



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 99 OF 2018

WILSON KIPKOECH LELEI.....PLAINTIFF

VERSUS

STEPHEN KIPSANG KOECH.....1ST DEFENDANT

LIDYA JEPNGETICH LELEI.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff vide a plaint dated 13/6/2007 and filed in court on 15/6/2007 instituted the present suit against the defendants seeking for judgment for:-

- a. An order of eviction to issue against the 1st and 2nd Defendants jointly and severally.
- (b) Without prejudice to paragraph (a) above, an order of eviction to issue against the 1st defendant.
- (c) An order of permanent injunction to issue restraining the 1st and 2nd defendants from harassing, threatening, intimidating and or in any other way obstructing the plaintiff from accessing, using, utilizing and or developing his suit land as he deems fit.
- (d) General damages.
- (e) Costs of the suit.
- (f) Any other relief this court deems fit and just to grant.

PLEADINGS

The Plaintiff

2. In the plaint, the plaintiff states that he is the registered owner of all that land known as **Kaplamai/ Sirende Block 2/ Ngonyek/ 162**; that he has caused the suit land to be divided into 4 portions, two of 6 acres, one of 4 acres and another of 2 acres; that he intends to transfer the 2 acre portion to a purchaser; that however the defendant have illegally chased away the purchaser; and that the defendants' continued occupation of the suit land without his consent is illegal and occasions him harm, hence the suit for eviction and injunction.

The Defence

3. The 1st and 2nd defendants filed their defence on 19/7/2007. They stated that the plaintiff holds title to the suit land in trust for the 2nd defendant and her children; that the land was acquired through the joint efforts of the plaintiff and the 2nd defendant and that the plaintiff intends to sell the suit land without regard to the 2nd defendant's rights under the law and that both defendants have acquired rights over the suit land.

Reply to Defence

4. The plaintiff filed Reply to Defence on **3/9/2007** denying that the land was acquired jointly or that he holds the land in trust as alleged by the defendants.

The Plaintiff's Case

5. The plaintiff, **Wilson Kipkoech Lelei**, testified on **28/3/2012**. In his evidence the plaintiff stated that he owns the suit land measuring twenty three (**23**) acres and that he purchased the land in the **1980's** and was registered as proprietor on **11th November, 1991**. He produced the title Deed in his name as **P. Exhibit 1**. The plaintiff stated that due to illness he decided to sell two (**2**) acres of the said land in order to raise the medical expenses. He sold the two (**2**) acres to one Moses Kipchumba and his wife. He produced the sale agreement as **P. Exhibit 2**.

6. The plaintiff testified that the defendants resisted the sale of the two (**2**) acres and prevented the purchaser from taking possession. The plaintiff stated that due to threats and intimidation by the defendants, the plaintiff left the land and went to live in Eldoret. He reiterated that the land belonged to him and had purchased it using his own money. That he never got financial assistance from anybody to purchase the land.

7. When cross-examined by Mr Kaosa, learned counsel for the defendants, the plaintiff confirmed that the 1st and 2nd defendants were his son and wife respectively. That he married the 2nd defendant in **1964**. He stated that they first lived in Nandi in his father's land and thereafter he purchased the suit property. He added that the 1st defendant was born in **1968**. The plaintiff stated that his father had given him and his wife four (**4**) acres to cultivate and earn an income.

8. He further stated that he had land in Cherangany measuring twenty one (**21**) acres which he and the 2nd defendant had been cultivating before exchanging it with the suit property. He stated that the defendants live in and occupy the suit property.

9. The plaintiff testified that he had another son by the name Julius whom he gave four (**4**) acres of the suit property but he sold his portion and went to live in Eldoret. He denied giving the 1st defendant four (**4**) acres and further denied selling two (**2**) acres out of the alleged four (**4**) acres. He stated that he sold the two (**2**) acres because he was unwell. The plaintiff added that he lives in Eldoret with his second wife and maintained that the suit property belonged to him and was not family land.

10. On being re-examined by Mr Chelashaw, counsel for the plaintiff, the plaintiff stated that he purchased the land at Cherangany with his own money and later exchanged it with the suit property. He stated that he hived off four (**4**) acres of the land and allocated it to his son by the name Julius while the 1st defendant purchased two (**2**) acres from him (the plaintiff), though that portion was yet to be transferred.

11. No other witness testified in support of his case and the plaintiff's case was marked closed on **23/7/2012**.

The Defendants' Case

12. The defence case proceeded on **14/4/2021** when **DW1, DW2, DW3** and **DW4** testified in the absence of the plaintiff or his counsel who had been served vide an email a copy of which is in the court record.

13. The **DW1, Stephen Koech**, adopted his witness statement dated **23/3/2012** as his evidence-in-chief in this suit. His evidence is that the plaintiff is his father; that he came into the land in **1980**; that his grandfather sold land in Nandi and bought the land at Seum; that his grandfather gave **DW1's** father **4** acres out of the Seum land; that the plaintiff and the 2nd defendant then bought another **9** acres of land; thereafter the plaintiff exchanged all the Seum land with land at Ngonyek (the suit land;) that the Ngonyek land was registered in the Plaintiff's name; that the Ngonyek land was charged to AFC but the 1st defendant produced money to repay the loan and the plaintiff gave him one acre and an agreement (**DExh 1**) was executed; that he later purchased **0.65** acres from the plaintiff vide an agreement dated **17/5/2001(DExh 2)**; that the plaintiff had sold **0.5 acres** of land to one Jeremiah Kosgey but the 1st defendant bought it back from Jeremiah; that Jeremiah had intended to purchase 1 acre from the plaintiff but only managed half an acre; that the plaintiff had also sold **2** acres to one Moses Sainet and his wife which land the 1st defendant also bought back; that Moses handed him the original agreement that he had executed with the plaintiff; that the family had entered into an out of court negotiations and reached an agreement dated **10/2/2017**; that by then the plaintiff's case had been closed; that each child has been given land by the plaintiff; that the 1st defendant has lived on the suit land since **1980** and that the suit ought to be dismissed.

