinations:

a. **Whether there was eviction from, and demolition of the plaintiffs' structures on the suit land, and if so whether they are entitled to any damages.**

b. **Whether the said eviction was carried by or on orders of the defendants.**

c. **Whether the eviction and demolitions were lawful.**

d. **Who pays the costs of the suit.**

8. The court has carefully considered the pleadings, oral and documentary evidence tendered by the plaintiffs, submissions by counsel, superior courts decisions relied on and come to the following findings:

a. That the award of 31<sup>st</sup> November, 2007 in **Eldoret CMC Award No. 1 of 2002**, from which an order was extracted and issued on the 6<sup>th</sup> November 2007, and upon which the eviction of the plaintiffs was ostensibly carried out was produced by the plaintiffs as **P. Exb 3**. The order reads in part;

"1. ....

2. **THAT pursuant to the Award dated 02. 07.2002 and the decree herein, an order is hereby issued evicting the Defendant/judgment debtor, his servants and /or agents from the Plaintiffs/Applicant Award parcel of land L.R TURBO WEST/BLOCK 1(CHEPTARWAI)1 measuring 62.74 hectares permanently so as to enable the District Surveyor to re-establish the boundary between the Defendant's /Respondent's parcel of land L.R No. 4793/2 and the Plaintiff's/Applicant's parcel of land L.R NO. TURBO WEST/ OSORONGAI BLOCK 1(CHEPTARWAI) 1 measuring 62.74 hectares.**

3. ....

4. ...."

That a keen examination of the said order shows that the parties were KIPKEMBOI BUSIENEI who was the Plaintiff, and MARITIM KIPTUI the defendant. That from the evidence before the court, neither the late Moses Kiprono Bett, nor the plaintiffs were parties in the suit where the order was emanated from. It is also evident that the dispute in that suit related to parcel of land L.R No. TURBO WEST/BLOCK 1 (CHEPTARWAI)1, and not TURBO WEST/BLOCK 1 (CHEPTARWAI)3, the suit property herein.

b. That the four photographs produced as exhibits 2(a) to (d) have semi-permanent houses with their roofs removed. The plaintiffs' evidence is that the houses were on their late father's land, and that the demolition was done by the defendants. The plaintiffs also produced as exhibit 1, a copy of the grant issued in Eldoret HC Succession Cause No. 144 of 2001, that confirms that they were appointed as administrators of the estate of the late Moses Kiprono Bett, on the 2<sup>nd</sup> July 2008. That evidence remains unchallenged or un rebutted as the defendants did not cross examine PW1 and PW2 when they testified, or call evidence in support of their defence. The defendants' averments in their statement of defence therefore, remains mere allegations that are without capacity to challenge the plaintiffs' evidence in support of their claim.

c. That as the plaintiffs' interests over the suit land herein has not been challenged, and noting that neither their late father nor themselves were parties in the magistrates court case, and that the order issued thereon did not involve the suit property where their houses were situated, then the defendants did not have any lawful basis to purport to evict the plaintiffs from their rightfully owned parcel of land, being **TURBO WEST/ OSORONGAI BLOCK 1(CHEPTARWAI)3**, or to destroy the seven (7) semi- permanent houses. The record confirms that filed with the plaint on the 23<sup>rd</sup> August 2013 was the notice of motion of even date seeking for

injunctive orders that was granted on the 26<sup>th</sup> August, 2013. The order was extracted and issued on the 27<sup>th</sup> August, 2013, and after inter parties hearing, a ruling was delivered in favour of the plaintiffs on the 19<sup>th</sup> June 2014. That in that ruling Munyao J, inter alia held and ordered as follows:

“ ... It has been argued that this suit is *res judicata*, but I do not see where this argument is coming from. The suit *Eldoret CMC Award No. 1 of 2002* involved different parties and the subject matter is certainly not the subject in this case. That argument, at least from the material before me, must fail.

..... I am unable to see how the purported eviction can be justified, even if the 1<sup>st</sup> and 2<sup>nd</sup> defendants were of the opinion that the plaintiffs were resident in their parcel, i.e, parcel No. 1. If the 1<sup>st</sup> and 2<sup>nd</sup> defendants are of the view that the plaintiffs are occupying land that belongs to them, then all they need do is to file the appropriate suit for their eviction, and their rights will be determined in such suit. The avenue is not to engage and proceed to forcefully evict the plaintiffs. .... I do not hesitate to issue an order of injunction, barring the defendants from evicting, destroying, demolishing or threatening to evict the plaintiffs from the land that the plaintiffs occupy, irrespective of whether the defendants think that the plaintiffs occupy land parcel No. 1 until the final determination of this suit. ....”

That though the above findings were made in respect of the interlocutory application, they remain valid even now as the plaintiffs’ evidence in support of their claim has remained without any challenge or contradictions from the defendants.

d. That noting that the order that the defendants appear to have relied on to carry out the eviction of the plaintiffs, and demolish their houses was issued in 2007 and only executed in 2013, which is more than five (5) years later, a show cause notice in terms of Order 22 Rule 18 of the Civil Procedure Rules needed to have been taken out and served first. That even if that was done, it could only have been directed to the party in the suit, and not the plaintiffs who are obviously strangers in that case. The eviction of the plaintiffs and demolition of their houses from their land, the suit property, was evidently unlawful, illegal and irregularly carried out on the strength of a court order issued in a case where they were not parties, and which had not affected their land. The plaintiffs are therefore entitled to the prayer for permanent injunction and compensation for the damages caused to their houses.

e. That as costs follow the event under section 27 of the Civil Procedure Act, chapter 21 of Laws of Kenya, the plaintiffs having succeeded in their claim are entitled to the cost of the suit.

9. That the court therefore enters judgment in favour of the plaintiffs against the defendants jointly and severally and orders as follows:

a. **THAT** a declaration is hereby issued that the eviction of the plaintiffs from the suit land, and destruction of their houses thereon, carried out by the defendants on or about the 17<sup>th</sup> July, 2013, was illegal, null and void ab initio.

b. **THAT** an order of permanent injunction is hereby issued restraining the defendants, agents, assigns and or servants and or any person acting on their instructions, or whatsoever from interfering, trespassing, threatening to evict, evicting and or in any other manner interfering with the plaintiffs’ quiet possession of land parcel Turbo West/Osorongai/Block 1 (Chepterwai)3, the suit property.

c. **THAT** the defendants do pay the plaintiffs Kshs. 2,100,000 (two million one hundred thousands), being compensation for the destruction of their seven (7) houses and damages for the unlawful eviction carried out on or about the 17<sup>th</sup> July, 2013 from their land.

d. **THAT** the defendants do pay the plaintiffs cost of the suit.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS .....9<sup>th</sup> .....DAY OF MARCH, 2022**

**S.M.KIBUNJA,J.**

**ELC ELDORET.**

IN THE VIRTUAL PRESENCE OF;

PLAINTIFFS: .....Absent.....

DEFENDANTS: .....Absent.....

COUNSEL: .....Ms. Odwa for the Plaintiffs.....

COURT ASSISTANT: ONIALA

**S.M.KIBUNJA,J.**

