



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 176 OF 2017**

**RODAH CHEPTONUI LANG'AT.....PLAINTIFF**

**VERSUS**

**REV AGGREY WATINDI.....1<sup>ST</sup> DEFENDANT**

**LOGOS REVIVAL MINISTRIES.....2<sup>ND</sup> DEFENDANT**

**PRINCEDOM EDUCATION CENTRE.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 19<sup>th</sup> April 2017 the plaintiff herein sued the defendants jointly and severally seeking for the following orders.

- a) A declaration that the Plaintiff is the rightful owner of land parcel No. Eldoret Municipality Block 12/288
- b) An order of eviction to issue against the defendants, their agents or servants from the suit land.
- c) General damages for trespass and mesne profits
- d) Costs of the suit
- e) Any other relief the court may deem fit to grant.

**PLAINTIFF'S CASE**

It was the plaintiff's case that she is the administrator of the estate of the late Samuel Kiprono Arap Langat and is the registered owner of the suit land measuring 0.8940 Hectares evidenced by a certificate of confirmation of grant produced in court.

PW1 stated that the deceased was issued with a letter of allotment to the suit parcel on 7<sup>th</sup> December 1989 and duly paid a sum of kshs. 78,280/- to cover stand premium, conveyancing fees, registration fees, stamp duty and survey fees. She further stated that the deceased was issued with a lease and a certificate of lease on 16<sup>th</sup> November 1990. It was also her evidence that her husband passed away on 29<sup>th</sup> March 1992 and she proceeded to lodge succession proceedings vide Kericho High Court Succession Cause NO. 3 of 1992 whereby she obtained a confirmation of grant on 28<sup>th</sup> October 1994.

PW1 stated that she attempted to take possession of the land but was frustrated as the Registry Industry Map had been illegally amended and the property displaced on the map. She further stated that upon intervention the property was traced and restored and when she went to the ground she found that the defendants had encroached on the suit land and erected a church and semi-permanent school.

PW1 further testified that when she inquired why the defendants had encroached on her land they stated that the land was sold to them by one Silas Kipchilat who indicated that he had sold to the defendants plot No. Eldoret Municipality Block 12/377 and not Eldoret Municipality Block 12/288. That the said Silas Kipchilat admitted that he did not have a claim over parcel No. Eldoret Municipality Block 12/288. PW1 therefore prayed for an order of eviction of the defendants from the suit land together with costs.

**DEFENDANT'S CASE**

The defendant filed a defence and counterclaim seeking for the following reliefs;

- a) A finding/declaration that Eldoret Municipality Block 12/337 is separate and distinct from Eldoret Municipality Block 12/288 and further that the defendants have properly and genuinely acquired Eldoret Municipality Block 12/337.
- b) A declaration that the defendants have acquired the parcel Eldoret Municipality Block 12/337 by adverse possession.
- c) An order of permanent injunction against the plaintiff from entering Eldoret Municipality Block 12/337
- d) Dismissal of the plaintiff's suit, allowance of the counterclaim with costs.

DW 1 gave evidence and stated that he bought plot No. Eldoret Municipality Block 12/377 from one Silas Kipchilat and produced an agreement dated 15<sup>th</sup> June 2002 as an exhibit. DW1 further testified that they fenced the suit land and constructed a church which was block 12/377. He stated that he does not know where Block 12/288 is on the ground. It was his evidence that the plaintiff came to them in April 2016 claiming that they had encroached on her land. The defendant therefore prayed that the plaintiff's suit be dismissed with costs and their counterclaim be allowed.

On cross examination by Mr. Yego Counsel for the plaintiff the defendant stated that he bought Block 12/377 and does not know where Block 12/288 is. DW1 admitted that the plot is in Kaptagat Flowers and has not transferred into the defendants' name. The defendant was also shown plaintiff's exhibit No. 9 which was a letter dated 18<sup>th</sup> November 2016 indicating that he had withdrawn any claim of plot No. Eldoret Municipality Block 12/288 which was erroneously allocated to Kaptagat Flowers as Eldoret Municipality Block 12/377. The letter further indicated that the plot was allocated to the late Samuel Kiprono Langat.

The defendants therefore closed their case.

### **PLAINTIFF'S SUBMISSION**

Counsel for the plaintiff reiterated the plaintiff's evidence and submitted that the plaintiff having produced the letter of allotment dated 7<sup>th</sup> September 1989, evidence of payment of Kshs. 78,280/- to cover stand premium, conveyancing fees, registration fees, stamp duty and survey fees, letter of acceptance letter dated 7<sup>th</sup> December 1989, a forwarding cheque no. A400102, a remittance from Kenyan Commercial Bank made on 5<sup>th</sup> December 1989 confirming remittance of kshs. 78,482/- in favour of the Commissioner of Lands, receipts in favour of the late Samuel Kiprono Langat in respect of building plan, land rent and processing of a lease, lease issued on 24<sup>th</sup> October 1990 and registered by the Land Registrar on 16<sup>th</sup> November 1990 and a certificate of lease issued by the District Land Registrar, Eldoret Lands registry on 16<sup>th</sup> November 1990 is proof that she is the rightful owner of the suit land.

