



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC. CASE NO. 417 OF 2017**

**(FORMERLY MACHAKOS ELC. CASE NO. 28 OF 2014)**

**SILANTOI ENE SANTA NKOIPIYIA.....1<sup>ST</sup> PLAINTIFF**

**KAPIRANYA OLE SANTA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NATASHA ENE SANTA NGOPIA.....DEFENDANT**

**JUDGEMENT**

By a Plaint dated the 7<sup>th</sup> April, 2014, the Plaintiffs pray for judgement against the Defendant for:

- a) An order of eviction do issue to evict the Defendant and her employees/servant/agents and any other person or persons claiming through her out of land reference number Kajiado/Dalalekutuk/1944 and demolition of the Defendant's buildings and structures thereon and the Plaintiffs be put into vacant possession of the said land.
- b) Permanent injunction restraining the Defendant and her employees/servants/agents and any other person or persons claiming through her from cultivating, building, trespassing or interfering in any manner whatsoever with Land Reference Number Kajiado/Dalalekutuk/1944.
- c) General Damages for trespass.
- d) Costs of this suit.
- e) Interest on (c) and (d).

The Defendant was duly served and filed a Defence and Counterclaim dated 1<sup>st</sup> May, 2014 and denied the averments in the Plaint except for the descriptive including the court's jurisdiction. She denied that the Plaintiffs were owners of land parcel number Kajiado/Dalalekutuk/1944 and insists if indeed they were registered as owners of the said land, then the same was by fraud or mistake. She contends that if the suit is based on trespass, then the same is time barred. Further, that the house in question was constructed before subdivision. She reiterates that the Plaintiffs' suit is time barred. In the counterclaim, she prayed for a declaration that:

- a) That the subdivision of the land Kajiado/Dalalekutuk/27 was null and void.
- b) That the registration of the Plaintiffs as owners of Kajiado/Dalalekutuk/1944 is null and void.
- c) Title No. Kajiado/Dalalekutuk/1944 be cancelled and the same reverted to the owner.

The Plaintiffs filed a Reply to Defence and Counterclaim where they reiterated their averments in the Plaint and denied that Kajiado/Dalalekutuk/27 was subdivided by fraud or mistake. They denied the particulars of fraud as contained in the Counterclaim and insisted that the Defendant is not entitled to the prayers sought in the Counterclaim having benefited from the alleged fraudulent subdivision as well as subsequent transfer of portions of land from all that piece of land known as Kajiado/Dalalekutuk/27.

The matter proceeded for hearing where each party called one witness.

**Evidence of the Plaintiffs**

PW1 who is the 2<sup>nd</sup> Plaintiff herein stated that he is the joint registered proprietor and occupier of land parcel number Kajiado/Dalalekutuk/1944 together with the 1<sup>st</sup> Plaintiff who is his mother. He explained that Kajiado/ Dalalekutuk/1944 was a resultant subdivision of Kajiado/ Dalalekutuk/27, together with 1945 and 1946 respectively, which was owned by his father Santa Nkopitia Norperesian. It was his testimony that the Defendant who is his stepmother was allocated land parcel number Kajiado/Dalalekutuk/1945 while his father sold Kajiado/Dalalekutuk/1946. Further, the Defendant was aggrieved with the subdivision of the land in equal shares between the two households as she had more sons than the 1<sup>st</sup> Plaintiff and she subsequently lodged a complaint with the Land Dispute Tribunal Number TC. 605/01/2011 which made an order directing a surveyor to enter Kajiado/ Dalalekutuk/1944 and annex fifteen (15) acres to the Defendant. The said order was adopted by the Senior Resident Magistrates' Court at Kajiado vide Land Dispute Tribunal Case No. 37 of 2011 on 5<sup>th</sup> July, 2011 but the same was quashed in the Machakos High Court Judicial Review Proceedings Number 168 of 2011. He claims the Defendant trespassed on their land Kajiado/Dalalekutuk/1944 in February, 2011 and constructed a permanent building thereon. Further, she has refused to vacate the land and made it impossible for them to utilize the same.

In cross examination PW1 confirmed that he never consulted the Defendant who is his stepmother before undertaking subdivision. He clarified that before subdivision, the Defendant had not constructed on the suit land. He insisted it is their father who subdivided the land and allocated different portions to family members. He denied selling the thirty (30) acres of land. He reiterated that he wanted the Defendant to move from his mother's land to her land. He did not know the acreage on the extent of encroachment. He sought for the Defendant's house to be demolished.

