



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 52 OF 2018

LAURENTI KIBIEGO CHEPKAITANY.....PLAINTIFF

VERSUS

DANIEL TANUI..... DEFENDANT

JUDGMENT

1. The plaintiff commenced these proceedings with a plaint dated **21st May, 2018** filed in court on **22nd May, 2018**. He prayed for judgement against the defendants for:

(a) A declaration that the defendant is trespasser on the plaintiff's title No. Chesiro/Kibuswa Block 2/Kemeloi/412, measuring 5.583 hectares or thereabouts and he be evicted forthwith from a portion of one (1) acre or any other portion occupied by himself, his servants, agents, employees or by any person acting under his authority.

(b) A permanent injunction do issue restraining the defendant either by himself, his servants, agents, employees or by any persons acting under his authority from entering into occupying, cultivating, harvesting any crop planted thereon, trespassing onto, interfering or in any other manner whatsoever dealing with the plaintiff's quiet occupation and lawful enjoyment of the suit property.

(c) Costs of the suit

(d) Interest

(e) Any other relief the court shall deem fit to grant.

2. There is an affidavit of service sworn by one **John Walter Wanyonyi** on the **19/2/2019** stating that the defendant was served with plaint and summons in this matter. I am satisfied that he was so served. However the defendant filed no appearance or defence in this matter and the suit proceeded ex-parte on the **12/3/2019**.

3. The plaintiff's claim is that he is the sole registered owner of title No. Chepsiro/Kibuswa Block 2/ Kemeloi/412 approximately measuring 5.583 Hectares; that in September, 2002 the plaintiff and the defendant agreed to exchange one acre from their respective portions of land so as to facilitate the settlement of one Isaac Kibet then a herdsman with the plaintiff on the defendant's one acre portion after the exchange; that the exchange took place and the said Isaac Kibet was settled on the one acre obtained by plaintiff from the defendant by virtue of the exchange agreement; that in exchange the defendant took possession of the one acre portion from the plaintiff's land and his in occupation thereof todate; that when the said Kibet passed on in 2009 the defendant, taking advance of the situation evicted Kibet's wife and children and took possession and has continued to occupy the land in fragrant violation of the exchange agreement despite attempts by the plaintiff to have him vacate the land.

4. As stated before no appearance or defence were filed by the defendant. the affidavit of John Walter Wanyonyi dated 30/5/2018 showed that the defendant was served with plaint, verifying affidavit, statement, list of witnesses and list of documents on 26/5/2018. However when this matter came up on 14/2/2019 this court noted that there was no mention of service of summons in that affidavit and adjourned the matter to 4/3/2019 when the matter was not heard. On 5/3/2019 upon a mention of the matter it was set down for formal proof on 12/3/2019. Hearing proceeded on 12/3/2019 when plaintiff and his three witnesses testified.

5. The plaintiff reiterated the contents of the plaint and adopted his written statement dated 21/5/2018. He produced a copy the resolution arrived at a meeting held to resolve the dispute between him and the defendant before the Assistant Chief Kapsigilai location on **7/9/2009** as **P. Exhibit 6**. However I have perused that exhibit and found no clear connection between it and this case save that the defendant herein is named as one of the plaintiff and the plaintiff is identified as a defendant in that dispute and that the defendant therein are required to surrender a total of 5 acres of land to the 1st defendant therein who is the plaintiff herein. The plaintiffs therein are also identified by that document as buyers. The amount of land the defendant herein was to surrender was 0.8 acres and not one acre as claimed in this case. the

defendant herein is said to have signed that agreement signifying that he was willing to surrender land to the plaintiffs. It is not clear from that document in what ratio the land that he was to give up to the defendants therein was to be shared or if it was to be shared between them at all. He stated that the defendant repossessed the one acre which he had given up by virtue of the exchange agreement one month after the demise of Isaac Kibet. The plaintiff produced a copy of demand letter dated 8/5/2019 and another dated 22/4/2019. He testified that the defendant was summoned by the police and he never turned up. However upon being with a demand letter dated 7/3/2018 (**P. Exhibit 7**) he responded through an advocate's firm which wrote the letter dated 12/3/2018 (**P. Exhibit 8**). His only desire the defendant be ordered to vacate from the one acre which he had given the defendant by virtue of the exchange agreement.

6. PW2, PW3 and PW4 gave evidence similar to the plaintiffs which need not be reiterated herein.

7. Despite my misgivings regarding **P. Exhibit 6** hereinabove set out I have noted that the demand letter dated 7/3/2018 maintains that there was an agreement whereby land was exchanged between the two parties. The response to that letter denies the truth of the allegations in the demand letter. One curious statement that the responses make is that the defendant herein "*denies the allegations and states that if there was any such agreement then the same did not materialize*". A further allegation in that response is that the plaintiff has sold the entire land parcel to third parties. The demand letter dated 7/3/2018 having been served upon him, he should have given a substantive response the allegation therein that he is not in occupation of plot No. Chepsiro/Kibuswa Block 2/ Kemeloi/412, that he has no right thereto and that he should vacate and that the plaintiff herein was entitled to mesne profits. His letter dated 12/3/2018 in response thereto does not address those issues. However I have noted that according to the certificate of official search dated 15/2/2019 the plaintiff is the absolute owner of the suit land known as Chepsiro/Kibuswa Block 2/ Kemeloi/412. In my view there is no denial either in the response dated 12/3/2018 or by way of a defence in this suit that the defendant is in occupation of a portion of plot No. Chepsiro/Kibuswa Block 2/ Kemeloi/412

8. I have carefully considered the oral evidence of the plaintiff and his witnesses and the documentary evidence that he produced at the hearing of the suit. There was no easier thing to do than for the defendant herein to specifically deny the response to the plaintiff's demand and in this suit by stating categorically that he is not in occupation of the plaintiff's land as things the evidence of the plaintiff and his witnesses has gone uncontroverted. In my view the plaintiff has established his claim on a balance of probabilities against the defendant.

9. Consequently I hereby enter judgment in favour of the plaintiff against the defendant and issue the following orders:

(a) A declaration that the defendant is trespasser on the plaintiff's title No. Chesiro/Kibuswa Block 2/Kemeloi/412.

(b) That the defendant shall remove himself and his property from title No. Chesiro/Kibuswa Block 2/Kemeloi/412 in default of which he shall be evicted from a portion of one (1) acre or any other portion occupied by himself, his servants, agents, employees or by any person acting under his authority.

(c) A permanent injunction is hereby issued restraining the defendant either by himself, his servants, agents, employees or by any persons acting under his authority from entering into occupying, cultivating, harvesting any crop planted thereon, trespassing onto or in any other manner whatsoever interfering with the plaintiff's quiet occupation and lawful enjoyment of the suit property.

(d) The defendant shall bear the costs of this suit.

Dated, signed and delivered at Kitale on this 29th day of April, 2019.

MWANGI NJOROGE

JUDGE

29/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi for plaintiff

N/A for defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

29/4/2019