



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC NO.358 OF 2014**

**HASSAN KIPKEMBOI NGENY.....PLAINTIFF**

**VERSUS**

**JULIUS KIPYEGO MAIYO.....DEFENDANT**

**JUDGEMENT**

**Introduction and Background**

1. The Plaintiff filed this suit against the Defendant on 2<sup>nd</sup> December, 2014. Though the Defendant was duly served with summons to enter appearance and file defence, he neither entered appearance nor filed defence. The case proceeded ex parte and a judgement was entered in favour of the Plaintiff.
2. When the process of execution started, the Defendant engaged the services of a lawyer who filed an application seeking to set aside the ex-parte judgment. On 25<sup>th</sup> September, 2017, a consent was recorded setting aside the ex-parte judgement. The Defendant was given an opportunity to file a defence. All parties were granted leave to amend their pleadings.
3. By an amended Plaint dated 18<sup>th</sup> October, 2017, the Plaintiff sought the following reliefs.

**a. An order of declaration that the defendant and his servants and/or agents are trespassers on the plaintiffs land known as Title Number NANDI/NDURIO/1019.**

**b. An order of eviction against the defendant, his servants and/or agents, evicting the defendant and his said servants and agents with all their belongings from all that parcel of land comprised in Title Number NANDI/NDURIO/1019 and also an order of demolition of the structures on the said Title Number NANDI/NDURIO/1019.**

**bb. An order directing and or ordering the Land Registrar, Nandi County to cause the re-survey. and replacement of beacons on Title Number NANDI/NDURIO/1019 at the cost of the defendant and/or of the plaintiff and the defendant to reimburse the plaintiff.**

**c. An order of permanent injunction restraining the defendant, his servants and/or agents from re-entering, occupying or continued occupation/possession and/or wasting the plaintiffs parcel of land comprised in Title Number NANDI/NDURIO/1019 and/or from doing anything that will interfere with and/or violate the plaintiff's proprietary rights and/or quiet possession in/over that parcel of land comprised in Title No. NANDI/NDURIO/1019.**

**d. Damages and/or mesne profits from the date of trespass until the defendant delivers up possession of the said Title No. NANDI/NDURIO/1019.**

**e. Costs of this suit.**

**f. Any other relief that this Honourable Court deems fit to grant.**

4. The Defendant filed a defence and counter claim on 8<sup>th</sup> December, 2020 in which he sought the following reliefs;-

**a. The plaintiff's original suit be dismissed with costs.**

**b. An order of declaration that the plaintiff as the absolute lawfull owner of the suit land parcel Number NAND1/NDURIO/1019.**

**c. An order directing and or ordering the Land Registrar, Nandi County (the 2<sup>nd</sup> Defendant) to cancel the registration of the Title deed to land parcel Number NAND1/NDURIO/1019 in the 1<sup>st</sup> Defendant's name and to register the title deed documents to the land parcel NAND1/NDURIO/1019 into the Plaintiffs names.**

**d. An order of permanent injunction restraining the defendant, his servants and/or Agents from entering, occupying or continued occupation/possession and/or wasting the Plaintiffs parcel of land comprised in land parcel NAND1/NDURIO/1019 and/or from doing anything that will interfere with and/or violate the plaintiff's proprietary rights and/or quiet possession in/over that parcel of land comprised in land parcel NAND1/NDURIO/1019.**

**e. Costs and interest.**

5. The Defendant failed to give instructions to his lawyer who applied to cease acting for him. The Defendant's lawyer was allowed to cease acting for him on 20<sup>th</sup> April, 2021. The case was set down for hearing on 29<sup>th</sup> June, 2021. When the case came up on that day, the court was informed that the Defendant who had been duly served was absent. The court adjourned the case noting that the Defendant's Advocate had ceased to act for him and that there was need to give the Defendant time to appear for hearing. The case was then adjourned to 29<sup>th</sup> September, 2021.

