



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

ELC NO. 373 OF 2014

MICHEAL J. C. K KAPSOT.....PLAINTIFF

VERSUS

KOTUT ARAP TOO.....DEFENDANT

JUDGMENT

By an amended plaint dated 23rd March 2015 the plaintiff herein sued the defendant seeking for the following orders:-

- a) An order of permanent injunction restraining the defendant by himself, their agents and/or servants from interfering, trespassing, intermeddling and/or in any manner dealing with the plaintiff's use, possession and/or ownership of all that Land Parcel Number Soy/Kipsomba Block 4(Kipsombe)12 measuring 0.32 Ha or thereabout.
- b) Costs and interest of the suit.
- c) A declaration be and is hereby issued declaring that the plaintiff is entitled to mesne profits and general damages for trespass from the defendant.

PLAINTIFF'S CASE

PW1 gave evidence and stated that he bought one acre of land from the defendant and paid the purchase price in full. It was also his evidence that they later went to the Land Control Board where he obtained a consent.

PW1 further stated that in 2003, a surveyor moved to the land and surveyed it. He stated that he paid the survey fees and was issued with title deeds in 2003. He further testified he entered into the first agreement with the defendant in 1980 and the second one in 1984 and has been in occupation since then. PW1 produced sale agreements and a survey map as Pex. 1, and 3 respectively. He also produced receipts in respect of processing title deed as pex. 5(a) and (b), and a copy of the title as pex. 6. A copy of official search was produced as pex. 7, a bundle of rates payment receipts as pex. 8, 9(a) and 9(b) and a list of names of Kipsombe farmers as pex 10.

On cross examination, he stated that he bought an acre of the suit land in 1980 for Kshs.1500/ and in 1984 he entered into another agreement where he paid Kshs. 1500/. He took possession of the land in 1981 and left in 2012.

It was his evidence that he was present when the surveyor went to the site in 2015 but the defendant was not present. That they had already gotten consent from the Land Control Board as a group and thus there was no need for the defendant to obtain another consent.

PW2 Cheplack Chepsaigut stated that the plaintiff bought the suit land from the defendant and has been staying on the suit land until he filed the case in court. He further stated that he was approached by the members to oversee the surveyor putting the beacons. That he was present when the beacons were put on the land. Lastly, he stated that the defendant sold plot number 12 to the plaintiff hence the plot belongs to the plaintiff. On cross examination, he stated that the plaintiff entered the suit land in 1980 and has been cultivating it since then.

PW3 Kipyego Kipaku stated that the plaintiff and the defendant entered into an agreement for sale of land. The plaintiff has been using the suit land until 2014.

On cross examination, he stated that he was present when the plaintiff and the defendant entered into an agreement for purchase of one acre of land. That he paid Kshs. 1500 and assumed possession after payment of the purchase price

DEFENDANT'S CASE

The defendant filed a counterclaim and sought for the following orders that:-

- a) An order cancelling the title deed for parcel of land No. SOY/KIPSOMBE/ BLOCK 4(KIPSOMBE)12
- b) An order of permanent injunction restraining the plaintiff(now defendant) by himself, his servants and or agents from in any way interfering, intermeddling, trespassing, alienating, selling or in any other manner dealing with the defendant's (now plaintiff) parcel No. SOY/KIPSOMBE/ BLOCK 4(KIPSOMBE)11 measuring 9.51 Ha or thereabouts.
- c) Costs of the suit

DW1 Kotut Arap Cheptoo testified that the suit land belongs to him and that he has a title deed. The same was produced as Dex 1. He denied ever entering into an agreement with the plaintiff and that at no point did he ever receive money from the plaintiff. He also denied the plaintiff ever taking possession of the suit land.

DW1 stated that he got his title deed in 2011 while the plaintiff got his in 2013. He further denied ever going to the Land Control Board and also ever having signed any transfer documents.

On cross examination, he admitted that they bought Kipsombe farm as a group. That he was a full member who was entitled to between 90 acres to 100 acres. He stated that he neither knows how to read nor write, therefore could not have entered into an agreement and signed transfer forms.

DW2 Ben Kipngetich testified that he is the son of the defendant and that they never sold the plaintiff any land. That he only got information through a letter that their land is to be subdivided. It was his evidence that the plaintiff has never occupied the land, never ploughed it and that there are no beacons on the suit land. Lastly, that the plaintiff obtained that title fraudulently.

On cross examination, he stated that he does not know the acreage since the suit land belongs to his father. He stated that the land was 45 acres which part of it has been sold to Baringoror and that his late brother was allocated 6 acres. Lastly, that the land from the surveyor's report indicated that the land was 23 acres yet on the ground it is 24 acres.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff submitted that the plaintiff has proved that he is the rightful owner of the suit land having acquired it procedurally. Counsel cited that the defendant has not proved fraud as alleged in the defence and counterclaim.

