



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT ELDORET**

**ELC NO. 874 OF 2012**

**PATRICK MUCHIRI.....PLAINTIFF**

**VERSUS**

**AGNES MUMBI.....DEFENDANT**

**JUDGEMENT**

By a plaint dated 15<sup>th</sup> May 2012 the plaintiff sued the defendant seeking the following orders:

- a) That the purported the survey ordered vide Eldoret PMCC 746 of 1987 cannot be undertaken outside 12 years of the judgment and therefore unenforceable.
- b) Any claim by the defendant to the late John Mungai Muchir's land namely. KAPSABET/KAPSARET BLOCK 1 (Yamumbi)/ 353 based on aforesaid decree is incapable of enforcement.
- c) The defendant be permanently restrained from encroaching onto or any other way interfering with parcel No. KAPSABET/KAPSARET BLOCK1(Yamumbi)/ 353 to the detriment of the beneficiaries of the estate of the late John Mungai Muchiri

**PLAINTIFF'S CASE**

PW 1 testified and stated that the Plaintiff filed the suit in his capacity as an administrator of the estate of the late John Mungai Muchiri who is the registered proprietor of the suit land. PW1 produced copies of titles to L.R No. KAPSARET/KAPSARET BLOCK/YAMUMBI / 353 & 354 respectively and that title No 353 was registered in the name of his father.

PW1 also produced the orders from Eldoret SPMCC 746/1987 that ordered a resurvey of the suit land but he stated that the case was a boundary dispute between the deceased proprietors of L.R KAPSARET/KAPSARET BLOCK /YAMUMBI /353) and L.R KAPSARET/KAPSARET BLOCK /YAMUMBI /354 (the late Mr. Gitahi). He further stated that the late Mr. Gitahi had gone beyond his boundary and encroached onto the suit land and further set up structures.

It was PW1's evidence that the matter was referred to a panel of elders who deliberated upon it and advised the court that in the interest of justice parties remain as they were thus status quo be maintained and a survey be promptly undertaken. That Mr. Gitahi had settled on the suit land hence evicting him would occasion injustice and produced proceedings and minutes as Pex 4 and 5 respectively.

further testified that the survey was not done until sometime in 2011 which was a span of about 19 years since the order was granted. PW1 stated that there was nothing preventing survey before 12-year period and that the time for enforcement of the court order was not extended. It was further his evidence that at time of the purported survey the status quo obtaining and informing orders of the survey had been overtaken by events and as such survey was no longer applicable within the term and meaning of the decree which was based on the elders' award.

PW I further testified that the illegal survey was undertaken when the defendant's structures were not on the ground. It was PW1's evidence that the structures had been burnt down during the 2007 -2008 post-election violence and the defendant's attempts to be resettled by the Ministry of Special programs were not successful since the land was disputed. That parties were advised by the liquidator of former Yamumbi Farmers' Cooperative Savings Society to go back to their respective parcels as per the original map .

PW1 stated that the defendant was directed to restrict herself to parcel No 354 which belonged to the late Mr. Gitahi as per Pex 7 which is a letter from the liquidator and further deliberations were also done before the Assistant Chief of Simat Sub location as per minutes dated 17<sup>th</sup> May 2011 where parties were also advised to stay in their respective parcels of land and mediate on compensation for loss of construction or user of land.

PW1 testified that the defendant failed to comply and instead caused and/or procured a resurvey to be done on the suit land whereby PW1 was never served with any notice. That the survey completely altered the alignment of the suit land which contradicts the KAPSARET / KAPSARET/ YAMUMBI / BLOCK 353 and 354 as per the original map produced as Pex 10.

PW2, Mr. Francis Mbatia adopted his witness statement and stated that he was a former Secretary of Yamumbi Farmers' Cooperative Society and also worked with the Liquidator after the Society went into liquidation.

It was PW2's testimony that the society was a farm purchasing entity and the late Muchiri was owner of parcel No. 353 after balloting while the late Gitahi was allocated parcel No 354. He confirmed that there had been a boundary dispute between them which began before parties went to court. PW2 stated that he was present in the 1<sup>st</sup> meeting where the society deliberated on the dispute and produced minutes of the committee and its award dated 12<sup>th</sup> June 1989 as Pex.3.

