



Bor & another (Suing as Legal Representative of the Estate of Philip Kibor-Deceased) v Kaguru & another (Environment & Land Case 359 of 2015 & 105 of 2018 (Consolidated)) [2022] KEELC 3245 (KLR) (8 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3245 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 359 OF 2015 & 105 OF 2018 (CONSOLIDATED)
SM KIBUNJA, J
JUNE 8, 2022

BETWEEN

SOSTEN KIPSONGOK BOR PLAINTIFF
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF PHILIP KIBOR-DECEASED

AND

DAVID WAITHAKA A.K.A WAITHAKA KAGURU DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 105 OF 2018

BETWEEN

DAVID WAITHAKA KAGURU PLAINTIFF

AND

SOSTEIN KIPSONGOK BOR DEFENDANT

JUDGMENT

1. Philip Kibor, the original Plaintiff, and now deceased, commenced this suit through the plaint dated August 21, 2015 that was amended on January 21, 2016 among others substituting Sosten Kipsongok Bor for the Plaintiff. The plaintiff seeks for the following prayers;

a) "A permanent injunction restraining the Defendant, his agents, servants, and/or assigns from entering into, occupying, fencing, selling, trespassing, encroaching, occupying, fencing and or otherwise interfering, with the Plaintiff's quiet possession, and/or enjoyment



of part of portion of land namely Eldoret Municipality Langas Phase II Sheet IV 64-68 and 73-77 (L R 8500).

b) An order directing the Land Registrar Uasin Gishu County through its authorised County surveyors to establish the correct boundary or beacon in respect of that parcel of land namely Eldoret Municipality Langas Phase II Sheet IV 64-68 and 73-77.

c) Cost and interest incidental to this suit.

d) Any such order or relief this court may deem just and fit to grant.”

The plaintiff avers that he is the legal representative of the estate of his late father, Philip Kibor Biego, who was the bonafide owner of the parcel of land known as Eldoret Municipality Langas Phase II Sheet IV 64-68 And 73-77 (L R 8500). That his late father had through a sale agreement of October 3, 1997 disposed 4.5 acres to be curved out of the parcel, to the defendant. That the Defendant had despite knowing the extent of his land, erected fences using the wrong beacons, and moving the initial demarcated beacons, with the sole intention to deprive the Plaintiff of his proprietary interest in the said parcel of land. That the defendant’s actions of moving, tempering, altering or changing the beacons is fraudulent, unlawful, illegal, malicious and amounts to an interference with the plaintiff’s right of ownership of the suit land.

2. The claim was disputed by the defendant through his statement of defence dated February 29, 2016, in which he sought for the plaintiff’s suit to be dismissed with costs. He averred that he purchased 4.5 acres of L R 8500 from the plaintiff’s late father, and has been in possession since 1977. That he also purchased one acre in L R 8500 from Georgina Jeruto Ngethe in 1981 to make his land 5.5 acres. That the suit land forms part of his matrimonial home, and neither the plaintiff nor his late father has been his neighbour.
3. David Waithaka Kaguru, the Defendant herein, subsequently filed a separate suit, being Eldoret ELC No 105 of 2018, vide the plaint dated September 3, 2018 against the Sosten Kipsongok Bor, the plaintiff as the defendant, seeking for:
 - a) A declaration that he is the lawful owner of all parcel of land known as Langas Phase II Sheet IV 64-68 and 73-77 located with Langas 8500 measuring 6 acres and the Defendant is a trespasser and should be evicted.
 - b) A permanent restraining the Defendant, his servants/agents, from trespassing into, occupying, interrupting, encroaching, encumbering and/or otherwise interfering with the plaintiff’s (and all people claiming under him) quiet possession and/or enjoyment, or in any way dealing with the parcel of land known as Langas Phase II Sheet IV 64-68 and 73-77 located with Langas 8500 measuring 6 acres.
 - c) Damages for malicious damage to property as per paragraph 11 of the plaint.
 - d) Costs of this suit
 - e) Any such other relief that this court may deem fit, just and expedient to grant.
4. The claim was opposed by the defendant through his statement of defence dated the 1st October, 2018. He among others averred that though the plaintiff had bought only 4.5 acres of the suit land, he has subsequently disposed of to third parties more than his entitlement. That Georgina Jeruto Ngethe was not the owner of the suit land and had no *locus standi* to sell part of the land to the defendant. That the remainder of the ten (10) acre land after providing for the 4.5 acres for the plaintiff belongs to



