



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 180 OF 2013

BENJAMIN CHEPKIRWOK ROTICH.....PLAINTIFF

VERSUS

JOSEPHINE LONGOK.....DEFENDANT

(Sued as the Legal Representative of DAVID EWOI (Deceased))

DIRECTIONS

1. The plaintiff commenced this proceedings vide a plaint dated 23rd December, 2013 filed in court on the same day. He prayed for judgement against the defendant for:

a. An order for eviction of the defendant, his agents, servants from Land Parcel No. Trans Nzoia/ Kaisagat/Makhonge Block 7/Ainasit/4.

b. Costs.

c. Any other relief the court deems just and fit to grant.

2. The plaintiff's claim is that he is the registered proprietor of Land Parcel No. **Trans Nzoia/Kaisagat Makhonge Block 7/Ainasit/4** measuring **4.90 Ha** and that the defendant has trespassed upon the said.

3. It is the plaintiff's case that the defendant has illegally occupied the suit land and has prevented the plaintiff from developing the same.

4. Despite written notices for the defendant to vacate the land, he has refused to do so hence this suit.

5. As a result of the unfortunate demise of the original defendant in this case during the pendency of this suit, the defence was amended and the original defendant **David Ewoi** now (deceased) was substituted with his wife the legal representative of his estate. The defendant filed her amended defence on **21/2/2019**. She denied all the allegations in the plaint. She pleaded that he is the lawful owner of **1 acre** of land off L.R. No. **7424** having bought the same from one **John Kurgat**.

6. The defendant further stated that the said **John Kurgat** had bought land from one **Joseph Samoei** who had bought land from **Francis Kandie**, the legitimate owner of all the **12 acres** in **Ainasit Farm No. 7424**.

7. According to her defence, the defendant alleged that she bought the piece of land on **8/5/1999**, has done extensive development and has had quiet possession since then then she claimed to have acquired adverse possession.

8. This matter then proceeded for hearing where the plaintiff testified as **PW1** on **8/7/2015**. His witnesses, a **Mr. Fredrick Bartonjo** testified on **19/9/2016** on which day the plaintiff closed his case.

9. The court then directed the parties to take a date in the registry for defence hearing and from the record, a mention date for the **15/3/2017** was given to await the availability of the new diary.

10. On the said mention date, that is, **15/3/2017**, counsel for the parties herein entered a consent judgment which read:-

“By consent, the County Surveyor Trans Nzoia to carve out one acre of land out of land parcel No. Trans Nzoia/Kaisagat Makhonge Block 7/Ainasit/4. The survey to be conducted in the presence of both parties and the survey fees be shared by both parties; the report of the County Surveyor to be filed within 30 days.”

11. After a series of applications to set aside the said consent judgment and their dismissals, the court ordered for the hearing of the main suit to proceed on the **29/7/2019**.

12. The matter then proceeded for defence hearing on **7/10/2019** where the defendant testified as **DW1** and on **11/11/2019**, **Joseph Kiprof Samoei** testified as **DW2** in furtherance of the defence case. The defence then closed its case and the court ordered for the parties to file written submissions.

13. I have perused the record and found that the plaintiff filed his submissions on **16/12/2019** while the defendant filed hers on **18/12/2019**.

DETERMINATION

14. After considering the pleadings, evidence on record and the submissions of the parties herein, I am of the view that the issues for determination are:

a. Whether the Consent of the parties recorded on 15/3/2017 finalised the matter.

b. Who should bear the costs of this suit?

15. The issues are addressed as hereunder.

(a) Whether the Consent of the Parties recorded on 15/3/2017 finalised the matter

16. I have examined the consent. It stated as follows:

“By consent, the County Surveyor Trans Nzoia to carve out one acre of land out of land parcel No. Trans Nzoia/Kaisagat Makhonge Block 7/Ainasit/4. The survey to be conducted in the presence of both parties and the survey fees be shared by both parties; the report of the County Surveyor to be filed within 30 days.”

17. I have considered the applications that have arisen in the course of this matter unsuccessfully attempting to set aside the consent order.

18. It appears that this matter went to the defence hearing stage inadvertently. In view of the court’s previous pronouncements regarding the consent order in its rulings dated **31/5/2018** and **8/7/2019**, this matter was concluded by the consent. There is no chance that the consent on the record could have been recorded without an admission of liability on the part of the plaintiff.

19. Consequently I vacate all the proceedings taken on **7/10/2019**, **11/11/2019** and **9/12/2019** except the directive to file submissions in so far as that directive relates to costs of the suit.

20. In lieu thereof I issue an order declaring that this matter is settled, that the court has no jurisdiction to hear and determine this matter beyond adopting the consent order recorded herein, and that the parties were only entitled to submit to this court regarding costs. As I state the above, I must add that it is regrettable that the parties and the court inadvertently proceeded with the hearing notwithstanding the existence of the consent buried deep within the folios of the voluminous court record, but it is noteworthy that an occasional mishap of that nature can occur in such old and voluminous files.

21. As the parties have filed submissions on costs as an extension of the submissions on the merits of the claim, the latter which I have vacated hereinbefore, I find it quite expeditious to expressly rule on this matter only regarding the issue of costs.

22. I have perused the record and found that the plaintiff having sued the defendant and having admitted the claim vide the consent outlined hereinabove admitted that he did not have any valid claim against the defendant. **Section 27** of the **Civil Procedure Act** provides that the costs of and incidental to all suits shall be in the discretion of the court, and the court shall have full power to determine by whom and out of what property and to what extent such costs are to be paid and the fact that the judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers. It is further provided that in the absence of the specific intervention of the Judge, costs shall follow the event.

23. Therefore, though I have declared that the court had no jurisdiction to try this suit after the consent was recorded, I, exercising jurisdiction under **Section 27** of the Civil Procedure Act hereby issue an order that the plaintiff shall bear the costs of this suit, and such costs shall include the costs of the taking of the proceedings of **7/10/2019**, **11/11/2019** and **9/12/2019**.

24. The plaintiff shall pay the taxed costs and in default execution shall issue in the normal manner.

Dated, signed and delivered at Kitale on this 27th day of February, 2020.

MWANGI NJOROGE

JUDGE

27/2/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi for plaintiff

Mr. Ingosi for the defendant

COURT

Directions read in open court.

MWANGI NJOROGE

JUDGE

27/2/2020