14. **DW2, Lidya Koech**, the 2nd defendant adopted her witness statement dated **23/3/2012** filed in this suit. Her evidence is that the plaintiff married her in **1964** while living at his father's land; that they moved to Cherangany after the father sold the Nandi land; that he gave her family **4** acres; that the family purchased **18** acres and combined the same with the **4** acres; that then they exchanged the Cherangany land with another person's land in Ngonyek; that the plaintiff married another wife; that the 2nd defendant opposed sale of portions of the suit land; that the plaintiff no longer lives on the suit land; that an agreement was reached amongst the family members in **2017**; that she was given **2** acres and the 1st defendant **4** acres; that the 1st defendant had been given **4** acres before he married a wife.

15. **DW3, Isaac Kipkemboi Koech**. He adopted his witness statement filed in this case dated **18/8/2020**. His evidence is that he is son to the 2nd defendant and the plaintiff; that he was born on the suit land; that he was witness to the agreements dated **16/3/2000** and **17/5/2001**; that his older brother was given **4** acres; that **DW3** occupies **2.6** acres; that his father brought a surveyor to the land who presumably subdivided the land; that his father got his portion and sold it and left and that there were 11 purchasers.

16. **DW4, John Cherungut Sakong**, adopted his witness statement filed in this case dated **18/8/2020**. His evidence is that on the basis of **DExh 6**, he bought land from the 2nd defendant's daughter in **2017** and that the plaintiff executed the agreement (**DExh 7**).

17. After the above evidence was adduced, the defendants closed their case.

Submissions

18. The plaintiff had filed written submissions on **13/12/2018**. He filed supplementary submissions on **25/5/2021**. The defendants filed written submissions on **29/4/2021**.

Determination

19. I have considered the plaintiff's case as pleaded, the defendants' defence, the evidence tendered in support thereof as well as the submissions filed.

Issues for Determination

20. It is indisputable that the plaintiff is the registered proprietor of the land comprised in **Kaplamai /Sirende Block 2 (Ngonyek) 162** and that a registered owner has right to deal with his land as he desires. It is not in doubt that the plaintiff desired to dispose of some portions of the suit land for his purposes which he terms as his medical expenses.

21. The main issues for determination in this matter are as follows:

- a. Whether the defendants have harassed and prevented any purchaser from occupying the portion he bought from the suit land;*
- b. Whether the plaintiff has been denied access and use of this land and thus sustained injury, loss and damage;*
- c. What Orders of eviction and injunction should issue against the defendants?*

22. The issues are discussed as hereunder:

(a) Whether the defendants have harassed and prevented any purchaser from occupying the portion he bought from the suit land;

23. I have considered the evidence adduced by both sides in this case and I am of the opinion that the agreement dated **10/2/2017** is genuine and that it distributed the plaintiff's land as described therein. In that agreement, the two acres sold to Moses Sainet were declared to belong to the 1st defendant. In this court's view the plaintiff's only concern was that Moses Sainet had been deprived of possession of the **2-acre** portion he had purchased. However, even if the agreement dated **10/2/2017** had not been arrived at, I doubt that the plaintiff had any locus to lodge this suit on behalf of Moses Sainet or that the claim could succeed against the defendants. Each person is supposed to lodge his own claim unless he has authorized another person to do so on his behalf in which case evidence would be required of which there was none in this case that the plaintiff had been authorized to bring the claim on behalf of the purchaser. Further it emerged in the evidence given by the defendants that the 1st defendant had refunded Moses Sainet the purchase price he had paid to the plaintiff and I have stated earlier in the application to set aside the earlier judgment in this suit that there was no evidence that Moses Sainet was claiming any refund of consideration from the plaintiff owing to failure to access the portion he had purchased. Consequently I find that there is no evidence that the defendants harassed or chased away the purchaser Moses Sainet from the suit land.

(b) Whether the plaintiff has been denied access and use of this land and thus sustained injury, loss and damage;

24. The plaintiff has failed to demonstrate that the purchaser was chased off the land illegally. The defendants have demonstrated that vide an agreement dated **2/11/99** the 1st defendant bought back the position that had been sold to Jeremiah Tirop Kosgey and vide an agreement dated **22/8/2011** he purchased the **2 acres** that had been sold to Moses Sainet. Those acts of purchase can not be faulted. Besides the suit land appears to have been subdivided by virtue of an agreement that was witnessed by a local administrator dated **10/2/2017** after this suit had been partly heard. It is therefore the case that the said agreement had the effect of compromising the instant suit. The suit is no longer sustainable in the light of the distribution of land as described in the said agreement. I can not therefore find that the plaintiff suffered any loss or damage.

(c) What Orders should issue?

25. The defendants have demonstrated their blood relations with the plaintiff. Besides the evidence they have adduced has demonstrated that they have right to be on the suit land as licencees. Further, the 1st defendant has gone as far as purchase of the two acre portion whose possession was the genesis of the instant suit. Finally, the dispute over the land has been resolved before an administrator in an agreement dated **10/2/2017** vide which each member of the family obtained some land and the dispute is therefore resolved. Consequently the orders sought by the plaintiff can not be granted and this suit can not stand.

CONCLUSION.

26. The upshot of the foregoing is that the instant suit is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER 2021.

MWANGI NJOROGE

JUDGE, ELC.