



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 147 OF 2014

JOSEPH KIPREPELI LOTUKEI.....PLAINTIFF

VERSUS

STEPHEN TOROITICH KORKOU.....DEFENDANT

JUDGMENT

BACKGROUND

1. The plaintiff filed a plaint dated **30/9/2014** and filed in court on the same date. He sought the following orders against the defendant:-

- a. **A declaration that the plaintiff herein is entitled to 3 acres from land parcel known as WEST POKOT/CHEPARERIA/2100;**
- b. **An eviction order to issue against the defendant by himself his servants and/or agents or any other person claiming through him from the 3 acres in the land known as WEST POKOT/CHEPARERIA/2100;**
- c. **Cost of the suit.**
- d. **Any other relief the court deem fit to grant.**

THE PLEADINGS

The plaintiff's claim

2. The plaintiff's father's family consisted of two houses; According to the plaint the defendant, assisted by another person had himself registered owner of **West Pokot/Chepareria/2100** (hereinafter referred to as **Plot no 2100** or "**Parcel No 2100**" for brevity) in **1992** at the land adjudication committee stage; in the year **2003** the plaintiff lodged a complaint before the land dispute tribunal which ruled that since the defendant was a child born out of wedlock he would receive a portion from each house with the plaintiff ceding **2** acres while the first family ceded the rest of the awarded size. The decision was adopted by the Magistrates court in **Kitale SPMC Land case 41 of 2003**. The plaintiff surveyed an excised **2** acres as directed and the defendant took possession without demur and he has been in occupation of that portion. The defendant however had after the surveying of the property in **1992** already caused himself to be fraudulently registered as proprietor of the entire suit land parcel. On **16/9/2014** the defendant, assisted by the chief evicted the plaintiff from the three acre portion he had been occupying, thus rendering the plaintiff and his family landless.

The Defendant's Defence and Counterclaim

3. The defendant filed his defence and counterclaim dated **3/5/2015** on **5/6/2015**. In his defence and counterclaim the defendant denied the plaintiff's claim and further responded that the registration of the suit land in his name was effected legally and with the knowledge and the assistance of the plaintiff and that the suit land was part of the defendant's share.

4. He denies knowledge of the land disputes tribunal case and asserts that the plaintiff was born out of wedlock. In response to the land disputes award he states that the same was not possible because he had already been registered as the owner of the land by **1999**. He also asserts that the two acres were to be carved out of **LR No West Pokot Chepareria 1259** (hereinafter referred to as "**Plot no 1259**" or "**parcel no 1259**" for brevity), but the plaintiff carved out a larger share out of **LR west Pokot Chepareria 1259** instead of allowing the parties to share the parcel equally. Thereafter the defendant forcibly took possession of **3** more acres. Subsequently the parties agreed to get the services of a surveyor to confirm the boundary between **1259** and **2100** and it was upon that survey found that the plaintiff had

encroached on the defendant's land by 3 acres. The defendant counterclaims for orders that the plaintiff be evicted from **West Pokot Chepareria 2100** (hereinafter referred to as Plot no 2100 for brevity) at his own costs.

