



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 90 OF 2016

JOSPHAT KIPRUTO KIPTARUS.....PLAINTIFF

VERSUS

SAMUEL KIPROP KIPTARUS.....DEFENDANT

JUDGMENT

By a plaint dated 6th June 2015 the plaintiff herein sued the defendant seeking for the following prayers:

- a) A declaration that the defendant's continued occupation and access of the suit parcel of land known as Uasin Gishu/Mvita Scheme/158 is illegal.
- b) An eviction order to issue against the defendant, his family, agents and or servants from the suit parcel known as Uasin Gishu/Mvita Scheme/158.
- c) An order of permanent injunction to issue restraining the defendant by himself, his agents and or servants from accessing, using leasing out, transferring or in any other way whatsoever interfering with the plaintiff's use and enjoyment of the suit parcel.
- d) General damages
- e) Costs of the suit
- f) Any other relief that this honorable court deems fit and just to grant.

The defendant filed a memorandum of appearance through the firm of C.D Nyamweya & Co. Advocates on 10th June 2016 but failed to file a defence within the stipulated period. Counsel for the defendant was served with a hearing notice for 16th October 2018 but did not attend court and therefore the matter proceeded ex parte.

Plaintiff's Case

The plaintiff adopted his statement which he had filed in court and stated that the defendant is his step brother. The plaintiff further stated that they filed a Succession Cause vide Eldoret Succession Cause No.87 of 2004 where they were legally appointed as Administrators of the estate of their late father Kiptarus Chebii together with their other brother Paul Kiplagat Tarus.

It was PW1's evidence that at the conclusion of the succession matter, the distribution of the deceased's estate was done to the two houses which involved two assets being:

- a) Land parcel Tulwet/Kesses Block 5 (Cheptiret)/46 and
- b) Uasin Gishu/Mvita Scheme/ 158.

It was further the plaintiff's testimony that him being from the 1st house, he got registered as the owner of **LR No. Uasin Gishu/Mvita Scheme/158** to hold it in trust for himself and his 5 siblings, while the defendant together with his brother Paul Kiplagat Tarus being from the 2nd house got registered as owners of **LR. No.Tulwet/Kesses Block 5 (Cheptiret)/46** as trustees for themselves and his siblings from the second house.

The plaintiff produced a copy of the grant and copies of titles to the suit parcels as exhibits before the court. He stated that the defendant has

encroached on parcel No. Uasin Gishu/Mvita Scheme/158 and has refused to vacate the parcel which has made it impossible for the plaintiff and his siblings who are entitled to peacefully occupy and utilize the portion. He further stated that the defendant already has his share on land parcel No. Tulwet/Kesses Block 5(Cheptiret)/46. He therefore prayed for orders as per the plaint.

PW2 Stephen Kipkoskei Kiptarus adopted his statement and stated that the plaintiff and the defendant are his brothers. He reiterated the plaintiff's evidence and stated that the defendant has his portion of land but has encroached on their portion. He urged the court to grant the orders of eviction and a permanent injunction against the defendant from interfering with the suit land. The plaintiff therefore closed his case.

Plaintiff's Submissions

Counsel for the plaintiff filed written submissions and gave a brief background to the case. He listed the following issues for determination by the court:

- a) Whether the plaintiff is the registered proprietor of land parcel No. Uasin Gishu/Mvita Scheme/ 158?
- b) Whether the defendant is a trespasser and unlawfully occupying land parcel No. Uasin Gishu/Mvita scheme/158?
- c) Whether the plaintiff is entitled to reliefs sought?

On the 1st issue as to whether the plaintiff is the registered proprietor of land parcel No. Uasin Gishu/Mvita Scheme/ 158, Counsel submitted that the plaintiff's evidence that he is the registered proprietor of the suit land holding in trust for himself and his other brothers and sisters namely; David Kiptarus, Stephen Kipkosgei Tarus, Carolyne Tarus, Philip Kibwambok Tarus and Benson Kibiwott Maiyo land parcel No. Uasin Gishu/Mvita Scheme/158 is uncontroverted. The plaintiff produced a title deed in respect of the suit property as an exhibit which confirmed that he is the registered owner.

