



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 143 OF 2015**

**KASIKAR LOITARENG.....PLAINTIFF**

**VERSUS**

**LIMANYANG LOITARENG.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. **Kasikar Loitareng**, (*hereinafter referred to as the “plaintiff”*) has come to court against **Limanyang Loitareng** asserting that he is the sole legal and the registered owner of all that parcel of land known as **WEST POKOT/KAPSANGAR/200** measuring **16.06 Ha** to the exclusion of others. That sometimes in the year **2008**, the defendant herein trespassed upon the plaintiff’s land and erected structures thereon. The plaintiff avers that the defendant has no proprietary interest in the said land.

2. The plaintiff’s claim against the defendant is for an order for eviction of the defendant his servants and/or agents from land parcel **WEST POKOT/KAPSANGAR/200**. The plaintiff also prays for costs of this suit and interest at court rates.

3. The defendants filed a defence denying the claim. The defendant denied the allegations in **paragraph 3** of the plaint and stated that the parcel of land in issue registered under the name of the plaintiff is family land and that the plaintiff secretly registered it in his name as the sole owner without involving the defendant and other family members.

4. The defendant specifically prays that the plaintiff’s suit be dismissed with costs.

5. The suit was set down for hearing and both the plaintiff and defendant testified and called several witnesses.

**The Plaintiff’s Case**

6. The plaintiff testified as **PW1**. He stated that the land in issue is his and he produced a title deed as **P. Exhibit 1**. It was the plaintiff’s testimony that he purchased the suit property from his uncle one **Mr. Longuranyang Tuliamuk** for a consideration of **Kshs. 10,000/=**. He stated that there was no written agreement as the transacting parties were relatives and hence they saw no need for the same.

7. The plaintiff stated that after the boundaries were placed, he built a home and the land was demarcated, surveyed and a title deed issued to him in the year **2006**.

8. The plaintiff stated that later on, he consented to the defendant’s temporary occupation of the suit property after the defendant married a 2<sup>nd</sup> wife, and that they agreed that the defendant was to stay for **3 years**. He testified that he later asked the defendant to move out of the suit land and the defendant declined to do so.

9. He stated that he sought the intervention of neighbours and the local chief in the matter but the defendant failed to vacate the suit land; that thereafter, he approached an advocate and instructed him to write a demand letter to the defendant to vacate the suit land and allow the plaintiff quiet possession of the same.

10. The plaintiff denied the defendant’s allegation that the suit property belonged to their father one **Mengich Tuliamuk**. He stated that their father had a separate parcel in **Chepkono** which has a title deed which is parcel **No. 604**.

11. He stated that the defendant and two of his other brothers live on plot **No. 604**. He asked this court to evict the defendant so that he may divide the suit land among his children.

12. In cross-examination, the plaintiff reiterated that the suit property which he owns is separate from the property owned by his deceased father.

13. The plaintiff called **Julius Korikwang** as **PW2** who adopted his witness statement recorded on **5/2/2018** as his evidence-in-chief. **PW2** stated that **Mengich Tuliamuk** had a parcel of land in **Chepkono** sub-location where he resided with his family; that on **5/9/1979**, the plaintiff called for a harambee where **PW2** was the guest of honour and that **Kshs. 12,900/=** was collected which monies the plaintiff used to buy the suit land in issue. He confirmed that he was the plaintiff's neighbour and that the plaintiff's mother lived in the suit land with the knowledge of the plaintiff. He confirmed that the defendant currently resides in the suit property with one of his wives.

14. **Mr. Joseph Longorgole** testified as **PW3**. He adopted his witness statement dated **5/2/2018** as his evidence-in-chief. On cross-examination he stated that the plaintiff bought the suit land from one **Longuranyang Tuliamuk** who is his uncle and denied the averment that the suit land was bought by the plaintiff's father, the late **Mengich Tuliamuk**. According to **PW3**, the defendant settled on the suit land sometimes in the year **2002** and refused to move out later when asked by the plaintiff.

