



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 211 of 2011

PHILIP SAWE ARAP BOKUTI.....PLAINTIFF

VERSUS

JAMES NGONYA.....DEFENDANT

JUDGMENT

1. The Plaintiff and one, Kekuta Ole Morijo(deceased) are the registered proprietors of all that parcel of land known as **L.R.No.Transmara/Moyoi/41** measuring approximately 103.55 hectares which is situated at Ngoiberia Location in Transmara West District (hereinafter referred to as **“the suit property”**). In his Plaint dated 23rd August, 2011, the Plaintiff has averred that Kekuta Ole Morijo and the Plaintiff were registered as joint proprietors of the suit property and as such, when the said Kekuta Ole Morijo died, the Plaintiff became the exclusive proprietor of the suit property pursuant to the provisions of Section 102(1) (b) of the Registered Land Act, Cap.300, Laws of Kenya (now repealed). The Plaintiff has averred further that, sometimes in the year 2001, the defendant herein caused a restriction to be lodged against the title of the suit property on the allegation that the Plaintiff had been registered as a joint proprietor of the suit property fraudulently. The Plaintiff claims that, on 11th August, 2011, the defendant together with his agents and servants entered the suit property, claimed to be the owners thereof and tried to stop the Plaintiff and his family from occupying and using the suit property. The Plaintiff has claimed that from that day, the defendant had been threatening to invade the suit property and cause his agents and servants to occupy the same on the pretense that he is related to Kekuta Ole Morijo and as such entitled to a portion of the suit property. The Plaintiff has averred further that the defendant has no right over the suit property and as such his activities on the suit property aforesaid are illegal and amounts to an infringement of the Plaintiff’s constitutional right to own and use the suit property. The Plaintiff has averred further that the said activities of the defendant amounts to an infringement of the Plaintiff’s rights under section 27, 28 and 143 of the Registered Land Act, Cap.300, Laws of Kenya (now repealed). The Plaintiff has averred that he is ready and willing to transfer to the widow of Kekuta Ole Morijo and his children, the share of the suit property that was owned by Kekuta Ole Morijo(deceased). The Plaintiff has sought, a declaration that he is the absolute and exclusive proprietor of the suit property by first registration and by way of survivorship under section 102(1)(b) of the Registered Land Act, Cap.300, Laws of Kenya (now repealed), a permanent injunction restraining the defendant by himself or through his agents or servants from trespassing and/or interfering with the Plaintiff’s activities or interests on the suit property and an order removing all restrictions and inhibitions lodged against the title of the suit property.

2. The defendant was served with Summons to Enter Appearance on 2nd November, 2011 but failed to enter appearance. The matter was listed for formal proof on 6th February, 2013 when the case proceeded to hearing. The Plaintiff gave evidence and called one witness. In his evidence, the Plaintiff testified that he was registered as a co-proprietor of the suit property together with Kekuta Ole Morijo in 1976. He

produced as Plaintiff's Exhibit No.1 and Plaintiff's Exhibit No. 2 respectively, a certified copy of the register and a certificate of official search to prove that the suit property is registered in his name and that of Kekuta Ole Morijo as owners. The Plaintiff testified further that Kekuta Ole Morijo died on a date he could not remember but during his life time, they had no dispute or misunderstanding over the ownership of the suit property. Similarly, he has not had any problem with Kekuta Ole Morijo's wife and children. The Plaintiff testified that his problem was with the defendant who invaded the suit property in the year 2001 and laid a claim to it. The Plaintiff reported the invasion to the area District Commissioner for assistance but the matter was not resolved. The defendant thereafter entered the suit property forcefully and has since then been leasing the same out to third parties. The defendant has not heeded the Plaintiff's demand that he vacates the suit property. The Plaintiff testified that the defendant who is the area chief has told him that there is nothing the Plaintiff can do to him. The defendant according to the Plaintiff has also claimed that the Plaintiff being a Kipsigis is not entitled to the suit property which belongs to the Maasai community to which the defendant belongs. The Plaintiff testified that the defendant has no right to interfere with the Plaintiff's occupation and enjoyment of the suit property as the defendant has no proprietary interest on the same neither is he the legal representative of the estate of Kekuta Ole Morijo. The Plaintiff testified that the defendant has since chased him away from the suit property together with the widow of Kekuta Ole Morijo. The defendant has also placed a restriction against the title of the suit property without any lawful cause. The Plaintiff testified that the defendant has now leased the whole of the suit property to third parties who are now cultivating the same save for a small portion which is being cultivated by the Plaintiff's son.