The Plaintiff's Reply to Defendant's Defence and Counterclaim

5. In his reply to the defence and counterclaim the plaintiff reiterated the contents of his plaint.

THE EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

6. PW1, the plaintiff, testified on **14/3/2018** and **12/6/2018**. His evidence is that the defendant is his stepbrother; that his father's land parcel no **811** was subdivided between the two houses and parcel no **1259** was given to the plaintiff's mother. By then the defendant had not been given land as it had not been known that the deceased had an illegitimate child; in **1992** an objection, **No 60/57** was lodged by Christopher Kamomai Korkou a son from the first house. The decision was that the sons of the first wife do get parcel no **811** (hereinafter also referred to as "**Plot no 811**" or "**Parcel No 811**" for brevity) while the plaintiff was to get parcel number **1259**; that families were to move from their settlements; Cheptete moved out of parcel no **1259** to plot no **811**; after that each house was to give the defendant **2** acres. The second house, to which the plaintiff belonged, gave its two acres to the defendant but the first house did not do so. In **1999** the plaintiff heard of rumours that his land had been split in half and upon investigating further he found that the defendant had been registered as owner of parcel no **2100** which was more than **2** acres, whereupon the plaintiff proceeded to the tribunal and wrote to the survey office; the tribunal award stated that the plaintiff and the 1st house do each give the defendant **2** acres and the award was adopted by the court and a decree taken out. Thereafter he unsuccessfully tried to use the court process to get the extra **3.2** acres from the defendants. He then lodged a caution against the parcel no **2100** in **2004**. In **2014** however the defendant brought a surveyor to fix a boundary. When the plaintiff showed the surveyor the decree entitling the defendant to only two acres out of the plaintiff's land the surveyor declined to follow it and parceled out **5** acres in favour of the defendant. The plaintiff maintains that the first house never gave the defendant the two acres it was meant to and that the tribunal decision was never appealed. Skirmishes between the plaintiff and the defendant led to the jailing of the defendant in **2003**.

7. PW2, Cheplegei Chepkech testified on **12/6/2018**. She adopted her written statement dated **26/9/2014** as her evidence-in-chief is this matter. Her evidence is that she is the second wife of Korkou Mariech and mother to the plaintiff; that Korkou Mariech passed on in **1985**; that upon demarcation and subdivision plot no **811** of **28.0** Ha went to the first family and plot **1259** of **11.0** ha went to **DW2's** family; that parcel **1259** was registered in the plaintiff's name; that it later became apparent that her husband had had a child out of wedlock, that is the defendant and the elders resolved that each house do contribute a portion of land to accommodate him; that she refused but the plaintiff agreed to give the defendant **2** acres; that in **1992** sons from the first house lodged an objection before the Land Adjudication Committee at Chepareria to the effect that the land should be distributed according to the number of sons and not according to the number of wives; that the committee however favoured sharing out of the land amongst the wives; that later on the plaintiff discovered that the defendant had illegally acquired title to the plot of land known as no **2100** which was **3.2** more acres than that which had been given to him; that up to the recent times the defendant was in occupation of **2** acres but he began threatening the plaintiff with eviction; that the defendant is entitled to only **2** acres out of parcel no **1259**.

The Defendant's Evidence

8. DW1 the defendant testified on **26/9/2019**. His evidence is that plot number **1259** borders plot no **2100**, that at an objection case at the land adjudication office in **1992** the plaintiff and one Christopher from the first house were the disputants and a decision was made that plot no **811** be divided into **4** portions and **1259** be divided between him and the plaintiff; that plot **1259** was **28** acres and was to be shared equally; that no appeal was filed against the objection award; that the defendant obtained title in **1999**; that he saw that it was **5** acres and not **14** acres; that when he inquired about the shortfall from the plaintiff he had him jailed and hived off **3** acres from parcel **2100**; that upon release the defendant pursued the matter and the land registrar and surveyor visited the site and fixed the boundaries to parcels **2100** and **1259** in **2014** and the **3** acres the plaintiff had appropriated were returned to the defendant; that the plaintiff vacated the **3** acres but sued the defendant in this case.

9. Upon cross examination he stated that he came to the land in **1996** and settled on **2** acres; that he was not brought up together with the plaintiff; that he is not aware of any case before elders or any other suit at the Kitale courts.

