



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 27 OF 2020

SAMUEL KIPRONO KAPTINGEI (Suing as the

Personal Representative to the Estate of the late

WILLIAM KAPTINGEI KIRWA - DECEASED).....PLAINTIFF

VERSUS

MONICAH RUTO.....DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit in his capacity as the personal representative of the estate of the late **WILLIAM KAPTINGEI KIRWA**, through the plaint dated 17th June, 2020 seeking for the following prayers:

*i. A declaration that the defendant is a trespasser and or inter-meddlers and any purchase of the Land Parcel No. **SOY/KAPSANG BLOCK 7 (NGOISA)/66** measuring approximately 9.33 Ha is null and void and her eviction from the said parcel;*

*ii. A permanent injunction to prevent the defendant, her agents, servants or anyone claiming under her from any form of dealing or interference with the Land Parcel No. **SOY/KAPSANG BLOCK 7 (NGOISA)/66** measuring approximately 9.33 Ha; and*

iii. Costs of the suit.

The plaintiff avers that land parcel **Soy/Kapsanga Block 7 (Ngoisa)/66**, the suit property, belongs to William Kaptingei Kirwa, who passed on the 6th May 2002. That he is the personal representative of the estate of the late William Kaptingei Kirwa, and has brought this suit on behalf of the said estate. That sometimes in 2019, the defendant trespassed and or invaded the suit property, tilled, planted crops, and is still cultivating on it without permission or legal rights. That the action by the defendant amounts to intermeddling with the estate of a deceased person, is illegal and fraudulent. The plaintiff filed a request for judgement dated the 19th October, 2020 on the 21st October, 2020 after the defendant failed to file her defence.

2. That in opposition to the plaintiff's claim, the defendant entered appearance through the memorandum of appearance filed together with a **"Memorandum of Defence"** dated 23rd October, 2020. The defendant avers that she is in possession of the suit property as an agent of one Isaac Kiprono Songok, who purchased it in 2004, and took possession. That the plaintiff's claim is time barred by dint of **Section 7 of the Limitation of Actions Act**. That further, the suit is bad in law, does not disclose a cause of action, is fatally defective, and shall raise a preliminary objection to have it struck out. That the suit be dismissed with costs.

3. That through a notice of motion dated 7th September, 2020 one **ISAAC KIPRONO SONGOK**, sought to be granted leave to be enjoined in the matter as the 2nd defendant. The plaintiff opposed the said application vide his replying affidavit sworn on the 18th January, 2021. The learned counsel for the plaintiff and the proposed 2nd defendant attended court virtually during the mention of 23rd November, 2020 and the application was fixed for hearing on the 3rd March 2021. That come that day, the counsel for the proposed 2nd defendant did not attend court, and the notice of motion was dismissed with costs upon the oral application of the counsel for the plaintiff. The court also endorsed the plaintiff's request for judgment dated 19th October, 2020 upon being moved by counsel for the plaintiff. That the matter was then fixed for formal proof on 15th April, 2021.

4. The plaintiff testified as PW1 on 15th April, 2021 and adopted his witness statement filed with the plaint on the 18th June, 2020 as his evidence in chief. He also produced the documents contained in his List of Documents dated 17th June, 2020 as exhibits, and asked the court to grant him the prayers contained in the plaint.

5. The learned counsel for the plaintiff filed their submissions dated the 23rd June, 2021. The counsel submitted that as no confirmed grant

had been obtained in a succession cause relating to the estate of the deceased, the defendant's action and claim of having bought a portion of the estate of the deceased contravenes **Section 45 of the Law of Succession Act**. That such action amounts to intermeddling with the estate of the deceased, and the court should intervene by ordering the eviction of the defendant. The counsel further submitted that the court should issue a permanent injunction against the defendant, since the plaintiff has satisfied the standard of proof outlined in the cases of *Giella v. Cassman Brown & Company Ltd (1973)*, *Benina Ndugwa Kunyuma and 4 Others - vs- National Land Commission [2015] eKLR*, *Healey-vs- Hawkins (1968) 3 ALL E R*, and *Dimet -vs- N H Foot ltd [1974] 2 ALL E R*.

