



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 288 OF 2017

JEREMIAH YATICH

(Suing as the administrator of the Estate of

JOSHUA YATICH CHEPYEGON (DCD).....PLAINTIFF

VERSUS

CHRISTOPHER KIPKOSGEL.....1ST DEFENDANT

DENIS KIPKOSGEL.....2ND DEFENDANT

SILAS KIPKOSGEL.....3RD DEFENDANT

ENOCK KIPTUM.....4TH DEFENDANT

JUDGMENT

By a plaint dated 16th August 2017 the plaintiff herein sued the defendants jointly and severally seeking for the following orders.

- a) Eviction order against the 1st to 3rd defendants from the suit land parcel No. BARINGO/SERGONJUN/229.
- b) An order of a permanent injunction restraining the defendants from further encroaching on the suit land.
- c) An order for removal of caution by the 4th defendant.
- d) Damages
- e) Costs

The plaintiff further sued Enock Kiptum vide Eldoret d. E&L NO. 289 of 2017 seeking for the following orders:

- a) Eviction order against the defendant from the suit land parcel No. BARINGO/SERGONJUN/240.
- b) An order of a permanent injunction restraining the defendant from further encroaching on the suit land.
- c) An order that the caution registered by the defendant in the suit land registry be set aside.
- d) Damages
- e) Costs

Directions during the pre-trial proceedings were taken and the parties agreed that the two suits be consolidated and the lead file be Eldoret E & L No. 289/17. The plaintiff and defendant testified in E&L no. 289 of 2017 whereas in E&L no. 288/2017, the plaintiff and the 2nd

defendant testified, the evidence of Enock Kiptum the 4th defendant was adopted in this instant suit.

PLAINTIFF'S CASE

It is the plaintiff's case that parcel No. Baringo/Sergonjun/229 located in Ossen area within Baringo County is registered in the name of Joshua Yatich Chepyegon who is their deceased father. PW1 stated that the 1st to 3rd defendants have unlawfully encroached onto the said parcel of land and settled on. That in April 2014, the 4th defendant registered a caution against it.

PW1 stated that he asked the defendants to vacate the suit land in vain, thus necessitating the filing of this suit. He therefore prayed that the 1st and 2nd defendants be evicted from the said land and the caution lodged by the 4th defendant be removed and an order of permanent injunction be issued against them.

On cross-examination he testified that he lived at Ossen on plot No. 447 which is registered in his name and that the defendants got onto the land in 2007. That his grandfather had distributed the land to his sons. The plaintiff reiterated his evidence and stated that his father was not holding the suit plot in trust for anyone. He also stated that this is not a boundary dispute and that there is no criminal case in Kabarnet where he is the complainant.

On re-exam he testified that by 1978 titles had not been issued as the titles were issued in 1992. Beacons had been placed temporarily and in 2014 it was agreed everyone to stay on his parcel of land.

Joseph Toroitich (PW1) testified in E&L No.289/2017. He stated that the suit land Baringo/Segonjun /240 measuring 0.37 Ha is registered in the name of Kangogo Arap Chepyegon and that the title was issued on 9th July 1993. It was his evidence that he found a caution lodged by his uncle Enock on the suit land when he carried out a search on 16th June 2017.

He testified that the defendants should remove the caution and he be allowed to occupy plot No. 240 as his father was not holding any land in trust for Japheth Chepyegon.

On cross –examination he stated that he lived on plot No. 230 and that there is nobody on plot No. 240 where the defendants were cultivating. On re-exam he testified that the defendants were using the land, and there was a sawmill.

DEFENCE CASE

The defendants in their defence denied the plaintiff's claim. They averred that the suit land is ancestral bequeathed to them by their late grandfather with the consent of the plaintiff's deceased father and have been in peaceful possession and occupation since 1978.

DW1 stated that he lodged the caution in 2014 as the plaintiff and his brothers wanted to sell the land. It was also his evidence that he has no house on the suit land and did not cultivate the land in 2017. He stated that he was not present when the land was subdivided and that he was given plot No.240. He further stated that the 1st 2nd and 3rd defendants were the beneficial owners of the parcel of land.

In their counter-claim they averred that the plaintiff's estate holds parcel No. Baringo/Sergonjun/229 in trust for the 1st 2nd and 3rd defendants as this was done during the adjudication and demarcation process. That their father took possession of the suit land in 1978 with the consent of the plaintiff's deceased father. They asked the court to declare the plaintiff held the land in trust for them.

