



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 25 OF 2012

JOSEPH WANYAMA KIBIRA.....PLAINTIFF

VERSUS

BOARD OF MANAGEMENT ST. TERESA SECONDARY SCHOOL.....1ST DEFENDANT

HASSAN NDAMWE WAKOLI.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. By an amended plaint dated **9/10/2015**, the plaintiff sought the following orders against the defendants jointly and severally:-

(a) **General damages.**

(b) **A mandatory injunction compelling the defendants to reinstate the original common boundary between the plot No. 105 and plot No. 106 forming part of Chepkorok Farm known as LR No. 5777/3.**

(c) **A permanent injunction restraining the 2nd defendant from interfering with the affairs of or subdivision Sikhendu Farm LR No.5777/3 into 126 plots as decreed as in Kakamega High Court Civil Miscellaneous Application No. 42 of 1995.**

(d) **Costs of the suit as well as interest at the court rates.**

(e) **Any other or further relief as this honourable court can deem fit to grant.**

THE PLEADINGS

The Plaint

2. In his claim, the plaintiff averred that he is a member of the **Kitale Chepkorok Farm** which is the registered proprietor of **Chepkorok Farm** which is **Land Reference No. 5777/3** situate at Sikhendu in Trans Nzoia. By an order of the court sitting at Kakamega the farm was subdivided into **126** portions and portion **Nos. 105** and **106** were allocated to the **1st** defendant and the plaintiff respectively. However on **3/8/2011** the **2nd** defendant together with the principal of the **1st** defendant and while also accompanied by armed police officers allegedly trespassed onto the plaintiff's land and fixed some boundary beacons thereon, thereby introducing a new boundary inside the plaintiff's plot, purporting it to be the boundary between parcels **Nos. 105** and **106**. It is pleaded that the **2nd** defendant acted outside the scope of his employment with the government and he is personally liable for the trespass.

The Defence

3. In the joint statement of defence and counterclaim dated **20/3/2012**, the defendants denied the plaintiff's claim and stated that the plaintiff has never been a member of the Company and that has never had a share therein, but admitted that the plaintiff was the son of one Veronica Kibira who was in her lifetime a member of the Company. Further they pleaded that the decree in **Kitale Chief Magistrate's Court Land Case No. 12 of 1999** in which the plaintiff's mother was a defendant, and which she never appealed against, entitled the **1st** defendant to **5 acres** in Chepkorok Farm. A preliminary point was also raised to the effect that the plaintiff, having no grant of letters of administration over his deceased mother's estate, has no capacity to bring this suit. The defendants aver that when the decree in **Kitale Chief Magistrates**

Court Land Case No. 12 of 1999 was passed on to the District Commissioner Trans Nzoia (DC) by the Resident Magistrate, Kitale for execution, the DC's instructions flowed down through the ranks so as to reach the 2nd defendant who was thereby required to provide security to the District Surveyor who was required to proceed to the ground to execute the decree, and that the acts complained of in this suit by the plaintiff were done not by the defendants but by the District Surveyor. The defendants further aver that in any event the said acts of the District Surveyor were lawful, and the suit is bad in law for non-joinder of the District Surveyor Trans Nzoia, the Attorney General and Chepkorok Farm Ltd. The defendants deny that the suit against the 2nd defendant in his personal capacity is competent as they allege that he had acted as a servant of the Government of Kenya. The defendants also raised a dispute regarding the numbering of the plots in question, alleging that the 1st defendant owned plot number **61** and not **105**, and that the plaintiff does not own plot number **106** as alleged.

4. The 1st defendant stated in its counterclaim that it owns plot No. **61** - Chepkorok Farm; that the original plaintiff's mother Veronica Kibira, among others, had been ordered by the court in **Kitale CMCC Land Case No. 12 of 1999** not to interfere with the **5 acres** belonging to the 1st defendant; that the plaintiff possesses no *locus standi*, having not secured letters of administration to his late mother's estate and that plaintiff has committed trespass on the 1st defendant's land. The 1st defendant in his counterclaim sought a permanent injunction restraining the plaintiff in the original suit and anyone claiming under him from trespassing onto plot number **61**, costs of the suit and interest.