6. The following are the issues for the court's determinations;

a. Whether the plaintiff has proved his claim against the defendant, and if so, what order(s) to issue?

b. Who pays the costs of the suit?

7. I have considered the pleadings filed by the parties as set out above, the evidence tendered by the plaintiff, the written submissions by the plaintiff, the superior courts' decisions cited therein and come to the following findings;

(a) That from the affidavit of service sworn by **Nathan Cheruiyot Kirui**, on the 19th October, 2020 and filed on the 21st October 2020, the summons and other suit papers were served upon the defendant on the 19th June, 2020. That at paragraph 5 of the said affidavit, the deponent discloses that the defendant entered appearance through M/s Kipkorir Cheruiyot & Co. Advocates, on the 7th July, 2020. That by the time the plaintiff filed their request for judgment dated the 19th October, 2020 on the 21st October 2020, the time for the defendant to file their defence had therefore lapsed. That as there is no evidence on record to confirm whether the defendant had sought for enlargement of time to file her defence before filing the document titled "**Memorandum of Defence**" dated the 23rd October 2020, the endorsement of the request for interlocutory judgment on 3rd March, 2021, entitled the plaintiff to proceed to prosecute her claim through formal proof.

(b) The Plaintiff has brought this claim on behalf of the estate of the late **WILLIAM KAPTINGEI KIRWA**, who passed away on 6th May, 2002 as is evidenced by a copy of his death certificate issued on 22nd June, 2020. He produced a copy of a Limited Grant of Administration *Ad Litem* issued on 21st June, 2019, in **Eldoret Chief Magistrate Succession Misc. Appl. No. 130 of 2019**. That as the said Grant *Ad Litem* has not been challenged, I find that the plaintiff is with capacity to file and prosecute this suit on behalf of, and for the benefit of the estate of the said deceased.

(c) That the plaintiff produced a copy of the title deed for SOY/KAPSANG BLOCK 7 (NGOISA)/66 bearing the name of **WILLIAM KAPTINGEI KIRWA** that was issued on 12th March, 2001. That the following provisions of the **Land Registration Act No 3 of 2012** are in my view relevant in determining the issues herein.

"24. Subject to this Act—

1. The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

2.

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. (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.

(2)"

That having considered the import of the foregoing provisions of the law, and the evidence tendered, I find that the copy of the title deed produced in court by the plaintiff is *prima facie* evidence that the deceased is the rightful proprietor of the suit land, and his ownership can only be challenged on the grounds stipulated in the Act, and **Article 40 of the Constitution, 2010**. That it is a fact that the suit land is registered in the name of the deceased, and the authenticity of the title deed for the suit land has not been challenged on account of fraud or misrepresentation or any other illegality by the defendant, who never tendered any evidence to controvert or challenge the plaintiff claim. That without any evidence having been availed by the defendant in support of her filed defence, the averments therein remain mere allegations incapable of defeating the plaintiff's claim.

(d) That a registered owner of land has the right to possess, occupy and use the land he/she owns. This Court takes note of the fact that the registered proprietor of the suit land herein has passed away, and that the proprietary rights that the deceased once held vest in his estate. That accordingly, I find the plaintiff claim succeeds and he is entitled to costs of the suit under **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

8. That having found that the plaintiff has established his claim on a balance of probability, I enter judgement for him against the defendant and order as follows;

(a) That a declaration is hereby issued that land parcel Soy/Kapsang Block 7 (Ngoisa)/66, belongs to the late William Kaptungei Kirwa, deceased, and the defendant's occupation of the said land amounts to trespass.

(b) That the defendant is given thirty (30) days to vacate from the said land, and to give vacant possession to the plaintiff, and in default eviction order do issue to be executed in accordance with the law.

*(c) That a permanent injunction is hereby issued restraining the defendant, her agents, servants or anyone claiming under her from interfering with Land Parcel No. **SOY/KAPSANG BLOCK 7 (NGOISA)/66** measuring approximately 9.33 Ha.*

(d) Costs to the Plaintiff.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 13TH DAY OF OCTOBER, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

In the presence of:

Plaintiff: Absent.

Defendant: Absent.

Counsel: Absent.