The Plaintiff produced the following documents as exhibits: Certificate of Official Search for Kajiado/Dalalekutuk/1944; Copy of the Award from the Kajiado Land Dispute Tribunal; Copy of the Decree from the Kajiado Senior Resident Magistrates Court in Land Disputes Tribunal Case No. 37 of 2011; Copies of proceedings from the Machakos High Court Judicial Review Case No. 168 of 2011; Demand Letter dated 20<sup>th</sup> September, 2011 and Notice of Intention to Sue.

### **Evidence of Defendant**

The Defendant as DW1 confirmed she was the wife to Santa Nkopia Norperesian. She claims her husband was owner of land parcel number Kajiado/Dalalekutuk/27. She explained that her husband is a sick man and could not have consented to the subdivision of his land. Further, the land was subdivided without the consent of her husband including herself. She sought for the subdivision to be declared null and void.

In cross examination she insisted the suit land belonged to her husband and parcel number was Kajiado/Dalalekutuk/27. Further, the said land was subdivided into three portions without her consent. She confirmed residing on one portion where PW1 allocated to his mother. She contends that it is PW1 who subdivided the said land as the husband is not aware of the same. She did not know the parcel of land allocated to her but insists she built on her portion and has a title deed to that effect. She reiterates that the husband has been unwell for a while and it is PW1 and his mother who took him to hospital. She clarified that out of the three subdivisions, thirty (30) acres of land was sold.

The Defendant produced a Letter from the Kajiado District Hospital dated 11<sup>th</sup> July, 2012 confirming the Mental Status of her husband, as her exhibit.

The parties thereafter filed their respective submissions.

### **Analysis and Determination**

Upon consideration of the Plaintiff, Defence including Counterclaim, Reply to Defence, Witness testimonies, exhibits and submissions, the following are the issues for determination:

- Whether the Defendant trespassed on the suit land and should hence be evicted therefrom.
- Whether the Plaintiffs are entitled to the orders sought in the Plaintiff.
- Whether the Defendant is entitled to the orders sought in the Counterclaim.
- Who should bear the costs of this suit.

The Plaintiffs in their submissions contended that parties are bound by their pleadings and relied on the case of **Daniel Otieno Migore V South Nyanza Sugar Co. Ltd (2018) eKLR** to buttress their averments. They submitted that the Defendant was a trespasser on their land and they should be awarded general damages for trespass. Further, that they had met the threshold set for grant of a permanent injunction. They reiterated that the Letter dated the 11<sup>th</sup> July, 2012 did not confirm the mental status assessment of Santa Nkopitia Norperesian. They insist the Defendant should be evicted from land reference number Kajiado/Dalalekutuk/1944. To support their arguments, they relied on the following decisions: **Eliud Njoroge Gachiri V Stephen Kamau Nganga (2018) eKLR**; **Judith Julia Wanjiro Njoroge V Samuel Ngeru Mwangi (2019) eKLR**; **Joseph Kipchirchir Koech V Philip Cheruiyot Sang (2018) eKLR** and **Joseph Muchina Njogu V Francis Mucacia Sibashi (2019) eKLR**.

The Defendant in her submission insist the subdivision of land parcel number Kajiado/ Dalalekutuk/27 was undertaken after she has constructed a house thereon, where her husband also resides. She reiterates that the suit is statute barred by dint of section 4 of the Limitation of Actions Act, as the Plaintiffs claim the trespass occurred in 2011 yet they filed the suit in 2017. She insists she is a co-wife to the 1<sup>st</sup> Plaintiff who was given 110 acres while she was given 87 acres. Further, there is no way the land could have been divided into equal shares as the survey was done after she had built her house. She reiterates that there is no evidence from any surveyor that the house is on the boundary nor a report from the surveyor's office that she encroached on the Plaintiff's land.

As to whether the Defendant trespassed on the suit land and should hence be evicted.

The Plaintiffs claim the Defendant has trespassed on their land and constructed a permanent house thereon. PW1 confirmed that their land was a resultant subdivision of Kajiado/ Dalalekutuk/27 which belonged to one Santa Nkopitia Norperesian who is his father. He explained that Kajiado/Dalalekutuk/1944 was a resultant subdivision of Kajiado/Dalalekutuk/ 27, together with 1945 and 1946 respectively and that the Defendant who is his stepmother was allocated land parcel number Kajiado/Dalalekutuk/1945 while his father sold Kajiado/Dalalekutuk/1946. Further, that together with his mother they are proprietors of Kajiado/Dalalekutuk/1944 which the Defendant had trespassed upon in February, 2011 and constructed a permanent building thereon and has refused to vacate it. The Defendant as DW1 denied trespassing on the suit land and contended that it is the 2<sup>nd</sup> Plaintiff who subdivided the land without her consent and sold one portion. Further, that the said subdivision was undertaken after she had constructed her house.

