

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

LAND CASE NO. 193 OF 2014

LEAH JEPKORIR KIBIL.....PLAINTIFF

VERSUS

JULIUS KIMELI alias KITUR.....1ST DEFENDANT

IRENE CHELULEY T/A

VALLEY MAPS SURVEYORS.....2ND DEFENDANT

JUDGMENT

By a plaint dated 9th June 2014 the plaintiff herein sued the defendants seeking for orders that :

- a) A permanent injunction to issue against the 1st defendant his servants agents family members and any other person through whom he may act against trespassing, erecting fences, erecting structures, uprooting beacons, ploughing, planting, grazing, transferring, selling, leasing and / or in any other manner dealing with land parcel No. PIONEER / LANGAS BLOCK 1 / 145 in any way detrimental to the interests of the plaintiff.
- b) A permanent Injunction to issue against the 2nd defendant, her servants, agents, assigns and successors and / or any other person through whom she may act against committing any further acts of trespass, subdivisions, interfering with boundary beacons and / or in any other manner dealing with land parcel PIONEER / LANGAS BLOCK 1 / 145 at the behest of the 1st defendant or any other person in any way An Order that the defendants jointly and / or severally be condemned to meet the costs of detrimental to the interests of the plaintiff.
- c) restoration of the uprooted beacons.
- d) An Order of eviction to issue against the 1st defendant to remove himself, his servants, agents, family members and any other person who enters land parcel PIONEER/LANGAS BLOCK 1/145 on the instruction of the 1st defendant **together with all their properties including removal of the perimeter fence, building stones and temporary building erected thereon.**
- e) Costs of the suit
- f) Any other and further relief that this Honourable court shall deem just and expedient to grant.

The plaintiff filed an application under certificate of urgency contemporaneously with the plaint seeking for a temporary injunction restraining the defendants from interfering with the suit land until this case is heard and determined. The application was heard and the court granted the injunction as prayed.

The defendants later filed an application dated 15th March 2017 seeking to strike out the plaintiff's suit but it was later withdrawn to enable parties proceed with the full hearing of the case.

Plaintiff's Case

The plaintiff gave evidence and stated that she is a Director with Eastern Produce Company in Nandi County and an owner of land parcel known as PIONEER/ LANGAS BLOCK 1/ 145. The plaintiff stated that she came to know the 1st defendant when she was informed by neighbors that her parcel of land had been encroached upon She produced a copy of the green card which was initially registered in the name of Pricila Chepkering Malel who transferred it to a company known as Kiset Kosop Co. Ltd. She further stated that her name appears in entry No. 4 on the green card.

The plaintiff also produced a certified copy of a certificate of lease registered in her name as exhibit 2. She testified that the defendants took advantage of the fact that the lease certificate reads 0.5 Ha whereas the official registered map reads 0.6 Ha while the official beacons read 0.6 Ha.

It was the plaintiff's evidence that the defendants had claimed that their parcel of land known as PIONEER/ LANGAS BLOCK 1/ 144 was adjacent to the plaintiff's plot but when she conducted due diligence she established that the said parcel of land is opposite the Eldoret Kisumu highway. The plaintiff further stated that the original owner of plot No. 144 and 145 is the same. She produced a copy of the green card for plot No. 144 as an exhibit.

The plaintiff stated that she took steps to find out why the defendants had encroached on her land and reported the matter to the police but the defendants were adamant. She later instructed her lawyers who wrote a demand letter to the defendants of which they denied any wrongdoing and stated that they did not have an interest in the suit parcel of land.

It was also the plaintiff's evidence that the defendants demarcated part of her land and removed a section of her perimeter wall, put up a structure, interfered with 2 beacons and have continued to till the land. The plaintiff testified that she requested the County Surveyor to establish the boundaries of plot No 144 and 145 of which the Surveyor went to the ground and wrote a report dated 7th May 2014 and confirmed the position of the two parcels of land as per the Registry Index Map (RIM) The report recommended that the acreage be rectified to be in line with the RIM which indicates 0.6Ha

Further the plaintiff stated that the defendants are the ones who subdivided the land using a map which was not authentic. She produced photographs showing the position of the parcel of land, the extent of the encroachment and the illegal structures erected by the defendants. She therefore prayed for judgment to be entered in her favour against the defendants as prayed in the plaint.

