



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Case 2 of 2004

KIPROTICH MOSONIK PLAINTIFF

VERSUS

PAUL KIPTONUI KOECH DEFENDANT

JUDGMENT

The plaintiff Kiprotich Mosonik, filed suit against the defendant Paul Kiptanui Koech seeking the declaratory order of this court to declare the defendant to be a trespasser on a portion of land measuring 3 acres in plaintiff's parcel No. ***Kericho/Silibwet/47***(*herein after referred to as the suit land*). The plaintiff further prayed for an order of this court to have the defendant deliver vacant possession of the suit land or in default thereof this court issues an order evicting the defendant from the suit land. The plaintiff averred that the defendant had in the year 2000 without any justifiable cause entered into and remained in possession of the 3 acres out of the plaintiff's parcel of land comprised of part of the suit land. He urged this court to grant the prayers in his plaint.

The defendant entered appearance and filed a defence. In his defence, he stated that he was not in occupation of any parcel of land belonging to the plaintiff. He denied that he had occupied part of parcel No. ***Kericho/Silibwet/47***. He averred that he was occupying parcel No. ***Kericho/Silibwet/52*** which was adjoining the parcel of land of the plaintiff. He further stated that the dispute between himself and the plaintiff had been adjudicated upon at the Bomet Resident Magistrate's court and determined in his favour. He urged the court to dismiss the plaintiff's suit with costs.

At the hearing of the suit, the plaintiff testified in support of this case. He stated that he was the registered owner of all that parcel of land known as ***Kericho/Silibwet/47*** measuring 2.7 hectares. He produced a copy of the title in respect of the said parcel of land as plaintiff's exhibit No.1. He also produced a registry map of the area showing the location on the ground of his parcel of land (*produced as Plaintiff's exhibit No.3*) and a certificate of search of the suit land which was produced as *Plaintiff's exhibit No.2*. He stated that the defendant had encroached on his parcel of land and occupied 3 acres thereof without any lawful justification. He denied the allegation by the defendant that the portion of land that the defendant was occupying comprised of parcel of land known as ***Kericho/Silibwet/52***.

The plaintiff testified that due to the dispute between him and the defendant over the said parcel of land, several criminal cases for trespass had been filed in the subordinate court. He produced the proceedings of the criminal case as *Plaintiff's exhibit No.4*. He denied that the defendant had purchased the suit land from one Paul Kiprono Koech who is the son to his brother. He stated that the said Paul Kiprono Koech owned a different parcel of land to the suit land. He was adamant that the parcel of land occupied by the defendant comprised his parcel of land which is registered as ***Kericho/Silibwet/47***. He denied that he

owned or was the registered owner of a parcel of land known as **Kericho/Silibwet/53**.

He insisted that the defendant had occupied part of his parcel of land measuring 0.7 hectares leaving him to occupy a portion of land measuring 2.1 hectares. The plaintiff urged this court to grant him the prayers sought in his plaint.

The defendant called four witnesses. The defendant testified that he purchased the parcel of land known as **kericho/Silibwet/52** from Paul Kiprono Koech for a purchase consideration of Ksh.165,000/= which he paid in full. He produced the agreement as *Defendant's exhibit No.3*. He attended the Land Control Board with the said Paul Kiprono Koech and the said parcel of land was transferred to him. He produced a title in respect of the said parcel of land as *Defendant's exhibit No.1*. He also produced a certificate of search as *Defendant's exhibit No.2* which indicated that he was the registered owner of the parcel of land known as **Kericho/Silibwet/52**.

The defendant testified that he took occupation of the said parcel of land. It was after he had taken occupation of the said parcel of land that the plaintiff started claiming that he had occupied a portion of his parcel of land known as **Kericho/Silibwet/47**. The defendant reiterated that he is occupying parcel **No.Kericho/Silibwet/52** and not part of parcel No. **Kericho/Silibwet/47** as claimed by the plaintiff. He testified that the plaintiff had referred the dispute to the Land Disputes Tribunal which determined the case in his favour. He recalled that before he had purchased the said parcel of land, he had taken a surveyor to the ground who confirmed the actual position and the boundaries of the said parcel of land. He testified that the said parcel of land measured 0.7 hectares. He reiterated that the plaintiff had no claim against him.

DW2 Samuel Murson Arap Soi, a resident of Silibwet, and a neighbour to both the plaintiff and the defendant testified that Paul Kiprono Koech had inherited parcel **No. Kericho/Silibwet/52** from his late father and later sold the same to the defendant. He testified that he had witnessed the agreement when the defendant purchased the said parcel of land from the said Paul Kiprono Koech. He denied that parcel **No. Kericho/Silibwet/52** was part of parcel **No. Kericho/Silibwet/47**. DW4 Joseph Maritim Sitonik similarly testified that the place where the defendant was occupying comprised of parcel **No. Kericho/Silibwet/52** and not parcel **No. Kericho/Silibwet/47**.