Reply to Defence and Defence to Counterclaim

5. The plaintiff filed reply to defence and defence to counterclaim dated **3/4/2012** and denied the claims of the defendants made therein.

Reply to Defence to Counterclaim

6. The defendants filed a reply to defence to counterclaim dated **11/4/2012** denying the allegations made therein.

Evidence for the Plaintiff

7. **PW1**, the plaintiff herein testified on **19/6/2014** and on **11/4/2018**. It is his evidence that he owns plot number **106** in the Chepkorok farm which measures **5.67 ha**; that **5** parcels in the farm are public utilities while **121** are owned by individuals; that his plot neighbours the 1st defendants' plot which he identified as plot No. **105** which had been set aside as a public utility by the company and which measures **2.02 Ha**; that the 2nd defendant is Chief of Sikhendu Location. He narrated how the 2nd defendant in the company of the District Surveyor and policemen and in the added company of school officials allegedly entered his land and erected beacons thereon. He stated that the boundary between the school and his land is separated by a road of about **9 metres** in width; the invaders announced the proper boundary between the two parcels to be as per the newly erected beacons. The plaintiff averred that a previous survey had been conducted on the land following the issuance of a consent of the Saboti Land Control Board and pursuant to the ruling in **Kakamega High Court Misc. Application No. 42 of 1995** which ordered the land to be divided into **126** portions. However the 2nd defendant wrote a letter seeking another consent of the land control board authorizing **856** subdivisions.

8. While under cross-examination by Mr. Ngeywa, the plaintiff denied that his mother had any land in Chepkorok Farm, and that his mother was only in occupation of his land. However he admitted to not producing any company receipt or share certificate in his evidence. He averred that a **1996** survey brought his plot into existence.

9. **PW2, Felix Kipkemboi Biwott** testified on **30/4/2019**. He adopted his statement recorded on **20/6/2016** as his evidence-in-chief. His evidence is that he has been the secretary to the Chepkorok Farm Ltd since its inception in **1975**; he produced the original memorandum and articles of association and certificate of incorporation of Chepkorok Farm Limited; he identified the plaintiff as one of the members of the company and as the owner of plot number **106** measuring **5.67 ha**; that the 1st defendant owns plot no **105**; that there is a road between the two plots; that the Company land was subdivided into **126** portions to cater for **121** members and **5** public institutions including the 1st defendant as per the consent of the land control board (**P. Exhibit 2**) which was upheld by the court in **Kakamega Misc. Appl. No. 42 of 1995**; he produced a court decree (**P. Exhibit 14**) approving the subdivision as per the consent marked "**P. Exhibit 2.**" He also produced a copy of a list of members as **P. Exhibit 6** which showed the plaintiff's plot and the 1st defendant's plot as Nos. **106** and **105** respectively. He denied that the plaintiff's mother was a member of Chepkorok Farm Limited. He stated that plot No. **105** has lesser acreage on the ground than indicated in records as it had been encroached on. However he did not disclose the encroachers. Under cross-examination by Mr. Ngeywa he stated that the company had filed a case, **No. 145 of 2015** seeking nullification of the consent for **856** subdivisions but gave no indication of how that case ended. He stated that he could not tell the current acreage of the school land on the ground at present.

10. **PW3, Protus Muindi**, the County Surveyor Trans Nzoia testified on **1/10/2019**. His evidence is that he became the County Surveyor Trans Nzoia on **1/7/2019** and has custody of land maps in Trans Nzoia County. His evidence is that the Chepkorok Farm is subdivided into **126** plots. He produced the relevant map as **P. Exhibit 13**. Upon cross-examination he admitted to having known of the history of the suit land only through reading the records, and that the County Surveyor Trans Nzoia in the year **2010** was called Hussein. He admitted that he could not trace the school land in the map that he had just produced and that he had not visited the land on the ground. He admitted that there are more than **126** occupants in the farm and that **P. Exhibit 13** (a land map of Chepkorok Farm) was a year **2009** edition.