On cross-examination DW1 stated that he was in agreement with the 4th defendant's evidence that parcel No. 229 was to be shared equally between his father and Enock Kiptum. He did not know the acreage of plot No. 229 and that Joshua had been given land elsewhere, though he did not have any document to support the same.

He stated that the 4th defendant lived on plot No. 345 and he was not holding the land in trust for anyone as it had been sub-divided by his grandfather. Plot No. 229 was to be given to his father, though he had not mentioned his father in the counter-claim.

On re-exam he stated that plot Nos. 229,230 and 240 belonged to his grandfather and that Plot No. 229 was held in trust for the defendants.

The evidence of Enock Kiptum was adopted in E&L No.288/2017 and stated that his father had sub-divided the land to his 6 sons. It was his evidence that he lives on plot No. 245 and the wife to Japheth Kiptum resided on plot No. 240.

It was his evidence that he had lodged a caution on the suit land in 2014 since the plaintiff and his brothers intended to sell the land.

On cross-examination he testified that he could not remember when the sub-division was done as he was in Ravine since 1964. He stated that he was given plot No. 345 and the titles were issued in 1992 and plot No 230 was registered in the name of Kipkosgei Chepyegon. It was his evidence that he was claiming beneficiary interest on plot No. 229, 240,230, 255 and 345 but did not have any document to show that his brother was holding the land in trust.

On re-exam he said that he had not sub-divided the land and that Denis stayed on plot No.230 whereas Hellen stayed on plot. No.240.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff filed submissions and reiterated the plaintiff's evidence and listed the following issues for determination:

- a) Whether the late Joshua Yatich Chepyegon was the registered owner of land parcel BARINGO/SERGONCHUN/229.
- b) Whether the late Joshua Yatich Chepyegon held the suit land in trust for the 4th defendant.
- c) Whether the 4th defendant has the legal capacity to claim that the suit land should be given to the 1st — 3rd defendants.
- d) Whether the 1st — 3rd defendants are lawfully on the suit land.
- e) Whether the 1st — 3rd defendants are entitled to declaratory order in terms of their Counter claim.
- f) Whether the Plaintiff is entitled to the prayers sought.
- g) Who will meet the costs of the Plaintiffs claim and of the Counter claim?

On the first issue as to whether the late Joshua Yatich Chepyegon was the registered owner of land parcel BARINGO/SERGONCHUN/229, counsel submitted that the plaintiff produced a Certificate of official search conducted on 19th February 2016 indicating as follows;

- a) The Register for the suit land's register was opened on 4th December 1992.
- b) Land Parcel BARINGO/SERGONCHUN/229 measures 0.31Ha.
- c) The late Joshua Yatich Chepyegon was registered as the proprietor on 4th December 1992 while title was issued on 9th July 1993.
- d) Nature of interest — absolute.

Counsel cited the provisions of Section 24 of the Land Registration (Act no.3 of 2012) which vests absolute and indefeasible rights to a registered owner. He stated that the same applies to the plaintiff over the said parcel of land. Counsel also relied on the case of Francis **Alubisa Achesa v. Miheso Masinde [2018] eklr. Where the court held,**

The registered owner of land has absolute proprietary rights over the land which is exclusive, peaceful, unfettered & unimpeded occupation and use thereof as stipulated in the Registration of/and act.

On the second issue as to whether the late Joshua Yatich Chepyegon held the suit land in trust for the 4th defendant Counsel submitted that the deceased Joshua Yatich did not hold in trust the land for anyone. In his evidence, the 4th defendant stated that their father had sub-divided the land to his children as follows:

- a) Baringo/Sergonchun/229-Joshua Chepyegon (deceased plaintiff estate)
- b) Baringo/Sergonchun/230-Kipkosgei Chepyegon(1st -3rd defendants father)
- c) Baringo/Sergonchun/240-Kangogo arap Chepyegon(deceased)
- d) Baringo/Sergonchun/245-Enock Kiptum(4th defendant)
- e) Baringo/Sergonchun/255-Japheth Chepyegon(deceased)

Counsel submitted that the implication being that the 1st - 3rd defendants' deceased father (Kipkosgei Chepyegon) and the 4th defendant were registered as the owners of the land parcels herein in the same process that their siblings were registered as the owners of their respective parcels of land. None of the 4th defendant's brothers, including the Plaintiff's deceased father got more land parcels or relatively larger parcel of land compared to the 4th defendant.

That Kipkosgei Chepyegon the 4th defendant's deceased brother, to whose sons the 4th defendant wishes the suit land to be transferred, had his own land parcel BARINGO/SERGONCHUN/230 which the 2nd defendant seems to be scheming to occupy alone as he fights for his brothers the 1st and 3rd defendants to occupy the suit land parcel BARINGO/SERGONCHUN/229.