3. The Plaintiff called one witness, RICHAS KIMUTAI KERICH (hereinafter referred to only as "PW2"). PW2 is the son of the Plaintiff. He told the court that the defendant has leased the entire land comprised in the suit property to third parties save for 12 acres which is being cultivated by him (PW2). He told the court that he had put up a house on the suit property but the same was burn down last year by arsonists. PW2 testified that the defendant who is claiming to be representing the family of Kekuta Ole Morijo is not occupying the suit property himself but has let the same to about twelve (12) people who are carrying out cultivation on the same. This evidence by PW2 marked the end of the Plaintiff's case.

4. The Plaintiff's advocate Mr.Otieno did not make any submission. He relied entirely on the Plaintiff's evidence and the evidence of the Plaintiff's witness and urged the Court to proceed and deliver judgment on the matter. I have considered the Plaintiff's case as pleaded and the evidence tendered in support thereof. The Plaintiff's claim against the defendant is based on trespass. In the book, **Clerk & Lindsell on Torts, 18th Edition at paragraph 18-01**, trespass to land is defined as consisting of **"any unjustifiable intrusion by one person upon land in the possession of another."** In the same book, it is stated that trespass is actionable at the suit of the person in possession of the land (paragraph 18-10) and that proof of ownership is a prima facie proof of possession (paragraph 18-110). In this case therefore, the Plaintiff was under a duty to prove to the court that the defendant has unjustifiably entered the suit property which is in his possession. I am satisfied from the testimony of the Plaintiff and his witness (PW2) and from the documents produced by the Plaintiff in evidence that the Plaintiff has discharged this burden of proof. The Plaintiff has proved that he is registered as co-proprietor of the suit property and that the defendant has without any lawful cause entered the suit property, assumed ownership thereof, evicted the Plaintiff therefrom and leased out a substantial portion of the same to third parties. The Plaintiff has also proved that the defendant has without any legal basis caused the land registrar, Transmara District to lodge a restriction against the title of the suit property thereby restricting the right of the Plaintiff as the co-proprietor of the suit property to deal with the same. The defendant did not defend this suit and as such did not place any material before the court to contradict the Plaintiff's evidence and that given by his witness. It is therefore my finding that the Plaintiff has proved his case against the defendant on a balance of probability. This finding takes me to the next issue namely, whether the Plaintiff is entitled to the reliefs sought in the plaint. On the evidence placed before this court, I am unable to declare the Plaintiff as the sole and exclusive owner of the suit property which is the first prayer in the Plaint. Copies of the register and certificate of official search that were produced by the Plaintiff in evidence show that the suit property is registered in the name of the Plaintiff and one, Kekuta Ole Morijo. It is not indicated in the two documents whether the ownership of the suit property by the Plaintiff and the said Kekuta Ole Morijo was on the basis of a joint tenancy or tenancy in common. The Plaintiff has claimed in the Plaint that the suit property was owned by him and Kekuta Ole Morijo as joint tenants. There is no evidence however in

proof of this claim. Section 101(1) of the Registered Land Act, Cap.300, Laws of Kenya (now repealed), provides that, when land is registered in the names of more than one person, it should be indicated whether those persons are joint proprietors or proprietors in common. In this case, the register does not show whether the Plaintiff and Kekuta Ole Morijo were joint proprietors or proprietors in common. In the absence of any indication as to whether the proprietorship herein was joint or in common, this court will have to revert to equity. It is a maxim of equity that “**equality is equity**”. Related to this, is the maxim that, “**equity leans against joint tenancies**”. It follows therefore that, equity will presume a tenancy in common where there is no express or other fair and practical basis upon which a property may be distributed among two or more claimants. In the circumstances, this court will presume that the Plaintiff and Kekuta Ole Morijo held the suit property as tenants in common. The estate of Kekuta Ole Morijo is therefore entitled to a half share of the suit property. The Plaintiff cannot therefore be declared the sole and exclusive owner of the suit property. Due to the foregoing, I enter judgment for the Plaintiff against the defendant as follows;

i. I declare that the Plaintiff is the absolute and exclusive owner of half undivided share in all that parcel of land known as L.R.No. Transmara/Moyoi/41;

ii. I issue a permanent injunction restraining the defendant by himself or through his servants and/or agents either jointly or severally from trespassing on and/or interfering in any manner whatsoever and howsoever with the Plaintiff’s activities or interest in all that parcel of land known as L.R.No. Transmara/Moyoi/41;

iii. I order the immediate removal of the restriction registered against the title of L.R.No. Transmara/Moyoi/41 on 20th March, 2001;

iv. The Plaintiff shall have the cost of this suit.

Signed, dated and delivered at KISII this 19th day of April, 2013

S. OKONG’O,

JUDGE.

In the presence of:-

No appearance for the Plaintiff
No appearance for the Defendant
Mobisa Court Clerk.

S. OKONG’O,

JUDGE.