### **DEFENDANT'S CASE**

DWI adopted her written statement and stated that she has been staying on plot No. 354 since 1974 and that the plaintiff occupied plot No. 353. It was DW1's evidence that the plaintiff's father filed a case in court where the court ruled that each party should continue staying on the plots that they had occupied from 1974.

DW1 testified that she had planted Napier grass on the boundary and no one objected to it and that she also planted trees but in 2010 the plaintiff sent a village elder to tell her to cut down the trees as they were affecting the plaintiff's land.

DW1 stated that the court gave a ruling in 1912 but they were unable to implement due to the land clashes which displaced them.

DW2 James Kamande a village elder testified and stated that he knew both the plaintiff's father and the defendant's husband who are now deceased. He adopted his witness statement and stated that James Giathe was allocated plot No. 354 and the plaintiff plot No 353 DW2 further testified that there was a dispute which was referred to the elders but the plaintiff was not satisfied hence filed a case which was later referred back to the elders who gave an award in 1989 and later adopted by the court in 1992. That the order was to the effect that parties to continue staying how they used to on the ground. DW2 further stated that there was no appeal filed against the award.

### **PLAINTIFF'S SUBMISSIONS**

Counsel for the plaintiff listed two issues for determination by the court namely;

- a) Whether the survey done in the year 2011 based on an order issued way back in 1992 is enforceable?
- b) Whether the defendant's assumed right over the suit land is valid or exists in law.

On the first issue whether the survey done in the year 2011 based on an order issued way back in 1992 is enforceable, counsel submitted that based on the plaintiff's evidence and admission by the Defendant that the survey was done after 19 years, the enforcement was not done within the law. That the action of enforcing a judgment after the 12 year period are statute barred Counsel relied on the case of **Maswai vs-Kossei (2004) eKLR (Omolo, Gifhinji, Deverdl LIA)** where the Court of Appeal held that the interpretation of action does not limit itself to suits and proceedings but includes execution of judgment or enforcement of decretal orders thereof. The court also noted that there was no reasonable or valid ground to substantiate reason for delay or not enforcing the judgment within the statutory limits. The Court of Appeal allowed the appeal and set aside orders that allowed the respondent to enforce a judgment and further evict the appellant.

Counsel further cited the case of **MALAKWEN ARAP MASWAI -VS- PAUL KOSGEI, ELDORETCIVIL APPEAL NO. 230 of 2001** where the court reiterated the principle that enforcement of judgments is limited to the 12-year period as per Limitations of Actions Act.

On the second issue as to whether the defendant's assumed right over the suit land is valid or exists in law, counsel submitted that it was the Plaintiff's evidence that the survey was not done until sometime in 2011 after span of about 19 years. That the plaintiff observed that there was nothing preventing survey before 12-year period. That during cross examination, DW1 admitted that the disputes arose in 1992 and the court made a decision in the same year and that the mutation form is dated 12<sup>th</sup> December 2012 hence the Defendant cannot assume the rights over the suit property.

Counsel therefore urged the court to enter judgment for the plaintiff as prayed in the plaint.

### **DEFENDANT'S SUBMISSIONS**

Counsel reiterated the parties evidence and submitted that the plaintiff's suit should be dismissed on the following grounds:

- a) The award of the panel of elders which was adopted as a decree of court was already executed substantively by the time of the present suit and that the order for survey and redrawing of the map was merely for the purpose of confirming what already existed on the ground and so was not an action contemplated under section 4(4) of the Limitation of Actions Act, hence not barred.
- b) From the time the court adopted the elder's verdict and issued a decree on 24<sup>th</sup> July 1992, James Ng'ang'a Giathe's occupation of the disputed portion became adverse to the James Mungai Muchiri's rights. James Ng'ang'a Giathe (and the Defendant) in the first instance acquired prescriptive rights over the portion claimed by the Plaintiff and that the Defendant is shielded by the doctrine of proprietary estoppel (arising from the conduct of the James Mungai Muchiri, and later that of the Plaintiff) and cannot be evicted

from the portion.

- c) Neither the Defendant nor the Plaintiff was at fault in occupying and using the parcels in the manner they did and that the parties therefore have equal equities and to the extent that the Defendant's portion was allocated first, her first equity must prevail.
- d) The Constitution calls upon courts to lean in favour of substantive justice. Hence in this matter justice leans towards affirming rights that have not only been long-settled (and acquiesced in), but that have also been affirmed by the judicial process and by the conduct of the parties.