11. **PW3's** evidence marked the close of the plaintiff's case.

Evidence for the Defendants

12. The defence called **Bainito Ombudu Hussein**, former County Surveyor, Trans Nzoia as **DW1**. It was his evidence that he had worked as County Surveyor Trans Nzoia from **2010** to **2019** when he retired and that he had discharged his duties with regard to Chepkorok Farm. Part of those duties were to implement a court order in **Kitale CMCC Land Case No. 12 of 1999**. He produced a copy of a decree which according to him he went to implement on the ground as **D. Exhibit 1**; He testified that he then prepared a report dated **19/3/2012** which he

produced as **D. Exhibit 2**. He was to demarcate **5 acres** being the 1st defendant's land on the ground. The dispute at that time was between Veronica Kibira and Isaac Kiboi on the one part and the school on the other. The chief of the location then provided him with security for the exercise. At the time of the exercise he had a map for the farm which reflected **856** plots. He visited plots **Nos. 1, 60 and 61** on the ground. According to **DW1**, Veronica (the plaintiff's late mother) was the owner of plot **No. 1**; Isaac Kiboi the owner of Plot **No. 60** and the 1st defendant the owner of plot number **61**. Further, the map he relied on during the demarcation exercise was the official map at the time of his retirement. **P. Exhibit 13** was the first survey map for Chepkorok Farm which caused much tension on the ground prompting **DW1's** predecessor, one *Peter Wanyama* to request in a letter dated **13/3/2009 (D. Exhibit 3)** to the Director of Surveys to withdraw it. He produced a letter (**D. Exhibit 5**) from the Director of Surveys advising the Chief Land Registrar that the subdivision scheme for **126** plots had been withdrawn and a letter from the Director of Surveys dated **27/7/11 (D. Exhibit 4)** to the District Surveyor Trans Nzoia stating that the subdivision scheme for **856** plots had been adopted. He also confirmed that the farm then had **856** plots. He produced the map **Saboti/Sikhendu/Bk 5 (Chepkorok)** Trans Nzoia as **D. Exhibit 6 (Sheet No 2)** on which he stated the land subject matter of this suit fell. **DW1** also stated that he relied on several supporting documents to compile the map **D. Exhibit 6** including a consent for subdivision and an area list for **856** parcels. Upon payment of the required fees the map was forwarded to the Commissioner of Lands vide a letter dated **31/10/2011 (D. Exhibit 7(a))**, the letter of consent as **D. Exhibit 7(b)** and Area List as **D. Exhibit 7(c)**. According to the area list whose copy was produced, Veronica Kibira the plaintiff's late mother was the owner of plot **No. 1** while plot **No. 60** and **61** belonged to Isaac Kiboi and the 1st defendant respectively.

13. DW2, Justus Chatty Wafula, testified on **26/2/2020**. His evidence is that he is the Principal at St. Theresa's Secondary School, Sikhendu and custodian of the school's Board of management records; that the school occupies a portion of less than **5 acres** while the rest of its entitlement is occupied by the plaintiff; he stated that the school's parcel is **No. 61**; that the plaintiff's mother had a land dispute with the school and she and one Isaac Kiboi had occupied a portion of the school land each. The school filed a land disputes tribunal case and was awarded the **5 acres**. A decree emanated from that Tribunal award and the plaintiff's mother filed **HC Misc. No. 48 of 1999** challenging that decree and claimed ownership of the land, but she failed to prosecute the suit and the decree was executed. He stated that the plaintiff was never a party to the proceedings in the dispute between his mother and the school. However the plaintiff is currently in occupation of the land instead of his mother who is now deceased.

