



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 385 OF 2012

EDWARD K. MISOI.....PLAINTIFF

VERSUS

FRANCIS K. MISOI.....DEFENDANT

J U D G M E N T

Edward K Misoi (*hereinafter referred to as the plaintiff*) came to court by way of plaint dated 14th September 2007 against Francis K Misoi (*hereinafter referred to as the defendant*) claiming to be the 1st Registered owner of the whole of that parcel of land known as KIPLOMBE/KUINET BLOCK 9/(ASMARA)/1 measuring 196.27 hectares. The register for the said parcel of land was opened on 13th April 1995 and a first registration title deed was issued to the plaintiff under the provisions of the Registered Land Act (Chapter 300) of the Laws of Kenya on 20th April 1995. The registration of the plaintiff as the proprietor of the said parcel of land therefore vested the Plaintiff with the absolute ownership of land parcel number KIPLOMBE/KUINET BLOC 9 (ASMARA)/1 and vested him with all rights and privileges belonging or appurtenant thereto. One of the rights that the Plaintiff is entitled to enjoy is the right to quiet possession. Occupation and use of the said parcel of land to the exclusion of everybody else.

The defendant on the other hand is the registered owner of that parcel of land known as KIPLOMBE/KUINET BLOCK 9(ASMARA)/5. The said parcel of land is adjacent to the Plaintiff's land and the Defendant has constructed and permanently resides on the building standing on the said land parcel number KIPLOMBE/KUINET 9 (ASMARA)/5. The Defendant has occasionally and without any justifiable cause whatsoever trespassed into the plaintiff's land.

The Plaintiff however contends that the Defendant's actions are illegal, null and void and amount to an interference with the plaintiff's proprietary rights over the suit land.

The Plaintiff's claim against the Defendant is therefore for a declaration that the Plaintiff is the owner of the whole of that parcel of land known as KIPLOMBE/KUINET BLOCK 9 (ASMARA)/1 and that he is therefore entitled to quiet possession and use of the said parcel of land to the exclusion of everybody else including the Defendant. The plaintiff also prays for a declaration that any acts of interference over the said parcel of land by the Defendant amount to trespass. The plaintiff consequently prays for a permanent injunction restraining the Defendant, his servants and or agents from trespassing into, cultivating, taking possession, constructing upon, wasting and or in any other manner whatsoever, interfering with land parcel number KIPLOMBE/KUINET BLOCK 9 (ASMARA)1. The Plaintiff finally prays for mesne profits against the Defendant. There was no other suit pending and there have been no previous proceedings in any court between the Plaintiff and the Defendant over the same subject matter. Demand and notice of intention to sue has been given in vain.

The defendant in his defence which is full of denials, states that the plaintiffs claim is time barred. He denies having trespassed on the plaintiff's land and further that there exists another suit. The Defendant claims that the plaintiff was fraudulently registered as the owner of the land.

When the matter came for hearing, the *plaintiff PW1*, testified that he is the registered owner of the suit land. He produced the title to the property being a title deed issued on 20th April 1995. He also produced a certificate of official search dated 9.2.2017 whose import is that the property is registered in the names of Edward Kipkemboi Misoi, the plaintiff. He states that the plaintiff owns another parcel of land KIPLOMBE/KUINET BLOCK 9 (ASMARA)/5. He produced a certificate of official search dated 3.3.2008 as evidence of the allegation. He produced the maps of the area and prayed for Judgment.

The Plaintiff called *PW2 Laban Kiptanui Misoi* from Kuinet Location in Soi Division, Uasin Gishu County. He is the father to the plaintiff and brother to the defendant. He stated that his father Kimisoi Bargoia had 1/3 share of land LR No. 8405/1 measuring 730 acres while Patel Gangji Mulji of P. O. Box 482 Eldoret had 2/3 (487 acres). His father had 1/3 equivalent to 243 acres. He was supposed to pay Kshs. 33,330 which he could not raise. He obtained a loan from AFC of Kshs. 20,000/= payable in a period of 20 years. He paid a down payment of 13,330/=. By 1964, all the money due to the vendors (Italians) had been paid. By the time of his father's death the outstanding loan was

46,936.79 payable by Patel and his father in shares of 2/3 and 1/3 respectively. Agricultural Finance Corporation gave a loan of Kshs. 60,000/= to his father and Patel payable on every 31st March of each year and 30th September of each year. The installment amount was Kshs.2,701.70. His father was to pay Kshs. 20,000/= while Patel was to pay Kshs. 40,000/=.

There was another loan from Agricultural Finance Corporation of Kshs.15,000/= for purchase of dairy cows to be paid by Patel and his father. That the loan was No.1022690319-29 payable at annual installment of Kshs.2,086.60 payable at every 31st December of each year.

By the time of his father's death, the dairy cows outstanding loan was Kshs.5,526.05 to be paid by Patel and his father in shares of 2/3 and 1/3 respectively. By 1970, the Kshs.60,000/= loan outstanding amount was Kshs.46,936.70. Its account number was 202869031911 payable for 20 years.

After his father's death on 7th December 1970, none of his family members was closely working with his father on farm activities. As at all times his mother was staying at their ancestral land 70 km away from the suit land. Francis was then in standard 5. He continued until form 2 when he dropped out of school that was in 1976. He was paying fees for his younger sister who had joined form 1 in 1971 in Molo. She completed in 1974.