Counsel cited Section 24 of the Land Registration Act No.3 of 2012 which provides as follows:-

"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"

Further that Section 26 of the same Act provides that 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 unless it is proven that it was procured through fraud, misrepresentation or through corrupt scheme.

Counsel also submitted that Article 40 of the Constitution guarantees the property rights of every person and provides that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.

On the 2nd issue as to whether the defendant is a trespasser and unlawfully occupying land parcel No. Uasin Gishu/Mvita scheme/ 158, Counsel submitted that the defendant occupied the plaintiff's parcel illegally and has refused to vacate even though he has his own parcel of land. That the defendant's occupation amounts to trespass and therefore should be evicted.

On the 3rd issue as to whether the plaintiff is entitled to the reliefs sought, Counsel submitted that the plaintiff has proved that he is the registered owner of the suit land and any occupation by the defendant is unlawful therefore amounts to trespass. Further that the plaintiff is entitled to general damages for loss of enjoyment of his parcel. He cited the case of **Duncan Nderitu Ndegwa —vs-Kenya Power and Lighting Co.Ltd & Anor (2013) Eklr Nyamweya J** held that:

"once trespass to land is established, it is actionable per se and indeed no proof of damage is necessary".

Further that in the case of **Vincent Koskei —vs-Benard Koskei (2018) eklr J.M Onyango** held that:-

"In the instant case I consider an award of Kshs.100,000/=(Kenya Shillings One Hundred Thousand) to be adequate compensation for the defendants infringement of the plaintiff's right to use and enjoy his land"

Counsel therefore urged the court to grant the orders as prayed.

Analysis and determination

This is a straight forward case whereby the distribution of the estate of the deceased person had already been done. The only issue for determination is whether the defendant is a trespasser on the suit land and whether the plaintiff is entitled to damages for trespass.

It is not in dispute that the plaintiff is the registered owner of parcel of land known as Uasin Gishu/Mvita scheme/ 158 having been registered in trust for his other siblings according to the confirmed grant which has not been revoked by the court.

The plaintiff produced a copy of a Grant of letters of administration and a copy of the title deed to the suit land which indicates that he is the registered owner. What more evidence do we need to establish this? The authenticity of the title is also not contested as per Section 26 of the

Land Registration Act which provides for indefeasibility of title but can be challenged on the grounds that the same was procured by way of fraud, misrepresentation or through corrupt scheme. This was not the case in this matter.

I find that the plaintiff has proved that he is the registered and rightful owner of the suit land. The defendant was given his parcel upon confirmation of Grant that distributed the estate of their late father. Why is the defendant not moving to his portion of the land as was distributed? Why is he not allowing the plaintiff and his siblings to enjoy their parcel peacefully? I find that he is a trespasser on the suit land.

It is trite law that once trespass to land is established, it is actionable per se and there would be no proof of damage. In this case I will award a nominal figure in respect of damages of Kshs. 50,000/ considering that the parties are brothers.

Having considered the evidence, submissions and the authorities cited, I find that the plaintiff has proved his case against the defendant to the required standard and make the following orders:

- a) A declaration is hereby issued that the defendant's continued occupation and access of the suit parcel of land known as **Uasin Gishu/Mvita Scheme/158** is illegal.
- b) That the defendant do give vacant possession to the plaintiff of the suit parcel of land known as **Uasin Gishu/Mvita Scheme/158** within 30 days failure of which an eviction order to issue.
- c) An order of permanent injunction is hereby issued restraining the defendant by himself, his agents and or servants from accessing, using leasing out, transferring or in any other way interfering with the plaintiff's use and enjoyment of the suit parcel.
- d) A nominal general damages of Kshs. 50,000/
- e) Costs of the suit.

Dated and delivered at Eldoret on this 25th day of April, 2019.

M.A. ODENY

JUDGE

JUDGMENT READ in open court in the presence of Miss.Kiplagat for the Plaintiff and in the absence of CD Nyamweya for defendant.

Mr.Mwelem - Court Assistant