- the defendant, and the plaintiff is in trespass of that portion. That he had filed an earlier claim being Eldoret ELC 359 of 2015 against the plaintiff, that was pending in court.
5. The court directed that the two suit detailed above to be consolidated and heard together with ELC CASE NO 359 of 2015 being the lead file, and the issues raised in ELC 105 of 2018 be the basis of the Defendant's counterclaim.
 6. During the hearing, the Plaintiff called five witnesses, and testified as PW1. He testified that his late father was a member of Langas Farm Limited with $\frac{1}{2}$ share that translated to 10 acres of land, out of which he sold 4.5 acres to the Defendant vide an agreement dated October 3, 1977. PW1 further told the court that the Defendant started encroaching onto the parcel of land, and selling portions of the same to third parties. That despite complaints being taken to the Chief to resolve the alleged dispute, none came to fruition. That Philip Kiplagat Chemwok, the area chief, testified as PW2. He told the court that the late Philip Kibor and the Defendant were people familiar to him. That he had interacted with them when Philip Kibor approached him over a land dispute against the Defendant having encroached on his 10 acres of land. That after hearing the two adverse parties, he got to know that 4.5 acres of the suit land had been sold by the deceased to the Defendant. He further testified that the Defendant refused to take part in the agreement to engage a surveyor. That Albert K Kibenei, the then secretary to Langas Farm Limited, testified as PW3 that the company acquired a huge parcel of land, being parcel number (Langas Farm Registration Number 8500), with the intention to sell it to shareholders. He confirmed that the late Philip Kibor held a half share entitling him to ten acres of land. That he later learnt that the said deceased had sold 4.5 acres of his share to the defendant. Then Joash Ogongo and Juma Anselimu Sikhulu, elders in the area, testified as PW4 and PW5 respectively, along the lines of the testimony given by PW2.
 7. The Defendant testified as DW1 accepting the fact that the initial acreage sold to him by the deceased was 4.5 acres, as confirmed by the Plaintiff. It was his testimony that he further bought half an acre from the deceased to make a total of 5 acres after the deceased gave him vacant possession and relocating to Cheptiret. That he later sought for more land from the deceased who informed him that one of the acres he wished to purchase had already been sold to one Georgina Jeruto Ngethe. That he approached the said lady and bought the one acre of land from her, making him the owner of 6 acres. That however the documentation on that transaction could not be traced on account of the Post- election violence which was prevalent in his area resulting to his house being burnt. That the said parcel of land was later demarcated into becoming Langas Phase II Sheet IV 64-68 and 73-77 (L R 8500), measuring 6 acres which he acknowledged to have sold to third parties. He called Chrisostom Kipserem Maiyo, the former area chief, who testified as DW2, that no dispute existed between the Defendant and the deceased or anyone else during 1985-2005 period in relation to the six (6) acre parcel of land. That he was shocked by the attempts of the Plaintiff to lay a claim to a suit property in which he was not residing in for over 30 years ago.
 8. The learned counsel for the plaintiff and the defendant filed their written submissions dated February 28, 2022 and March 21, 2022 respectively.
 9. The following are the issues for the court's determinations;
 - a. Who between the parties is the registered proprietor of Langas Phase II Sheet IV 64-68 and 73-77 (L R 8500), the suit land, and its acreage.
 - b. Whether the plaintiff has established his claim against the defendant, and if so what order(s) to issue.



- c. Whether the defendant has proved his counterclaim against the Plaintiff, and if so what order(s) to issue.
 - d. Who pays the costs in the two claims.
10. The court has carefully considered the parties' pleadings, evidence tendered, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following conclusions;

- a. That before I consider the facts presented in support and opposition of the two claims, the issue of whether or not the suit is time barred, as submitted by the Defendant must be addressed first. This is because that submission has the effect of questioning the competence of the court to determine the issues raised in the suit, on the basis that the Defendant has been in occupation of the suit land for a period exceeding 30 years. The argument by the Defendant fails on two grounds; first that, the Defendant failed to raise the same in his pleadings or by way of an application through a preliminary objection and cannot be heard to raise it in his submissions, as parties are bound by their pleadings. That secondly, the Defendant's argument fails for reasons that, whereas he rightly makes reference to section 7 of the *Limitations of Actions Act* chapter 22 of Laws of Kenya, which provides that;

“ An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

He appears to be unaware of the provision of section 26 of the said statute which provides that;

“ Where, in the case of an action for which a period of limitation is prescribed, either

—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”
- b. That a glance into the facts of the case establishes the single fact that the matter in question is one that largely borders on fraud where the Plaintiff contends that the parcel of land sold by the deceased was 4.5 acres, and not 6 acres as alluded by the Defendant. The alleged encroachment dispute was first reported to the chief sometime in July, 2015 by the deceased which led to the Defendant being summoned on July 7, 2015. The suit herein was filed in 2015 by the deceased. Therefore, in accordance to section 4(1) of the *Limitations of Actions Act*, the Plaintiff's cause of action begun to run from July 2015, and he was rightly within the legal parameters to bring this claim in court. That the Defendant's argument that the suit was time barred therefore fails.
 - c. That it is apparent from the facts presented by both parties that each party is challenging the extent of the other's ownership of land herein. The Plaintiff has alleged that the Defendant is only entitled to 4.5 acres, while the Defendant has made a claim for the entire 6 acres. That it is trite that he who alleges must prove. The standard of proof in civil claims, like the instant



one, is on a balance of probabilities. Sections 107, 108 and 109 of the Evidence Act chapter 80 of Laws of Kenya provides that;

“ 107. Burden of proof

(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

Moreover, section 26 of the Land Registration Act No 3 of 2012 provides;

“ 26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

This court is therefore mandated by statute to give credence to any claim on ownership of land which can be verified by documentation within the provisions of section 26 of the Land Registration Act.

- d. That it has not been controverted that original proprietorship of the land parcel in question belonged to the deceased, through his half a share ownership at Langas Farm Limited. Both the Plaintiff and the Defendant are in agreement that vide a sale agreement dated October 3, 1977, the deceased was able to pass good title to the defendant of 4.5 acres of the suit land. Since this is not in contention this court accordingly finds the Defendant to have acquired good title of the 4.5 acres of the said land pursuant to the agreement dated October 3, 1977.
- e. The court now turns its eye on whether the Defendant has a legitimate claim to the other 1.5 acres, which is in dispute herein. The Defendant told the court that he further bought



additional half acre from the deceased, who granted him vacant possession, as he relocated to Cheptiret. The Defendant asked the court to take judicial notice of the Post-Election Violence during which his house was burnt with his documents, including the transaction in question. The Court indeed takes judicial notice of the hostile ramifications visited upon the victims of the Post-Election Violence in the country during that period. However, a court of law must at all times be a hallmark of justice delivery, which is sound and evidence led. With due respect to the Defendant, I find the averment that his documents got burnt during the PEV does not take away his legal obligation to tender proof in support of his claim to the suit property. If the court was to hold otherwise, what will stop other litigants from coming to court to lay claims of ownership over any property they desire, even where they have no evidence of entitlement? That even assuming that the Defendant's documents got burnt as alleged, there are other means to establish his claim over the half acre of land in dispute. The Defendant could have called witnesses who for instance, signed the agreement, as well as produce evidence of payment or other pieces of evidence that could have corroborated his averments. That in the absence of further pieces of evidence, this court is unable to find any legitimate claim to the half-acre of land as averred by the Defendant, and holds that the same does not, and should not be part and parcel of the Defendant's land.

- f. The Defendant has also laid a claim of 1 acre, which he claimed he bought from one Georgina Jeruto Ngethe, who had reportedly bought it from the deceased. In support of his case, he relied on an agreement between the two parties, and alleged that the initial agreement was part of the documents that had been burnt in his house. The Defendant also placed reliance on a letter dated December 14, 2015 to show that one Georgina Jeruto Ngethe had agreed to sell the parcel of land. The court notes that neither the agreement, nor the letter indicates the acreage of the land in question as one acre. The letter talks of $\frac{1}{4}$ acre, while the agreement filed on May 30, 2016 talks of $\frac{1}{2}$ of an acre. That both documents are alleged to have come from the said Georgina Jeruto Ngethe. That if it was true that the defendant had bought one acre of land from the said Georgina, why was the transaction not reduced into writing? Secondly, why was the said Georgina Jeruto Ngethe not called by the defendant as a witness to confirm the alleged transaction? The foregoing leads the court to the finding that the Defendant's claim over the one acre of land has not been established to the standard of proof required by the law. That it follows that the defendant's counterclaim, save for the fact that he is the proprietor of 4.5 acres of land and not 6 acres, is unmerited and is hereby dismissed.
- g. That flowing from the above findings, the plaintiff has proved to the required standard that the defendant entitlement to the suit land is limited to the 4.5 acres of the suit land he bought from the late Philip Kibor, father to the plaintiff. The prayers sought by the plaintiff through the amended plaint, includes permanent injunction against the Defendant from further encroachment onto the suit land. In the case of *Kenya Power & Lighting Co Ltd vs Sheriff Molana Habib* (2018) eKLR the court stated that:

“ A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

In addition to the injunction prayer, the plaintiff has requested the court for an order directing the Land Registrar Uasin Gishu County, through its authorised County surveyors to establish



the correct boundary or beacon in respect of that parcel of land namely Eldoret Municipality Langas Phase II Sheet IV 64-68 and 73-77. The court finds that as the Plaintiff has proved his claim on a balance of probabilities, there is need to establish and ascertain the boundary of the 4.5-acres portion of the suit land that belongs to the defendant, and to restrain the defendant from further interference of the remaining parcel

- h. That in view the nature of this litigation, the prior relationship between the defendant and the late Philip Kibor, and with a view of encouraging the parties to foster cordial relations, the court finds that each party should bear his own costs, notwithstanding the provision of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.
11. That the court finds for the Plaintiff against the Defendant in both the main suit and counterclaim and orders as follows;
- a. That the Defendant's claim in Eldoret ELC No 105 of 2018, that was taken as his counterclaim in the consolidated suits, has not been proved and is dismissed.
 - b. That the Plaintiff has proved his claim and judgment is hereby entered in his favour, against the Defendant in terms of prayers (a) and (b) of the amended plaint.
 - c. That each party to bear his own costs in both suits.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 8TH DAY OF JUNE, 2022.

S M Kibunja,J

Environment & Land Court - Eldoret

In the virtual presence of;

Plaintiff: absent.

Defendant: absent.

Counsel: Mr Omboto for Plaintiff

***Mr kinyanjui for Defendant**

Court assistant: Oniala

S M Kibunja,J

Environment & Land Court - Eldoret

