



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 172 OF 2014**

**WILLIAM MAINA MACHARIA.....1<sup>ST</sup> PLAINTIFF**

**JOHN MUTHUI MAINA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FRANCIS BARCHURO.....1<sup>ST</sup> DEFENDANT**

**CHEBUTIEI KOIN.....2<sup>ND</sup> DEFENDANT**

**JACKSON BARCHURO.....3<sup>RD</sup> DEFENDANT**

**DANIEL RUTO.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 29<sup>th</sup> May 2014 the plaintiffs herein sued the defendants seeking for the following orders:

- a) A declaration that the defendants are not entitled to enter, possess and or use parcel of land No. CHERANGANY1/KAPCHEPROP/171 and that any entry, possession and or use thereof by the defendants amounts to trespass.
- b) A permanent injunction restraining the defendants whether by themselves from entering upon, taking possession, using or otherwise interfering with land parcel No. CHERANGANY1/KAPCHEPROP/171
- c) A declaration that the Plaintiffs are entitled to possession of the suit land.
- d) Eviction of the defendants from the suit land.
- e) Damages for trespass.
- f) Costs of the suit.

The defendant filed a defence and a counter claim based on adverse possession which they never appeared in court to prosecute even though they were served with a hearing notice. There were also interested parties who had entered into an arrangement with the plaintiffs to purchase the plaintiffs interest once the suit is determined.

**Plaintiff's Case**

The first plaintiff adopted his statement and his list of documents which were filed in court and testified reiterating the contents of his statement. He stated that his late father owned the suit land which is approximately 18.5 acres. He produced a copy of certificate of title. He also stated that he got letters of Administration in respect of his father's estate which he produced as an exhibit before the court.

It was further the plaintiff's testimony that the defendants whose grandfather had sold the suit land to his late father had lodged a restriction on the suit land. He stated that the defendants do not stay on the disputed land as they have alternative land which they own.

The plaintiff stated that the defendants started the dispute after the 1992 land clashes. It was the plaintiff's evidence that he reported the matter to Kapcherop DO's office whereby the defendants agreed that the land does not belong to them. The plaintiff further produced minutes before the DO's office dated 2/3/05 as an exhibit. It was further the plaintiff evidence that the defendants did not adhere to the terms

of the agreement before the DO's office prompting the plaintiff to go back to the DO's office in 2014.

The plaintiff testified that the DO summoned the defendants who admitted that the land did not belong to them. He stated that the DO gave the defendants one month to vacate the suit land or go to court. The plaintiff produced the letter as an exhibit and stated that the defendants did not vacate therefore necessitating the institution of this suit. He therefore prayed for judgment to be entered in their favour as prayed in the plaint together with costs of the suit.

The defendants were not present in court to defend the suit and prosecute their counterclaim so the plaintiff urged the court to dismiss the defence and counterclaim.

On cross examination by Counsel for the interested party the plaintiff confirmed that the 1<sup>st</sup> defendant had lodged a restriction on the suit land which he would like the court to order that it be removed. The plaintiff also stated that he had sold the land to the interested parties whom he would like to transfer the land to. The plaintiff therefore closed his case.

### **Plaintiffs Counsel's Submissions**

Counsel for the plaintiff gave an opening statement in respect of the plaintiff's case and stated that the plaintiffs are the children and the legal representatives of the estate of the late Ishmael Maina Gichumbi who was the registered proprietor of the suit land.

Counsel urged the court to dismiss the defence and counterclaim due to the fact that the defendants were not present to prosecute the same.

Counsel submitted that the plaintiff led evidence to the effect that his late father had acquired the suit land from the defendants' grandfather in the 1960's which made him an absolute proprietor of the suit land having been issued with a land certificate.

It was further Counsel's submission that Section 82 of Cap 160 the Succession Act, provides that

*"personal representative shall, subject only to any limitation imposed by their grant, have the followings powers"*

*a) To enforce, by a suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate.*

*b) To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or in the execution of their duties, all or any part of the assets vested in them as they think best.*

Mr. Ngigi therefore submitted that the plaintiffs are personal representatives of the estate of the deceased by dint of the grant of letters issued by the High Court prior to filing of this action and as such have come to court to enforce the rights of their late fathers' estate which are ownership rights that accrue to the estate and survive the deceased.

Counsel also cited the provisions of The Land Registration Act No. 3 of 2012 at Section 24 and 25 which provides for the effect of Registration of a person as proprietor and the rights acquired by such proprietor. Counsel further relied on the provisions of Section 26 of the Land Registration Act (supra) states at the marginal Notes; which states that

*"Certificate of title to be held as conclusive evidence of proprietorship"*

At Sub-section (1) A certificate of title issued by a Registrar of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that that person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances endorsed in the certificate and the title of that proprietor shall not be subject to challenge except on;

a) Ground of fraud or misrepresentation to which the person is proved to be party.

b) Where the title has been acquired illegally, procedurally or through a corrupt scheme.

