



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**E & L NO. 272 OF 2013**

**MARIGAT GROUP RANCH & OTHERS.....PLAINTIFFS**

**VERSUS**

**WESLEY CHEPKOIMET & 19 OTHERS.....DEFENDANTS**

**JUDGMENT**

By a plaint dated 6<sup>th</sup> May 2012 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:-

- a) A declaration that the 1<sup>st</sup> Plaintiff is the absolute registered owner of all that parcel of land known and fully described BARINGO/MARIGAT/1 measuring approximately six, six four, four DECIMAL NAUGHT (6644.0) Ha or thereby as contained in registry map sheet no. 1-334 and that the Defendants' entry, occupation, possession or use of parts thereof is illegally unlawful and amounts to trespass.
- b) An order of temporary injunction restraining the Defendants either by themselves, their agents, servants or anybody claiming under them howsoever, from further entering, occupying, cultivating, grazing, interfering with the survey (sub-division process) or in any way dealing with the suit land to-wit BARINGO/MARIGAT/1 pending the hearing and determination of this suit.
- c) An order of a permanent injunction restraining the defendants either by themselves, their agents, servants or anybody claiming under them howsoever, from further entering, occupying, cultivating, grazing, interfering with the survey (subdivision process) or in anyway dealing with the suit land to-wit BARINGO/MARIGAT/1.
- d) An order of eviction and/or order directing the Defendants, the servants, agents and or anybody claiming under them to give vacant possession of the suit land to the Plaintiffs.
- e) Mesne profits from January 2012 to the date of judgement.
- f) Costs and interest.

The defendants filed their defence dated 29<sup>th</sup> July, 2013 denying all the allegations and the matter proceeded for hearing on 29<sup>th</sup> July, 2019 when the plaintiff gave evidence in support of his case.

PW1 Fredrick Kirui stated that he is the Chairman of the plaintiff company which was registered on 30<sup>th</sup> June 1992 and has a membership of 333 members. He produced a certificate of registration as Pexbt 1, a register of members as Pexbt 2. He also produced a copy of the green card and a search certificate as Pexbt 3(a) and (b), consent from the Land Control Board dated 15<sup>th</sup> June 1995 as Pexbt 4, produced a letter by the Director of land Adjudication and settlement dated 1/12/1994 as Plaintiff exhibit 5 which letter essentially gave the consent for dissolution and subdivision.

PW1 further testified that they wanted to dissolve the group ranch so that each person gets his land and applied for consent to subdivide the land dated 14<sup>th</sup> December 2011 which he produced as Pexbt 6. It was his testimony that the surveyor was not able to complete the work due to defendants' encroachment on the land. He produced the letter dated 29<sup>th</sup> March 2012 and a map as Pexbt 8 (a) and (b).

It was PW1 further testimony that the District Land Adjudication and Settlement Officer Baringo District gave his go ahead to the 1<sup>st</sup> Plaintiff to proceed with its dissolution and the subdivision of the suit land and the consent to subdivide the suit land was thereafter obtained on the 14/12/2011.

The plaintiff therefore prayed for orders to be granted as prayed in the plaint and the defendants defence and counter claim be dismissed with costs.

The defence case was closed without them tendering their evidence and thus remains uncontroverted.

### **PLAINTIFF'S SUBMISSION**

Counsel for the plaintiff submitted that it is not in dispute that the 1<sup>st</sup> plaintiff is the registered owner of the suit land BARINGO/MARIGAT/1 measuring 6644 Ha and that there was no document produced to prove that the 1<sup>st</sup> plaintiff's title is unlawful or that it was fraudulently acquired. Further that the 1<sup>st</sup> plaintiff as the title holder is vested with proprietary rights over the suit property.

Counsel further submitted that since the plaintiffs have proved that they are the registered owners of the suit land, in view of the provisions of sections 24, 25 and 26 of the Land Registration Act, the plaintiff's title to the suit property would only be challenged successfully on allegations of fraud where the plaintiff is a party to the fraud.

