



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 374 OF 2017

DANIEL KIPKETER RUGUT.....PLAINTIFF

VERSUS

ERNEST KAVAYI.....1ST DEFENDANT

AGGREY LWALO.....2ND DEFENDANT

LENA KAVAYI.....3RD DEFENDANT

GLADYS SHANYISA.....4TH DEFENDANT

HARBERT IGADWA.....5TH DEFENDANT

RUTH KADENYI.....6TH DEFENDANT

JUDGMENT

1. **Daniel Kipketer Rugut**, the Plaintiff, sued **Ernest Kavayi, Aggrey Lwalo, Lena Kavayi, Gladys Shanyisa, Harbert Igadwa** and **Ruth Kadenyi**, the 1st to 6th Defendants respectively, vide the Plaint dated the 23rd November, 2017 seeking for an order of eviction against them from land parcel **Kemeloi/Koibarak”A”/175** and costs. The Plaintiff avers that land parcel **Kemeloi/Koibarak”A”/175**, the suit land, is registered in the name of his father **Elias Kiprugut Songok**. That the Defendants are illegal encroachers who have illegally erected structures and engages in farming on the suit land without permission. That there has been several cases before the Courts Arbitration Boards, and Adjudication Committee involving the Defendants and their relatives over the suit land which they have all lost. That the Plaintiff has asked the Defendants to vacate from the suit land but they have declined and hence this suit.

2. The Plaintiff’s claim is opposed by the 1st to 3rd Defendants through their statement of defence and counterclaim dated the 1th January, 2018. They aver that **Isaya Kavayi**, who was their late father and husband to 1st Defendant, had bought 12 acres portion of the suit land from **Christopher Kiptoo**, now deceased, in 1964 when the land was known as parcel No. 70 during adjudication. That however, the Plaintiff’s father registered the whole land in his name, including their father’s 12 acres portion. That they have been in actual possession of the 12 acres portion since 1964 without interruption and the Plaintiff’s claim is therefore statutory time barred. That the Plaintiff and his father are the ones who had filed numerous suits over the land’s ownership with minimal success. That the Plaintiff’s title over their 12 acres portion has been extinguished by operations of the law. That in their counterclaim, the 1st to 3rd Defendants allege that the Plaintiff’s father fraudulently caused the whole land to be registered in his name while aware they had bought and occupied the 12 acres portion. That they seek for orders that they are entitled to the 12 acres portion that they occupy and utilize under adverse possession; that Land Registrar, Kapsabet to cancel the title deed issued to the Plaintiff’s father over the suit land and rectify its register accordingly; and permanent injunction against the Plaintiff over the 12 acres portion and the Plaintiff’s suit be dismissed with costs.

3. The Plaintiff filed a defence to the 1st to 3rd Defendants’ counterclaim headed **“Reply to counterclaim”** dated 9th July, 2018. The Plaintiff avers that the 1st to 3rd Defendants are not entitled to any portion of the suit land as their occupation has been constantly challenged. That his father was registered with the land following protracted objections and claims during adjudication and registration and therefore the 1st to 3rd Defendants claim is illegal ab initio. That the prayers sought by the 1st to 3rd Defendants are unconstitutional and intended to deprive him of his inalienable right to own, possess and work on the suit land at their exclusion and all others.

4. The Plaintiff’s claim is also opposed by the 4th to 6th Defendants through their statement of defence dated the 29th January, 2018. They aver that the Plaintiff has no locus standi to bring the suit. They averred that they legally entered onto the suit land, erected houses thereon, ploughed, grew trees and crops and have continued to do so for over 20 years. That the Plaintiff had in 2016 filed **Eldoret ELC No. 128 of 2016** over a similar claim that he later withdrew. That the suit land is subject of **Eldoret Succession Cause No. 297 of 2001** that was still pending. They denied having been served with a notice to vacate. That if the Plaintiff has title to the suit land, then it should be cancelled as

it was fraudulently obtained. That their occupation of the suit land has been peaceful, continuous, uninterrupted and adverse to the title of the Plaintiff. That they have acquired proprietary right over the suit land and the Plaintiff's suit is incurably defective, incompetent, bad in law and should be struck out and dismissed with costs.

5. The Plaintiff testified as **PW1** and told the Court the suit land is in the name of his father named **Kipruto Arap Songok**, and that he has filed this suit on the strength of the power of attorney donated by him dated 24th October, 2017. He identified copies of the proceedings before the adjudication officer, and letter confirming the outcome of the subsequent appeal to the Minister. He also identified copies of ruling in **Eldoret Misc. Application No. 4 of 1991** by Defendants that they lost, and Settlement Officer's letter dated 30th June, 1992 confirming the land belonged to his father among others. He denied that the Defendants, had bought a portion of the land. That his father got registered with the land in 1995 though it had been allocated to him much earlier. He prayed for the Defendants to be evicted and costs of the suit. During cross examination, the Plaintiff testified that his father made the power of attorney in America where he lives. That PW1 registered the power of attorney at Kapsabet after he signed. He agreed that the copy of the power of attorney in court did not have his signature or evidence of registration with the Land's Office. That his father inherited the land from his late father. That he was penalized by this Court for disobeying the Court injunction order. That the Defendants had lived on the suit land for over 12 years since the 1960's, before vacating in 2018. That on the suit land, is still a house of 3rd Defendant but that none of the Defendants are on the land as at the time of his testimony. That it is true his grandfather had sold what belonged to his father without the Plaintiff's father's permission. That he withdrew ELC No. 168 of 2015 on finding he had no capacity to file it and thereafter he filed this case after obtaining the power of attorney. That he had registered the power of attorney with the Lands Officer under reference No. 1889 of 2017 that is indicated at the top right margin. The Plaintiff called **David Kiplangat Songok** and **David Koech** who testified as **PW2** and **PW3** respectively.

6. The 1st to 3rd Defendants called Beatrice Mbone Kavayi who testified as **DW1**, and her mother, the 3rd Defendant, who testified as **DW2**. That the 4th, 6th and 5th Defendants testified as **DW3** to **DW5** respectively. That the 1st to 3rd Defendants' case is that the late Isaya Kavayi, who was the husband to the 3rd Defendant, bought 12 acres parcel then known as parcel No. 70 from one Christopher Bitok in 1964. That his family moved onto the land in 1968, developed it by erecting houses, planting trees, coffee, fruit trees, bananas, sugarcanes and others until 15th April, 2018 when the Plaintiff forcefully evicted them, and demolished their houses. That when the late Isaya Kavayi was alive, he discovered one Elias Rugut had caused parcel No. 70 to be consolidated with his parcel and registered as Nandi/Koibarak "A"/175 in his name. That the late Isaya Kavayi filed a case at Kakamega claiming the land but the case was not heard by the time he passed on in 2002. That after being evicted on 18th April, 2018, they reported to the Assistant Chief, and Chief who called the police, but they did not assist them. The 3rd Defendant testified that they filed a counterclaim against the Plaintiff and prayed for the land to be registered with Christopher, who would in turn transfer it to them. DW3 testified that she had bought a portion of 1½ acres of the suit land from **James Gwando** and 6th Defendant in 1978 at Shs.160,000 and took possession. That she erected a house, connected electricity, planted trees, crops and kept cows until 4th April, 2018 when the Plaintiff came with others and evicted her and other Defendants. She prayed that she be allowed back onto the land. DW4, a widow to James Gwando, testified that she got married in 1982 on the suit land. That her husband who passed on in 2016, and their children who have passed on, were buried on the suit land. That she lived on the suit land until 2018 when they were evicted with the other defendants, and their houses demolished. That the suit land belonged to her late husband. DW5, a brother in law to DW4 testified that the suit land belonged to their father James Gwando and have lived on it since 1963 to 2018 when they were forced out. That his late father, three brothers and other children who have passed on were buried on the suit land. That the suit land had been sold to their late father by the Plaintiff's grandfather. That Elias Rugut however, had the land registered as his without their knowledge claiming it had been given to him by the same grandfather who had sold it to their father. That the land bought by their father was about 35 acres while, 3rd Defendant had bought 12 acres from Christopher Kibitok. That their land and that of 3rd Defendant were amalgamated with other parcels by Elias Rugut and registered in his name. That from 1963, they had lived on the land peacefully until their eviction in 2018. He prayed to be allowed back on the land.

7. The learned Counsel for the Plaintiff, 1st to 3rd Defendants and 4th to 6th Defendants filed their written submissions dated the 15th October, 2020, 30th October, 2020 and 9th December, 2020 respectively.

8. The following are the issues for determinations by the Court;

(a) Whether the Plaintiff is with locus standi to file, prosecute and defend this case in his name.

(b) Whether the Plaintiff has established that Defendants, or any of them, are illegal trespassers onto the suit land and if so, whether eviction order should issue.

(c) Whether the 1st to 3rd Defendants have capacity to sue in their own name and whether they have proved their entitlement to 12 acres of the suit land under adverse possession as prayed in their counterclaim.

(d) Whether the 4th to 6th Defendants have established their defence of adverse possession to the Plaintiff's claim.

(e) Who pays the costs of the Plaintiff's suit and 1st to 3rd Defendants' counterclaim.

9. The court has carefully considered the pleadings as summarized above, the evidence tendered by PW1 to PW3, DW1 to DW5, submissions by the three learned Counsel and come to the following findings;

(a) That the record and evidence presented confirms that the dispute between the parties is ownership and use of portions of land parcel Kemeloi/Koibarak "A"/175. That the copy of the title deed attached to the Plaintiff's list of documents indicates that the land was first registered on 10th October, 2013 in the name of Kiprugut Arap Songok, who the court takes to be the one variously referred by the parties herein as Elias Kiprugut Songok or Kiprugut Songok or Rugut Songok, the father to the Plaintiff.

(b) That the said Elias resides outside the country and according to the Plaintiff, he donated to him the authority to file and prosecute this suit through the power of attorney dated the 24th October 2017, that he subsequently registered with the Lands Office under reference 1889/17, that is on the right top margin. That the Defendants have disputed the Plaintiff's capacity or *locus standi* to file and sustain this suit in his name. That the Plaintiff's Counsel has in their submissions referred to **Section 9 Rule 2 of the Civil Procedure Rules**, and submitted that though the Plaintiff filed the suit in his name and not that of his father, that was a procedural defect curable by **Article 159 (2) (d) of the Constitution** as the parties in the suit had notice he was suing as an authorized agent of the registered proprietor of the suit land. That the learned Counsel for the 4th to 6th Defendants submitted that the Plaintiff was without locus standi in view of **Sections 4 of the Registration of Documents Act Chapter 285 of Laws of Kenya**, and **Section 19 of the Stamp Duty Act** that had not been complied with as the power of attorney the Plaintiff relied on had not been formally registered. That further, the Plaintiff did not produce the said power of attorney as exhibit in court, and as he was not the registered proprietor to the suit land, the case should be dismissed with costs. The learned counsel cited the following superior court, decisions; **Kirugi & Another Vs Kibiya & 3 Others (1987)**, **Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagir [2014] eKLR**, and **Francis Mwangi Mugo Vs David Kamau Gachago [2017] eKLR**. That the learned Counsel for the 1st to 3rd Defendants also submitted that the Plaintiff has no locus standi in this case. The counsel referred to **Sections 44(1), (2), (4), (5)(b) and 46 of the Land Registration Act, Cap. 300 of Laws of Kenya**, **Section 88 of the Evidence Act Chapter 80 of Laws of Kenya**, **Section 19(1) of Stamp Duty Act** and **Order 9 Rule 2 of the Civil Procedure Rules** and submitted that the power of attorney the Plaintiff relied upon had not complied with the legal requirement therein. That the requirements of the said provisions goes to the issue of the Plaintiff's legal capacity, and cannot be cured by **Article 159 (2) (d) of the Constitution** as it was not a procedural defect. The counsel relied on the superior court decision in **Francis Mwangi Mugo Vs David Kamau Gachago [2017] eKLR**. The Court wishes to point out from the onset that **Land Registration Act is Act No. 2 of 2012** and not **Chapter 300 of Laws of Kenya**. That the Land Registration Act replaced the **Registered Land Act Chapter 300 of Laws of Kenya** and four (4) other statutes that were repealed under **Section 109** of the of the said Act. The Court takes the reference to **Chapter 300 of Laws of Kenya** in the 1st to 3rd Defendants' learned Counsel submissions to have been in error and will be taken to refer to **Act. No. 3 of 2012**.