15. **PW4** was **Lokudo Chilapong**. He adopted his witness statement dated **5/2/2018** as his evidence-in-chief in this case. He stated that he was a cousin to the disputing parties and that **Mr. Mengich Tuliamuk** his late uncle, has his own land which forms part of family land in **Chepkono**. He averred that he had attended the harambee which the plaintiff had organized to enable the plaintiff purchase the suit land. He maintained that the plaintiff bought the suit land using the money contributed in the harambee.

#### The Defendant's Case

16. The defendant testified as **DW1**. He acknowledged that the plaintiff is his elder brother and adopted his witness statement dated **4/4/2016** as his evidence-in-chief. On cross-examination, he stated that the suit land was purchased from **Longuranyang Tuliamuk**. Upon being shown **P. Exhibit 1** by the plaintiff's counsel, he admitted it was indeed issued when the said **Longuranyang Tuliamuk** the parties' uncle, was alive and that no one raised any complaints at the time.

17. **Mr. Vincent Kapsetum Loitareng** who is a brother to both parties in the suit, testified as **DW2**. He stated that the plaintiff took in the defendant into the suit land as it was family land. He averred that under the Pokot culture which they ascribe to, the eldest brother stands in for his father in matters land and that the land in issue is family land which the plaintiff was holding in trust on behalf of the other members of the family. **DW2** admitted that his father **Mr. Mengich** passed on in **2014**.

18. **William Ngurakomol Lingaa** a neighbour to both parties testified as **DW3** and stated that the suit property was family land and the plaintiff and the defendant had been living together on the suit property.

19. **DW4, Pirakimei Merinyang** and **DW5, Siatukei Loitareng** also testified in support of the defendant's case and reiterated that the land in issue is family land and that the defendant was rightfully in occupation thereof.

#### The Plaintiff's Submissions

20. The plaintiff filed his submissions on **14/11/2019** and submitted that he did obtain a title deed to the suit land in accordance with the **Land Adjudication Act Cap 284** and no objection was ever raised by the defendant during the demarcation process as confirmed by **PW1, PW2, PW3, PW4** and that **DW1** has no legal right over the parcel of land as the plaintiff is the registered owner.

21. It is further submitted that the plaintiff adduced sufficient evidence to show that he is the first registered owner as proved by **P. Exhibit 1**.

22. According to the plaintiff, the defendant never adduced evidence of fraud, misrepresentation, illegality, unprocedural or any corrupt scheme used by the plaintiff in acquiring his title while giving testimony. On the allegation of the land being a family land, the plaintiff submits that the parcel of land belonging to the family is **WEST POKOT/CHEPKONO/604** and the same was registered in the name of their father as per the register opened on **3/10/1997**; that the register to land parcel **WEST/POKOT/KAPSANGAR/200** was opened on **2/2/2009** when their father was still alive and that if indeed the suit land was family land, the same ought to have been registered in their father's name who was alive in **2009** when the register for the suit land was opened.

#### The Defendant's Submissions

23. The defendant filed his submissions on **9/12/2019** and recapitulated the pleadings and the testimonies of each witness from both parties. Counsel for the defendant submitted that the suit land is a family land and the plaintiff being the first born is holding it under customary trust in favour of the defendant.

24. He added that the plaintiff did not produce a sale agreement in court to support the assertion that he purchased the suit land from **Longuranyang Tuliamuk** and that further, no lease agreement was produced as evidence to show that the plaintiff had granted the defendant space to reside for 3 years as alleged.

#### Determination

##### Issues for Determination

25. Having analysed the pleadings, the evidence adduced in court and the submissions presented before me, the following issues emerge for determination:

(i) *Who is the proprietor of L.R No. WEST POKOT/ KAPSANGAR/200.*

(ii) *Is the plaintiff holding the suit property in trust for the defendant?*

(iii) *Whether the defendant is trespassing on the suit property.*

(iv) *Is the plaintiff entitled to the reliefs sought?*

### **Analysis and Determination**

(i) **Who is the Proprietor of LR No. WEST POKOT/KAPSANGAR/200**

26. Learned counsel for the plaintiff submitted that the plaintiff had proved that he had a good title to the suit property which should be protected by the law. He relied on **Section 26 Land Registration Act, 2012** which provides as follows:

***“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.”***

27. The defendant admitted that the plaintiff is the registered owner of the suit property. Despite his testimony that the suit property is family land, the defendant did not produce any document to counter the plaintiff’s evidence. It is also clear from the evidence on record that the title to the suit property was issued when the plaintiff’s father was still alive. If indeed the suit property was paid for by their late father, Mr. Mengich, then it would have been registered in his name as registration process seems to have taken place when he was alive.