14. DW3, Hassan Ndamwe Wakoli, the Sikhendu area Chief, testified on **4/3/2020**. He adopted his statement recorded in this case on **20/3/2012** as his evidence-in-chief. The summary of his evidence is that there was a protracted dispute between buyers of the suit land which according to him went through the land disputes tribunal level to the Provincial Land Appeals Tribunal and then to court where it assumed the reference **Eldoret HC No. 36 of 1986**. In the list of members appearing in the Arbitration panel proceedings [(**D. Exhibit 9 (b)**)] Veronica, the plaintiff's mother appeared as member number **34** with an entitlement of **11.26 acres** prior to the factoring in of public utilities whose provision later reduced each member's land. Therefore according to **DW3**, Veronica and not the plaintiff was among the first **121** members of the farm. The witness testified that Isaac Kiboi ceded land to the school but Veronica did not. Later on some members sold land and membership increased to **856**. Also, a consent was obtained on **2/7/2004** authorizing the subdivision of the farm into **856** plots and the said letter of consent of the Saboti Land Control Board has not been nullified by any court. According to him, **DW3** was instrumental in writing to the Land Control Board (L.C.B.) to facilitate the issuance of an updated LCB consent reflecting the increase in the number of members from **121** to **856**, but averred that the application for consent was lodged by members of the farm and the Board agreed with it and gave the members the updated consent. Later on cross-examination he stated that he was not present when the matter said consent was deliberated upon by the Board. He maintained that he could not have proceeded to the suit land together with the District Surveyor and the security team had there been no court order issued, and he could not have gone there in his private capacity. He also stated that the plaintiff had never approached him for the necessary preliminary steps towards lodging succession proceedings in respect of his late mother's estate.

15. DW4, Marasi Isaac, a Record Management Officer stationed at Kitale Law Courts Archives. He produced the original file record for **Kitale SPMCC Land Case No. 12/99** as **D. Exhibit 10 (a)** and **Kitale HC Misc. No. 48/99** as **D. Exhibit 10(b)** respectively.

16. The defence then closed its case. Subsequently, by a consent of the parties the defendant's counterclaim was deemed to have been heard alongside the plaintiff's suit and the evidence on the record adopted in relation to the counterclaim.

SUBMISSIONS

17. The plaintiff filed his written submissions filed on **10/6/2020**. I have perused the file record and found no submissions filed on behalf of the defendants.

ANALYSIS AND DETERMINATION

18. This court finds that the major issues for determination are as follows:-

- a. Was it proper for the 2nd defendant to be enjoined in his personal capacity in the suit and if not, should the suit against him be summarily struck out?**
- b. Does the plaintiff possess locus standi to lodge and maintain the suit against the defendants?**
- c. Did the defendants trespass on the plaintiff's land?**
- d. Should a mandatory injunction issue compelling the defendants to reinstate the original common boundary between the school land and the land occupied by the plaintiff?**
- e. Should a permanent injunction issue restraining the 2nd defendant from interfering with the affairs of or subdivision of the Farm?**

f. Is the plaintiff entitled to general damages?

g. Who should bear the costs of the suit?

19. The issues are addressed hereinbelow:-

(a) Was joinder of the 2nd defendant to be in his personal capacity in the suit proper and if not, should the suit against him be summarily struck out?

20. The plaintiff explicitly pleaded in **paragraph 8** of his amended plead that the 2nd defendant was enjoined as a defendant in his personal capacity. However in **paragraph 6** of the same pleading he describes the circumstances in which the 2nd allegedly trespassed onto the land he occupies. He stated that he and the principal of the 1st defendant's school and armed administration police officers entered the suit land and planted beacons thereon. No mention was made of the District Surveyor in that pleading. However in his evidence given in court on **19/6/2014**, the plaintiff stated that the 2nd defendant was accompanied by the District Surveyor.

