



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**ELC CASE NO. 212 OF 2013**

**EMMANUEL KIPNGETICH.....PLAINTIFF**

**VERSUS**

**DAVID TARUS.....1<sup>ST</sup> DEFENDANT**

**RAYMOND TARUS.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 2<sup>nd</sup> October 2012 the Plaintiff pleaded that he was the owner of 10 acres out of *Title No. Nandi/Kamobo/1427* (hereinafter called the *suit property*) in common ownership with the 1<sup>st</sup> Defendant and the deceased mother of the 2<sup>nd</sup> Defendant. It was further pleaded that the Plaintiff had on several occasions sought to have the suit property partitioned so that he could have a separate title for his one acre without success. It was alleged that the Defendants had obstructed and frustrated the intended partitioning without lawful justification.

2. The Plaintiff, therefore, sought the following reliefs in his plaint;

*a. An order of mandatory injunction compelling the Defendants to cease and desist from obstructing the intended survey to partition of parcel Nandi/Kamobo/1427 failing which the Honorable court do issue an order to compel the Defendants jointly and severally whether by themselves or through their agents, servants, employees or whomsoever acting on their instructions from any act or form of obstruction and or blocking the intended partition (sic).*

*b. Costs of the suit.*

*c. Any other or further orders that the honourable court may deem not to award.*

3. The Defendants filed a joint statement of defence dated 12<sup>th</sup> October 2012 in which they denied the Plaintiff's claim to one acre out of the suit property. They pleaded that the Plaintiff did not have the legal capacity to solely institute the instant suit and that the suit property could not be partitioned because the other co-proprietors were deceased.

4. The Defendants further pleaded that in any event the Plaintiff was fraudulently registered as a proprietor of one acre out of the suit property through *Kapsabet Succession Cause No. 32 of 1989* and that the 1<sup>st</sup> Defendant had since applied for rectification of the grant issued in the said matter.

5. When the said suit came up for hearing on 1<sup>st</sup> November 2018 the Plaintiff's advocate was ready to proceed with two witnesses. The Defendants' advocate, however, sought an adjournment to enable him file an application to cease acting for the Defendants for lack of instructions. The said application for adjournment was rejected since the court was not satisfied that there was a valid justification to delay the hearing and conclusion of the suit.

6. Since the Defendants were not present at the hearing, only the Plaintiff testified. The Plaintiff simply adopted his witness statement dated 2<sup>nd</sup> October 2012 as his sworn testimony. He produced the documents listed in his list of documents dated 2<sup>nd</sup> October 2012 as exhibits.

7. The court has considered the pleadings, the oral and documentary evidence on record as well as the Plaintiff's written submissions. The court is of the view that the following issues arise for determination;

a. Whether the Plaintiff is entitled to have the suit property partitioned so that he may have a separate title for one acre out of the suit

property.

b. Whether the Plaintiff acquired one acre out of the suit property fraudulently.

c. Whether the Plaintiff is entitled to the reliefs sought in the plaint.

d. Who shall bear the costs of the suit.

8. The court has considered the entire evidence on record on the 1<sup>st</sup> issue. The Plaintiff is not seeking to obtain one acre out of the suit property on account of purchase from the previous owner. He is already registered as a co-proprietor in common with others. According to the certificate of official search for the suit property, the Plaintiff is entitled to one (1) acre only.

9. The material on record reveals that the Plaintiff obtained that interest of one acre through succession proceedings in *Kapsabet Succession Cause No. 32 of 1989*. Although it was pleaded by the Defendants that they had applied for rectification of the grant to deprive the Plaintiff of the one acre, there was no evidence tendered at the trial hereof to demonstrate what became of the said application.

10. Since the Plaintiff acquired one acre out of the suit property through succession proceedings, the legality or propriety of such acquisition can only be challenged before the succession court. In the absence of evidence to demonstrate the rectification of grant, the Plaintiff's interest in the suit property remains intact. The court notes that the Defendants did not testify at the trial hereof in support of their defence of fraud which was pleaded in their joint statement of defence.

11. The inevitable conclusion to be drawn on the basis of the material on record is that the Plaintiff has an interest in one acre out of the suit property. He is entitled to vindicate his property rights on his own and not necessarily in association with his co-proprietors or their personal representatives. Accordingly, the court answers the 1<sup>st</sup> issue in favour of the Plaintiff.

12. The 2<sup>nd</sup> issue relates to the Plaintiff's alleged fraudulent acquisition of one acre of the suit property. Although this issue was raised by the Defendants in paragraph 9 of their statement of defence, they did not tender any evidence in support thereof at the hearing. The allegation and particulars of fraud were, therefore, not proved. The 2<sup>nd</sup> issue is consequently answered in the negative.

13. The 3<sup>rd</sup> issue is whether or not the Plaintiff is entitled to the reliefs sought in the plaint. Since the Plaintiff has succeeded in demonstrating his interest in one acre of the suit property, it would follow that the Plaintiff is entitled to the reliefs sought in the plaint. The court shall, therefore, issue an order of injunction restraining them from obstructing the intended survey and partition of the suit property.

14. In order to bring this long standing litigation to a close, the court is also inclined to issue a facilitative order by authorizing the Deputy Registrar of the court to sign and execute all necessary forms, documents and papers in order to facilitate the sub-division and partitioning of the suit property so that each of the owners in common may get a separate title for their respective shares.

15. The 4<sup>th</sup> and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. Accordingly, a successful litigant should normally be awarded costs of an action unless, for good reason, the court directs otherwise. See Hussein **Janmohamed & Sons Vs Twentsche Overseas Trading Co Ltd [1967] EA 287**. In the instant suit, there is no good reason why the successful litigant should not be awarded costs of the suit. Accordingly, the Plaintiff shall be awarded costs of the suit.

16. The upshot of the foregoing is that the court is satisfied that the Plaintiff has proved his case to the required standard. The court shall enter judgement for the Plaintiff against the Defendants in the following terms;

a. An injunction be and is hereby issued restraining the Defendants by themselves, their agents, servants or employees from howsoever obstructing the intended survey and partition of *Title No. Nandi/Kamobo/1427*.

b. The Deputy Registrar of the court is hereby authorized to sign and execute all necessary forms, documents and papers in order to facilitate the sub-division and partitioning of the suit property so that each of the owners in common may obtain separate titles for their respective shares.

c. The Plaintiff is hereby awarded costs of the suit to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

17. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **ELDORET** this **24TH day** of **JANUARY, 2019**.

In the presence of the Mr. Choge for the Plaintiff

Mr. Segor for the Defendants

Court clerk Emmanuel

**Y.M. ANGIMA**

**JUDGE**

**24.01.19**