It was Counsel's submission that the defendants have not alleged any wrong doing on the part of the proprietor. They acknowledge his title and seek to acquire it by adverse possession. He therefore urged the court to grant the orders as prayed in favor of the plaintiff as he had proved his case against the defendants.

### **Analysis and determination**

This is a case where the plaintiff wants the court to declare that defendants are trespassers in the suit land and a permanent injunction restraining the defendants from interfering with the suit land.

The issue for determination is whether the plaintiffs are entitled to the suit land and whether the defendants are trespassers. Have the defendants acquired the suit land by way of adverse possession.

The first issue for determination as to whether the plaintiffs are entitled to the suit land, the plaintiff led evidence to the effect that the late father bought the suit land from the defendants grandfather in the 60's and that during the land adjudication the suit land was registered in

the name of Maina Gichumbi whereby a land certificate was issued. The plaintiff also indicated that they had several meetings at the District Officer Kapcherop whereby the defendants admitted that the land does not belong to them. The plaintiff produced minutes and the deliberations by the DO whereby the defendants requested for one month to move out of the disputed land.

It is not in dispute that the suit land is registered in the plaintiff's late father's name as evidenced by the land certificate produced in court. It is also not in dispute that the plaintiffs are the administrators of the estate of the late Ishmael Maina Gichumbi as per the letters of administration produced in court. Further it is also not disputed that the interested parties are purchasers of the suit land which the plaintiff is ready to transfer upon the determination of this suit and the removal of the restriction by the defendants.

What is in dispute is as to whether the defendants have acquired the suit land by way of adverse possession. The defendants were served with a hearing notice but failed to attend court to defend this case and prosecute their counterclaim. Even though the defendants did not attend I will be obliged to analyze the defense and counterclaim on record. In a claim of adverse possession the plaintiff must establish that he or she has actually acquired the suit land through continuous, quiet and uninterrupted possession. The doctrine of adverse possession must be strictly proved because it is a doctrine which dispossesses one person of his or her land by operation of the law. It is unfortunate that the defendants were not in court to lead evidence on why they think they have acquired the suit land by adverse possession.

From the pleadings on record it would have been an uphill task for the defendants to mount a defence and succeed in proving adverse possession because there are documents which were produced in court where they had agreed that the land does not belong to them and had requested for a period of one month to stop utilizing the land. I will not deliberate more on the issue as the defendants having failed to attend court to prosecute their case, counsel urged the court to dismiss the defence and the counterclaim which the court after consideration dismissed with costs to the plaintiffs.

Having dismissed the defence and counterclaim it therefore follows that the claim is not controverted but that does not mean that if a claim is not defended then it must succeed. It is still incumbent upon the plaintiff to prove his claim to the required standard, if the same is not done, then it can suffer the fate of being dismissed for lack of proof. As for the interested parties their claim is hinged on the success of the plaintiff's case. The plaintiff had admitted that he had sold portion of land to the interested parties and is willing to transfer to them upon the determination of this case and the removal of the restriction.

I have considered the pleadings, the exhibits produced together with submissions of Counsel and find that the plaintiff has proved his case on a balance of probabilities. I therefore enter judgment in favour of the plaintiffs and make the following orders:

- a) A declaration is hereby issued that the defendants are not entitled to enter, possess and or use parcel of land No. CHERANGANY1/KAPCHEPROP/171 and that any entry, possession and or use thereof by the defendants amounts to trespass.
- b) A permanent injunction restraining the defendants whether by themselves from entering upon, taking possession, using or otherwise interfering with land parcel No. CHERANGANY1/KAPCHEPROP/171
- c) A declaration is hereby issued that the Plaintiffs are entitled to possession of the suit land and an order for the removal of the restriction on the suit land is hereby granted.
- d) That the defendants do vacate Land parcel No CHERANGANY1/KAPCHEPROP/171 within 30 days from the date of this judgment failure of which eviction orders to issue.
- f) Defendants to pay costs of the suit to the plaintiffs.

**Dated and delivered at Eldoret this 4<sup>th</sup> day of July, 2018.**

**M.A ODENY**

**JUDGE**

Judgment read in open court in the presence of Mr. Nduhiu holding brief for Mr. Ngigi Mbugua for Plaintiff and in the absence of the defendants. Plaintiff's case succeeds.

Mr. Koech : Court Assistant.