On cross examination by the defendant's Counsel the plaintiff stated that the defendants denied having encroached on the suit land and that they have an interest on the land parcel No. 144. She further stated that by the defendants demarcating her parcel of land amounted to trespass. She also confirmed that subdivision is not on the official map. She further stated that the photographs are a true reflection of what is on the ground.

PW2 gave evidence and corroborated the plaintiff's testimony. He stated that he went to the suit land on 24/2/14 and found some people fencing the land and had placed new beacons. He also confirmed that the suit plot is registered in the plaintiff's name who is his wife. PW2 also said that the suit parcel of land is not adjacent to plot No. 144 as the defendants claimed. The plots adjacent to plot No. 145 are 146 and 147 and that they have never sold plot No. 145 to anyone. He urged the court to grant the plaintiff the orders as prayed in the plaint. The plaintiff therefore closed her case.

Defendant's Case

The 2nd defendant Irene Cheluley testified and stated that she is a Land Surveyor by profession trading in the name and style of Valley Maps Surveyors. It was her evidence that she was instructed by the administrator of the estate of Malel known as Esther Malel to undertake a survey on LR No 12390 in Uasin Gishu. It was her evidence that that she had been instructed to do an area check which she did , gave a report and did not interfere with the beacons.

DW1 stated that Plot No 144 and 145 measured 0.6Ha respectively and that she had not been instructed by the 1st defendant Julius Kitur. That she does not have an interest in the suit land as she was just a service provider.

On cross examination by Mr. C. F Otieno for the plaintiff DW1 stated that she has never seen the map marked as exhibit 12 and that the two plots 144 and 145 are not adjacent to each other. She finally confirmed that the she did not demarcate the land. On reexamination DW1 reiterated her evidence and they closed their case.

Plaintiff's Submission

Counsel for the plaintiff reiterated the plaintiff's evidence and submitted that the official map clearly indicates that parcel PIONEER / LANGAS BLOCK 1/ 145 have no partitions save for the one created by the defendants in person and / or through their agents. That the partition on Exhibit 11 marked with the red dotted line was created by the defendants jointly and / or severally and is not part of the official map.

Mr.Otieno further submitted that the plaintiff proved that she is the registered owner of the suit land and the same was not disputed. Counsel cited the repealed Registered land Act but the same provisions of indefeasibility of title have been replicated in Section 26 of the Land Registration Act 2012.

He submitted that it was clear from the evidence of PW1 and PW2 that they neither authorized any sub- division nor sold any part of their land to anybody. He also submitted that it is the Plaintiff's case that the interference with her land was occasioned by the 2nd defendant who trespassed on her land without her knowledge and / or authority and illegally assisted the 1 defendant and his agents to fence off her land.

Further that Section 25 (2) Proviso (ii) also prohibited the sub-division of land that is subject to a lease. The proviso reads:-

[[25.(1).....

(2) Upon the application of the proprietor of a parcel for the division of his parcel into two or more parcels, the Registrar shall effect the division by closing the register relating to the parcel and opening new registers in respect of the new parcels resulting from the division, and recording in the new registers all subsisting entries appearing in the closed register:

Provided that -

- (i) nothing shall be done under this section which would be inconsistent with this Act or any other written law; and
- (ii) no parcel which is subject to a lease shall be subdivided.

Counsel submitted that he chose to rely the a repealed Act Registered Land Act for the following reasons

- a) The Plaintiff purchased land in the year 2007 at a time when the Repealed Act was still in force.
- b) The land purchased already had a Title.
- c) The land was purchased from a Second owner who was not the original owner.
- d) The rights of the Plaintiff date back to the law in force as at the date of purchase of the suit land and / or the date upon which she acquired title to the suit land.
- e) The Saving and transitional provisions under Section 162 of The Land Act 2012
- f) The Saving and transitional provisions under Section 107 of The Land Registration Act, 2012.

