



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERICHO

ELC CASE NO. 144 OF 2017

HENRY KIPNGETICH TERERPLAINTIFF

VERSUS

CECILIA SOI 1ST DEFENDANT

STANLEY NGENO.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. By a plaint dated 24th November 2017, the Plaintiff commenced this suit against the Defendants for trespassing onto L.R. Kericho/Ndaraweta/2153 (“the suit land”) which is registered in the name of his father Kipsoi Arap Maina (“the deceased”). He claims that due to the Defendants’ continued occupation of the suit land, he and other beneficiaries of the deceased’s estate have suffered irreparable loss and damage. His plea is that the court issue an order evicting the Defendants from the land to enable him transfer the land to the deceased’s beneficiaries.

2. The 1st Defendant opposed the claim through an amended defence and counterclaim dated 19th March 2018. In addition to denying that the Plaintiff lacked the required *locus standi* to institute the suit she also asserted that the court lacked jurisdiction to hear the suit. She further averred that her husband Kipkemoi Elijah Soi had purchased 5 acres of the suit land from the Plaintiff’s deceased father and they had been living on it as a family since 1998. She claimed that the Plaintiff’s father died before he transferred the land to her husband. That in March 2017, the Plaintiff forcefully entered into their land and plucked tea and cut down some trees for which she sought compensation. She also urged the court to declare her and her husband as bona fide owners of 5 acres of the suit land.

3. The 2nd Defendant claimed that he had entered into a land exchange agreement with the Plaintiff’s brother Zephania Marindany (deceased) where he gave Zephania 1.3 acres in Mauche in exchange for an acre of the suit land. He claimed that once they exchanged their parcels of land, Zephania took possession of the land in Mauche while he took his portion of the suit land and occupied it for 11 years without interference. He therefore urged the court to dismiss the entire suit with costs.

4. The parties gave oral evidence in support of their rival positions. A summary of their evidence at trial is captured below.

PLAINTIFF’S CASE

5. Henry Kipngetich Terer (PW 1) testified that he had filed the suit against the Defendants because they had trespassed onto his father’s land. He stated that his father, Kipsoi Arap Maina passed away on 23rd January 2004 and was survived by 3 wives and 20 children. He told the court that he had heard that his father had been given some money by the 1st Defendant’s husband for land but he had not come across any sale agreement between the Defendants and his late father. He also denied that his late brother Zephania Marindany had sold land to the Defendants. He added that the Defendants had been residing on his father’s land for 7 years and his attempts to find out why they were living there had turned violent. He testified that there were 3 criminal cases in Bomet court against the 1st Defendant’s sons for malicious damage to property and assault.

6. During cross examination, the Plaintiff admitted that his advocate had sent a letter to the 1st Defendant which showed that there had been an agreement for the purchase of 5 acres of land. That in another letter dated 6th November 2011; his advocate had written a letter to the 2nd Defendant which indicated that the Plaintiff was aware that the 2nd Defendant was residing on the suit land. The Plaintiff admitted that his late brother Zephaniah had exchanged land with the 2nd Defendant between 2000 and 2005. He however denied the accusation that they had chased the 2nd Defendant away and stated that he had left the land of his own accord.

DEFENDANTS’ CASE

7. The 1st Defendant, Cecilia Soi (DW 1) adopted her written statement as her evidence in chief. She added that she had been living on the suit land with her husband Kipkemoi Elijah Soi since 1979, when he bought 5 acres of the land from Kipsoi Arap Maina. She stated that before 2017, they had been living peacefully on the land. Cecilia produced a letter dated 6th November 2017, which had been written to her by the Plaintiff's advocate demanding that they surrender 0.25 of an acre of the land they were occupying or pay an additional Kshs. 250,000/= for it. She produced a response from her advocate in which the Plaintiff was advised of his incapacity to handle the issues and was asked to commence succession proceedings. She also produced a valuation report of the tea that had been plucked and the trees that had been destroyed by the Plaintiff's nephews when they invaded the land and urged the court to grant the reliefs sought in the counterclaim.

8. During cross examination, DW 1 stated that there had been a sale agreement for 5 acres of land they purchased although she did not produce it in court. She also claimed that her husband had obtained the consent of the Land Control Board for the purchase of the land.

