



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

E.L.C CASE NO. 1 OF 2017

JAMES GEOFFREY CHEPKWONY.....PLAINTIFF

VERSUS

WILSON KIPSIELE KOSKE.....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff moved this court by way of plaint claiming that the Defendant who is his brother had trespassed onto his land parcel number KERICHO/CHEBORGE/1166 and planted tea bushes thereon. He seeks the following reliefs:

- a) An eviction order against the Defendant his agents, servants or employees compelling the Defendant to vacate land parcel number KERICHO.CHEBORGE/1166
- b) Costs of this suit
- c) Any other order that this court may deem fit to grant.

2. The Defendant filed a Defence in which he denies the Plaintiff's claim. He states that the suit property was family land which was sub-divided and both the Plaintiff and Defendant were given their respective portions of land. As a result of the sub-division the Defendant's tea bushes fell on the Plaintiff's portion of land. The Plaintiff was therefore supposed to compensate the defendant for the said tea bushes but he has failed to do so.

3. The suit was set down for hearing and both the Plaintiff and Defendant testified and called their witnesses.

Plaintiff's case

4. The Plaintiff testified that he is the registered owner of land parcel number KERICHO/ CHEBORGE/1166 measuring 0.89 hectares. He produced a copy of the title deed dated 3rd March 2016 as Plaintiff's exhibit 1. He explained that the suit property was derived from their father's land which was sub-divided and each of them got a portion measuring 2.2 acres. He said that as a result of the sub-division the Defendant's tea bushes fell on the Plaintiff's portion of land measuring 0.4 of an acre. It was then agreed as a family that the Defendant would compensate the Plaintiff in the sum of Kshs. 50,000 or allow the Plaintiff to plant an equivalent number of tea bushes on the Defendant's land but the Defendant refused to abide by this agreement. He stated that as a result of the defendant's unlawful occupation of his land, the Plaintiff has been denied the use and enjoyment thereof.

5. Upon cross-examination he stated that he has since sold the suit land to one Eric Yegon after which he relocated to Nakuru. He said that the Defendant's tea plantation is on a portion of the Plaintiff's land. He stated that he sued the Defendant because he has refused to compensate him yet he continues to pluck the tea which is now on the plaintiff's land.

6. The Plaintiff called one of his brothers David Chepkwony who testified as PW2. He adopted his witness statement which corroborates the Plaintiff's testimony.

Defendant's case

7. The Defendant adopted his witness statement filed in court on 13.11.2017. In the said statement he confirms that each of his brothers

including the Plaintiff were given a portion of their father's land measuring 2.2 acres. He does not deny that the tea bushes belong to him. However, he states that as family they agreed that those whose tea bushes spilled over to their brother's land should compensate them or allow them to plant an equivalent number of tea bushes on the respective brother's land.

8. Upon cross examination he stated that it had been agreed between him and the Plaintiff that he (Defendant) would remove his property from the suit land. He said that it was further agreed that the Plaintiff would plant an equal number of tea bushes on the defendant's land but the Plaintiff failed to do so.

9. DW2 Abraham Kipkorir Chepkwony who is also a brother of the Plaintiff and Defendant corroborated the Defendant's testimony and clarified that pursuant to the family agreement the Plaintiff was supposed to plant 1800 tea bushes on the Defendant's land but once the Plaintiff got his title deed, he sold his land and moved to Nakuru. Upon cross –examination he stated that the Plaintiff became hostile and refused to settle the matter amicably.

10. Counsel for the Plaintiff filed her submissions which I have considered. The Defendant opted not to file any though he filed a document on 28.3.19 in which he belatedly seemed to be raising a counterclaim. This was irregular and the same has not been taken into account.

Issues for Determination

- i. Whether the Plaintiff is the registered owner of land parcel number KERICHO/ CHEBORGE/1166
- ii. Whether the Defendant has trespassed on the suit property
- iii. Whether the Defendant is entitled to the orders sought

Analysis and Determination

11. It is not in dispute that the Plaintiff is the registered owner of land parcel number KERICHO/CHEBORGE/1166. He produced the title deed in respect of suit property issued on 3rd March 2016 as Plaintiff's exhibit 1.

Section 26 of the Land Registration Act 2012 provides as follows

“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 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 grounds of fraud, or misrepresentation to which 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.”**

12. It is therefore my finding that the Plaintiff is the registered proprietor of the suit property.

13. The second issue is whether the Defendant has trespassed on the Plaintiff's land.

14. Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows:

“Any unjustifiable intrusion by one person upon land in possession of another.”Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

15. From the evidence on record, it is common ground that the defendant's tea bushes are on a portion of the Plaintiff's land measuring 0.4 acres. The said tea bushes were planted by the Defendant long before the family land was sub-divided among the Plaintiff and his 8 brothers. The Defendant and DW2 testified that they all agreed as a family that in order to compensate the Plaintiff, the Defendant would allow the Plaintiff to plant an equal number of tea bushes on the Defendant's land but the Plaintiff refused to abide by this agreement and instead sold his land after which he filed this suit. It is therefore clear that this is not a typical case of trespass where one deliberately intrudes on another person's land. I therefore have difficulty in making a finding of trespass as is envisaged in the law. However, since the defendant has been using the Plaintiff's land without his consent I will reluctantly hold that he trespassed on the Plaintiff land. However, I will not award any damages as the Plaintiff deliberately refused to mitigate his losses by accepting the Defendant's offer that that he plants tea bushes of the Defendant's land.

16. I will now move on to the prayers sought by the plaintiff. The Plaintiff seeks an order of eviction and costs against the Defendant. However, from the facts of the case it is clear that the Defendant does not reside on the suit property though his tea bushes are still there. It would therefore have been appropriate to seek a permanent injunction rather than an eviction order. In any event the Plaintiff has sold the suit property and moved to Nakuru. Since the court does not act in vain, I will I order that the Defendant desists from using the suit property and removes any of his property that may be on the suit property within 90 days failing which the Plaintiff will be at liberty to apply for an eviction order.

17. The upshot is that the Plaintiff has proved his case on a balance of probabilities. I therefore enter judgment for the Plaintiff and make the

following final orders:

- a) The Defendant is ordered to remove his property from the Plaintiff's land parcel no. KERICHO/CHEBORGE /1166 within 90 days failing which the Plaintiff may apply for an eviction order.
- b) Given the peculiar circumstances of this case and considering that it is a family dispute, each party shall bear his own costs.

Dated, signed and delivered at Kericho this 29th day of March 2019

J.M ONYANGO

JUDGE

In the Presence of

Miss Sitati for the Plaintiff

Defendant - present in person

Court Assistant; Mr. Rotich