



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 131 OF 2016

PHILLIP TAPAKWANG.....PLAINTIFF

VERSUS

JACKSON KARIWO.....1ST DEFENDANT

ESTHER KARIWO.....2ND DEFENDANT

AMBROSE KELISO.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff in this suit filed a plaint dated 29/8/2016 on 30/8/2016. The Plaintiff seeks judgment against the defendants jointly and severally for the following orders:-

- (a) An eviction order against the 1st, 2nd and 3rd defendants their agents, and/or servants from the said parcel of land known as LR. No. West Pokot Chemwochoi/545 measuring 21.85 hectares;
- (b) A permanent injunction restraining the 1st, 2nd and 3rd defendants, their agents and/or servants from trespassing upon and/or committing any acts upon the plaintiff's said parcel of land known as LR. No. West Pokot Chemwochoi/545 measuring 21.85 hectares;
- (c) General damages for illegal trespass
- (d) Costs of this suit with interests
- (e) Any other or further relief that this court may deems fit and just to grant.

PLEADINGS

The Plaintiff

2. In the body of the plaint the plaintiff claims to be the absolute proprietor of **LR. No. West Pokot/Chemwochoi/545** (hereinafter also referred to as "*the suit land*") and that the defendants have trespassed thereon and cultivated and grazed the animals on the land besides felling indigenous trees for fuel. They have also started constructing structures without the plaintiff's consent hence the suit.

The Defence

3. The defendants filed a joint statement of defence on 2/3/2017. In that defence they aver that the plaintiff's suit does not sufficiently disclose material particulars for any cause of action; that they do not reside on the suit land; that the 1st defendant resides in Kokma six kilometres away from the suit land; that the 2nd defendant resides on **LR. No. West Pokot/Chemwochoi/300** and the 3rd defendant who is described in the defence as the plaintiff's brother lives on **LR. No. West Pokot/Chemwochoi/299** which allegedly belonged to their father. It is said that the 3rd defendant has utilized the said land since 2009 but that the land has now been fraudulently subdivided by the plaintiff to create two portions one of which is that the plaintiff claims to be his in this suit. The defendants aver that the plaintiff has encroached on **LR.**

No. West Pokot/Chemwochoi/300. It is stated that the subdivision conducted by the plaintiff on **LR. No. West Pokot/Chemwochoi/299** was not consented to by the plaintiff's father one **Tapakwang Rimalinga** who is the former registered owner. The 3rd defendant states that he came to know the existence of **LR. No. West Pokot/Chemwochoi/545** upon receipt of summons in this suit. The defendants also state that the boundaries to **LR. No. West Pokot/Chemwochoi/545** have never been demarcated on the ground.

The 2nd and 3rd Defendants Counterclaim

4. The 2nd and 3rd defendants rely on the averments on the defence with regard to the plaintiff's fraud which they reiterate in the body of the counterclaim. In their counterclaim they seek the following orders:

(a) That the title Nos. West Pokot/Chemwochoi/544 - 549 created as a result of subdivision of West Pokot/Chemwochoi/299 be cancelled and the same revert back to West Pokot/Chemwochoi/299;

(b) The plaintiff be ordered to pay the costs of the suit and the counterclaim.

5. In the body to the counterclaim it is also averred that **LR. No. West Pokot/Chemwochoi/299** was registered in the name of the plaintiff's father **Tapakwang Rimalinga** in **1980**; that the plaintiff has encroached on **3 acres** which are part of **LR. No. West Pokot/Chemwochoi/300**; that in **2009** the 3rd defendant was allocated an unsurveyed portion of land in **LR. No. West Pokot/Chemwochoi/299** by his father as a gift which he took possession of immediately and which he has utilized to date. The particulars of fraud leveled against the plaintiff in the defence are reiterated in the counterclaim.

Reply to defence

6. The plaintiff filed his reply to defence dated **24/4/2017** in which he joined issues with the defendants in their defence and counterclaim and maintained that they have trespassed on his land.

Preliminaries

7. By a consent order of the parties adopted by the court on **23/11/2017** it was ordered that the County Surveyor do survey **LR. No. West Pokot/Chemwochoi/545** and identify the proper boundary to the land and file a report that indicates the extent of encroachment by the defendants if any. The County Surveyor West Pokot District filed a brief report dated **17/5/2018** indicating that the site was visited on **9/5/2018** in the presence of among others the chief and a village elder, the plaintiff, the 3rd defendant and others. His report states that the defendants had partially encroached into **LR. No. West Pokot/Chemwochoi/545** by **0.41 Hectares**.

8. However the matter proceeded to a substantive hearing on **22/10/2018**, **6/3/2019** and **24/2/2020** and also **24/2/2021** despite the contents of the County Surveyor's report as there was no consent by parties.