21. In his evidence the 2nd defendant averred that he would not have visited the plaintiff's land if there had been no court order and he did not therefore visit the site in his personal capacity. The County Surveyor corroborated his statement and stated that there was a court decree issued on **25/3/2009** which had to be implemented. The 2nd defendant who also testified as **DW3** also narrated how the instructions flowed from the office of the District Commissioner through the District Officer down to the 2nd defendant's office for provision of security for implementation of the court order. Indeed the 3rd limb of the decree that the County Surveyor went to implement on the land expressly gave the County Surveyor the mandate to do so. By the same logic employed by the plaintiff and for fairness in his joinder of the 2nd defendant in his personal capacity, the County Surveyor ought then to have been enjoined in the suit in his personal capacity but was not enjoined in this suit at all. So should have been the school officials. In this court's view the plaintiff's suit against the 2nd defendant in his personal capacity is not supported by any evidence to warrant such joinder. However as the presence of the 2nd defendant in the activities that led to the filing of the suit are not in doubt, and the provisions of the **Civil Procedure Act** and rules are such that no suit may be defeated solely on account of non-joinder or misjoinder of parties. The 2nd defendant's joinder in his private capacity will be preserved with the attendant consequence that he merits costs of the suit against the plaintiff.

(b) Does the Plaintiff possess locus standi to maintain the suit against the Defendants?

22. The issue of *locus standi* of the plaintiff revolves around whether the plaintiff was an original Chepkorok Company Ltd member owning land in the Company Farm at Sikhendu or whether the land was owned by his mother, Veronica Kibira.

23. Much oral and documentary evidence has been adduced in respect of this issue and in view this is an issue that could only have been determined by way of evidence and not solely by submissions as a preliminary objection. The plaintiff's *locus* in this case is severely affected by the fact that there are records including litigation records that indicate that the original dispute regarding the suit land was between the plaintiff's mother and the 1st defendant's school. She is reflected as the 1st respondent in the Land Disputes Tribunal case proceedings dated 4/11/1998. In the body of the proceedings she is stated to have claimed ownership of the suit land. The plaintiff is not mentioned anywhere in those proceedings. The evidence of the probe committee member *Mr. Samuel Ngeiywa* during the course of the proceedings indicated that when school land was demarcated it was Veronica's land that was affected and that she had been compensated for her loss. Subsequently when the elder's award was adopted by the Magistrate's Court as required by law it was the plaintiff's mother who approached court in 1999 in Kitale SPMCC Land Case No. 12 of 1999 seeking a stay of execution and the plaintiff was not mentioned anywhere. At the time of the execution of the decree in Kitale CMCC Land Case No. 12 of 1999 the plaintiff and his brother attended the exercise carried out by the District Surveyor and they are reflected in the District Surveyor's report as "*sons to the late Veronica Kibira.*" In Kitale HC Misc. Application No. 48 of 1999 which the plaintiff acknowledged to have been filed, Veronica Kibira was the *ex-parte* applicant and she swore the verifying affidavit claiming to own 14 acres in Chepkorok farm by virtue of her holding two share certificates Nos. 155 and 157 in the Chepkorok Farm Co Ltd. She also deposed in the same affidavit that she had occupied the land since 1971 and that the probe committee demarcated part of her "*land and gave it to St Teresa Secondary School.*" **There can be only one** St Teresa Secondary School in Sikhendu Location which is the subject matter of this suit and that must be the school run by the defendants. There can also be only one parcel lying contiguous to the St. Teresa School which was owned by Veronica, and which was affected by the dispute then, and the plaintiff has not demonstrated that the parcel he is claiming is a different one.

24. Besides, the proceedings in **Kitale HCCA No. 26 of 1986** upheld the decision of the panel of elders who dealt the dispute by consent of both parties and in the record of proceedings of that panel the name Veronica Kibera appears as member **No. 34** while no name of the plaintiff appears therein. This court therefore safely concludes that the parcel claimed by the plaintiff is one and the same as the one claimed by the deceased Veronica Kibira.