9. Stanley Kimutai Ngeno (DW 2) testified that the portion of the suit land that he had bought belonged to the Plaintiff's brother Zephania. He explained that he had exchanged land parcels No. Nakuru/Likia/ 474 and Nakuru/Likia/359 with the portion the Plaintiff's brother gave him and took possession of the land in 2006. He occupied his portion of the suit land until 2018, when Zephania's sons chased him away. He testified that parcel No. 474 was registered in the name of his mother (DW3) while parcel No. 359 was registered in the name of John Kipkemoi Martim. DW 2 told the court that the Plaintiff's nephews had demolished his property, harvested his tea and even proceeded to occupy his house and construct another house on his land. He lamented that he had to live in a rented house as he could not go back to the land in Mauche since half of it had already been sold. He therefore urged the court to assist him get back his land in Ndaraweta.

10. DW 2's mother Taprobkui Chepkoskei Bore (DW 3) confirmed that she had given her son a portion of land parcel No. Nakuru / Likia/ 474 which he exchanged for 0.9 acres of the suit land with the Plaintiff's brother Zephania. Her evidence was reaffirmed by DW 2's wife Zeddy Chepkurui Kelong (DW 3) who testified that her husband had given two parcels of land to Zephania in exchange for the land in Ndaraweta.

PLAINTIFF'S SUBMISSIONS

11. Learned counsel for the Plaintiff argues that there was no valid agreement between the Defendants and his deceased father. He submits that under the Law of Succession Act, no person has the legal authority to sell immovable property of a deceased person before confirmation of the grant, thus the sale of the suit land to the Defendants was null and void. He points out that the 1st Defendant had not produced a sale agreement for the portion she occupied and also contends that the agreement documents produced by the 2nd Defendant had not been drawn by a qualified person in contravention of **Section 34** of the **Advocates Act**. Counsel also argues that since the suit land was agricultural land, the consent of the Land Control Board was a mandatory requirement and in this case, the purchase of the land was void as the consent of the Land Control Board had not been sought.

1ST DEFENDANT'S SUBMISSIONS

12. Learned counsel for the 1st Defendant submitted that the matter before this court is purely a succession dispute which this court lacks jurisdiction to determine. It was also counsel's view that the enjoinder of the 1st Defendant to the suit was improper as the issue in controversy is whether the deceased sold land to her husband Elijah Kipkemoi Soi. Counsel argues that her assertion that she had purchased 5 acres of land from the deceased in 1998 was not challenged. He submits that the 1st Defendant is entitled to the reliefs sought in the counterclaim as she has proved that there was a valid contract of sale between her family and the deceased. That she and her husband should be declared the bona fide owners of the land they occupy and the Plaintiff restrained from interfering with it. He also argues that they have shown that the Plaintiff or his servants and/or agents entered the land and illegally felled trees and plucked tea worth Kshs. 30,600/= and the 1st Defendant is therefore entitled to that amount and general damages for the trespass to her land.

2ND DEFENDANT'S SUBMISSIONS

13. Learned counsel for the 2nd Defendant relies on the demand dated 15th February 2018 to support the submissions that the Plaintiff was aware of the land exchange agreement between his brother the late Zephaniah Marindany and the 2nd Defendant. He argues that from the letter, the Plaintiff's demand was for payment of the tea bushes on the land. He contends that there was no such agreement and that in any case, the maxim that whatever is affixed to the soil belongs to the soil is applicable. He contends that the Plaintiff's bid to circumvent the land exchange agreement is insincere and contrary to the principle that he who comes to equity must come with clean hands. He also submits that after selling the 2nd Defendant's land, the heirs of the late Zephania Marindany have now teamed up with the Plaintiff to declare him an intermeddler. He argues that the beneficiaries of the estate the Plaintiff represents instigated the actions that led to the case and he should therefore not be awarded costs.

ISSUES FOR DETERMINATION

14. From the evidence and the parties' submissions, I find that the main issues arising for determination are;

- a. Whether this court has jurisdiction to hear and determine this suit;
- b. Whether the 1st Defendant has a valid claim to 5 acres of the suit land;
- c. Whether the 1st Defendant is entitled to the reliefs sought in her counterclaim;
- d. Whether the 2nd Defendant has a claim to the portion of the suit land which he occupies; and

e. Whether the Plaintiff is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

15. Before I deal with the issues set out above, I will first dispose of the question of jurisdiction which has preliminary significance. The issue was raised by the 1st Defendant in her defence and counterclaim as well as her written submissions. She argues that this suit is not properly before this court as it relates to a succession dispute which this court lacks jurisdiction to determine.