DW3 Paul Kiprono Koech testified that he sold parcel **No. Kericho/Silibwet/52** to the defendant after he had inherited the same from his late father. He testified that the parcels of land registered as **Kericho/Silibwet/45, 47, 52 and 53** were originally one parcel of land before the same were subdivided and distributed to Kipkoech Mosonik and Kiprotich Mosonik. The two were brothers. Kiprotich Mosonik, his late father owned parcel **No. Kericho/Silibwet/52** which was a distinct parcel of land from that owned by the plaintiff which is parcel **No. Kericho/Silibwet/47**. He reiterated that he had sold the said parcel of land to the defendant which was distinct and separate from the plaintiff's parcel of land.

After the close of both the plaintiff's and the defendant's case, the plaintiff and the defendant agreed by consent on the 26th of July 2006 to have the District Surveyor, Bomet visit the two parcels of land in dispute in this case and determine their true position on the ground. The survey fee was to be paid by the plaintiff. The surveyor was required to file his report in court within 30 days of the said date. Unfortunately, by the time this court wrote this judgment, no such report had been availed to the court.

The issue for determination by this court is therefore whether the plaintiff has established on a balance of probabilities that the defendant encroached into the suit parcel of land so as to entitle this court to grant him the orders sought. The real dispute between the plaintiff and the defendant is whether the parcel of land occupied by the defendant is or is not part of parcel **No. Kericho/Silibwet/47**. Whereas the plaintiff is convinced that the defendant has occupied part of his said parcel of land, the defendant on the other hand has testified that he occupies a distinct and separate parcel of land which is different from that of the plaintiff.

Having carefully evaluated the evidence adduced in this case, including the documentary evidence that was adduced by both the plaintiff and the defendant, it is clear that the issue in dispute would have

been resolved if the surveyor had presented his report to the court. It was the plaintiff who was mandated to take the surveyor to the two parcels of land so that he could determine the true position on the ground of the two parcels of land claimed by the plaintiff and the defendant. The plaintiff chose not to avail the said surveyors report to this court. This court would therefore determine this case based on the evidence on record.

Certain facts are not in dispute in this case. It is not disputed and indeed it was established by both the plaintiff and the defendant that they are the registered owners of parcels **No. Kericho/Silibwet/47 and Kericho/Silibwet/52**. Parcel **No. Kericho/Silibwet/47** measures 2.8 hectares according to the copy of the title which was produced in court by the plaintiff as *Plaintiff's exhibit No.1* whereas parcel **No. Kericho/Silibwet/52** measures 0.7 hectares. The defendant and his witnesses gave evidence on how the said parcel of land came to be registered in his name. The defendant purchased the said parcel of land from one Paul Kiprono Koech who is a nephew of the plaintiff; the said Paul Kiprono Koech is the son to the brother of the plaintiff known as Kipkoech Mosonik who is now deceased. The said Paul Kiprono Koech inherited the said parcel of land from his late father and later sold it to the defendant.

I believed the testimony of the defendant when he testified that he had conducted a search at the Land Registry as regard the said parcel of land before he purchased it from the said Paul Kiprono Koech. He confirmed that the said parcel of land known as **Kericho/Silibwet/52** was registered in the name of the said Paul Kiprono Koech. He produced the certificate of search as *Defendant's exhibit No.2*. After the said parcel of land was transferred to the defendant in 1999, he took occupation of the same. However it is apparent that the plaintiff thought that the defendant had occupied part of his parcel of land known as Kericho/Silibwet/47. The dispute was referred to various fora for determination but unfortunately there seem to have been no solution found to the dispute. The dispute had mutated into a criminal case for trespass where the plaintiff was tried and convicted on his own plea of guilty. The proceedings of the case were produced as *Defendant's exhibit No. 4*.

I have evaluated the facts of this case. The plaintiff's claim against the defendant would succeed only if he can establish that the parcel of land which the defendant is occupying is part of the suit land and not parcel **No. Kericho/Silibwet/52**. The plaintiff has failed to discharge this onus of proof placed on him. Indeed the defendant has established on a balance of probabilities that parcel **No. Kericho/Silibwet/52** is a distinct and a separate parcel of land from parcel No. Kericho/Silibwet/47 which is owned by the plaintiff. The plaintiff has not therefore established that the defendant has encroached on his parcel of land.

In the circumstances of this case therefore, the plaintiff's suit must fail. It is hereby dismissed with costs.

DATED at KERICHO this 2nd day of November, 2006.

L. KIMARU

JUDGE