10. DW2, Christopher Koikoi, testified the same date as **DW1**. His evidence is that he is the step brother to the parties; that in **1992** a dispute arose because the plaintiff took up plot **1259**; that he had raised that objection as he wanted all the land comprised in parcel **811** and **1259** consolidated and subdivided according to the number of sons including the plaintiff and the defendant; that the decision was that plot **811** be shared out among the sons of the first house while plot **1259** was to be shared equally between the plaintiff and the defendant; that no appeal was filed against the decision; that he processed the title deed in favour of the defendant; that the title was **5** acres in total; that the defendant was jailed at the instance of the plaintiff and when he came out the Land Registrar and the Land Surveyor fixed the boundary between parcel **811** and **1259**; that the plaintiff was ordered to reinstate three acres which he had taken from the defendant; that the plaintiff and the defendant were born out of wedlock and their mothers never came to the *boma*; upon cross examination he stated that his father had two wives: only his mother and the defendants mother and the plaintiff's mother was not married in the homestead. He also admitted to not having given the defendant land from his family land; he admitted that his family land was not shared equally between the brothers; he seemed unsure of whether the defendant came to the homestead in **1980** or in **1985**;

11. DW3, Lokowareng Chesimaya, testified on **26/9/2019**. He adopted his statement dated **3/6/2015** as his evidence-in-chief in this matter. According to his evidence the parties herein are his neighbours; that their elder brother filed an objection before the land adjudication officer West Pokot in **1992**; that **DW3** participated in the objection proceedings; that the decision in the objection was that the land comprised in parcel no **1259** be shared equally between the plaintiff and the defendant; that each was to get **14** acres; that the plaintiff caused the issuance of titles no **1259** and **2100** whereby the defendant's titles was made to reflect only **5** acres; that the plaintiff should cease claiming the three acres he claims and be satisfied with the **23** acres in **1259**. Upon cross examination he stated that the parties' father had only **2** wives by the

names Cheptete and Chemuso. He denied that a man called Limangura was involved in the sharing out of the land.

12. The defendant then closed his case.

SUBMISSIONS

13. The plaintiff filed his written submissions on **22/11/2019**. The defendant filed his on **7/2/2020**. I have considered the plaint, the defence and the submissions filed.

Determination

14. The issues that arise in this suit and counterclaim are as follows:

a. Did the decision of the land Adjudication Officer on the objection raised in 1992 or the Kapenguria Land Disputes Tribunal entitle the defendant and the plaintiff to 14 acres each?

b. Was the title to plot no 2100 measuring 5.2 acres fraudulently obtained by the defendant?

c. What orders should issue?

15. The issues are addressed as hereunder.

a. Did the decision of the land Adjudication Officer on the objection raised in 1992 or the Kapenguria Land Disputes Tribunal entitle the defendant and the plaintiff to 14 acres each ?

16. It is incumbent upon any party who wishes a favourable order to be made regarding a certain state of affairs to adduce evidence in support of that state of affairs. In the case of **Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR Civil Appeal No. 307 of 2008** where it was held as follows:

“As was held in the case of Kirugi & Another -Vs- Kabiya & 3 Others [1987] KLR 347, the Court of Appeal held thus:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

17. It is clear that the dispute between the parties revolves around what was decided by at the objection proceedings by the Land Adjudication Officer. Some witnesses for the defence stated that plot number **1259** was to be divided equally between the plaintiff and the defendant while the plaintiff and his mother **PW2** hold the position that that was not the case.

18. The decision must be examined for all it is worth. It was produced by the plaintiff as **PExh1**. The plaintiff was the defendant while his step brother from the first family, Christopher was the objector. The objector on cross examination by the plaintiff herein and the Land Adjudication Officer admitted that their father had only two wives.

19. Going by the observation that parcels nos. **811** and **1259** existed at the time of the award, it is also clear that had the Land Adjudication Officer intended that the defendant do get land from parcel no **811**, he would have said so expressly. He did not. It is therefore the case that the defendant was to get land from only parcel **1259**. At the end of those proceedings the award was that parcel number **1259** be subdivided into two portions, one for the plaintiff and one for the defendant. No particular directions were issued on the size of each portion. It is therefore not clear from the award as to what amount of land the defendant was to get from parcel no **1259**.

