



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT BUSIA

ELC CASE NO. 51 OF 2018

VINCENT OUMA BWIRE..... PLAINTIFF

= VERSUS =

WILLIE LOVICE BWIREDEFENDANT

J U D G E M E N T

1. The plaintiff and the defendant are father and son respectively. The plaintiff has sued his son vide his plaint dated 23rd March 2018 and filed in court on 8th June 2018. The plaintiff pleaded that he is the absolute proprietor of the land known as Bukhayo/Kisoko/1998. That in the year 2012 at the request of the defendant, the plaintiff permitted the defendant to stay on a portion of this land on condition that he would relocate upon finding a place of his own or at the request of the plaintiff.

2. The plaintiff pleaded further that in total abuse of this privilege, the defendant decided to engage in wanton acts of destruction, wastage and degradation of the land thereby infringing on the plaintiff's right to peaceful use and enjoyment. That in spite of notice to vacate served, the defendant has failed to comply necessitating the filing of this suit. Reasons wherefore the plaintiff prays for judgment to be entered in his favour as below:

i. A permanent injunction to restrain and prohibit the Defendant, his servants, agents and assigns from entering land No. BUKHAYO/KISOKO/1998 and/or from committing wanton acts of destruction, wastage and degradation thereon.

ii. An order to evict and remove the Defendant, his servants, agents or assigns from land parcel No. BUKHAYO/KISOKO/1998.

iii. Costs of the suit with interest thereon.

iv. Any other or further relief this court may deem fit to grant.

3. The defendant filed a statement of defence on 5th July 2018. The defendant denied that the plaintiff is the absolute owner of the suit land because the land belongs to their family which land the plaintiff inherited from their grandfather. The defendant also pleaded that he is the son of the plaintiff and Bevelyne Ongecha Ouma – deceased. That he was born and brought up on the suit land as their family land.

4. The defendant pleaded that it is the plaintiff who is infringing on his rights to peaceful inheritance and occupation. The defendant denied inviting 3rd parties to use the said land without the plaintiff's consent. That they have a good relationship to the extent the plaintiff gave him the suit plot and plot No. South Teso/Angoromo/6202 before a council of elders. The defendant prayed that the plaintiff's suit be dismissed with costs and:

a. A DNA test be carried out between the defendant and his father at the father's cost to ascertain if the defendant is truly not a biological son to the plaintiff.

b. A permanent injunction restraining both parties the defendant and the plaintiff from carrying out any activities on the same parcel of land Bukhayo/Kisoko/1998 until the case is heard and determined.

c. Cautions reinstated on Bukhayo/Kisoko/1144 on fears by the defendant that the plaintiff intends to sell the same.

d. Revocations on sale transactions carried out on plots South Teso/Angoromo/6201, 6202 and 6203.

e. Status quo be maintained until the suit is heard and determined.

f. A permanent injunction to restrain and prohibit the plaintiff, his servants, agents and assigns from entering a portion of land Bukhayo/Kisoko/1998 which was given to the defendant as an inheritance right.

g. Costs of suit with interest thereon.

h. Any other or further relief this court may deem fit to grant.

5. Each party gave their oral evidence on 18th September 2019 and produced as exhibits the documents filed in their list. The plaintiff stated that the defendant disappeared with his mother while he (the plaintiff) was living and working in Uganda. He denied being married to the defendant's mother. The plaintiff produced a copy of title for the suit plot as Pex 2. The plaintiff further stated, that the defendant in 2012 demolished a permanent house he had on the land. The witness also produced photos of his destroyed cane as Pex 3.

6. The plaintiff said he had given the defendant a portion of the suit land measuring 2 acres which was to be marked by the surveyor. He produced this agreement as Pex 4. The plaintiff continued that he is now not willing to transfer the portion to the suit land because the defendant registered a caution on the title on 20/4/2012. He urged the court to issue eviction orders and a permanent injunction against the defendant. That their problem started when the defendant began claiming the land belonged to his mother.

7. In cross-examination by the defendant, the plaintiff admitted having five children with the defendant's mother. That he regarded her as his wife during their stay together. That he is the one who showed the defendant where to build which house the defendant eventually built. **PW1** continued that the defendant destroyed his mother's house after her death. **PW1** admitted inheriting the suit land from his father. He was aware of the agreement of 28/4/2012 which gave the defendant 2 acres of the suit land and the whole of parcel number 6202. **PW1** denied threatening to sell any of the two parcels and re-locate to Uganda. He however admitted selling parcel No. 6202 in 2014.