Section 162. provides

1. Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.
2. Unless the contrary is specifically provided in this Act or the circumstances are such that the contrary must be presumed, if any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.
3. Any instrument executed before the commencement of this Act whereby any disposition permitted under this Act is completed may be presented for registration in the prescribed register and—
 - a) the question whether any instrument so presented is to be registered shall be determined by the Registrar by reference to the law in force at the time of its execution; and
 - b) Subject to the provisions of paragraph (a), the provisions of this Act shall apply to that instrument as if it had been executed after the commencement of this Act.
4. If a lessor or lender had initiated any steps to forfeit a lease or to foreclose a charge, as the case may be, before the commencement of this Act, a court may on the application of the lessee or the chargor issue an injunction to the lessor or, to the lender to stop the continuation of any such step.
5. If a court had issued an injunction under subsection (4), the lessor or lender to whom the injunction has been issued may commence any action under this Act to terminate that lease or bring that charge to an end.

Counsel further cited the provisions of Section 107 of The Land Registration Act, 2012

1. Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.
 - (1) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.
 - (2) For the avoidance of doubt, any lease granted to a noncitizen shall not exceed ninety-nine years.
 - (3) An instrument executed before the commencement of this Act whereby any disposition permitted under this Act is completed may be presented for registration in the prescribed register and"
 - (a) the question whether any instrument so presented is to be registered shall be determined by the Registrar by reference to the law in force at the time of its execution; and
 - (b) subject to the provisions of paragraph (a), the provisions of this Act shall apply to that instrument as if it had been executed after the commencement of this Act.

(4) If any step has been taken to forfeit a lease or to foreclose a charge before the effective date, a court may, fit considers it just and reasonable so to do, on and after the effective date, on the application of the lessee or, as the case may be, the borrower to issue an injunction to the lessor or, as the case may be, the borrower to issue an injunction to the lessor or, as the case may be, the lender to stop the continuation of any such step and where a court has issued an injunction under this subsection, the lessor or lender to whom the injunction has been issued may commence any action under this Act to terminate that lease or bring that charge to an end.

Counsel submitted that the 2nd defendant distanced herself from the fake map produced as PExh 12 from the office of the 2nd defendant. That she further stated on oath that she had been asked by the administrator of the Estate of Priscilla Malel to go and confirm the acreage of parcel No. 145 belonging to the Plaintiff and parcel No. 144. Why these two parcels only? She also admitted that she entered the land of the Plaintiff without consulting the Plaintiff which in law is trespass. It was also the 2nd defendant's evidence that the 1st defendant was her client and she clearly stated that she had signed an authority in his favour to act for her in this suit.

Counsel also submitted that the defendants deliberately concealed crucial facts which have been exposed by their very conduct. On the averment that the defendants were wrongly sued, Counsel submitted that the plaintiff has demonstrated that the suspect map PExh 12 originated from the 2nd defendant. She also admitted being at the scene without the consent of the Plaintiff and that PW 2's evidence confirmed that it is the 1st defendant and his agents who were fencing off the Plaintiffs parcel No. 145 by erecting a new fence creating the illegal partition. Counsel therefore urged the court to find that the plaintiff has proved her case against the defendants and hence judgment should be entered as prayed in the plaint.

1st and 2nd defendant's submissions

Counsel for the defendants gave a brief background of the case and reiterated the defendant's evidence. He submitted that the defendants filed a defence and stated that the plaintiff had instituted the claim against the wrong parties and specifically pleaded that they do not have interest in the said property as alleged by the plaintiff.

He also submitted that the ownership of the subject parcel of land is not in dispute and thus no cause of action against the defendants. It was Counsel's submission that it is clear from the evidence and the testimony of the witnesses that the defendants do not claim any part of the property in dispute and that they failed to prove that the defendants had trespassed on the suit land.

When the matter came up for defence hearing the 2nd defendant testified that she was instructed by the administrators of the estate of the late Malel to do an area check of their parcels comprising LR No. 12390 within which the parcel in dispute is situate to ascertain if the parcels sold marched the acreage as some of the people who bought into the estate did not have actual land on the ground owing to the discrepancy in the subdivision

During defence hearing there arose an issue of the authority signed by the 2nd defendants to the first defendant. It was Counsel's submission that the wording of the authority is plain and straight forward the scope of the authority dated 2nd June 2017 as crafted

Counsel submitted that the plaintiff has failed to establish that the defendants trespassed on her land parcel, that the 1st defendant erected an illegal fence, deposited building materials and uprooted the beacons marking boundary of the plaintiffs parcel of land. He urged the court to dismiss the plaintiff's case with costs

Analysis and determination.