Mr. Oduor counsel for the defendant submitted that the panel of elders to which the matter had been referred rendered the following award:

- i. These people [i.e., Plaintiff and Defendant] should live as they are now until a surveyor comes to survey the plot.
- ii. As these people [i.e., Plaintiff and Defendant] are living in peace and there is no fight over any boundary or over any acreage they should live as they are at present.
- iii. The plot should be surveyed across so that each gets two acres of the other unsettled plot, as all of them have developed each two acres of the disputed plot.
- iv. Mr. Muchiri remains in his part of the developed two acres and Mr. Giathi on the other two developed acres although it bears the name of Mr. Muchiri until survey comes to rectify the situation.
- v. The surveyors to survey the land across and the land Registrar to issue title deeds accordingly and boundaries amended as in the manner they are now.

Counsel further submitted that the court adopted the award as its judgment and the decree extracted therefrom on 11<sup>th</sup> October 2011 was as follows:

- a) That status quo is maintained until the surveyor surveys the land.
- b) That the plot should be surveyed across so that each gets two acres of the other unsettled plot as all of them have developed each two acres of the disputed plot.
- c) That Mr. Muchiri remains in his part of the developed two acres and Giathi on the other two developed acres although it bears the name of Mr. Muchiri until the surveyor comes to rectify the situation.
- d) That the surveyors to survey the land across and the land registrar to issue the title deeds accordingly and the boundaries amended as in the manner they are now.

It was counsel's submission that the only executory part of the award/decree was the rectification of the survey map as occupation was already as is hence the reference to status quo whereby James Ng'ang'a continued occupation which part was of the decree was executed.

Mr. Oduor further submitted that the situation here is different from one where a party obtains an order for eviction but fails to execute it within the stipulated time and if that were the case, then section 4(4) of the Limitation of Actions Act would be a bar to an "action" meant to enforce the resultant decree.

Counsel submitted that the Defendant did not need to take any action other than continue to live as he had as rectification of the map was merely supportive of an already existing state of affairs and is not an "action" within the meaning of the impugned section.

Counsel relied on the Court of Appeal's rendition of the meaning of the term "action" as used in section 4(4) of the Limitation of Actions Act in the case of **M'ikiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe [2007] eKLR**, where the court stated that the word "action" for purposes executing a decree for possession of land includes all forms of civil proceedings including execution and that under the Civil Procedure Rules (in this case Order 22 rule 29 of the current rules), a decree for possession of land is executed by "delivery of the property and eviction of any person who refuses to vacate".

Counsel also relied on the case of **PKA v I-ISA & Another [2017] eKLR**, where Okong'o J stated that in determining whether proprietary estoppel has been established, the court will inquire into 3 issues, being:

- a) Whether equity in favor of [a party] arises out of the conduct and relationship of the parties;
- b) What is the extent of the equity, if one is established; and
- c) What is the relief appropriate to satisfy the equity?

Citing the English case of *Thorner v Major & Others* [2009] UKI- 18; [2009] 1 WLR 776, the court further explained as follows:

“.....the doctrine of proprietary estoppel is based on three main elements “..... a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance (see page 6, highlighted)

Mr. Oduor submitted that by acquiescing on the determination by the panel of elders and doing nothing even after its adoption by the court, and by his use of the parcels of land in accordance with that determination, the Plaintiff's father had by conduct signalled that he shall no longer challenge the existing usage of the parcels. James Ng'ang'a Giathe relying on that assurance by conduct invested in the land and as a matter of fact never considered that he had a claim in the portion taken over.

Counsel therefore urged the court to dismiss the plaintiff's case with costs.

### **ANALYSIS AND DETERMINATION**

This is a matter that was heard ex parte but the judgment was set aside to allow the defendant to give evidence. The issues for determination are as to whether the survey ordered in Eldoret PMCC 746 of 1987 is unenforceable, whether the defendant acquire the suit land vide adverse possession and who is to pay costs.