8. The defendant also gave evidence on the same day. He stated that he lives in Nairobi. That trouble started after the death of his mother. The defendant said his father threatened to sell the land he inherited from his father which land he had given him (the defendant) both orally and in writing. The defendant denied there was cane on the land at the time it was given to him. That it is him who contracted a 3rd party to plant and harvest the cane. That the contracted person harvested cane the first time without any problem. However during the 2nd harvest, the plaintiff stopped him.

9. The defendant continued that he had placed building materials on plot No. 6202 which the plaintiff ended up selling when he sold the said plot. That he only placed a restriction after realising the plaintiff had sold parcel numbers 6202, 6203 and 6204. That his house on plot No. 1998 is valued at Kenya Shillings Six Million. That he has nowhere to go if his father (the plaintiff) chases him away. The defendant added that the plaintiff had even allowed him to bury his son on the suit land. He denied trespassing on his father's land. Instead he avers that he has never had peace to live in the house he built because of the violence meted on him by his step brothers. He urged the court to dismiss the plaintiff's suit.

10. In cross-examination, the defendant states that the plaintiff lives on L.R. 1998. That the plaintiff gave the defendant a portion of 1998 pursuant to an agreement. That the boundary planted was removed by the plaintiff and he reported the matter to the police station. That the plaintiff signed a transfer form for him but he had not acquired a title because he did not receive the plaintiff's P.I.N. and photograph. Further that there was no time limit for registering the transfer but he had not pushed the registration because of this case. The defendant then closed his case.

11. The parties relied on the evidence presented. There is no dispute that the plaintiff is the father of the defendant. There is also no dispute that the plaintiff gave the defendant a portion of the suit land Bukhayo/Kisoko/1998 and the parcel of land Bukhayo/Kisoko/6202 through an agreement dated 28th April 2012. The agreement was signed by both of them and witnessed by Mzee Noa Juma Omojongo; Mzee Paulo Wasike Bwire and Mzee Patrick Ijara Masonio.

12. The plaintiff went further to execute a transfer form and application for obtaining land control board consent. In both forms, the consideration was indicated as "**gift to my son**". The defendant had not secured title deeds in his name for the two parcels given. The defendant however has built a house on the suit land also with permission from the plaintiff. The plaintiff pleads that the defendant in total abuse of the privilege accorded him by the plaintiff decided to engage in wanton acts of destruction, wastage and degradation of the land thereby infringing on the plaintiff's rights to peaceful occupation and enjoyment of his land.

13. I have analysed the evidence presented by the plaintiff towards the proof of the wastage and destruction. The evidence is that the defendant destroyed the plaintiff's cane as shown in the photographs produced as Pex 3(a) and 3(b). The defendant in countering this allegation states that there was no cane on the land at the time it was given to him. That he is the one who leased the land for someone to plant and harvest the cane. So according to the defendant, the cane did not belong to the plaintiff.

14. I take up two issues with this piece of evidence presented by the plaintiff because the burden of proof was on him. First he did not persuade this court that the cane in dispute belonged to him and was indeed harvested on the portion of the land that did not form the part he had given the defendant. The second issue is that he did not satisfy the court that it is the defendant who destroyed the cane. Thirdly it was not clear whether the cane was harvested by a third party or destroyed. He failed in these aspects by not producing an agricultural officer's report to corroborate that the cane in the photographs were indeed destroyed and that they were from his land. Neither did the plaintiff tell this court the actual date when the defendant carried out the destruction in view of the evidence that the defendant does not ordinarily live at home.

15. Further the agreement of 28/4/2012 did not attach any conditions to the giving of the land other than the condition that the defendant was his son. The father-son relationship has not been terminated. The defendant in pursuance of enjoying the gift stated that he built himself a

house where he was shown on the land by his father (plaintiff). The plaintiff has breached their agreement when he admitted he already sold parcel No. Bukhayo/Kisoko/6202. The defendant said that fearing the plaintiff was keen to sell the remaining land he placed a caution on the title to preserve it.

16. In my opinion and I so hold that the plaintiff has not demonstrated sufficient grounds why he is back-tracking on his agreement. Added to this is the fact that the suit land is ancestral land which the defendant is entitled to a share just like the plaintiff inherited it from his father. The plaintiff is thus holding the registration in trust of the generation after him, the defendant included as provided for in Section 28(b) of the Land Registration Act No. 3 of 2012. The fact that the title is in his name does not entitle him to dispossess the others entitled as he wills. For the given reasons, I dismiss his suit. I order each of them to bear their respective costs.

Dated, signed and delivered at BUSIA this 5th day of November 2019.

A. OMOLLO

JUDGE