Counsel relied on the case of *Kuria Kiarie & 2 others vs Sammy Magera (2018) eKL Rwhere Tunoi JA* as he then was stated that

“it is well established that fraud must be specifically pleaded and particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and proved and not allowable to leave fraud to be inferred from the facts.”

Counsel submitted that the title deed issued to the plaintiff conferred on him absolute proprietary rights which are protected under Article 40 of the constitution. That there is also a similar protection under the Land Registration Act, Section 24 and Section 25. Counsel urged the court to find that the plaintiff is entitled to the orders sought in the plaint.

DEFENDANTS SUBMISSIONS

Counsel for the defendant submitted that it is not in dispute that the plaintiff holds a title deed for parcel of land number Soy/Kipsomba Block 4(Kipsomba)/12 measuring 0.32 Ha and that the defendant is the absolute owner of land parcel number Soy/Kipsomba Block 4(Kipsomba)/11 measuring 9.51 Ha. That the only dispute is whether the defendant sold the parcel of land measuring 0.32 Ha to the plaintiff through a sale agreement dated 13/10/1980. Also that what is in dispute is how the plaintiff acquired the parcel of land and his occupation of the suit parcel of land.

Counsel further submitted that the sale agreements purportedly dated 13/10/1980 and 13/2/1981 were not witnessed by an independent witness as envisaged under Section 3(3)(b) of the law of Contract Act and thus the plaintiff cannot assert title through a sale agreement that is a nullity.

That the plaintiff merely produced a title deed as proof of ownership however, the process of how the said title was acquired was not explained to court. That the District surveyor's report cannot be relied on as not all parties were involved in the exercise and that the report is one sided favoring the plaintiff.

It was counsel's submission that the suit is time barred as the same was filed in 2014 yet the cause of action arose in 1994 which is 20 years down the line.

ANALYSIS AND DETERMINATION

The issues for determination in this case are as to whether the plaintiff is the legal owner of the suit land and whether the plaintiff is entitled to the orders of injunction against the defendant.

The plaintiff has already demonstrated that he has title and pursuant to the provisions of Section 26 of the Land Registration Act 2012, such title ought to be protected unless the defendant proves that the plaintiff's title was acquired through fraud or mistake. The law is clear that he who alleges must prove.

The provision of **Sections 107 and 112 of the Evidence Act Chapter 80 of Laws of Kenya** are relevant in this instance and states as follows;

“107 (1) Whoever desires any court to give judgment as to why any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

In the case of **Koinange and 13 Others – Vs - Koinange [1986] KLR 23** the Court restated the cardinal precept of the law of evidence that he who alleges must prove it. In this case there is evidence that there was a sale between the plaintiff and the Defendant. The sale agreements produced as pexbt 1 and 2 are a clear indication of the same.

Sections 23-26 of the Land Registration Act No. 3 of 2012 imports the provisions of the Registered Land Act (now repealed) on this issue. Section 25 (1) of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the 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 to any lawful encumbrances, set out in this section.

Section 26 of Land Registration Act provides that 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 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 grounds of fraud, or misrepresentation to which 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.

On the claim for mesne profits, mesne profits is a special damage which must be specifically pleaded and proved. The Court of Appeal in the case of **Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others [2018] eKLR** held as follows on mesne profits;

“This court in Peter Mwangi Mbuthia & Another vs Samow Edin Osman [2014] eKLR expressed that it is upon a party to place evidence before the Court upon which an order of mesne profits could be made. It was stated;

“As regards the payment of mesne profits, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint and it appears to us *prima facie*, that there was no evidence to support the actual figure awarded....That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all.”

“We agree with Counsel for the appellant that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the Learned Judge erred in awarding the amount that was neither substantiated nor established.”

The plaintiff pleaded mesne profits but did not specifically prove what amount he had lost and from what period. This limb therefore fails.

From the evidence on record I find that the plaintiff has proved that he is the registered owner of the suit land and no fraud has been proved that the same was acquired irregularly. I therefore make the following orders.

- a) An order of permanent injunction is hereby issued restraining the defendant by himself, their agents and/or servants from interfering, trespassing, intermeddling and/or in any manner dealing with the plaintiff's use, possession and/or ownership of all that Land Parcel Number Soy/Kipsomba Block 4(Kipsombe)12 measuring 0.32 Ha or thereabout.
- b) Mense profits not proved therefore not awarded.
- c) Costs and interest of the suit to be paid by the defendant.

DATED and DELIVERED at ELDORET this 27TH DAY OF FEBRUARY, 2020

M. A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr.Kandie for Plaintiff and Mr.Juma holding brief for Mr. Okara for Defendant.

Mr. Yator – Court Assistant