(c) That as the issue of a party's capacity to institute a suit is an important one that is likely to impact on the other issues and it is critical that it be determined first. That it is not in dispute that the suit land is registered in the name of Kiprugut Arap Songok who reportedly lives in the United States of America. That the suit was however filed in the name of the Plaintiff who is reportedly the son of the said Kiprugut Arap Songok, ostensibly on the strength of a power of attorney. The locus standi of the Plaintiff has been questioned through the Defence filed by the Defendants and submissions filed by their learned Counsel. The term locus standi is defined in **Black's Law Dictionary, 9th Edition** at page 1026 as;

“The right to bring an action or to be heard in a given forum”.

That in the case of **Law Society of Kenya vs Commissioner of Lands & Others, Nakuru High court Civil Case No. 464 of 2000**, the Court held that;

“Locus standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in court of Law”.

That in the case of **Alfred Njau & Others vs City Council of Nairobi (1982) KAR 229**, the Court held that;

“the term locus standi means a right to appear in Court, and conversely, to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceedings.”

(d) That in the Plaintiff dated 22nd November, 2017 through which this suit was commenced, the Plaintiff has not indicated in any paragraph, or even at the heading, that he is suing the defendants on behalf of the registered proprietor on the strength of the power of attorney donated to him. That however, at paragraph 2 of his verifying affidavit sworn on the 23rd November, 2017 and filed with the Plaintiff, he has deposed that he is swearing the **“affidavit on my own behalf and that of my father Elias Kiprugut Songok”**. The copy of the power attorney is attached to the said verifying affidavit and is dated the 24th October, 2017. It authorizes the **Plaintiff “to file suit in person and/or hire such sub agent as may be deemed lawfully necessary, make statements, complains, sign, and collect all documents, in respect of all that piece of land under adjudication described as KOIBARAK NO. 175 A measuring 9.94 Ha”**. That a power of attorney that is lawfully donated, accepted and registered, and where necessary notarized allows the person (**donee**) to whom it is directed by the donor (**principal**) to act in accordance with the instructions thereon. That when such donee (**agent**) so acts, he/she does so as if it was the donor (**principal**). The power of attorney must as of necessity contain the full name and address of the donor and donee, signed by both of them, and properly executed. It must be stamped upon the stamp duty being paid under the **Registration of Documents Act**. The provision of **Section 4** of the said Act provides that all documents conferring any right, title or declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property shall be registered. That whereas the power of attorney is not specifically mentioned in the said provision to be among those requiring registration, it falls under the documents which declare certain rights or limitations over immovable properties which must be registered.