The Plaintiff's Evidence

9. The plaintiff **Philip Tapakwang** adopted his statement and stated that the defendants are his neighbours who have trespassed upon his land **LR. No. West Pokot/Chemwochoi/545**. He produced the search certificate to demonstrate that the land belonged to him. He also produced a map of the land and pointed out boundaries thereon between him and his neighbours. He stated that he reported the trespass by the defendants to the police vide **O.B. No. 33/24/04/2016**; he produced a demand noticed dated **9/6/2016** as **P. Exhibit 5**. He stated that there is massive destruction of indigenous trees on the land; the defendants are also grazing of animals and burning of charcoal on the said land. He produced photographs as evidence of those activities [**P. Exhibit 6 (a) - (j)**]. He also produced a green card as **P. Exhibit 7**. He relied on the surveyor's report filed in court record which was analysed herein above. He claimed that the defendants get approximately **Kshs.100,000/=**, without stating whether it is per month or per year. Upon cross-examination he admitted that the 1st and 2nd defendants are from his clan and the 2nd defendant is wife to the 1st defendant while the 3rd defendant is his half-brother who does not reside on the land. He stated that the defendants have their land elsewhere; that he got title to his suit land in **2015**; that his father transferred it to him and that he therefore got the land legally. He admitted that the 1st and 2nd defendants live on **LR. No. West Pokot/Chemwochoi/300**. He stated that the 2nd defendant lives on a part of the suit land. He stated that his mother is the first wife while the mother of the 3rd defendant is the 2nd wife to their father. Upon giving that evidence the plaintiff closed his case.

The Defendants' Evidence

10. **DW1, Jackson Kariwo** testified on **24/2/2020**. He adopted his statement dated **1/3/2019** as his evidence-in-chief. He denied living on the suit land and stated the **LR. No. West Pokot/Chemwochoi/300** belongs to his father and produced a search certificate as **D. Exhibit 1**. He dismissed the survey report filed in the court record as untruthful. He averred that it is his father who should have been sued.

11. **DW2, Ambrose Keriso Tapakwang** gave evidence and adopted his witness statement date on **1/3/2019**. He stated that **LR. No. West Pokot/Chemwochoi/299** belonged to his father and he produced its green card as **D. Exhibit 2**. He maintain that he lives on **LR. No. West Pokot/Chemwochoi/299**. He stated that the surveyors visited **LR. No. West Pokot/Chemwochoi/300** upon the order of the court. He also stated that he was born on the land and married from there. Upon cross-examination by Mr. Bororio he denied knowledge of the owner of **LR. No. West Pokot/Chemwochoi/545**. He stated that he has never reported any fraud to the Criminal Investigation Department. According to his statement he was allocated a portion of land by his father and the plaintiff obtained land after taking advantage of his father's sickness and fraudulently caused the land to be subdivided to his advantage without the consent of the family. Upon re-examination he also denied having encroached upon **LR. No. West Pokot/Chemwochoi/545**.

12. DW3, Esther Kariwo testified on 23/2/2021 and adopted her witness statement dated 1/3/2019. Her evidence is that she does not live on LR. No. West Pokot/Chemwochoi/545; she maintained that she lives on LR. No. West Pokot/Chemwochoi/300. Upon cross-examination she denied that she and her husband have trespassed on plaintiff's land. She maintained that the plaintiff illegally got LR. No. West Pokot/Chemwochoi/545.

13. At that juncture the defendants closed their case.

SUBMISSIONS

14. Submissions were filed on behalf of the plaintiff on 8/3/2021. The defendants filed submissions on 26/4/2021.

DETERMINATION

15. I have considered the pleadings, the evidence and the submissions. The main issues for determination are:

- (a) *Whether LR. No. West Pokot/Chemwochoi/545 registered in the name of the plaintiff;*
- (b) *Did the plaintiff obtain registration of title to LR. No. West Pokot/Chemwochoi/545 in his name fraudulently?*
- (c) *Whether the defendants have trespassed on the said land;*
- (d) *Whether an order of eviction against the defendants should issue*
- (e) *Who should bears the cost of the suit?*

16. The issues are addressed as hereunder:-

(a) **Whether LR. No. West Pokot/Chemwochoi/545 is registered in the name of the Plaintiff**

17. The plaintiff produced the original title to LR. No. West Pokot/Chemwochoi/545. Section 26 of the Land Registration Act provides as follows:

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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”.**

18. Section 107 of the Evidence Act provides as follows:

“107. Burden of proof

(1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

19. I find that it was upon the plaintiff to establish that he is the registered proprietor of the suit land and he has discharged that burden.

20. Beside the original title the plaintiff also produced a certificate of official search showing that the land belonged to him. I am therefore satisfied that the land is registered in the name of the plaintiff.

21. These findings effectively dispose of the claim by the defendants that the plaintiff's claim has not been adequately set out in the plaint to show that a cause of action exists. Regarding the claim the 1st defendant's father should have been suit, I am of the view that in matters of trespass which is usually a physical act, it is the trespasser and not necessarily landowner who ought to be sued. The land owner needs be sued if he is in trespass. In this case it was not alleged that the 1st defendant's father lives on the land. This court can not presume that he was in trespass and recommend that the plaintiff sues him. It must be believed that the plaintiff sued the persons he had evidence to prove that they were in trespass. The plaintiff ought to be allowed to proceed to prove the rest of his claim.