6. On 29<sup>th</sup> September, 2021 the case could not be reached. It was adjourned to 30<sup>th</sup> September, 2021. Come 30<sup>th</sup> September, 2021, the Defendant who had been served with a hearing notice was not in court. The hearing therefore proceeded ex-parte.

### **Plaintiff's case**

7. The Plaintiff testified that on 12<sup>th</sup> September, 2012, he entered into a sale agreement with the registered owner of LR.No.NANDI/NDURIO/1019 (suit property) at a consideration of Kshs.675,000/=. He proceeded to obtain the consent of the Land Control Board after which title was issued to him on 21<sup>st</sup> November, 2012.

8. In the year 2014, the Defendant invaded the suit property and put up temporary structures on it. He reported the invasion to Kobujoi Police Station. The Defendant and the person who sold the land to the Plaintiff were summoned to the Police Station. When the police went through the documents held by the Plaintiff, they advised him to file a civil suit. This is how he came to file this case.

9. The Plaintiff called PW2 Barnaba A. Kichwen. This is the person who sold the suit property to the Plaintiff. He confirmed that the suit property was initially registered in his name but that he sold it to the Plaintiff.

10. The Plaintiff also called PW3 Richard Kipkemboi Sang who testified that he knew both the Plaintiff and the Defendant. He gave the history of the suit property which was a subdivision of LR.NO.NANDI/NDURIO/117. He stated that the Defendant used to reside on LR.NO.NANDI/NDURIO/118 which was neighbouring LR.NO.NANDI/NDURIO/117. In 2014, the Defendant invaded the suit property and has refused to move out. He further stated that the Defendant's family own another parcel known as NANDI/NDURIO/121.

11. This witness further testified that in 2012, the Defendant's elder brother sued Barnaba Kichwen in ELC 992 of 2012 (Formerly HCCC No.201 of 2012). This case was fully heard and was dismissed through a judgement delivered on 20<sup>th</sup> June, 2013.

### **Analysis**

12. I have gone through the evidence adduced by the Plaintiff. The only issue for determination is whether the uncontroverted evidence has proved the Plaintiff's case on a balance of probabilities. The Plaintiff produced a sale agreement between him and Barnaba Kimeli A.Kichwen [exhibit.1]. In this agreement, the Vendor acknowledge receipt of Kshs.675,000/= on execution of the agreement. A copy of the green card [exhibit.9(a)] confirmed that the suit property was registered in the name of the Vendor.

13. The Vendor obtained the consent of the Land Control Board as shown in exhibit 4. The Plaintiff processed and obtained title which he produced as exhibit 5. Whereas the Defendant claimed in his pleadings that he has been on the suit land since he was born, the evidence adduced showed that his elder brother had filed a suit against the Vendor in 2012 in which he claimed that LR No.NANDI/NDURIO/117 from which the suit property was hived was their family property. This suit was dismissed in a judgement delivered on 20<sup>th</sup> June, 2013 [exhibit.6].

14. The Defendant's claim of adverse possession therefore has no basis. It is clear that there was a dispute as regards boundary of LR.NO.NANDI/NDURIO/118 and NNDI/NDURIO/117. The Defendant is trying to take advantage of this to lay claim to the suit property. The Defendant had been given a second chance to prove his case but he squandered that chance by not coming to court to urge his counter-claim.

15. There is evidence tat the Defendant has interfered with the beacons marking the boundary of the suit property. There is therefore need to have them re-established on the ground.

### **Disposition**

16. From the above analysis, I find that the Plaintiff has proved his case on a balance of probabilities. I allow the same in terms of prayer (a), (b), (bb), (c) and (e) of the amended plaint. I decline to award mesne profits as the same were not proved as required. As the Defendant did not lead any evidence on his counter-claim, the same is hereby dismissed with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 18<sup>TH</sup> NOVEMBER, 2021**

**E.O. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Wafula for Plaintiff

Court Assistant – Mercy

**E.O. OBAGA**

**JUDGE**