16. The jurisdiction of the Environment and Land Court is defined in **Article 162 (2) (b)** of the **Constitution** and expounded in **Section 13** of the **Environment and Land Court Act**. Essentially, the Environment and Land Court is to hear and determine issues relating to the environment and the use and occupation of, and title to land. The core mandate of the probate and administration court on the other hand is to determine how the estate of a deceased person may be distributed by the deceased's personal representatives to the beneficiaries of that estate.

17. The present case relates to land that initially belonged to the Plaintiff's father, the late Kipsoi Arap Maina. The Plaintiff obtained limited letters of Administration *ad litem*, to enable him pursue this matter on behalf of the estate of the deceased. The main contention between the parties herein is whether the Defendants acquired good title to the portions of the suit land that they occupy. The determination of the matter will require dealing with issues pertaining to occupation and title to land which this court is better suited to handle. I therefore find that this court has the requisite jurisdiction to handle the matter.

18. The second issue falling for determination is whether the 1st Defendant has a claim for/or acquired good title to 5 acres of the suit land. The Plaintiff accuses the 1st Defendant of trespassing and illegally occupying the suit land. He testified that there was no valid agreement between the 1st Defendant and his deceased father for purchase of the land she occupies and that if there was any such sale, no Land Control Board consent was sought for the transaction which relates to agricultural land. The Plaintiff also contended that the 1st Defendant had purchased the land from persons purporting to be beneficiaries of the estate of the deceased before the confirmation of the grant which rendered the transaction null and void.

19. It is common ground that the Plaintiff's father was the registered proprietor of the suit land. The 1st Defendant's case is that her husband Elijah Soi bought 5 acres of the suit land from the Plaintiff's father between 1979 and 1998. She claimed that after the sale, her family took possession of the land in 1998 but the Plaintiff's father passed away before he transferred the land into her husband's name.

20. Although, the Plaintiff claimed that the 1st Defendant purchased the suit land from beneficiaries of the estate, he testified that he was aware that his father had received some money from the 1st Defendant's husband Elijah Soi. Additionally, the letter dated 6th November 2017 from the Plaintiff's advocates to the 1st Defendant corroborated the 1st Defendant's evidence that they had purchased the 5 acres of the suit land and taken possession of that portion since 1998. The relevant part of the letter which was produced as D. Exh. 1 read as follows;

RE: KERICHO/NDARAWETTA/2153

HENRY TERER- OUR CLIENT

We have been retained by our client above named on whose instructions we write and address you as follows:-

THAT in the year 1998 or thereabouts you entered into sale agreement of land out of the above mentioned parcel of land for a portion of land measuring 5 acre but on 24th October, 2017 the said land was confirmed to be 5.25 acres and hence it exceeded with 0.25 of an acre and the same exercise was conducted in the presence of village elders. Full particulars are well known to you.

We are further informed our client wants you to surrender the said 0.25 of an acre to him or in alternative pay the value of the same at the current market rate of Kshs. 250,000/= plus the costs of the said survey.

21. Prior to the amendment of **Section 3 (3)** of the **Law of Contract Act** in 2003, an unwritten agreement for purchase of land was enforceable if it was proved that the intending purchaser had taken possession of the land in part performance of the contract as the 1st Defendant did here. Although she did not produce a written agreement, she proved that there was an agreement for purchase of 5 acres of the suit land and also proved that she had taken possession of that portion of the land. Thus, her failure to produce a sale agreement did not take away the fact that there was a valid agreement for purchase of 5 acres of the suit land. I am guided by the finding of the Court of Appeal in **Peter Mbiri Michuki v Samuel Mugo Michuki Civil Appeal No. 22 of 2013 [2014]eKLR** where the Court of Appeal held as follows;

"We are fortified in this view because the letter dated 18th August 1978 from Karuga Wndai & Co. Advocates on behalf of the appellant stated that the appellant had deposited Kshs. 300/= for transmission to the plaintiff because he had changed his mind to sell the land; we find that this letter is corroborative evidence illustrating that a sale agreement had been entered into between the parties and purchase price had been paid. On the strength of this corroborative evidence, we are convinced that the learned judge did not err in finding that there was a sale agreement."

22. The Court further held;

"It is our view that Section 3 (7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the Law of Contract Act

applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the Law of Contract Act.”