Further that the above persons were registered also as proprietors of their parcel of land, the title deed did not indicate that parcel No. 229 was held in trust for anyone. The 4th defendant had his own land, and from the above, the 4th defendant's father intended the land to be shared equally amongst his children.

Mr. Kipnyekwei submitted that in addition to the above, the land apportioned to Joshua Chepyegon could only be inherited by his sons, and not the 1st to 3rd defendants as alleged by the 4th defendant. The 1st to 3rd defendants had already inherited their fathers land parcel No.230,

therefore the 4th defendant could not gift them land that was not his. The 2nd defendant admitted that he lived on parcel No. 230 which was their father's. The 1st to 3rd defendants were unlawfully occupying land, which was not theirs and therefore they ought to move out.

On the third issue as to whether the 4th defendant has the legal capacity to claim that the suit land should be given to the 1st — 3rd defendants, counsel submitted that the defendant's demands and or prayer is absurd because the estate of Kipkosgei Chepyegon inherited their father's land parcel BARINGO/SERGONCHUN/230.

Counsel submitted that it is not legally possible for the defendant to decree that a title holder surrenders his interest to his neighbor against the will of the title holder. The reasonable action would have to file suit seeking orders that the suit land belonged to him after which he can cede the same to whomsoever he fancied.

On the fourth issue as to whether the 1st — 3rd defendants are lawfully on the suit land, counsel submitted that JOSHUA YATICH CHEPYEGON is the absolute owner of the suit land parcel BARINGO/SERGONCHUN/229. No evidence was led by the defendants to demonstrate that the said JOSHUA YATICH CHEPYEGON (dcd) held the suit land in trust for the defendants herein.

The 4th defendant has no proprietary interest capable of being transferred to the 1st Defendants'.

Mr. Kipnyekwei further submitted that in addition to the above, the declaratory orders sought by the defendants in their counter claim cannot stand because of the contradictory evidence by the defendants, especially when the 4th defendant stated that Joshua Yatich held the land in trust for Kipkosgei Chepyegon and himself, and he wished the land to go to the 1st to 3rd defendants.

Counsel therefore urged the court to grant the orders as prayed in the plaint with costs as the plaintiff had proved his case against the defendants on a balance of probabilities.

DEFENDANTS' SUBMISSION

Counsel for the defendants submitted listed the following issues for determination:

- a) Whether the defendants have encroached and/or trespassed on the suit properties?
- b) Whether the defendants have beneficial interest on the suit properties?
- c) Whether the plaintiffs are holding the suit properties in trust for the Defendants
- d) Whether the prayers sought by the plaintiffs should be granted.

On the first issue as to whether the defendants encroached and/trespassed on the suit properties, counsel submitted that from the evidence tendered it is clear that the defendants are the uncle and first cousins to the plaintiffs. That the suit properties were originally given to Enock Kiptum the defendant in ELC 289 OF 2017 and the 4th defendant in ELC NO 288 of 2017 by his late father.

Counsel therefore submitted that the plaintiff's deceased father did not have an interest on the suit properties as he had been given land elsewhere. The land had been registered in his name since there was an interest expressed by A.I.C church to acquire more land for the church, it was to bestow them a benefit in the event the church acquired land.

The late brothers took possession of the land in 1964 and late 1978, developed the land and have resided therein and run their businesses. Counsel therefore submitted that the defendants have not encroached on the suit land.

On the second issues as to whether the defendants have beneficial interest on the suit properties, counsel submitted that the defendants are uncle and first cousins to the plaintiffs and that the land had been given to Enock Kiptum who was requested by his late father to leave the land for his late brother Japheth Kiptoo Chepyegon and Kipkosgei Chepyegon, therefore the late Japheth got parcel no. 240 and no. 229 to Kipkosgie Chepyegon the father to the defendants in ELC no. 288/2017 hence thy are beneficial owners of the suit parcels of land.

On the third issue as to whether the plaintiffs are holding the suit properties in trust for the Defendants, counsel cited Section 28(b) of the Land Registration Act 3 of 2012 which provides that:

“unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-(b) trusts including customary trusts”

That it was not necessary that the trust be indicated in the title as was held in **Kerugoya High Court no.278 of 2013 Jason Gitimu Wangara v. Martin Munene Wangara & Ors.**

Counsel submitted on the last issue that the plaintiffs are attempting to circumvent the succession process and dispossess the defendants of their land. That the defendants have shown reasons why they had lodged a caution to protect their beneficial interest on the land which had been held in trust and third parties would be affected in case the court grants the plaintiffs prayer.

