



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHHO

ELC NO. 61 OF 2012

NANCY CHEBII SANG (Suing as personal representative of the estate of the late

ESTHER TAPRANDICH SANG.....PLAINTIFF

VERSUS

EZEKIEL KIPSIELE KOSKEI.....DEFENDANT

JUDGEMENT

1. By a Plaint dated the 24th July 2014, the original Plaintiff herein, Esther Taprandich Sang, sought for eviction orders to issue against the Defendant to vacate from her parcel of land known as LR Kericho/Kapsuser/320 She also sought for cost of the suit and any other orders that the court may deem fit and just to grant.
2. Upon service of the Plaint, the Defendant filed his statement of defence and counterclaim dated 17th August 2012 claiming to have purchased $\frac{3}{4}$ acre of land, to be excise from LR Kericho/Kapsuser/320, from the Plaintiff's late husband. That apart from the $\frac{3}{4}$ acre of land, he was also in occupation of two acres erroneously comprised in the suit land LR Kericho/Kapsuser/320 for which the original Plaintiff had refused to transfer to him. The Defendant had thus sought for a declaration that he was the rightful owner of the two acres comprised in the suit land which should be transferred to him either by the Plaintiff, or in the alternative the Deputy Registrar of the court to effect the transfer on behalf of the Plaintiff.
3. Following the death of the original Plaintiff on the 13th May 2015, on the 27th July 2015, the court marked the suit as abated pursuant to the provisions of Order 24 of the Civil Procedure Rules. Thereafter, the present Plaintiff filed her Application dated the 3rd October, 2016 seeking to substitute the original Plaintiff Esther Taprandich Sang so as to proceed with the suit on behalf of her deceased mother.
4. The application was heard ex-parte and granted upon the court's satisfaction that service had been effected upon the Defendant who chose not to file any response. On the 5th April 2018, by consent the same application was allowed as unopposed and thereafter on the 31st May 2018, the matter was confirmed ready for hearing.
5. The matter did not proceed for hearing despite the several times it had been scheduled due to the Defendant's absence. On the 13th March 2019, the court was informed that parties wanted to resolve the matter out of court wherein counsel had sought for time to consult their respective clients.
6. The court obliged them and several mention dates were slated to confirm the settlement. Subsequently an Application dated the 7th December, 2020 was filed by the Plaintiff seeking to strike out the Defendant's pleadings citing that it raised no triable issues to be determined by the court. There was no response and the application was allowed as prayed and the matter fixed for formal proof hearing.

The Plaintiff case.

7. The Plaintiff testified as PW1 to the effect that the original Plaintiff, Esther Taprandich Sang was her mother and that she was now deceased having passed away in the year 2015. That upon the death of her mother, she had obtained letters of Administration ad-litem dated 8th September 2016 to pursue her mother's claim. She produced the same as Pf Exh 1.
8. The Plaintiff proceeded to testify that she was the last born in their family and that the deceased lived in Kapsuser on land title No. 320 which measured 9.8 hectares and which land she was currently utilizing. That apart from herself, another person called Ezekiel Koskei, the Defendant herein, also lived on that land because he had bought $\frac{3}{4}$ acres from her father, land which was to be excised from the suit land. That her deceased mother had also been aware of the sale.

9. That about 10 years ago, the Defendant had trespassed onto an additional two acres of land wherein he had planted tea. Her quest was therefore that the court assists her by giving the Defendant his share of the $\frac{3}{4}$ acre of land that he had purchased and to ask him to return the two acres he had unlawfully grabbed.

10. She confirmed that the sale of the land had been in the year 1982, that there had been no sale agreement but that she did not know why. She also confirmed that her father, Joshua Kiprono Sang who sold the $\frac{3}{4}$ acre of land to the Defendant, was also deceased having passed away in the year 1984.

11. She was referred to the title deed of parcel No. Kericho/Kapsuser/320 issued on the 9th May 2012 to which she confirmed to be a true copy of the title, the original copy having been forgotten at home. The copy of title deed was produced as Pf Exh. 2

12. The Plaintiff also produced a demand letter dated the 11th July 2012 as Pf Exh 3 and proceeded to testify that the same had been addressed to Ezekiel Koskei asking him to vacate from the land. That although he had received a copy of the same, the Defendant who worked for an advocate had refused to leave the suit land.

13. The Plaintiff also produced a copy of the area Map in relation to the suit land No. 320 as Pf Exh 4, and went on to testify that she had procured the same from the land's registry. She proceeded to point out the location of the suit land No. 320 Kericho/Kapsuser.

14. The court examined the witness who was steadfast and who responded that the Defendant lived on $2\frac{3}{4}$ acres of land and that there was no way he could have come on the land in the year 1952 because he had purchased the land in the year 1982 wherein he had taken possession of $\frac{3}{4}$ acres in the same year. That he had added himself the 2 acres about 10 years ago wherein he had fenced off all the $2\frac{3}{4}$ acres.

15. That her parents used to live on the suit land and were buried therein. That they were only two girls and her sister was now married. That they had gone before the Assistant Chief wherein the Defendant had agreed to have purchased the $\frac{3}{4}$ piece of land. She confirmed that the whole title was registered to her mother's name.

16. The Plaintiff closed their case and filed their written submissions.

Plaintiff's submissions.

17. The Plaintiff's submissions was to the effect that she was seeking for eviction orders against the Defendant to vacate fourth with from the parcel of land known as LR Kericho/Kapsuser/320 land which was registered to the original Plaintiff.