23. I am not persuaded by the Plaintiff’s argument that the agreement was void for failure to obtain a Land Control Board’s consent. The 1st Defendant did not dispute that the suit land was agricultural land and thus subject to the Land Control Act. She claimed that the consent of the Land Control Board had been obtained but did not produce a copy of the same to rebut the Plaintiff’s assertion that none was sought. Under **section 8 (1)** of the **Land Control Act**, the court is empowered to extend the time within which one can obtain the consent of the Land Control Board where sufficient cause has been shown. The circumstances in this case would be befitting of the exercise of this discretion since it is apparent that the plaintiff was aware that the land the 1st defendant was in occupation of since 1998 had been purchased from the deceased. (see *Martha Njeri Wanyoike & 2 others v Peter Macharia Mwangi & 4 others Civil Appeal No. 39 of 2012 [2016]eKLR*).

24. To fully determine this issue, I will go back to one aspect of the matter which is whether the 1st Defendant has a valid claim for the portion she occupies given her admission that it was in fact her husband Kipkemoi Elijah Soi who purchased the land. Closely related to this issue is the 1st Defendant’s contention that she had been wrongly sued as there was no privity of contract between her and the deceased.

25. At this point it is clear that the 1st Defendant is in occupation of the suit land and thus her argument that she was improperly enjoined to this suit is untenable. Further, as the wife of the purchaser and having been in actual occupation of the land for more than 12 years, the 1st Defendant has acquired an overriding interest over the land in accordance with **section 28** of the **Land Registration Act** which provides;

28. 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—

(a) spousal rights over matrimonial property; ...

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; ...

26. The foregoing analysis leads me to the conclusion that the 1st Defendant has a valid claim over 5 acres of the suit land. The plaintiff’s case against the 1st Defendant therefore cannot stand.

27. That leads me to the third issue which is whether the 1st Defendant is entitled to the reliefs sought in her counterclaim including;

(a.) A declaration that she and Kipkemoi Elijah Soi are the bona fide and legal owners of five (5) acres of the suit property L.R. number Kericho /Ndaraweta/2153 and that the encroachment by the Plaintiff is illegal, null and void;

(b.) An order of injunction restraining the Plaintiff from interfering with the 1st Defendant’s and Kipkemoi Elijah Soi quiet possession and trespassing on the five (5) acres of the suit property L.R. number Kericho Ndaraweta/2153;

(c.) *Puisne* (sic) profits (to be specified at the time of hearing in Kshs.)

(d.) Interest in (c) thereon at Court rates until payment in full of filing suit;

(e.) Costs of the suit;

(f.) Any other or further relief that this Honourable Court may deem fair, just and equitable to grant.

28. In the case of *Mbaki & Others vs Macharia & Another (2005) 2 EA 206*, at page 210, the Court held that “*It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.*” Since the 1st Defendant’s husband, Kipkemoi Elijah Soi was neither enjoined nor called to testify in the proceedings; it is unclear what his position of the matter is. However, it is clear from the evidence on record that he purchased 5 acres of the suit property from Kipsoi Maina. Furthermore I have already held that the 1st Defendant is beneficially entitled to the 5 acres she has been occupying with her husband since 1979. In the circumstances I find and hold that the 1st Defendant and her husband Kipkemoi Elijah Soi are beneficial owners of 5 acres of the suit property L.R No. KERICHO/NDARAWETA/2153 and that the encroachment by the Plaintiffs is illegal, null and void.

29. I will also grant the second relief, since the 1st Defendant established that she has a valid claim over 5 acres of the suit land.

30. The 1st Defendant also seeks “*puisne*” (sic) profits for the tea leaves and trees she claimed had been destroyed by the Plaintiff’s nephews. She produced a valuation report to support her assertion that she had incurred a loss of Kshs. 30,600/=. I believe what the 1st Defendant meant to seek is mesne profits as opposed to *puisne* profits. Mesne profit is defined as the loss suffered as a result of a wrongful period of occupation of one’s property by another. (See *Attorney General v Halal Meat Products Limited [2016] eKLR*). A person in wrongful possession and enjoyment of the immovable property is liable for mesne profits. (see *Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR*)

31. There is no evidence that the 1st Defendant has ever lost possession of the portion of land she occupies. However, it is clear that the relief she seeks is in the nature of special damages. As a principle, special damages must not only be specifically pleaded, but must also be

strictly proved with as much particularity as circumstances permit. (See *National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR*, *Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR*)

32. The 1st Defendant did not specify the amount of damages in her pleadings. She also failed to show that the Plaintiff caused his nephews to destroy her crops. I therefore dismiss her claim for compensation of the same. She is nevertheless entitled to costs as her claim against the Plaintiff is successful.

