



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 76 OF 2018

JOSEPH KIBET RONO.....1ST PLAINTIFF

PAULINA CHEPKORIR RUTO.....2ND PLAINTIFF

VERSUS

NELSON KIPRONO RUTO.....1ST DEFENDANT

JOSEPH SONGOK.....2ND DEFENDANT

DAVID KIPKURGAT SONGOK.....3RD DEFENDANT

RULING

1. The Defendants filed the Notice of Motion dated the 17th October, 2019 seeking for the order of 2nd October 2019 to be vacated, and the Plaintiff's suit re-opened to enable the Defendants participate. The application is based on the eleven (11) grounds on its face and supported by the affidavit of Joseph Songok, the 2nd Defendant, sworn on the 17th October, 2019.

2. The application is opposed by the Plaintiffs through the replying affidavit sworn by Joseph Kibet Rono, the 1st Plaintiff, on the 11th November, 2019.

3. That learned Counsel for the Defendants and Plaintiffs filed their written submissions dated 13th February, 2020 and 12th February, 2020 respectively.

4. The following are the issues for the Court's determination;

(a) Whether the Defendants have made a reasonable case for vacating orders of 2nd October, 2019 and re-opening the Plaintiff's case.

(b) Whether the Defendants have a reasonable defence to the Plaintiffs' claim to go to trial.

(c) Who pays the costs?

5. The Court has carefully considered the grounds on the application, affidavit evidence, written submissions by learned counsel for both parties, the record and come to the following findings;

(a) That this suit was commenced through the Plaintiff dated and filed on the 2nd May, 2018. That it is clear from paragraphs 4 to 12 of the Plaintiff that the dispute arose out of the alleged trespass. That what the Plaintiffs seek is an order of permanent injunction and costs under prayers (a) and (b). That the Defendants filed the Notice of Preliminary Objection dated 24th May, 2018 on the ground of jurisdiction in view of **Section 18(2) of the Land Registration Act** in response to the Motion dated 2nd May, 2018 filed with the Plaintiff. The defendant also posit that the application and the suit are premature, misconceived, vexatious and an abuse of the court process.

(b) That the Plaintiffs' application for temporary injunction order dated 2nd May, 2018 came up for hearing on the 24th May, 2018 and both parties were represented by Counsel. The court ordered that the County Land Registrar and Surveyor to visit the suit lands and ascertain their acreage and boundaries and submit their report. That order was subsequently amended by consent to add some other parcels of land. That the report dated the 7th September, 2018 was filed and the Plaintiffs moved the court through the Motion

dated the 4th February, 2019 to have it adopted as an order of the court. That application was granted on the 8th February, 2019. That the Defendants then filed the Motion dated the 21st February, 2019 seeking for setting aside of the Order of 8th February, 2019 to enable them file a replying affidavit. The application was opposed by the Plaintiffs through the replying affidavit sworn by 1st Plaintiff on the 27th March, 2019. That application was dismissed with costs on the 21st June, 2019 after which the Court was informed of the pending preliminary objection. The Court then directed that a mention be in Court 2 on a date to be taken at the registry.

(c) That when the matter came up on the 2nd October, 2019, Mr. Kariuki the learned Counsel for the Plaintiffs informed the Court that the hearing date was fixed on the 25th January, 2019. The Defendants have denied having been involved in fixing that date or having been served with a hearing notice. The Court has checked the proceedings of 25th January, 2019 and confirmed that the Defendants' Counsel was represented while there was no representation for the Plaintiffs' Counsel. That the date fixed was for hearing and not mention.

(d) That the finding in (c) above clearly shows that the Defendants have only themselves to blame for not participating in the hearing of 2nd October, 2019. That the Defendants have to-date not filed a defence to the Plaintiffs' claim.

(e) That the Notice of Preliminary Objection dated the 24th May, 2018 was a reply to the Motion dated 2nd May, 2018 which for all intents and purposes was compromised through the order referring the matter of acreage and boundaries position to the County Land Registrar and Surveyor. That the officers filed their report dated 7th September, 2019 that was subsequently adopted as the court order on the 8th February, 2019. That after the issue of the boundaries was settled through the adoption order of 8th February 2019, what remained of the Plaintiffs' claim was whether the Defendants had trespassed onto the Plaintiffs' land, and whether permanent injunction should issue and costs. That in the absence of any defence filed by the Defendants, the court is unable to determine whether they have a reasonable defence to the Plaintiffs' claim that raises triable issues to go to trial. That the Court therefore has no basis upon which to set aside the proceedings and order of 2nd October, 2019.

(f) That the Defendants have therefore failed to establish a reasonable case for vacating the orders of 2nd October, 2019 and to re-open the Plaintiffs' case.

6. The foregoing leads the court to the conclusion that the Defendants' Motion dated 17th October, 2019 is without merit and is dismissed with costs.

Orders accordingly.

Dated and signed at Eldoret this 4th day of March, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in open court in the presence of:

Mr. Kandie for Mwaniki for Plaintiffs.

Mr. Mukabane for Akenga for Defendants.

Court Assistant: Christine