



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 942 OF 2012

FELISTA CHEMAIYO

SOSTEN.....PLAINTIFF

VERSUS

SAMSON MUTAI.....DEFENDANT

JUDGMENT

(Plaintiff having title to suit land and seeking orders against defendants; title of Plaintiff acquired after sub-division of parent title; parent title being subject matter in pending suit where defendant has claimed a share; stay order having been issued; title of Plaintiff acquired when stay order was in force; whether such title valid; Plaintiff's title cancelled to await outcome of other pending suit on the parent title; costs in a suit; whether a must for there to be a demand; notice before costs are awarded; no such provision.)

A. INTRODUCTION AND PLEADINGS

This suit was commenced by way of plaint filed on 19 September 2011. In the plaint, the plaintiff pleaded that she is the registered proprietor of the land parcel Nandi/Baraton/1646 measuring 3.18 Ha (the suit land). She pleaded that on or about 10 September 2011, the defendant without any colour of right encroached into the suit land and started cultivating it. In the suit, she wants the defendant permanently restrained from the suit land and damages for trespass.

Upon service, the defendant filed Defence. He denied that the plaintiff is the registered proprietor of the suit land. He also pleaded that he has a purchaser's interest in the suit land. He averred that the subject of the suit has been the subject matter in Kapsabet PMCC No. 100 of 2010, Kapsabet LDT Case No. 52 of 2009 and Eldoret HCCC No. 37 of 2011. He asked that the suit be dismissed with costs.

B. EVIDENCE OF THE PARTIES

The plaintiff and defendant gave evidence as the sole witnesses.

The plaintiff testified that she is the registered proprietor of the suit land and she produced a certificate of official search to demonstrate this. She testified that she was given this land by her mother, Jepkuto Barngetuny. She testified that she is the only child of Jepkuto, who was said to be over 100 years and needing care. She testified that she is the one who takes care of her mother and the mother gave her the land as a gift. She testified that the defendant has however interfered with her peaceful occupation of the land and has placed a caution in the title.

In cross-examination, the plaintiff stated that she came to live on the suit land in April 2011. Before that, she was living in Kisumu where she is married. She got title in August 2011. She stated that she does not know on what basis the defendant started using the land as she had not known him before. She stated that she has no knowledge that her mother sold the land to the defendant. She also testified that she is not aware of any case between the defendant and her mother.

The defendant on the other hand testified that Jepkuto, mother to the plaintiff sold to him 4.4 acres of part of a land parcel Nandi/Baraton/382, and the two wrote an agreement on 30 November 2006. Later another agreement for sale of an additional 0.3 acres of the same land was entered into. In total, he stated that he purchased 4.7 acres. The money was paid to both Jepkuto and her son, who appears to have later died. But when he engaged a surveyor to demarcate his 4.7 acres, Jepkuto started developing cold feet. He testified that he then filed a case before the Land Disputes Tribunal, the same being case No. 85 of 2007. He stated that the plaintiff testified as one of the witnesses of Jepkuto. He stated that the Tribunal held in his favour and awarded him 4.7 acres of the land parcel Nandi/Baraton/382. He produced the Tribunal proceedings as an exhibit. The award was filed at the Kapsabet Magistrate's Court and adopted as a judgment of the court. Jepkuto tried to have the award quashed in the High Court but this did not succeed. She then filed an appeal before the Rift Valley Appeals Land Committee. The Appeals Committee reversed the decision of the Land Disputes Tribunal and instead awarded the defendant 1.2 acres and directed Jepkuto to refund a sum of Kshs. 326,000/= being the money paid for the additional acreage above the 1.2 acres. The defendant was not happy with this decision and filed Eldoret High Court Judicial Review Case No. 37 of 2011. He testified that the said case is still pending. The case was filed on 25 May 2011. But while the case was still pending, Jepkuto sub-divided the land parcel No. 382 which produced the land parcels Nandi/Baraton/1646 and 1647, the former of which is the suit land. He then placed a caution on both titles on 7 September 2011. He asked that the 4.7 acres be given to him.