He completed school in 1969 whereupon he decided to do business. He converted an empty shop building left by his father and established a shop. He became a businessman by November, 1969. He employed his own staff. When his father died he discussed with his mother about the outstanding farm loans and was not able to raise any money she told him to look for his own way of repaying the loan.

After his father's death, he moved to the suit property in 1971, Patel told him that he wanted to sell his 2/3 share of the land. He continued to service his father's loan. The dairy cows became sick none of them had the knowledge in dairy farming. The cows started dying. He informed his mother and they agreed to sell them and pay off the Agricultural Finance Corporation Loan.

PW3, John Kipkong stated that he started working for Laban Misoi in the year 1969. He used to be a tailor together with Francis Kimani as a personal assistant. They could do tailoring then Laban sells the clothes. That is was a general shop. He had closed the old stock and therefore Laban used to buy materials from as far as Nakuru and Eldoret and Nairobi. They used to have some other employees. That after Samuel Kimisoi died they shifted to Asmara farm when he continued with his employment and salaries were paid by Laban Misoi and supervision was also done by Laban.

At the farm, the work was very low, when they came in and Patel & Bargoria had even leased the land to a 3rd party. He started digging the land by hiring the tractor. He later bought a Massey Ferguson and in 1972 and in 1973 he added 2 more tractors. He left after the work had tremendously grown with the machines lips and bounds. He closed the shop in 1974 after buying the tractors to concentrate on farming.

PW4, Cheruiyot Arap Langat states that In 1957, he joined the land presently Asmara Farm No.8405/1, as a herdsman when it was owned by Gerrit Stephanus Joubcent (A.K.A. Kiburur). He used to take care of the cows, later he learnt the tractor driving. In 1958, the Kiburur sold the land to the Carlo Muchille and Maria Luisa Bore and Gragio Muchille who were common tenants and were Italians. They called the farm Asmara Farm. He became tractor driver in 1958 together with his brother KIPROP SURKITEL who used to work with them. In 1964, the Italians sold the land to Kimisoi Bargoria and Patel as tenants in common. KIMISOI had 1/3 and PATEL 2/3. That he continued being in charge as head driver and mechanic and storekeeping. In 1965, they bought cows on loan from a Mzungu. That he continued being in-charge. In 1970, they leased the arable land to a third party and in December 1970, KIMOSII Bargoria died. Before his death at the hospital bed, he told him that he should assist his son Laban Misoi to deal with management of the land.

In 1971, Laban Misoi took over from the people who had been leased and started tilling the land. He negotiated with PATEL from January 1971 to buy his share. And tilled the whole land. He continued being in charge of operation of the entire land. That he was the one paying salaries to all workers. He was buying seeds, fertilizer and fuel etc. He had only one old tractor. That in 1972 he brought a 2nd Hand Massey Ferguson Tractor.

They continued operation and in 1973 he bought two more Massey Ferguson Tractor. That as a driver PW4 used to drive Francis Kiprum to school. In 1974, he was in form 1 and 1975 form 2 and Alice Jekemboi Kibos his sister was also in secondary school in Molo. The widow Sarah Kabilo never contributed anything to the operation in the farm but used to come as a visitor. Jane Kimaiyio was married. She never assisted in the farm operations.

In 1976, Francis Kiptum was not assisting anything in the operation of the land and was sent away by his brother. He was called back in by his brother in 1980 when he had already finished paying all the liabilities on the land. Laban Misoi should get a bigger parcel of his father's land as he was the one who repaid the loan that was outstanding at the time of Kimisoi Bargoria. He should get the whole of Patel's land as he bought it himself after his father's death.

The defendant did not attend court and offered no submissions. The plaintiff submitted that he is the registered proprietor of land parcel number KIPLOMBE/KUINET BLOCK 9 (ASMARA) 1.

I have considered the pleadings evidence on record submissions and do find that the plaintiff has demonstrated that he is the registered proprietor of the suit property. **Section 24 of the Land Registration Act no 3 of 2012 provides that subject thereto: —**

a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed

agreements, liabilities or incidents of lease.

Section 25 of the Land Registration Act no 3 of 2012 states as follows: -

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject: —

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

Section 26 of the aforesaid Act states as follows: -

“(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”.

The defendant has not demonstrated that the plaintiff obtained the property fraudulently, corruptly or un-procedurally. The plaintiff has proved his case on a balance of probabilities hence do grant a declaration that he is the owner of the whole of that parcel of land known as KIPLOMBE/KUINET BLOCK 9 (ASMARA)/1 and that he is therefore entitled to quiet possession and use of the said parcel of land to the exclusion of everybody else including the Defendant. Further I do grant a declaration that any acts of interference over the said parcel of land by the Defendant amounts to trespass. Lastly, I do grant a permanent injunction restraining the Defendant, his servants and or agents from trespassing into, cultivating, taking possession, constructing upon, wasting and or in any other manner whatsoever, interfering with land parcel number KIPLOMBE/KUINET BLOCK 9(ASMARA)/1. Mesne profits were not proved and therefore I do not grant the same. Costs to the plaintiff

Dated and delivered at Eldoret this 19th day of March, 2019.

A. OMBWAYO

JUDGE