The court is being urged to determine whether a party can enforce a decree or a judgment after the expiry of 12 years. It is not in dispute that the decree or judgment that was to be executed was issued on 24<sup>th</sup> July 1992. It is further not in dispute that the resurvey was done in September 2011 pursuant to the said decree. The order in Eldoret PMCC 746 of 1987 was pursuant to an award in respect of a dispute between the plaintiff's late father and the defendant's late husband. The decree dated 24<sup>th</sup> July 1992 was as follows:

- a) That status quo is maintained until the surveyor surveys the land.
- b) That the plot should be surveyed across so that each gets two acres of the other unsettled plot as all of them have developed each two acres of the disputed plot.
- c) That Mr. Muchiri remains in his part of the developed two acres and Giathi on the other two developed acres although it bears the name of Mr. Muchiri until the surveyor comes to rectify the situation.
- d) That the surveyors to survey the land across and the land registrar to issue the title deeds accordingly and the boundaries amended as in the manner they are now.

The decree was to the effect that the plot be surveyed so that both parties could get two acres of the unsettled plot of 2 acres each. The order also stated that the status quo be maintained until the surveyor surveys the plot. Both parties were to remain on their respective parcels until the surveyor rectified the situation.

The award of the panel of elders which was adopted as a decree of court was already executed substantively by the time of the present suit and the order for survey and redrawing of the map was merely for the purpose of confirming what already existed on the ground and so was not an action contemplated under section 4(4) of the Limitation of Actions Act, hence not barred.

It should be noted that enforcement of the decree in 2011 requiring the survey to be done was part of the unimplemented part of the decree. The decree had already been partly executed by virtue of the fact that the parties were to maintain status quo by occupying the parcels of land that they were already occupying. Does the term 'action' as specified in section 4(4) of the Limitation of Actions Act for purposes of executing a decree for land apply in this particular scenario.

In the case of **Koinange Investments and Development Company Limited v Ian Kahi Ngethe & 3 others [2015] eKLR** the court observed as follows:

*An issue also arises as to whether Section 4(4) of the Limitation of Actions Act can apply where the execution process had been started even if completion comes after the statutory 12year period. The court in **Hudson Moffat Mbue –vs- Settlement Fund Trustees & 3 others(Supra)** took the view that the process must be allowed to be completed. The court therefore expressed itself thus on the issue:-*

*“I hold the position therefore that the expression “An action may not be brought upon a judgment after the end of twelve years from the date on which judgment was delivered -----“ means that unless an application has been brought for enforcement of the judgment and has been completed and/or the same has not been concluded by the time the 12 year, period expires no fresh action for enforcement of the judgment can be brought after the expiry of 12 years from the date of the delivery of the judgment”*

The Judge held in the Koinange Case (supra) and stated that:

*“ I therefore find that the judgement in question does not fall within the ambit of section 4(4) of the Limitation of Action Act as the execution process commenced before the lapse of 12 years from the date of judgment, and it was forestalled by the court. The Originating Summons is therefore without merit on that front.”*

Order 22 rule 29 provides;

*Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.*

For an action on the delivery of land the law provides for a situation where one is not in possession of the suit land and seeks to possess the said land. In the present suit the decree holder is already in possession of the suit land, and this is pursuant to the court order. The decree did not require anybody to be removed from the suit land to give vacant possession as envisaged under Order 22 Rule 29 above.

In this case there was no time limit placed on the maintenance of the status quo either. By occupying the land, the order was already in partial execution. Given that the section is not couched in mandatory terms, the court can exercise its discretion hence the survey that was done in 2011 was enforceable in the circumstances. This is due to the fact that part of the order had been enforced and explanation has been given on the reason why the same was not enforced which was due to the land clashes which the court takes judicial notice of.

The order was specific that the parties stay on their portions as it were and maintain a status quo which has not been interfered with to date. The status quo was awaiting the survey being carried out.

The defendant submitted that the late James Ng'ang'a Giathe became adverse to John Mungai Muchiri's plot and time began to run from the date the court pronounced its verdict on 24<sup>th</sup> July 1992. The issue that was to be decided was not occupation but use of the land on the ground. The court had decreed that the parties continue to use the land as before and that occupation be the same as it was before. The rectification of the survey map was all that remained to be executed. Therefore, the issue of adverse possession does not arise in this case.

It should also be noted that the plaintiff did not file an appeal against the award that was adopted by the court. He chose to bring this suit more than 15 years after the fact. The implementation of the order of survey was to benefit both parties in respect of the order rendered by the court

I have considered the pleadings the submission of counsel and the relevant judicial authorities and find that the plaintiff's suit lacks merit and is therefore dismissed with costs to the defendant.

**DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF NOVEMBER, 2021**

**M. A. ODENY**

**JUDGE**