



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Civil Case 87 of 2006

ELINA J SIAN.....1ST PLAINTIFF

NAHASHION KIRWA SAINA.....2ND PLAINTIFF

VERSUS

METHUSELAH KIBOIT KIRWA.....DEFENDANT

JUDGEMENT

In a Plaint Amended on 15th January 2008, the Plaintiffs seek an eviction order against the Defendant.

The Plaintiffs state that they are husband and wife and the Defendant is their grandson. The parcel, subject matter of this suit, NGERIA/MEGUN BLOCK 4 (SAINA) 125 is registered in favour of the 1st Plaintiff having been transferred to her by the 2nd Plaintiff, her husband apparently in consideration of love and affection.

That the Defendant who has been living with them as their son at their request has now become a detrimental nuisance to them and that they want him out of their home the subject matter of this dispute.

The Defendant has on record an Amended Defence filed on the 7th July 2008. He denied that the 1st Plaintiff is the registered owner of the suit property and in the alternative avers that if the 1st Plaintiff is indeed the owner then the transfer of the title in her favour from the 2nd Plaintiff was procured by fraud. The Defendant who is represented effectively by able counsel goes ahead to give, in his defence, particulars of the fraud he alleges against the 1st Plaintiff as follows:

- (I) Hurriedly registering the land in her name so as to disinherit the Defendant and/or deny him occupation of the same.
- (II) Coercing the Plaintiff into transferring the land to her.
- (III) Secretly procuring a transfer of the land into her own name using undue influence without obtaining Consent from the relevant Control Board.
- (IV) Causing a transfer of the land to herself without complying with the provisions of law.

During the trial, the 2nd Plaintiff was the first person to adduce evidence and even before this case was ready for hearing. I gave my reasons for the hearing before pre-trials in a short ruling.

The 2nd Plaintiff, NAHASHION KIRWA SAINA, testified that he is over 100 years old. He has lived in Kapseret since 1972 from Tebeson, Nandi District. The Defendant is his grandson, being the son to his son one Daniel Arap Kiwra. Daniel Arap Kirwa was born to the 2nd Plaintiff and the late Mariam Saina. The 2nd Plaintiff testified that he bought a piece of land in 1972 from one Philip Arap Chepsiror measuring about 280 acres. He subdivided the land among his children and remained with 50 acres.

His son, Daniel Arap Kirwa, the Defendant's father did not benefit from the divisions in Kapseret but the 2nd Plaintiff bought land in Moi's bridge and gave it to him as a son. The parcel in Moi's bridge given to the Defendant's father is 100 acres. He testified that his son Daniel Arap Kirwa was happy with what he gave him. He wants the Defendant to claim from his father's land in Moi's bridge area.

He testified that the Defendant was invited into the land by him and he built a small cottage. The Defendant is now disturbing him and at his age he cannot put up with such nuisance and wants him out of his midst.

He said that besides the 100 acres he gave to his son Daniel Arap Kirwa in Moi's Bridge, he also gave Timothy Kirwa another 50 acres in Kapseret. The said Timothy Kirwa is a brother to the Defendant and a son to Daniel Arap Kirwa. He regretted that he could not extend his kindness any more to that household.

He called elders to resolve the dispute but with no success.

On cross-examination he confirmed that the Defendant had been in the said portion since his boyhood, was circumcised there and married in that land. The Defendant had been like his son and indeed that he is his grandson.

In her testimony, the 1st Plaintiff reiterated the evidence of the 2nd Plaintiff, her husband. She testified that the parcel in question was given to her. It measures 5 acres and the title is registered in her name. She produced the title as an exhibit. She testified that the Defendant resides in a portion of her land but does not cultivate. His dogs have killed her sheep and his growing herd destroys her maize, besides that the Defendant is a nuisance and will not leave the land despite all the demands she and her husband have made. Both Plaintiffs want the Defendant out of the land. That they can no longer stay with him within the same land.

On his part, the Defendant testified to the averments in paragraph 5 of his Amended Defence as follows:-

- I) Prior to marrying the 1st Plaintiff, the 2nd Plaintiff was married to Miriam Saina.
- II) Miriam Saina and the 2nd Plaintiff were the parents of Daniel Kirwa who is his biological father.
- III) About 1986, the 2nd Plaintiff and Miriam Saina brought him on the suit land to stay with and generally assist the 2nd Plaintiff, his grandfather and grandmother who were ailing.
- IV) He lived peacefully on the suit land and was treated by his grandparents as a son.
- V) The 2nd Plaintiff, his grandfather, arranged his wedding and paid dowry on his behalf.
- VI) His grandmother passed away in 1998.
- VII) He continued living peacefully on the suit land until 2005 when the 1st Plaintiff became hostile and unwelcoming.

In addition to confirming the above, he also testified that the original title was in his grandfathers name (2nd Plaintiff) and his late grandmother assured him that he would not leave the land. Based on the above testimony, he wants to remain in the land as he was since his childhood. In essence, he believes that he

has right to remain in the family land. He also asserts that any claim against him is barred by statute of limitation.

After taking witness testimonies, counsels representing parties filed Written Submissions in support and in opposition of the suit herein.

The property in dispute is registered under the Registered Land Act. The 2nd Plaintiff out of love and affection gave his son, Daniel Arap Kirwa, the Defendant's father 100 acres of land in Moi's Bridge. This is fact that has not been challenged by the Defendant. He also gave the Defendant's brother 50 acres of land. He expected his son Daniel Arap Kirwa to give the Defendant a portion from the 100 acres. The suit portion is 5 acres which he transferred to his wife, the 1st Plaintiff. They both want the Defendant out of the portion of the landed.

With due respect, the Defendant's Counsel has set his own issues in the case and more particularly in the written submissions. The issues have no weight in determining this dispute. However, I agree with the Defendant's written submission that this case raises other considerations such as moral issues. This is always so in family disputes. But this Court has its hands tied by law. It cannot make decisions based on morality, conscious, sympathy which, were not enacted into law, without losing track with due path of the law.

I have noted that the parties had prior to this suit gone to the Area Chief to resolve this matter. In a document captioned FAMILY DISPUTE, the Defendant herein sought upto January 2007 to leave the suit title. I have no idea what happened in this regard.

The right to land in this country cannot be over emphasized. The Defendant has no legal claim in the property that is undisputably the 1st Plaintiff's. I cannot understand the issue of limitation raised by the Defendant. The Defendant lives in the portion with the blessings of the grandparents who own the land and he must appreciate that all persons grow and live in their families premises until they decide to leave on their own or expelled by the head of that family. It is my considered view that a child cannot rely on statute of limitation against his parents on the basis that he grew up in the land in dispute. It is true, man/woman becomes nuisance if he/she disagrees with his/her prents and remains in the family house. His nuisance is continuous and a fresh cause of action arises every time he causes such nuisance.

The Plaintiffs must succeed in this suit. Being alive to the nature of the parties' relationship, I make the following orders:

1. I grant an order of eviction as prayed in the Amended Plaint dated 15th January 2008.
2. I grant the Defendant Three (3) months grace period within which he shall vacate the suit land NGERIA/MEGUN BLOCK 4 (SAINA) 125 unless that period is extended by the 1st Plaintiff.
3. If the Defendant fails to vacate as ordered by this court, the Court Bailliffs shall proceed to execute this order against him upon lapse of 3 months from the date of this Judgement.
4. The Defendant shall bear the costs of the suit.

DATED AND SIGNED AT NAIROBI ON THIS 17TH DAY OF AUGUST 2012

M. K. IBRAHIM
JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 10TH DAY OF OCTOBER 2012

F. AZANGALALA

JUDGE

In the presence of: Mr. Kiboi for the plaintiffs and Mr. Omusundi for the defendant.