



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC CIVIL SUIT NO.274 OF 2012

MARGARET KABURA CHEGE.....PLAINTIFF

VERSUS

JEREMIAH KINYANJUI CHEGE.....DEFENDANT

JUDGEMENT

Introduction

1. The dispute herein relates to a parcel of land known as Title No.**Nyandarua/Oraimutia 1908** (hereinafter referred to as the suit property) which is registered in the name of the plaintiff.
2. The plaintiff contends that on or about **12th April, 2012** the defendant interfered with her ownership and use of the property by destroying her fence and letting his animals graze on her crops. As a result of the defendant's illegal/ unlawful conduct, she suffered massive loss and damage.
3. The plaintiff reported the defendant at the Ol' Joro - Orok police station. Consequently, the defendant was arrested and charged with the offence of trespass on private land contrary to **Section 3(1)** as read with **Section 8** of the Trespass Act, Cap 294 Laws of Kenya. The defendant pleaded guilty to the charge and was given a conditional discharge under Section 35(1) of the Criminal Procedure Act.
5. The plaintiff claims that despite the defendant having pleaded guilty to the offence mentioned hereinabove, on or about May, 2012 the defendant planted a tomato crop on the suit property and despite her lawyers having warned him to move out of the suit property immediately he harvested his crop, in breach of her rights over the suit property, the defendant refused to move out and planted another crop of potatoes.
6. The plaintiff contends that all her pleas to get the defendant to move out of the suit property have fallen on deaf hears.
7. For the foregoing reasons, the plaintiff, *inter alia*, seeks an order of permanent injunction to restrain the defendant either by himself, his agents, servants, employees, relatives or anybody claiming in or under his names from entering, remaining or interfering with her ownership and enjoyment of the suit property.
8. In his statement of defence the defendant contends that the plaintiff holds the suit property in trust for his siblings and himself, that he is using the suit property with the knowledge and consent of the plaintiff. In this regard, he claims that the suit property had been sold to **Paul Moigua Mbothu** who failed to complete the sale transaction. After Paul failed to meet his contractual obligations, the defendant was asked to sue for the recovery of the property by the plaintiff, which he did. Since the Plaintiff could not refund the moneys he expended in recovering the property, the plaintiff promised to give him the suit

property or part thereof as compensation.

9. Contrary to the plaintiff's allegation that the defendant pleaded guilty to the charge of trespass herein, the defendant contends that he was discharged for lack of evidence.

10. With regard to the prayers sought, the defendant contends that the plaintiff does not have any right to ask and/or demand that he , vacates the suit property unless and until he is reimbursed in full the money he expended in the suit against Paul.

EVIDENCE

The plaintiff's Evidence

11. Before me the plaintiff (who is the defendant's mother) stated that the defendant and herself lived in the same homestead on the suit property; that she had allocated to all her sons, the defendant included, her land to wit, Title No. **Nyandarua/ Oraimutia/1907**; that the defendant dissatisfied with his share, on **2nd April, 2012** let his cows enter the other portions cultivated by her other sons and destroyed their crops. She reported the matter at ol Jorok police station whereat she was referred to the area chief. The area chief came and assessed the damage. She produced the letter from the area chief dated **14th September, 2012** as Pexh 1. The defendant is said to have refused to vacate the suit property or stop harrasing his siblings. As a result the siblings advised her to take him to court.

12. To prove ownership of the suit property, the plaintiff produced the title to the suit property as Pexh 2. She testified that apart from instructing her advocates to write letters to the defendant to vacate the suit property, she had done nothing else to the defendant as she feared such action may cause her alot of heartache since she does not even talk with the defendant. She produced several letters that her advocates have written to the defendant as Pexh 3(a), (b), and (c).

13. Contending that what the defendant had stated in his statement of defence was not true, she explained that she was the one who gave the defendant money to follow up the case against Paul. Besides, she contended that there was no document produced showing that they had entered into an agreement to the effect that the defendant would get a bigger portion of land than his siblings.

The Defence Evidence

14. On his part, the defendant denied having any knowledge of the parcels of land mentioned in the plaint. He claimed that their father had only one parcel of land and that before his demise, he had showed each of them their respective portions. He claimed that the plaintiff had leased out some portions of the suit property to strangers who alleged that his cows had trespassed onto their land.

15. He maintained that he was the one who paid the costs of the suit against Paul which had totalled to about Kshs.100,000/= and that as a family they had agreed that he would be refunded the money or in the alternative he would be allocated a bigger portion of the suit property.

16. He denied the allegations that he was harrasing his mother (the plaintiff) and/or his siblings. However, he admitted that the letter from the chief, dated **22nd September, 2011** said that he was the problem. He also admitted that he had no document to prove that he was the one who paid the costs of the suit against Paul and that he would be refunded the money failing which he would be entitled to a bigger portion of their land.

17. Reiterating his contention that he was not aware of the portion of land the plaintiff was complaining about, he explained that his other siblings and himself occupied 4 acres at plot No. 30 which was registered in the plaintiffs name. He alleged that the plot originally occupied by Paul was not being utilised by any member of his family and was not the suit property herein. However, he contradicted himself by stating: -

"Each of my siblings including myself tills on those three acres and every one has been shown their portion. However, the other siblings are supposed to refund me the money paid to enable me allow them to continue using the said land."

18. The Advocates for the respective parties filed written submissions, which I have read and considered. The sole issue for consideration is whether the plaintiff has made up a case for issuance of a permanent injunction to restrain the defendant either by himself, his agents, servants, employees, relatives or anybody claiming in or under his name from entering, remaining or interfering with her ownership and enjoyment of the suit property.

Analysis of the Evidence

19. It is not in dispute that the suit property is registered in the name of the plaintiff. As a result of that fact, it was submitted that under **Section 24** of the Land Registration Act 2012, which replaced the Registered Land Act, under which the suit property is registered and which is a replica of **Section 25** of the Registered Land Act, registration of the plaintiff as the proprietor vested in her absolute ownership of the land with all rights and privileges belonging and appurtenant thereto. Further that under **Section 26** of the same Act (Land Registration Act) the certificate issued by the registrar is *prima facie* proof that the person named as the proprietor of the land is the absolute and indefeasible owner thereof.

20. Being the registered proprietor of the suit property, it was submitted that the only way through which the defendant could challenge the plaintiff's ownership of the suit property was if he alleged that the property was registered fraudulently or through misrepresentation or if the title was acquired illegally, unprocedurally or through a corrupt scheme.

21. Since the defendant's claim was not based on any of the above cited grounds contemplated by law for challenging title or the rights of a registered proprietor, it was submitted on behalf of the plaintiff, that the defendant's claim against the plaintiff was unmaintainable. In this regard reference was made to the case of **Republic v. Commissioner of Lands and Another ex parte Carolizanne Gathoni Kuria (2013)eKLR** and **Joseph Chepkong'a Rotich v. Michael Cheron (2005) eKLR**.

In **Joseph Chepkong'a Rotich v. Michael Cheron, Kimaru J.** Observed—

"...When the appellant's father was registered as the first registered owner of the said parcel of land, his title to the same could not be impeached save as provided for by section 28 of the Registered Land Act. The respondent's interest over the suit land cannot be said to be an overriding interest as provided by section 30 of the Registered Land Act. Any claim that the respondent had over the suit land was extinguished once the appellant's father was registered as the owner thereof."

22. In the circumstances of this case, this court is urged to find and hold that the suit property belongs to the plaintiff and the defendant has no right whatsoever on it.

23. On his part, the defendant argues that the dispute herein involves family issues and has a history. He maintains that the plaintiff asked him to sue Paul (to whom the suit property had been sold by their father but who did not complete the transaction) for recovery of the suit property; that since he was the one who paid the costs of the suit, the plaintiff agreed to part with the possession of the suit property . and vest it to him. The defendant contends that, the plaintiff reneged on her promise to give him the suit property despite having been in Possession of the same with her knowledge and permission.

24. Arguing that he was given the suit property as a form of payment for the costs of legal services he paid in redeeming the suit property, he urges this court to find that he is lawfully on the land or that he is on the land with the permission of the plaintiff.

25. Upon reading and considering the evidence adduced in this suit to wit: -

(i) Letter from the office of the chief 0l Joro Orok dated 14/09/20 11 (PxeH 1);

(ii) The title deed issued to the plaintiff in respect of the suit property, on 24/4/2012 (Pexh 2); and

(iii) The various letters from the plaintiffs advocate, (Pexh 3(a), (b) and (c) dated 25/4/2012 , 26/5/2012 and 12/7/2012), I find as a fact that the plaintiff is the registered proprietor of the suit property and that at some point in time, the plaintiff had of her own will given the defendant part of the suit property to use (see annexure 3(b)). However, at some point in time the plaintiff exercised her rights over the suit property by requesting the defendant to stop using the property and hand it over to her. The defendant refused prompting the filing of this suit.

The law applicable to the case

26. Since the suit property is registered in favour of the plaintiff, I agree with the plaintiffs Advocate that registration of the plaintiff as the proprietor of the suit property conferred on her absolute ownership of the land together with all rights and privileges belonging and appurtenant thereto. I also agree with the plaintiff's Advocate that the only way the defendant can challenge the plaintiffs registration and ownership of the suit property is if he alleged that the property was registered in her name fraudulently or through misrepresentation or if the title was acquired illegally, unprocedurally or through a corrupt scheme. See Section 24 of the Land Registration Act, 2012 as read with Section 26 thereof.

27. The foregoing notwithstanding, it is noteworthy that the rights of a proprietor conferred by the said registration are subject to, *inter alia*, such liabilities, rights and interests as affect the same and are declared by **Section 28** (of the Land Registration Act) not to require noting on the register, unless the contrary is expressed in the register. It is also noteworthy that the rights do not relieve a proprietor from any duty or obligation to which the registered proprietor of the land is subject to as a trustee.

28. Under Section 28 aforementioned, unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests-

(a) spousal rights over matrimonial property;

(b) trusts including customary trusts;

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(d) natural rights of light, air, water and support;

(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law.

29. From the foregoing and given that the defendant's claim is also based on an alleged trust, the question to ask is whether the defendant's alleged trustee beneficiary relationship entitles him to occupy the land against the interest of the plaintiff who by operation of law is *prima facie* the absolute and indefeasible owner thereof (See Section 26 of the Land Registration Act).

30. On this question, it noteworthy that apart from leading evidence to show that there exists mother-son relationship, the defendant did not tender any evidence to show that the plaintiff holds the title to the suit property in trust for him and in exclusion of his siblings, so as to entitle him continue using it against the interest of the plaintiff and his other siblings, who under the alleged trust (even though not proved) are equally entitled to benefit from the suit property.

31. Having found the defendant not to be entitled to occupation or use of the suit property under the alleged trustee- beneficiary relationship, I turn to the defendant's claim that he was given the property as

compensation for the costs he incurred in recovering the property from Paul.

32. Regarding this claim, whereas the defendant claims that he was instructed by the plaintiff to institute a suit against Paul for recovery of the suit property and that the family members agreed to refund his costs failing which he would be entitled to a bigger portion of the suit property; he tendered no evidence to prove the alleged agreement or that he personally paid the costs of that suit.

33. Although it is not in dispute that a suit was lodged against Paul (see the testimony of the plaintiff), it is noteworthy that the plaintiff maintained that she personally paid for those costs. As none of the contending parties tendered evidence to show who paid the costs of the suit against Paul, with regard to that question, this court invokes the provisions of **Section 3(4)** of the Evidence Act, Cap 80 Laws of Kenya which provides:-

"A fact is not proved when it is neither proved nor disproved."

34. I also invoke the provision of Section 107 of the Evidence Act which places the burden of proof on the person desiring any court to give judgment as to any right or liability dependent on existence of facts which he asserts to prove that those facts exist, to find and hold that in the circumstances of this case, the defendant has failed to discharge the burden imposed on him by law of proving that he indeed paid the costs of the suit and on the premise that he would be entitled to a larger share of the suit property.

35. Without any evidence to that effect and in the absence of any written contract to the effect that the defendant would be entitled to Possession of the suit property, in consideration of the costs he incurred in recovering the suit property, I find and hold that his claim that he is on the suit property pursuant to an oral agreement is unmaintainable. In this regard see **Section 3(3)** of the Contract Act which provides that:-

"No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

Conclusion

36. By dint of the foregoing provisions of Law and in view of my finding that the defendant's claim under the alleged trustee- beneficiary relationship has not been proved, I find and hold that the plaintiff has made up a case for issuance of a permanent injunction to restrain the defendant either by himself, his agents, servants, employees, relatives or anybody claiming in or under his name from entering, remaining or interfering with the plaintiffs ownership and enjoyment of the suit property.

37. The upshot of the foregoing is that the plaintiffs claim has merit and is allowed with costs.

Dated, Signed and delivered in open Court at Nakuru this 7th day of November, 2014.

L N WAITHAKA

JUDGE

Present

N/A for the plaintiff

N/A for the defendant

Emmanuel Juma : Court Clerk

L N WAITHAKA

JUDGE