20. The plaintiff's further evidence is that he lodged a dispute with the Land Disputes Tribunal Kapenguria which ordered that the defendant do get **2** acres from the plaintiff and two acres from the family of the elder wife. Proceedings of the land disputes tribunal were given in evidence as **PExh 4**. Hearing was evidently at the district officer's office on **6/11/2002**. The award was as observed by the plaintiff. The title to parcel no **2100** was issued on **1/4/1999**.

21. However I must summarily decline to be swayed by that land dispute tribunal award as it was made without jurisdiction. The **Registered Land Act** was in force at the material time. **Section 159** of the **Registered Land Act Cap 300** (now repealed) stated that:

“...159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.”

22. In view of the provisions of the above provisions of the repealed **RLA**, by the time the land disputes tribunal heard the dispute lodged before it, it had no jurisdiction.

23. Also, the provisions of **Section 3(1)** of the **Land Disputes Tribunals Act** (now repealed) did not envisage that the Land Disputes Tribunal could have mandate to issue an award that affects a registered proprietor's ownership of any part of his land. (See the decision in

24. Any step, act or proceeding taken without jurisdiction is a nullity. In the case of **Nairobi Civil Appeal No. 244 Of 2010 Between Phoenix Of E.A. Assurance Company Limited And S. M. Thiga T/A Newspaper Service** it was stated as follows:

“If we find that the suit was filed before a court bereft of jurisdiction, the principle encapsulated in the time honoured *locus classicus* case of *Macfoy v United Africa Co LTD* [1961] 3 All ER, 1169, comes into play and Appeal No. 6 of 2018 would therefore fall by the wayside. In that case it was held thus:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...””

25. The proceedings of the Land Disputes tribunal and the order therein made are therefore of no avail to the plaintiff in this case.

26. Therefore, neither the decision of the Land Adjudication Officer on the objection raised in 1992 nor the Kapenguria Land Disputes Tribunal categorically gave either the defendant or the plaintiff an entitlement to 14 acres each.

27. Where does that leave the plaintiff? As this court has found no merit in the determination of the Land Disputes Tribunal, that leaves the plaintiff with only the determination of the Land Adjudication Officer which, in this court’s view, did not also give any specific ratios for the subdivision of parcel number 1259.

b. Was the title to plot no 2100 measuring 5.2 acres fraudulently obtained by the defendant?

28. I have examined the evidence in support of the plaintiff’s case and found no evidence to enable this court conclude that the defendant was guilty of any fraud in procuring the title to plot no 2100. It would be apt to examine the same evidence to determine if the defendant’s counterclaim ought to succeed.

29. The defendant’s counterclaim only seeks that the plaintiff be evicted and he be left in peace to enjoy the portion that has been registered in his name which, in contrast to the plaintiff’s portion of 23 acres, measures approximately 5.2 acres. In view of the fact that the parties are descendants of the same father, and that each of the sons got some land, it is clear that the defendant is entitled to some land, and even in the absence of specific apportionment by the Land adjudication officer in his decision on the objection, this court does not find 5.2 acres out of 28 acres to be inequitable. This court is therefore not inclined to disturb the titles as issued. In the absence of fraud, each party should remain with their parcel as represented by their respective titles.

(3) What orders should issue?

30. In the final analysis this court finds that the plaintiff has failed to prove his claim on a balance of probabilities and that the defendant has proved his counterclaim on a balance of probabilities. I hereby enter judgment for the defendant on the counterclaim and I issue the following final orders:

a. The plaintiff’s suit is dismissed with costs.

b. The defendant’s counterclaim is allowed.

c. The plaintiff shall remove himself from that parcel of land known as West Pokot/ Chepareria/2100 within 45 days and in default be forcibly evicted.

d. The plaintiff shall bear the costs of the counterclaim.

It is so ordered.

Dated, signed and delivered at Nairobi Via Teleconference on this 20th day of May, 2020.

MWANGI NJOROGE

JUDGE

Judgment read in the presence of:

Ms Chebet for the plaintiff.

Mr Chebii for the defendant.

Hon Mercyline Lubia, DR.

MWANGI NJORGE

JUDGE