18. That the Defendant alleged to have purchased $\frac{3}{4}$ of an acre comprised in the suit land which allegation the Plaintiff conceded in her pleadings. That the Defendant further contended that he was in occupation of two acres of land which had been erroneously included in the suit land and therefore he should be declared as the owner of the same. However there was no evidence or explanation elaborated by the Defendant to support these allegations.

19. That the Defendant was by implication intent on relying on the doctrine of adverse possession but in the Plaintiff's opinion, the same could not arise as the Defendant was only lawfully entitled to occupation of the $\frac{3}{4}$ acres and not the two acres he had unlawfully and without Plaintiff's consent encroached upon. Reliance was placed on the decided case in **Mung'ania vs Imanyara [1985] eKLR**.

20. That adverse possession ought to be clearly established by a continuous and uninterrupted possession, on the part of a person claiming, for over 12 years. The Defendant's entry on the land was on the basis of the agreement for sale of $\frac{3}{4}$ acres which did not in any way entitle him to claim adverse possession of an additional two acres of the suit land. That a claim for adverse possession had to be instituted as prescribed under Order 37 Rule 7 of the Civil Procedure Rules.

21. The Plaintiff further submitted that although the Defendant had raised the issue of long occupation of the suit land in his defence, where he had sought for orders of declaration of ownership in the counter claim, this was not one of the prescribed ways under the law and his claim must fail.

22. That it was not in dispute that the deceased Plaintiff was the registered proprietor of the suit land and that she had been willing and was ready to effect transfer to the Defendant for the $\frac{3}{4}$ acre that the Defendant had purchased. However the Defendant was persistent in occupation of the two acres which he did not state and substantiate how he had acquired the same. The Plaintiff's submission was that there being no evidence backing the Defendant's claim for the two acres, the honorable court should issue an order of eviction as prayed in the Plaintiff's submission as well as costs of the suit. That as mutually acknowledged, the Defendant was only entitled to $\frac{3}{4}$ acre of land compressed in the suit land to which the Plaintiff was ready and willing to transfer to him. The Plaintiff sought for the orders as prayed.

Determination.

23. I have reviewed and considered the uncontroverted evidence of the Plaintiff, which was precise and to the point, in support of her claim. I find the issue for determination as being whether the Plaintiff is entitled to the eviction orders sought against the Defendant to vacate from parcel of land known as LR Kericho/Kapsuser/320.

24. Having duly considered the evidence adduced before court by the Plaintiff who did not call any witness and who was the legal representative of her mother the original Plaintiff, the registered proprietor of the suit land LR Kericho/Kapsuser/320 herein, her evidence came out to me as believable as it was backed by documentary evidence that were not contested since the Defendant never appeared at the hearing either in person or through Counsel. I find that all the Plaintiff wanted from the Defendant was for him to take up his $\frac{3}{4}$ acre parcel of land and thereafter to vacate from the additional 2 acres he had encroached on.

25. It is evident that the Defendant's Counsel herein had been served with numerous hearing notices but both he and his client had failed to turn up in court to defend their case despite having entered their memorandum of appearance and filed the defence pleadings. However, even if the suit was not defended, the Plaintiff still had the duty to formally prove her case on the balance of probabilities as required by law.

26. The Plaintiff's case which was not rebutted was that the Defendant herein bought a portion of $\frac{3}{4}$ of an acre from her deceased father Joshua Kiprono Sang in the year 1982, land which was to be excised from the suit land LR Kericho/Kapsuser/320. That after the purchase, the Defendant had occupied the $\frac{3}{4}$ acre, but subsequently he had encroached on an additional 2 acres in the year 2012 which land he now sought to be registered as its proprietor.

27. The Plaintiff, testified through the production of documentary evidence that her father later passed away in the year 1984 wherein her late mother, the original Plaintiff in this suit, Esther Taprandich Sang was registered as proprietor of LR Kericho/Kapsuser/320. That through a demand letter dated the 11th July 2012 addressed to the Defendant, Ezekiel Koskei her mother, the deceased had sought to get him out of the land in vain.

28. That pursuant to the death of her mother in the year 2015 she had obtained letters of Administration ad-litem dated 8th September 2016 to which she sought to pursue her late mothers case in seeking for the orders herein above stated. The Plaintiff conceded that the Defendant was entitled to only $\frac{3}{4}$ acre of land compressed in the suit land to which she was ready and willing to transfer to him.

29. *Against this backdrop, I have considered the Defendant's defence and counter claim herein and find that although the same was not prosecuted, yet it did not contain a valid or reasonable defence to the Plaintiff's claim.* The Plaintiff produced in evidence a copy of a title deed for the suit property in the name of the original deceased Plaintiff which confirmed ownership of the suit property, the same having been registered to her deceased mother on 9th May 2012.

30. The provisions of Section 24(a) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows;

'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.....'

31. Section 25(1) of the Land Registration Act also stipulates that ;

'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...'

32. The law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:

"the Certificate of Title issued by the Registrar upon registration, 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 the 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

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

33. In light of the above, and there having been no evidence adduced to the contrary, this court finds that the Plaintiff has established that her mother, the original Plaintiff was indeed the duly registered proprietor of the suit property and therefore she was entitled to all the rights appurtenant thereto.

34. Since it has been demonstrated that despite service, the Defendant failed to defend the suit, the court has no alternative but to find in favour of the Plaintiff. I therefore make the following orders:

i. The Defendant, shall by himself, agents, servants, employees or any other party acting on his behalf, forthwith vacate from the land known as LR Kericho/Kapsuser/320 within 30 days of the delivery of this judgment.

ii. Costs to the Plaintiff at the lower scale since the suit was undefended.

Dated and delivered via Teams Microsoft at Kericho this 11th day of November 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE