



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 79 OF 2014**

**DAVID KIMUGUN KOSKEI.....PLAINTIFF**

**VERSUS**

**BENJAMIN TUWEI.....1ST DEFENDANT**

**JULIUS TUWEI.....2ND DEFENDANT**

**JUDGMENT**

By a plaint dated 10<sup>th</sup> March 2014 the plaintiff herein sued the defendants jointly and severally seeking for the following:

- a) An order directing the defendant to move out of land parcel **NO.SOY/KAPSANG BLOCK 5(ZIWA)184** and in default be forcefully evicted therefrom.
- b) A permanent injunction restraining the defendants from committing acts of trespass over land parcel **NO. SOY/KAPSANG BLOCK 5(ZIWA)184**.
- c) An order for general damages for trespass against the defendants.
- d) Costs and interest.

On 3<sup>rd</sup> December 2015 the court gave an order that the Uasin Gishu County Land Registrar and the Surveyor do visit the suit parcels of Land and determine the boundaries between **NO.SOY/KAPSANG BLOCK 5(ZIWA)184** and **NO.SOY/KAPSANG BLOCK 5(ZIWA)128** and file a report within 60 days.

The County Land Registrar and the Surveyor went to the suit parcels of land and filed a report as ordered by the court. The Surveyor's report was adopted as an order of the court and a date fixed for assessment of damages. Both Counsel agreed that the report determined the plaintiff's claim but Counsel for the defendant indicated that the defendant had filed a counterclaim which must be determined.

**Plaintiff's Case**

The plaintiff adopted his statement dated 10<sup>th</sup> March 2014 as part of his evidence before the court whereby he stated that he is the registered owner of land parcel number **SOY/KAPSANG BLOCK 5(ZIWA)184** and the defendants have been committing acts of trespass on the parcel of land. The plaintiff produced a copy of a title deed and an official search in respect of the suit land as exhibits before the court.

The plaintiff gave evidence and called two witnesses in support of his case. It was the plaintiff's evidence that he became a registered owner of the suit land in 2012 having purchased the same from one Malakwen Sisiwa. The plaintiff testified that the eldest son of Malakwen Sisiwa an administrator of the estate transferred the land to him after obtaining grant of letter of administration.

According to the plaintiff, the suit land was part of a larger farm purchased by locals from the departing white settlers after independence. It was the plaintiff's evidence that his father and the defendants' father were some of the shareholders and that upon sub-division of the farm, parcel number **SOY/KAPSANG BLOCK 5(ZIWA)184** was given to one of the shareholders, Malakwen Sisiwa who in turn sold it to the Plaintiff in 2005.

The plaintiff also stated that he has sued the 1<sup>st</sup> defendant because he removed his fence. He further stated that an eviction order was issued by the Chief Magistrate's Court at Eldoret in Award No. 43 of 2002 in execution of the tribunal's award. The plaintiff testified that it is not true that the defendants have stayed on the suit land for a period of over 30 years.

It was further the plaintiff's evidence that a surveyors report was adopted as an order of the court on 8<sup>th</sup> March 2017 which confirmed the boundaries between plot No 184 and 128.

He therefore urged the court to grant orders as prayed in the plaint with costs.

On cross examination by Counsel for the defendants the plaintiff stated that the defendants have not been on the suit land for over 30 years but were grazing illegally on his land when they removed his fence. The plaintiff confirmed that he got his title deed in 2012 and they had gotten the land in 1965 but the surveyors came to the parcel to demarcate in 1995. He stated that he does not have a problem with the 2<sup>nd</sup> defendant who has been grazing his animals on his land.

On reexamination he reiterated his evidence and urged the court to grant the orders as prayed in the plaint. PW2 Musa Kitur the son of the late Malakwen Sisiwa gave evidence and corroborated the evidence of the plaintiff, produced documents to show that he was the administrator of the estate of Malakwen sisiwa. He also stated that the plot No. 184 belonged to his father who had sold it to the plaintiff. That the plot was given to the plaintiff vide transmission in a succession cause as per the confirmed grant which was produced in court.

PW 2 also confirmed that he filed a case at the tribunal to evict the defendant from the suit land after he had demolished their fence. That an eviction order was granted against the defendant but he is still interfering with the suit land.

On cross examination he stated that it is his father who sold the suit land and that the defendants have their own parcels of land.

PW3 also corroborated the evidence of the plaintiff and PW2. He stated that he was a member of the farm and confirmed that the suit land was given to Malakwen Sisiwa. He also confirmed Malakwen Sisiwa sold the land to the Plaintiff. It was his evidence that nobody lived on the suit land but it is used for grazing animals only.

That was the close of the plaintiff's case.

### **Defence Case**

The 1<sup>st</sup> defendant gave evidence and adopted his statement dated 5<sup>th</sup> May 2015 where he stated that 3.54 acres should be excised from plot No. 184 and added to plot No. 128 which belongs to him. It was his evidence that plot No. 184 should be 3 acres and not 6 acres as there was an error on the ground. DW1 also stated that he has stayed on the land since 1970 and has acquired the land by adverse possession and that the land should be subdivided so that his brothers can get land. He also urged the court to dismiss the plaintiff's suit with costs and allow his counter claim as prayed.

### **PLAINTIFF WRITTEN SUBMISSION**

Counsel for the plaintiff reiterated the plaintiff's case and stated that the plaintiff is the registered owner of the suit land and that the defendants had illegally encroached on the same.

Counsel further submitted that before the commencement of trial, the court had made an order for the County Surveyor and Land Registrar to visit the disputed land, establish its boundaries and file a report. This was done and a report together with a sketch map was filed which indicated that the land parcel number SOY/KAPSANG BLOCK 5(ZIWA)184 is separate and distinct from land parcel number SOY/KAPSANG BLOCK 5 (ZIWA) 128.

Mr Keter Counsel for the plaintiff submitted that this report would have settled the issues arising in this suit but the defence claimed that they had a defence and counter claim which raises the issue of adverse possession. He stated that the 1<sup>st</sup> defendant had been sued in Land Disputes Tribunal for trespass and an order of eviction was issued in enforcement of the award. It was Counsel's submission that from the evidence it was clear that the defendants did not have continuous and uninterrupted possession of land number SOY/KAPSANG BLOCK 5(ZIWA)184 so as to raise a claim of adverse possession.

Counsel further submitted that from the evidence the parcel of land was originally part of a larger farm bought from settlers after independence and that the sub-division and issuance of individual titles to the shareholders/purchasers was done in 1995. Prior to that the purchasers were utilizing the land in common as the land had not been subdivided. The plaintiff got his title in 2012 and filed this suit against the defendants in 2014 to enforce his proprietary rights therefore the period of 12 years mandatory for a claim under adverse possession had not lapsed in favour of the defendants prior to 1995 when titles were issued.

Counsel submitted that the principles to be considered on the law on adverse possession were set out in the case of Jandu —vs- Kirpal & Another (1975) EA 225.

*“A person seeking to acquire title to land by way of adverse possession must prove non permissive, non consensual, actual, open, notorious, exclusive and adverse use by him of the land for the statutory period of 12 years.”*

Counsel therefore submitted that the defendants' counter claim should be dismissed with costs. He submitted that the plaintiff has on the other had proved that he is the owner of the suit land and that the defendants have been trespassing on to his land and grazing cattle thereon thus interfering with his proprietary rights hence should be awarded general damages for trespass for the period of 2012 to 2018 at Kshs 100,000/= per year, making a total Kshs 700,000/= in general damages.

### **SUBMISSIONS ON BEHALF OF THE DEFENDANT**

Counsel for the defendants also reiterated the evidence of the defendants whereby they claimed that title No. SOY/KAPSANG BLOCK5 (ZIWA)/184, was wrongly and unlawfully hived out of SOY /KAPSANG BLOCK5 (ZIWA)/128, which is the property of their late father LUKA KIPKERICH CHUMBA. He stated that it was the defendants' case that the plaintiff caused the hiving of 3.54 acres out of SOY/ KAPSANG BLOCK5 (ZIWA)/128, to be part of SOY/ KAPSANG BLOCK5 (ZIWA)/184.

It was Counsel's submission that the plaintiff's rights of use over the said parcel of land measuring 3.54 acres have therefore been extinguished by virtue of adverse possession as the defendants had been in occupation for over 30years.

Counsel took issue with the Tribunal case that was filed by the son of the late Malakwen Sisiwa who was issued with Grant of letters of administration in 1999, that he had no right to file the case and further that he was not the plaintiff. As such he stated that the proceedings in tribunal case No. 43 of 2002 have no relevance to the present case.

Counsel cited the Court of Appeal case of *Wanje V. Saikwa* (1984) KLR 284 at 289 where it was stated that:

*To defeat a title by dispossessing the former owner, acts must be done, which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.*

Counsel therefore urged the court to find that the defendants have proved the ingredients of adverse possession in their counter claim

### **Analysis and determination**

This suit is on a claim of trespass by the defendants on the plaintiff's parcel of land known as SOY/KAPSANG BLOCK 5 (ZIWA)184, a permanent injunction and general damages for trespass.

Before the hearing commenced in this suit the court ordered the County Land Registrar and the County Surveyor to visit the suit lands and establish the boundaries. The same was done and a report filed in court which was to the effect that the boundaries of parcel Nos SOY/KAPSANG BLOCK 5 (ZIWA)184 and SOY/KAPSANG BLOCK 5 (ZIWA) 128 conform to the relevant Registry Index Maps in the registration section.

This report was subsequently adopted as the order of the court and the matter was set down for assessment of damages. The defence however filed a defence and counter claim which they wanted to canvass. This matter was therefore fixed for hearing for assessment of damages and defendants' counterclaim.

It is not disputed that the plaintiff is the registered owner of land parcel No. SOY/KAPSANG BLOCK 5 (ZIWA)184. This was confirmed by the production of the title deed in respect of the suit land by the plaintiff. The issues for determination are as to whether the defendants are trespassers on the suit land and whether the defendants have acquired the suit land by way of adverse possession

It should be noted that the defendant was sued in a Land Dispute Tribunal which award was subsequently adopted as a judgment of the court for eviction of the defendant on 27<sup>th</sup> October 2005. The plaintiff stated that the defendants later removed the fence that had been erected by the plaintiff on the suit land claiming part of it.

The report by the County Land Surveyor confirmed that plot No. 184 and 128 are distinct and in tandem with the Registry Index map and the ground. The beacons were also affixed as per the registry index map. Any attempt by any party to interfere with the set boundary amounts trespass.

The defendant did not produce any evidence to show that the plaintiff had curved 3.4 acres of his land. The issue of curving out the acres does not hold any water as the boundaries were confirmed to be accurate as per RIM. The history of how the parcel of land was acquired, sold and transferred by way of transmission was also tabled before the court. The court has no reason to doubt the process as it was supported by documentary evidence which was corroborated by witnesses and an expert witness.

The defendants' claim for adverse possession of the suit land on grounds that he has occupied it for more than 30 years is mute. This is a case where the defendants want to reap where they have not sown especially the 1<sup>st</sup> defendant. He is looking for a way to get land for his brothers and not share what he has with them as he stated in his evidence that the land was to be subdivided for his brothers.

The defendant should not be allowed to encroach on the plaintiff's land with impunity. The filing of a counter claim by the defendant was an afterthought which was not well thought through. It is not clear what he is basing his claim on adverse possession on.

The law in respect to adverse possession is now settled. For one to succeed in a claim of adverse possession he must satisfy the following ingredients as was stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held;

*“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.*

Has the defendant proved the above? My answer is in the negative as there has be no adequate possession in continuity, in publicity and that it was adverse to the registered owner. The plaintiff was registered as an owner of the suit land in 2012, assuming that the defendant was in continuous occupation then it would not meet the threshold of 12 years as it is only 7 years.

I find that the defendant has failed to prove his counter claim and the same is dismissed with costs to the plaintiff.

On the issue of general damages for trespass, it is trite law that trespass to land is actionable *per se* (without proof of any damage). See the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014)** eKLR where **J.M Mutungi J.**, stated:-

*“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ..”*

When trespass has been proved then it is actionable *per se*. The court is therefore under a duty to assess the damages that can be awarded. I therefore find that the defendants are trespassers and should therefore pay damages. The plaintiff had asked for Kshs. 700,000/ but I will award Kshs. 250,000/ as a reasonable figure as the defendants have benefited from their illegal acts.

I therefore enter judgment for the plaintiff against the defendants in the following terms:

- a) The defendants are hereby ordered to give vacant possession of land parcel **NO.SOY/KAPSANG BLOCK 5(ZIWA)184** within 30 days and in default be forcefully evicted therefrom.
- b) A permanent injunction is hereby issued restraining the defendants from committing acts of trespass over land parcel **NO. SOY/KAPSANG BLOCK 5(ZIWA)184**.
- c) An order for general damages for trespass against the defendants for Kshs 250,000/
- d) Costs and interest to the plaintiff.

**Dated and delivered at Eldoret on this 4<sup>th</sup> day of April, 2019.**

**M.A ODENY**

**JUDGE**

JUDGMENT READ IN OPEN COURT

in the presence of the Plaintiff and Mr.Kuria holding brief for Mr.Chebii for Defendants and in the absence of Mr.Keter Nyolei for Plaintiff.

Mr.Koech – Court Assistant