In cross-examination the defendant agreed that the plaintiff was not a party to the proceedings before the Land Disputes Tribunal nor in the High Court proceedings between Jepkuto and the defendant. He stated that no consent of the Land Control Board was ever issued.

C. SUBMISSIONS OF COUNSEL

Counsels filed submissions in support of their respective positions. Mr. Kamau Lagat for the plaintiff submitted that as title holder, the plaintiff's title is entitled to protection and therefore the permanent injunction ought to be issued. He further submitted that the defendant has not asked for cancellation of the plaintiff's title. He submitted that the defendant's evidence was drawn from decisions of the Land Disputes Tribunal which had no jurisdiction to handle the matter as the issue concerned title. He submitted that the defendant should pursue Jepkuto for any remedies. He relied on a case which was however not filed with the submissions.

M/s Gicheru & Company Advocates for the defendant, submitted that this suit is res judicata as there have been previous litigation on the same. They also submitted that the manner of acquisition of the plaintiff's title is suspect. They submitted that the plaintiff knew of the agreement between her mother and the defendant but still went ahead to register the title into her name. They submitted that the defendant got herself registered as proprietor while the suit J.R No. 37 of 2011 was still pending in court. They submitted that on costs, there must be proof of a demand notice before costs are awarded. They also submitted that the plaintiff has not proved any injury suffered for her to be awarded damages for trespass.

D. DECISION

I have considered the pleadings, the evidence and submissions of counsel.

It is not in dispute that the plaintiff is the registered proprietor of the land parcel Nandi/Baraton/1646. She became registered as proprietor on 16 August 2011. There does not seem to be a contention that the land parcel Nandi/Baraton/1646 arose out of a sub-division of the parcel Nandi/Baraton/382. I have indeed seen from the Certificate of Official Search, produced as plaintiff's exhibit No. 1, that the suit land arose out of sub-division of land parcel No. 382. The parcel No. 382 had been the subject of a dispute between

the defendant and the plaintiff's mother. The dispute was lodged by the defendant before the Kapsabet Division Land Disputes Tribunal. I have seen the minutes of the Tribunal produced as Defence exhibit No. 4 by the defendant. The Tribunal seems to have awarded a total of 4.6 acres (not 4.7 acres as stated by the defendant). Jepkuto filed Eldoret High Court Judicial Review No. 29 of 2009. This suit was struck out on 16 June 2010 apparently because it was filed out of time. Before that dismissal, Jepkuto also filed a case in Kapsabet against the defendant, being Kapsabet Magistrate's Court Case No. 100 of 2010 where she had sought orders of permanent injunction against the defendant. The suit was dismissed on 31 August 2010 as being *res judicata*. In addition to the two suits, Jepkuto also filed an appeal to the Land Disputes Appeals Committee which was registered as case No. 50 of 2008. The appeal was decided on 6 May 2011. The decision therein was that the defendant should get 1.2 acres and that the defendant be refunded Kshs. 326,956.50/= being consideration paid for 3.2 acres to the son of Jepkuto. This was to be paid within 6 months of the decision failure to which the defendant could claim the 3.2 acres. The defendant was aggrieved by this decision and filed the case Judicial Review No. 37 of 2011 to quash the award of the Appeals Committee. I have looked at the record of that case. Leave to apply for orders of *certiorari* was granted on 26 May 2011 and the grant of leave was to operate as a stay of the decision of the Appeals Committee.

It appears that despite the orders of stay, Jepkuto proceeded to sub-divide the land parcel No. 382 and became registered as first proprietor of the sub-divided portions on 19 August 2011. On 26 August 2011, she transferred one of the sub-divided portions, which is the suit land, to the plaintiff herein, who is her daughter. It is this title that the plaintiff wants protected.