Counsel also submitted that plaintiffs have met the threshold for grant of an injunction as the 1<sup>st</sup> plaintiff is registered owner of the suit land and as a result of the defendant's illegal possession, the plaintiffs have been deprived off the use of land.

On the issue of mesne profits, Counsel submitted that it is not in dispute that the plaintiffs have not given any sums to guide the court in assessing general damages for trespass but the court should take into consideration and noting the duration of the trespass and the size of the land, and therefore award a figure in the sum of Kshs.150,000/= being a nominal award of general damages in the instant case. Counsel relied on the case of **Maina Kabuchwa vs Gachuma Gacheru (2018) eKLR** where Justice J.G Kemei awarded damages for trespass to the plaintiff despite the plaintiff failing to quantify the same.

### **ANALYSIS AND DETERMINATION**

The issues for determination in this case are as to whether the plaintiff is the registered proprietor of the suit land and whether the plaintiff is entitled to the reliefs sought.

The plaintiff gave a chronology of how they acquired the suit land and the processes that they have gone through to get the titles. Section 24 of the Land Registration Act No 3 of 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.”

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.”

Section 26 of the same 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.”

The Plaintiff testified that he is the registered owner of land parcel BARINGO/MARIGAT/1 as demonstrated by Plaintiff’s Exhibit 3(a) and (b). Since the plaintiff’s evidence was not challenged at the hearing there is no doubt that the plaintiff is the absolute proprietor of the suit property. The defendants have not demonstrated any lawful claim to the suit land whatsoever.

I find that the plaintiff is therefore entitled to protection of the said title as provided for under the Land Registration Act No. 3 of 2012. Additionally, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that:

“No person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property”.

Regarding the issue as to whether the plaintiff is entitled to the reliefs sought, the Plaintiff seeks two remedies; a permanent injunction against the defendants and in default thereof an order of eviction against them. The plaintiffs having established that they are the legal owners of the suit land, the plaintiff is entitled to an order of eviction and an injunction against the defendants. I therefore find that the plaintiffs have proved their case on a balance of probabilities save for the prayer for mense profits which is a special damage which must be specifically pleaded and proved. Mesne Profits, which is defined as the profit of an estate received by a tenant in wrongful possession between the dates (see Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. The plaintiff did not prove that it is entitled to mense profits.

The argument that mense profits can be granted without proof is not tenable and the authority quoted by counsel is distinguishable as the same was for general damages. The case was as to whether a party can claim for both general damages and mesne profits whereby the court found that you could choose one. If a party sues for general damages for trespass which is actionable per se then the court would award such damages if trespass is proved.

In the case **Peter Mwangi Msuitia & Another Vs Samow Edin Osman (2014) e KLR**, the Court of Appeal held as follows:

*“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”*

I therefore make the following final orders:

a) A declaration is hereby issued that the 1<sup>st</sup> Plaintiff is the absolute registered owner of all that parcel of land known as **BARINGO/MARIGAT/1** measuring approximately **six, six four, four DECIMAL NAUGHT (6644.0) Ha** or thereby as contained in registry map sheet no. 1-334 and that the Defendants' entry, occupation, possession or use of parts thereof is illegally unlawful and amounts to trespass.

b) An order of a permanent injunction is hereby issued restraining the defendants either by themselves, their agents, servants or anybody claiming under them howsoever, from further entering, occupying, cultivating, grazing, interfering with the survey (subdivision process) or in any way dealing with the suit land known as **BARINGO/MARIGAT/1**.

c) The defendants to give vacant possession of the suit land to the plaintiffs within the next 45 days failure to which eviction to issue.

d) Prayer of Mesne profits is declined

e) Defendants to pay costs of the suit and interest.

**DATED and DELIVERED at ELDORET this 23<sup>RD</sup> DAY OF APRIL, 2020**

***M. A. ODENY***

***JUDGE***