28. **Section 24 of the Land Registration Act 2012** provides 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.”***

29. **Section 25 (1)** of the said Act further 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.”***

30. Based on the above provisions of the law, it is therefore the finding of this court that the plaintiff is the absolute proprietor of the suit property. Consequently, he is entitled to protection of the said title as provided for under the **Land Registration Act No. 3 of 2012**.

(ii) **Is the plaintiff holding the suit land in trust for the defendant?**

31. With regard to the second issue, the defendant alleged that the property was family land and the plaintiff merely held it in trust for the family. It is trite that he who alleges must prove. This principle is clearly captured in **Section 107 (1) of the Evidence Act (Chapter 80 of the Laws of Kenya)**, which provides:

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

32. The burden of proving that the suit property was family property therefore fell on the defendant once he questioned the legitimacy of the plaintiff’s title. The defendant failed to produce any substantive evidence to prove his allegation whereas the title deed produced in court indicated the plaintiff as the registered owner of the land parcel known as **WEST POKOT/KAPSANGAR/200**. In my considered view therefore the issue of trust does not arise.

(iii) **Whether the Defendant is a Trespasser on the suit land**

33. The third issue for determination is whether the defendant is a trespasser in land parcel known as **WEST POKOT/KAPSANGAR/200**.

34. According to **BLACK’S LAW DICTIONARY 8<sup>TH</sup> EDITION**, Trespass is defined, in the strictest sense, as:

***“An entry on another’s ground, without a lawful authority, and doing some damage, however inconsiderable, to his real***

property.”

35. Both the plaintiff and the defendant have admitted that they lived on the suit property in peace and harmony for a period of 3 years or thereabouts before their dispute arose. This evidence was corroborated by their witnesses who testified that the two parties have been living together on the suit property for a long time. The plaintiff in his evidence stated that he authorized the defendant, albeit for a temporary period, entry into the suit property. By a demand letter dated **14/08/2015** the plaintiff asked the defendant to vacate the suit property. I can therefore infer from this that the consent which the plaintiff had granted the defendant was officially revoked on **14/8/2015**. The defendant therefore had no authority to be on the suit property once the plaintiff demanded his eviction from the land and his mere denial of the plaintiff’s right of proprietorship does not negate the trespass. In view of this, I find that the defendant’s continued occupation of the land after he was asked to vacate the same constitutes trespass upon private land.

**(iv) *Is the Plaintiff entitled to the reliefs sought?***

36. The last issue for determination is whether the plaintiff is entitled to the reliefs sought. Having found that the defendant has trespassed on the plaintiff’s parcel of land, it therefore follows that the plaintiff is entitled to the reliefs he is seeking in his plaint.

37. In the upshot, I enter judgment for the plaintiff and against the defendant and I issue the following final orders:

**(a) A declaration that the defendant is a trespasser on the plaintiff’s parcel of land known as land parcel No. WEST POKOT/ KAPSANGAR/200;**

**(b) The defendant shall vacate the suit land within 120 days from the date hereof failing which the plaintiff may apply for an eviction order;**

**(c) A permanent injunction restraining the defendant from remaining on, cultivating, interfering with or doing any other act which is prejudicial the plaintiff’s quiet enjoyment and occupation of land parcel no. WEST POKOT/ KAPSANGAR/200,**

**(d) This being a suit between brothers, each party shall bear their own costs.**

**Dated, signed and delivered at Kitale on this 3<sup>rd</sup> day of March, 2020.**

**MWANGI NJOROGE**

**JUDGE**

**3/3/2020**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Chebet for the plaintiff

N/A for the defendant

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**3/3/2020**