In my view, this title was improperly acquired. When the parent title No. 382 was sub-divided, there existed a stay issued in Judicial Review No. 37 of 2011. The reason for the stay was for purposes of preserving the subject matter of the suit, which was parcel No. 382, pending the outcome of the judicial review proceedings. The title to the suit land was therefore procured in violation of the stay order. Although no counterclaim was filed by the defendant, asking for cancellation of that title, I am unable to bring myself to protect a title that was procured in violation of a court order. Neither can the plaintiff attempt to plead ignorance of the presence of the cases between her mother and the defendant. Although the defendant stated that she testified in the proceedings, I have not seen any record of this, but her husband Sosten Kimaiyo Chepsiror, did testify and I find it difficult to believe that the plaintiff was not aware of the existence of the cases between her mother and the defendant.

Section 26 of the Land Registration Act, Act No. 3 of 2012, provides as follows :-

26. (1) 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 and 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 the ground of fraud or misrepresentation 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

It will be seen from the above that a title is liable to be challenged *inter alia* if it has been obtained illegally, unprocedurally, or through a corrupt scheme. Since this title was obtained when there was an order in existence, stopping dealings in the land parcel Nandi/Baraton/382, the same is liable to be cancelled. The title herein cannot be cancelled without also cancelling the title in Nandi/Baraton/1647. I proceed to cancel this title as well. I am aware that I have taken a drastic step, but at times, such measures are necessary in order to preserve the dignity of court orders. The Land Registrar in charge of the register for Nandi/Baraton should proceed to cancel the titles to Nandi/Baraton/1646 and 1647 and restore the title Nandi/Baraton/382, with Jepkuto as the registered proprietor.

The ownership of the title Nandi/Baraton/382 will be decided in Judicial Review No. 27 of 2011. The parties herein should therefore await the outcome of the said suit before proceeding to deal with the suit land.

Owing to the above, I am unable to issue the order of permanent injunction sought and the order of general damages for trespass sought by the Plaintiff. Instead, as seen above, my order is that the land parcel Nandi/Baraton/382 should be retained. This suit has to be dismissed.

The only other issue is costs, but I feel that before I make my order as to costs, I need to address an issue brought forth by the submissions of counsel for the defendant. It was submitted that the plaintiff ought not to get costs (assuming that she succeeded in the case) because no demand letter had been issued. I do not know where counsel for the defendant got that. The award of costs is covered in Section 27 of the Civil Procedure Act (CAP 21) which provides as follows :-

Costs

S. 27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2)The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

Nowhere in the above section does it state that if no demand letter is issued then costs cannot be awarded to the successful litigant. I think it is time that such notion is dispelled. It is up to the court to assess the surrounding circumstances of the case and decide whether or not to award costs to the successful party, but ordinarily, costs are supposed to follow the event unless for good reason the court otherwise orders.

In this case, I have not upheld the case of the plaintiff but I also note that the defendant never asked for the cancellation of the title of the plaintiff, which is an order that I have made because of the unique surrounding circumstances of this case. I also take note that there has been no determination so far that the defendant is the rightful owner of the land in issue since a determination in J.R No. 37 of 2011 is yet to be made. For the events herein, I make no orders as to costs.

I therefore make the following final orders :-

(a) I hereby revoke title to the land parcels Nandi/Baraton/1646 and Nandi/Baraton/1647.

(b) I hereby direct the Land Registrar who is in custody of the requisite register, upon service of this court order, to proceed to cancel the titles Nandi/Baraton/1646 and 1647, and instead reinstate the title Nandi/Baraton/382 as it was before its sub-division into Nandi/Baraton/1646 and 1647.

(c) The parties are hereby directed to await the outcome of the suit Eldoret High Court Judicial Review case No. 37 of 2011.

(d) I decline to issue orders of permanent injunction nor award general damages as sought by the

plaintiff.

(e)There shall be no orders as to costs.

Judgment accordingly.

DATED AND DELIVERED AT ELDORET THIS 11TH DAY OF NOVEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Miss. C.N. Adisa present for the plaintiff

Mr. H.O. Areso present for defendant.