25. By virtue of that observation it is clear that the plaintiff was suing in respect of property owned by his late mother and therefore needed authorization by the court, he required a grant of letters of administration in accordance with the provisions of **Section 45** of the **Law of succession Act** which he never produced before court in evidence and he may be termed as intermeddler more so for the reason that at least one of the possible beneficiaries to Veronica Kibira's estate is named in the Survey Report produced by **DW1**. For this omission the plaintiff lacks *locus standi* to lodge or maintain this suit and this suit is therefore dismissed with costs to the defendants.

26. As the second issue above effectively disposes of the entire suit, this court finds it not necessary to delve into the merits of the rest of the issues listed for determination as the determination on the plaintiff's *locus standi* in this suit has rendered the determination thereof a mere academic exercise.

27. The following are the issues for determination with regard to the 1st defendant's counterclaim dated **20/3/2012**:-

(a) Should an order of permanent injunction to restrain the defendant from trespassing on plot No. 61 - Chepkorok Farm issue against the defendant in the counterclaim as prayed.

(b) Who should meet the costs of the counterclaim?

28. It is trite that the counterclaim is a suit separate from the plaint and it may be granted even where the plaint has been dismissed as in the instant case. (See **Order 7 rule (3)** of the **Civil Procedure Rules**). This court having not declared that the same can not be conveniently disposed of in this suit, it is bound to pronounce itself on it alongside the determination in respect of the plaint. Dismissal of the plaintiff's suit therefore left the determination on the counterclaim pending, and the plaintiff's participation in the confirmation of the consent dated 2/6/2020 in the proceedings of 16/6/2020 is an approbation of this fact from which they are estopped from retracting.

29. I have considered the evidence on the record and I am satisfied that while it did not support the plaintiff's claim to the required standard, it fully proved on a balance of probabilities both the defence of all the defendants and the counterclaim of the 1st defendant.

30. To begin with, the court found on the basis of the evidence on record that the plaintiff in the main suit had no *locus standi* to deal with the land or even bring the main suit and that the joinder of the 2nd defendant in his private capacity was not warranted. Further, by the same evidence, all the defendants have proved that the 1st defendant owned the land. They have also established by evidence of an expert, the County Surveyor who visited the site to implement an order of the court in **Kitale CMCC Land Case No. 12 of 1999** that the 1st defendant's school's plot is **plot No. 61**. It was evident from the record that the demarcation map that that former County Surveyor Bainito Ombudu Hussein, (**DW1**) used was the map that was in existence by the time he left office on retirement, and that the evidence of his successor (**PW3**) which purported to contradict that position was weak and unsupported by any first hand evidence of experience at the locus of the dispute. The beacons erected by the former County Surveyor on the ground in the exercise conducted to implement the court order in **Kitale CMCC Land case No. 12 of 1999** are the proper beacons demarcating the boundary between land owned by the school and the land occupied by the plaintiff in the main suit. It is surprising that **PW3** could not trace any school plot on the map that he had just produced before court yet the school is admitted to exist on the ground by all parties including the plaintiff, and its acreage has been established to be 5 acres.

31. In the circumstances outlined above I find that the 1st defendant has proved its counterclaim on a balance of probabilities and therefore it deserves judgment against the defendant. An order of injunction must therefore issue on the 1st defendant's counterclaim restraining **Joseph Wanyama Kibira**, his agents, servants and or family members and/or any other person claiming interest through him from trespassing on **Plot No. 61 Chepkorok Farm** belonging to **St Theresa's Secondary School - Sikhendu**.

32. The 1st defendant's counterclaim dated 20/3/2012 is therefore allowed and I issue the following final orders in favour of the plaintiff in the counterclaim against the defendant therein:-

a. An order of permanent injunction restraining Joseph Wanyama Kibira, his agents, servants and/or family members and/or any other person claiming interest through him from trespassing on Plot No. 61 Chepkorok Farm belong to St. Theresa's Secondary School-Sikhendu.

b. The defendant in the counterclaim shall bear the costs of the counterclaim.

It is so ordered.

Reviewed, Dated, and Signed at Kitale via electronic mail on this 11th day of February, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.