Black's Law Dictionary 10<sup>th</sup> Edition defines trespass to land as follows: ' *A person's unlawful entry on another's land that is visibly enclosed.*'

Section 3 (1) of the **Trespass Act, Cap 294** provides that: **"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."**

In the case of **Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR**, the Court of Appeal favourably cited the case of **M'Mukanya v M'Mbijwe (1984) KLR 761**, wherein the ingredients of the tort of trespass were stated as thus:'

*"trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See Thomson v Ward, (1953) 2QB 153."*

**In the said case, the Court of Appeal further cited an excerpt from Winfield & Jolowicz on Tort, Sweet & Maxwell, 19<sup>th</sup> Edition at page 428 which stated as follows:**

*"Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land." [Emphasis supplied].'*

In this instance, the Plaintiffs confirmed that their land and the Defendant's land emanated from one mother title. They contend that the Defendant has trespassed on their portion of land but did not furnish court with the mutation nor a surveyor's report to confirm the extent of the Defendant's acts of trespass. The Plaintiffs further did not avail one Santa Nkopitaa Norperesian, the original owner of the land parcel number Kajiado/Dalalekutuk/27 to confirm when he undertook the subdivisions and if the same was conducted after the Defendant had constructed on the land. Further, from the Certificate of Official Search which was produced by the Plaintiffs, it indicates they were registered as owners of the suit land on 10<sup>th</sup> September, 2010. There was no evidence tendered to confirm if their land was clearly distinct from the Defendant's land with proper boundaries. The Defendant insisted the said subdivision was done without her knowledge as there was no family meeting. Further, that their husband is not of sound mind and was not aware of the subdivision, which fact was opposed by the Plaintiffs. At this juncture, I opine that the burden of proof was indeed upon the Plaintiffs as envisaged by section 107 of the Evidence Act to demonstrate that the Defendant indeed trespassed on their land after they were issued with their title. However, based on the facts as presented while relying on the legal provisions cited above as well as associating myself with the quoted decisions, I find that the Plaintiffs have failed to prove that the Defendant indeed trespassed on their land and constructed thereon. The Plaintiffs further did not tender evidence to confirm the damages they had suffered as a result of the Defendants acts of encroachment. In the circumstance, I find that the Plaintiffs are not entitled to the orders sought in the Complaint and will decline to grant them.

As to whether the Defendant is entitled to the orders sought in the Counterclaim. The Defendant has sought for orders to reverse the subdivision of Kajiado/Dalalekutuk/27; that the registration of the Plaintiffs as owners of Kajiado/Dalalekutuk/1944 be declared null and void; and for cancellation of the Plaintiffs' title No. Kajiado/Dalalekutuk/1944. I note she did not enjoin the original owner Santa Nkopitia Norperesian in the suit to confirm he disputed the subdivision and that the Plaintiffs acquired their title through fraud. At this juncture, I wish to shift the burden of proof to the Defendant as envisaged in section 107 of the Evidence Act. I note the Defendant has not denied being a beneficiary of the resultant subdivision of Kajiado/ Dalalekutuk/27 as she is the registered owner of Kajiado/Dalalekutuk/1945 which title she has not sought for its cancellation. I opine that the Defendant does seem confused as she is also a beneficiary of the alleged fraudulent subdivision which she now seeks to cancel. Further, I note that Kajiado/Dalalekutuk/1946 was sold to a third party who is also not a party to this suit. It is my considered view that if indeed the Defendant wanted the reversal of the subdivision, she ought to also have sought for rectification of titles emanating from the subdivision of Kajiado/Dalalekutuk/27 and made any person who acquired any of the resultant subdivisions to be a party to this suit first. In the circumstance, I find that the Defendant is not entitled to the prayers as sought in the counterclaim as the same are premature and will decline to grant them.

Who should bear the costs of the suit.

Since the Plaintiffs and the Defendant belong to one family, I will direct that each party bears their own costs.

It is against the foregoing that I find the Plaintiffs have not proved their case on a balance of probability and will dismiss it. I further find that the Defendant has not proved her counterclaim on a balance of probability and will also dismiss it.

Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5<sup>TH</sup> DAY OF OCTOBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**