



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 73 OF 2017

FRANCIS RONO KERICH.....PLAINTIFF

VERSUS

JOSEPH KIMAIYO.....DEFENDANT

RULING

The plaintiff has brought this suit claiming that at all material times to this suit, the plaintiff has been the lawful legal proprietor of all that property known as CHEBURBUR CENTRE PLOT NO. 8 measuring 40 x 100 feet (hereinafter the “suit property”) having purchased the same from the defendant vide a written agreement dated 29.04.1990 at an agreed total consideration of Kshs.13,000. The plaintiff did pay the said purchase consideration of Kshs.13,000 on the date of the signing of the said agreement. That the plaintiff has since been in possession of the suit property and has enjoyed quiet, peaceful and uninterrupted possession of the same until.

The plaintiff claims that on diverse dates between 18th and 30th of January, 2017, the defendant/respondents jointly and severally without any colour of right forcefully encroached and/or trespassed upon the suit property destroyed the live fence along the boundaries of the property, ploughed the suit property and planted beans on the property despite the plaintiff’s protests and best efforts to stop the said unlawful action.

That following the defendant’s unlawful actions, the plaintiff through his agent proceeded to report the aforesaid damage at Eldoret Police Station where the matter was booked as O.B. No. 108/20/01/2017.

The aforesaid unlawful actions by the defendants to trespass upon the plaintiff’s land CHEBURBUR CENTRE PLOT NO. 8 measuring 40 x 100 feet is in clear violation of the plaintiff’s right to own property envisaged in Article 40 of the Constitution.

That despite demand made and notice of intention to sue issued, the defendants have failed, refused and/or neglected to vacate from the suit property. The Honourable court has jurisdiction to hear and determine this matter.

That the plaintiff avers that there is no other suit pending and/or that there have been no previous proceedings between the plaintiff and the defendants over the same subject matter. The plaintiff prays for judgment against the defendant for:

(a) A permanent injunction restraining the defendants jointly and severally whether by themselves, their agents and/or servants from in any way whatsoever interfere with the plaintiff’s quiet possession and occupation of all that property known as CHEBURBUR CENTRE PLOT NO. 8 measuring 40 x 100 feet.

(b) General damages,

(c) Cost of this suit and

(d) Any other and/or further relief the Honourable court deems fit to grant.

Accompanying the suit is an application for a temporary order of injunction restraining the defendants by themselves, their agents, servants, or any other person whatsoever purporting to act on their behalf from accessing, using, carrying out, selling, transferring or in any other way dealing with the plaintiff’s piece of land known as CHEBURBUR CENTRE PLOT NO. 8 measuring 40 x 100 feet within Uasin Gishu County pending hearing and determination of this suit.

The application is based on grounds that the plaintiff/applicant is the lawful Legal owner of that parcel of land known as CHEBURBUR CENTRE PLOT NO. 8 measuring 40 x 100 feet.

On diverse dates between 18th and 30th of January, 2017, the respondents/defendants without any colour of right trespassed into the plaintiff/applicant said parcel land and have threatened to commence construction on it and have further threatened to evict him unlawfully.

The plaintiff/applicant is apprehensive that the respondents/defendants are determined to violate his peaceful occupation and user of his lawful property.

The balance of convenience tilts in favour of the plaintiff/applicant given that he is the lawful Legal owner of the suit land. There is need to protect the plaintiff's/applicant's right to property by granting the prayers sought. No prejudice will be occasioned to the respondents should the prayers be granted.

The defendant has raised a preliminary objection that the suit herein is founded on contract entered in writing on 29th April, 1990 as such offends the provision of section 4(1) of the Limitation of Actions Act, Cap. 22, Laws of Kenya.

The defendant submits that this suit is founded on contract entered into on 29.4.1990 and therefore, the suit offends the provision of Section 4(1) of Limitation of Actions Act, Cap. 22, Laws of Kenya. He submits that the plaintiff's claim is time barred as the action was brought 27 years later and therefore caught up with Limitation of Actions Act.

The plaintiff in his part submits that the action is premised on both contract and trespass and that the plaintiff claims to be in possession.

According to the plaintiff, the cause of action accrued on the 30.1.2017 when the defendant forcefully encroached and or trespassed upon the applicant's property.

The defendant in the replying affidavit filed on 24.3.2017 admits that the land in question is neither registered in his name nor the plaintiff's name and that adjudication process has not been done.

The cause of action can be based on contract for breach of agreement dated 29.4.1990 or trespass on the alleged entry by the defendant on 30.1.2017.

This court observes that the preliminary objection is not based on a pure point of law as it requires facts to be ascertained and that none of the parties is registered as proprietors of the suit land and therefore, the preliminary objection is dismissed with costs. In the interest of justice and expeditious disposal, I do order the status quo to be maintained until the hearing of the suit on priority basis.

Dated, signed and delivered at Eldoret this 30th day of July, 2018.

A. OMBWAYO

JUDGE