(e) That it follows that the power of attorney which confers upon the donee a right to deal with immovable property, like the one the Plaintiff relies on, must be registered. That failure to register such a power of attorney means the donee, in this case the Plaintiff, cannot claim any right under it. That the failure to register the power of attorney means the stamp duty was not paid on it as required under **Section 19 of the Stamp Duty Act**. That a power of attorney whose stamp duty has not been paid cannot be accepted for registration under **Section 46 of the Land registration Act**. The Plaintiff had an obligation in law under **Section 107 of the Evidence Act Chapter 80 of Laws of Kenya** to tender evidence that the power of attorney he sought to rely on as the basis of his capacity had been registered in accordance with the law, but failed to do so. That further, the power of attorney do not comply with **Section 44 (1), (2), (4), (5)(b) of the Land Registration Act** as it does not have the signature of the Plaintiff to signify his

acceptance. That further the certificate required in respect of a power of attorney executed outside Kenya has not been availed or attached to the document.

(f) That further, the power of attorney the Plaintiff relies on was executed in the United States of America and cannot be admitted under **Section 88 of the Evidence Act Chapter 80 of Laws of Kenya** without prove of the seal or stamp or signature by way of affidavit or otherwise by the Notary authenticating it.

(g) That in the case of ***Francis Mwangi Mugo Vs David Kamau Gachago [2017] eKLR***, the Court held that;

“20...I think the more fatal omission is not necessarily payment of stamp duty important as it is, but the failure to register the power of attorney before filing suit, for to me, it is the act of registration which then vests the donee with capacity to deal with the immovable property claimed by the donor. The power of attorney in this instance, is not similar to a sale agreement or a lease, whose value is only evidentiary. The power of attorney here, falls under the purview of capacity for one cannot act for another without having the legal capacity to do so. I hold the view that before a donee of a power of attorney can act, on a matter, at least that involving immovable property, then he must register that power of attorney before he can allege to have capacity to act.”

That decision is not binding to this Court but the Court agrees with the finding that before a donee of a power of attorney can be clothed with capacity to act in respect of immovable property, the power of attorney must be registered in accordance with the law, and among others after payment of stamp duty.

(h) That **Article 159 (2)(b) of the Constitution of Kenya, 2010** that enjoins the Court to look at substantive issues and not technicalities cannot provide refuge to the predicament the Plaintiff finds himself in by failing to register the power of attorney. That the issue of locus standi or capacity to sue or defend a suit is so central in legal proceedings that it cannot be classified among technicalities. The court agrees with the finding in ***Francis Mwangi Mugo Vs David Kamau Gachago (supra)***, where it was held that;

“21. I do not think capacity is a technicality curable under Article 159 of the Constitution. It is either you have it or you do not. You do not gain capacity retrospectively. At the time of filing suit, Francis Mwangi Mugo, in my view did not have capacity because he had not registered the power of attorney. I therefore have no option but to strike out the suit with costs...”

That likewise, the Plaintiff’s suit should be struck out with costs without even dealing with the other issues set out above for determination.

(i) That the 1st to 3rd Defendants’ counterclaim is in view of the above findings against a party, the Plaintiff herein, who is without capacity or *locus standi* to sue or be sued in respect of title or ownership of the suit land under contract of sale and or adverse possession. That even without going to the other issues set out for determination, the foregoing finding is sufficient to deal with finality the 1st to 3rd Defendants’ counterclaim. That it suffers the same fate the Plaintiff’s suit has suffered. That however, each party will pay their own costs in the counterclaim.

10. That in view of the findings above, the Court orders as follows;

(a) *That the Plaintiff’s claim against all the Defendants is hereby struck out with costs for lack of capacity.*

(b) *The 1st to 3rd Defendants’ counterclaim against the Plaintiff is also struck out with each party being their own costs.*

DELIVERED VIRTUALLY AND DATED AT ELDORET THIS 5TH DAY OF MAY, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Cheruiyot for Sagasi for Plaintiff.

M/s Chesoo for Juma for 1st to 3rd Defendants and

M/s Odwa for 4th to 6th Defendants.

Court Assistant: Christine

and the Judgment is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.