The plaintiff filed several issues for determination by the court but I will condense them to four issues. The issue as to whether the plaintiff is the registered owner of the suit land is not in dispute therefore is not an issue in contention. The plaintiff went at length to prove that she is the rightful owner of the suit land which gives her locus to file this suit to claim and protect her rights. She produced a copy of a certificate of lease, copy of green card registered in her name as exhibits before the court. This is prima facie evidence that she is the rightful owner of the suit parcel of land.

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the

absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

There was no evidence that the title was procured fraudulently or by way of misrepresentation. I find that the plaintiff has proved that she is the rightful owner of the suit parcel of land from the evidence on record.

The issues for determination by the court are as to whether the defendants trespassed on the plaintiff's parcel of land, whether the 1st defendant deposited building stones on the plaintiff's parcel of land, whether the 1st defendant erected an illegal fence on the plaintiff's parcel of land and uprooted beacons, whether the 2nd defendant caused an illegal subdivision of the suit land and finally whether the plaintiff is entitled to the orders sought.

The plaintiff gave elaborate evidence on the history of her acquisition of the suit land and produced supporting documentation to prove her ownership. The plaintiff also produced photographs and maps indicating the current position on the ground in respect of the suit land.

The plaintiff's evidence was uncontroverted by the defendants who denied having an interest in the suit land. The 2nd defendant admitted that she had been given instructions to carry out an area check on the suit land which she did. She also confirmed that the 1st defendant was her client. The 1st defendant had given the 2nd defendant authority to plead in the case on his behalf which she did. This means that they were working together on the issue of this parcel of land. Why would the 1st defendant give such authority to plead in this case if he did not have an interest in the suit land? Had the defendants been involved in some way with the suit land?

PW2 also gave evidence and confirmed that he visited the site and found the 1st defendant and his agents on the site fencing the suit plot and later the matter was reported to the police station. This is evidence that the 1st defendant was involved in the trespass into the plaintiff's land. Why did the defendant not come to court to give evidence?

The 2nd defendant also confirmed that plot No. 144 and 145 are not adjacent to each other. Did they use authentic maps to do the subdivision or they were in collusion to alienate the plaintiff's land? The maps that were produced by the plaintiff were authentic and gave the true position of the parcel of land on the ground. The photographs produced also proved that there was encroachment on the plaintiff's land. I find that the plaintiff has proved her case against the defendants on a balance of probabilities and enter judgement for the plaintiff as prayed.

I therefore make the following orders.

a) A permanent injunction is hereby issued against the 1st defendant his servants agents family members and any other person through whom he may act against trespassing, erecting fences, erecting structures, uprooting beacons, ploughing, planting, grazing, transferring, selling, leasing and / or in any other manner dealing with land parcel No. PIONEER / LANGAS BLOCK 1 / 145 in any way detrimental to the interests of the plaintiff.

b) A permanent Injunction is hereby issued against the 2nd defendant, her servants, agents, assigns and successors and / or any other person through whom she may act against committing any further acts of trespass, subdivisions, interfering with boundary beacons and / or in any other manner dealing with land parcel PIONEER / LANGAS BLOCK 1 / 145 at the behest of the 1st defendant or any other person in any way An Order that the defendants jointly and / or severally be

condemned to meet the costs of detrimental to the interests of the plaintiff.

c) An order for restoration of the uprooted beacons by the defendants.

d) An against the 1st defendant to remove himself, his servants, agents, family members and any other person who enters land parcel PIONEER/ LANGAS BLOCK 1/ 145 on the instruction of the 1st defendant together with all their properties including removal of the perimeter fence, building stones and temporary building erected thereon within 30 days failure of which an eviction order to issue.

e) Costs of the suit

Dated and delivered at Eldoret this 3rd day of October, 2018.

M.A ODENY

JUDGE

Judgment read in open court in the presence of Mr. Omusundi holding brief for C.F Otieno for the Plaintiff and Mr. Kandie holding brief for Mr.Kirwa for the defendants.

Mr. Koech: Court Assistant.