(b) **Did the plaintiff obtain registration of title to LR. No. West Pokot/Chemwochoi/545 in his name fraudulently?**

22. Similarly, in accordance with Section 107 of the Evidence Act, it was incumbent upon the defendants to established fraud on the part of the plaintiff. The most they did was to state in their evidence that the plaintiff took advantage of his father's sickness when his father was alive and subdivided the land and registered himself over a portion thereof. No evidence was given of the plaintiff's father's sickness. No

documentary evidence was produced to show that any investigations regarding fraud were conducted by the police while focusing on the plaintiff as a suspect. I find that the allegation of fraud against the plaintiff have **not** been established by the defendants.

(c) Whether the defendants have trespassed on the said land

23. As to whether the defendants have trespassed on the suit land I have considered the expert evidence of the County Surveyor in the form of a survey report filed in court. The site visit was conducted in the presence of the plaintiff and the 3rd defendant at which it was established that the occupiers of **LR. No. West Pokot/Chemwochoi/300** have encroached on **LR. No. West Pokot/Chemwochoi/545** by **0.41 hectares**. The defendants did not adduce any evidence to controvert this evidence by the surveyor. I find that the plaintiff's claim of encroachment by the 1st and 2nd defendants has been established.

24. As regards trespass by the 3rd defendant I find that plaintiff's evidence is that he has also encroached on **LR. No. West Pokot/Chemwochoi/545**. The court was not told by the plaintiff which land belongs to the 3rd defendant. However I have taken cognizance of the fact that the defendants themselves aver that the 3rd defendant resides on **LR. No. West Pokot/Chemwochoi/299**. The 3rd defendant in his evidence averred that he was born on that land and married while on that land parcel. However it is clear to see from the evidence of the defendants that that land parcel does not exist anymore. It ceased existing on **10/4/2015** upon subdivision. The green card produced by 3rd defendant as **D. Exhibit 2** shows that **5** new portions were created upon subdivision, that is, **544, 545, 546, 547, 548** and **549**. This is contrary to the 3rd defendant's belief that only **2** portions emanated from the subdivision. It is clear that these events place during the 3rd defendant's father lifetime as he has admitted so. In the absence of any evidence of fraud on the part of the plaintiff, it would appear that the father to the plaintiff who was also father to the 3rd defendant subdivided the land into five portions and one of these portion was registered in the name of the plaintiff when he was alive. From the evidence on record this court may not know which portion amongst the five was reserved for the 3rd defendant. What remains clear is that the plaintiff being the owner of **LR. No. West Pokot/Chemwochoi/545** has right against all third parties and his title must be recognized as required by **Section 26** of the **Land Registration Act** subject to any legal exceptions. The defendants have not brought themselves under any of the legal exceptions stated in **Section 25(1)** and **(2)** of the **Land Registration Act** and have in addition failed to prove fraud on the part of the plaintiff as required by **Section 26 1(a)** or **(b)** so as to impeach the plaintiff's title to the suit land. This being a suit for eviction it was incumbent upon all the defendants to demonstrate that they have a good cause to be on the suit land belonging to the plaintiff and they have not discharged that burden of proof. I find that they cannot sustain their occupation of the suit land in the circumstances and that they are trespassers on **LR. No. West Pokot/Chemwochoi/545**.

(d) Whether an order of eviction against the defendants should issue

25. In light of the foregoing I find that the Plaintiff has established his claim on a balance of probabilities against all the defendants. I find the defendants are trespassers on **LR. No. West Pokot/Chemwochoi/545** registered in the name of the plaintiff and they do not have any legal basis to occupy the suit land and that they should be evicted. I have considered the claim for damages for trespass. I also find that no evidence sufficient to prove the claim of damages having been given this court, having regard to the fact that the plaintiff has proved trespass and upon the presumption that he must have suffered some loss, may in its discretion only award a nominal sum, which in my opinion is **Kshs.100,000/= (Kenya Shillings One Hundred Thousand Only)**.

(e) Who should bears the cost of the suit?

26. The defendants occasioned this suit by their conduct and they should bear its costs.

Conclusion

27. In the final analysis I find the plaintiff's suit against all the defendants has merit and I hereby issue the following orders:

(a) The 1st, 2nd and 3rd defendants shall all jointly and severally remove themselves forthwith from said parcel of land known as LR. No. West Pokot Chemwochoi/545 and in default thereof they shall be forcibly evicted therefrom at their cost.

(b) A permanent injunction is hereby issued restraining the 1st, 2nd and 3rd defendants, their agents and/or servants from trespassing upon the plaintiff's said parcel of land known as LR. No. West Pokot Chemwochoi/545.

(c) General damages of Kshs. 100,000/= (Kenya Shillings One Hundred Thousand Only) are awarded and the said sum shall be paid by the defendants jointly and severally to the plaintiff for trespass on LR. No. West Pokot Chemwochoi/545.

(d) The defendants shall bear the costs of this suit.

It is so ordered

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 4TH DAY OF MAY, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.