33. I now turn to the last issue which is whether the 2nd Defendant has a valid claim for the portion of the suit land which he occupies. The 2nd Defendant testified that he entered into a land exchange agreement with the deceased's son Zephania Marindany (deceased). He stated that they agreed that he would get 0.927 acres of the suit land and he would give the Plaintiff's brother 0.7 acres of land parcel No. Nakuru/ Likia/474 and 0.5 acres of land parcel No. Nakuru/ Likia/359. The 2nd Defendant also told the court that parcel no. 474 was registered in the name of his mother (DW3) while parcel no. 359 was registered in the name of John Kipkemoi Martim.

34. Although the 2nd Defendant's mother was involved in the land exchange agreement and testified in support of it, John Kipkemoi Maritim was not involved in the transaction. The 2nd Defendant did not have title to land parcel No. Nakuru/ Likia/359 and could not sell or exchange what did not rightly belong to him. Similarly, the Plaintiff's brother did not have any good title to the suit land pass to the 2nd Defendant.

35. I agree with the Plaintiff's submissions that the sale of immovable property of a deceased prior to the confirmation of grant is a contravention of **Section 82 (b) (ii)** of the **Law of Succession Act** which states that no immovable property shall be sold before confirmation of the grant. **Section 55 (1)** of the Act also provides;

55 (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in [section 71](#).

36. In *Kadzo Charo v Alex Nzai Dzombo Civil Appeal Number 11 of 2018 [2019] eKLR* the Court of Appeal held;

*46. In the present case, the respondent contracted with a seller who had no capacity to sell the property. Without grant of letters of administration of the estate of Charo Kinda, deceased, in whose name the property is registered, the deceased's first widow, or for that matter, the appellant, did not have the capacity to sell the property to the respondent or to any other person. In the case of **Benson Mutuma Muriungi vs C.E.O Kenya Police Sacco & another [2016]eKLR** cited in the High Court decision in *In re Estate of M'Ngarithi M'Miriti [2017] eKLR* that:*

"Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so."

47. Dealings with the property of the deceased in the absence of letters of administration is therefore intermeddling within the meaning of Section 45 of the Law of Succession Act and the respondent's claim to enforce a contract of sale in breach cannot therefore succeed.

37. When Zephania sold 0.927 acres of the suit land to the 2nd Defendant no confirmed grant had been issued in the estate of the deceased. He had no good title of the land to the 2nd Defendant and the land exchange agreement between him and the 2nd Defendant was void. Consequently, I find that the Plaintiff has proved his case against the 2nd Defendant. Given that the 2nd defendant has already been evicted from the suit land and the portion of land he exchanged with the late Zephania has already been sold off, I will accept his invitation to deny the Plaintiff the costs of the suit.

38. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove his case against the 1st Defendant but has succeeded in his case against the 2nd Defendant. The court also finds that the 1st Defendant has proved her counterclaim to the required standard. The court consequently makes the following final orders;

a. The Plaintiff's suit against the 1st Defendant is hereby dismissed in its entirety.

b. Judgement is hereby entered for the 1st Defendant on the counterclaim in the following terms;

i. A declaration is hereby issued that the 1st Defendant and Kipkemoi Elijah Soi is the beneficial owner of 5 acres of the suit property L.R NO. KERICHO/NDARAWETA/2153 and the encroachment by the Plaintiff is illegal, null and void.

ii. An order of injunction is hereby issued restraining the Plaintiff from interfering with the 1st Defendant's quiet possession and trespassing on the five (5) acres of the suit property L.R. Kericho / Ndaraweta/2153;

iii. Costs of the suit and the counter claim shall be borne by the plaintiff;

c. The plaintiff's suit against the 2nd Defendant is hereby allowed in the following terms;

i. An eviction order is issued against the 2nd Defendant and or any person cultivating or occupying L.R. No. Kericho/

Ndaraweta/2153 under the authority of the 2nd Defendant;

ii. An order of injunction is hereby issued restraining the 2nd Defendant from interfering with the Plaintiff's quiet possession of 0.927 acres of L.R. No. Kericho/ Ndaraweta/2153.

iii. Each party shall bear his costs.

Dated, signed and delivered by email this 28th day of May, 2020.

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J.M. ONYANGO

JUDGE