Counsel urged the court to dismiss the plaintiff's claim with costs to the defendants.

ANALYSIS AND DETERMINATION

The issues for determination are as follows:

- a) Whether the late Joshua Yatich Chepyegon was the registered owner of land parcel BARINGO/SERGONCHUN/229.
- b) Whether the defendants have encroached and/or trespassed on the suit properties?
- c) Whether the defendants have beneficial interest on the suit properties?
- d) Whether the plaintiffs are holding the suit properties in trust for the Defendants

On the first issue as to whether the late Joshua Yatich Chepyegon was the registered owner of land parcel BARINGO/SERGONCHUN/229, from the evidence on record together with the documentary proof submitted to court, it is evident that the late Joshua Yatich Chepyegon was the registered owner of land parcel BARINGO/SERGONCHUN/229, as per the Certificate of official search conducted on 19th February 2016 indicating that the register was opened on 4th December 1992 for the suit land measuring 0.31Ha and title issued on 9th July 1993.

Section 26 of the 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 and indefeasible owner, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

Section 26 provides

“The certificate of title issued by the Registrar upon , 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 and 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 the ground of fraud or misrepresentation 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 second issue as to whether the defendants have encroached and/or trespassed on the suit properties, having found above that the late Joshua Yatich Chepyegon was the registered owner of the suit land, and the defendants having admitted that they are on the suit land and some of them are utilizing the land, it follows that they are trespassers as they have no right to the land.

On the third issue as to whether the defendants have beneficial interest on the suit properties, from the evidence on record, the defendants did not lead any evidence to show that they have any beneficial interest apart from claiming that the plaintiff’s father held the land in trust for them.

It is also on record from the 4th defendant’s evidence that that the suit land had been sub divided and allocated accordingly to the plaintiff and the defendants as follows:

- a) Baringo/Sergonchun/229-Joshua Chepyegon (deceased plaintiff estate)
- b) Baringo/Sergonchun/230-Kipkosgei Chepyegon(1st -3rd defendants father)
- c) Baringo/Sergonchun/240-Kangogo arap Chepyegon(deceased)
- d) Baringo/Sergonchun/245-Enock Kiptum(4th defendant)
- e) Baringo/Sergonchun/255-Japheth Chepyegon(deceased)

What more do the defendants need yet the land had been distributed as above. I find that the defendants have no beneficial interest in the suit land.

On the fourth issue as to whether the plaintiffs are holding the suit properties in trust for the defendants, it should be noted that the legal burden of proving the existence of a trust rests with the one who is asserting a right and to discharge this burden.

In the case of **Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR** which quoted with approval the holding in the case of **Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42**, the Court of Appeal held that customary law trust is proved by leading evidence. Trust is a question of fact which must be proved by whoever is claiming a right under customary trust.

In the case of **Isack Kieba M’Inanga Vs Isaaya Theuri M’Lintari & Another SCoK No 10 of 2015** the Supreme Court Justices held that;

“...each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in **Kiarie v. Kinuthia**, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:- (a) The land in question was before registration, family, clan or group land; (b) The claimant belongs to such family, clan, or group; (c) The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; (c) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group.

The court cannot imply the existence of a trust unless there was intention to create a trust in the first place. The evidence of record led by the defendants does not gravitate towards the creation of a trust and no intention has been proved. In **Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR** where the Court held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

In **Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] Eklr** the Court also held that It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

Having considered the evidence on record and the judicial authorities I find that the plaintiffs have proved their cases on a balance of probabilities. There is no evidence that the plaintiff's father held the land in trust for the defendants. I therefore make the following orders:

- a) The defendants do give vacant possession to the plaintiff on land parcel No. BARINGO/SERGONJUN/229 and 240 in the two consolidated cases within 30 days failure of which eviction to issue.
- b) An order is hereby issued for a permanent injunction restraining the defendants from further encroaching on the suit parcels of land.
- c) An order is hereby issued for removal of caution by the 4th defendant.
- d) Costs to be paid by the defendants plus interest.
- e) Defendants' counterclaim is dismissed with costs to the plaintiffs.

DATED and DELIVERED at ELDORET this 25TH DAY OF FEBRUARY, 2020

M. A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr.Kipnyekwei for Plaintiff and 2nd Defendant, Dennis Koskei and in the absence of Mr.Chebii for Defendants.

Mr. Yator – Court Assistant