Counsel further submitted that the plaintiff produced a certificate of confirmation of grant as proof that the suit land was listed as part of the deceased's estate. Counsel also submitted that vide a letter produced as exhibit No. 9 the said Silas Kipchilat admitted that the suit land was erroneously allocated to him as Eldoret Municipality Block 12/337 of which the plaintiff stated that there is no evidence that Block 12/337 exists and the defendants did not produce any proof that the parcel they occupy is different from the suit parcel claimed.

Mr. Yego also submitted that the defendants' claim for adverse possession is not tenable as they claim to be in occupation of Block 12/377 yet have made a claim of adverse possession of Block 12/288. They cannot claim adverse possession of the suit land yet they claim to be in occupation of a distinct parcel.

Counsel therefore submitted that the plaintiff has proved her case against the defendants on a balance of probabilities and the prayers sought should be granted as prayed.

### **DEFENDANTS' SUBMISSION**

Counsel for the defendants submitted that the plaint is defective as the plaintiff has not specifically stated that the action has been brought in her capacity as a legal representative of the deceased. Counsel urged the court to strike out the suit as there is no room for amendment and the capacity in which she is suing is not properly defined.

Counsel further faulted the plaintiff for failure to enjoin the Commissioner of Lands despite claiming that the registry index map had been illegally amended. He submitted that the failure to enjoin the Commissioner of Lands makes it impossible for the court to grant the orders the plaintiff is seeking for and as such the plaintiff has failed to prove her case based on a balance of probabilities.

It was further Counsel's submission that the plaintiff's case should be dismissed with costs as the defendants bought the suit land from one Silas Kipchilat and have been on the suit land for a period of 14 years.

### **ANALYSIS AND DETERMINATION**

Counsel for both parties had agreed to submit the documents in respect of the suit land to the Uasin Gishu County Surveyor to visit the ground and make a report but later dispensed with the report as no such report was filed. Counsel agree further to submit on the report if filed but at the time of writing this judgment the report had not yet been filed.

The issues for determination in this case are as follows:

- a) Whether the Plaint is incurably defective for failing to define the capacity of the defendant in the title

- b) Who is the lawful owner of land parcel number Eldoret Municipality Block 12/288?
- c) Whether the defendants are in occupation of Eldoret Municipality Block 12/288 or Eldoret Municipality Block 12/337
- d) Whether the defendants have acquired the suit land by way of adverse possession.
- e) Whether the defendants should be evicted

**WHETHER THE PLAINT IS INCURABLY DEFECTIVE FOR FAILING TO DEFINE THE CAPACITY OF THE DEFENDANT IN THE TITLE**

The defendants do not dispute the plaintiff's capacity to sue, they merely dispute the title of the plaintiff in the suit. Further, the defendants contended that the suit ought to be dismissed as the Commissioner of Lands was not enjoined.

Order 1 Rule 9 of the Civil Procedure Rules provides;

**No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.**

The exclusion of the Commissioner of Lands is not fatal to the suit. The County surveyor was summoned during the pendency of the suit and would have served the purpose required with regards to the claims sought.

Article 159(2)(d) of the Constitution which abhors procedural technicalities at the expense of substantive justice states that:

***“In exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.”***

In the case of **REPUBLIC VS. DISTRICT LAND REGISTRAR, UASIN GISHU & ANOR (2014) EKLK** where Justice Ochieng held that:

***“.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.”***

The absence of the phrase “suing as a legal representative of the deceased’ is not fatal to the suit. The plaintiff produced a certificate of confirmation of grant and this is sufficient proof of her capacity in the present suit. Further, the paragraphs of the plaint clearly state her capacity in the suit. I find that the plaint is proper before the court.

**WHO IS THE LAWFUL OWNER OF THE SUIT LAND?**

Section 26 of the Land Registration Act provides;

**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.**

The plaintiff produced a certificate of lease issued in favour of her husband on 16<sup>th</sup> November 1990. This was prima facie evidence that he indeed was the indefeasible owner of the land.

In **Munyu Maina Vs.. Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Appeal Court held that: -

***“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”***

The plaintiff produced a letter of allotment and a remittance from Kenyan Commercial Bank made on 5<sup>th</sup> December 1989 confirming remittance of Kshs. 78,482/- in favour of the Commissioner of Lands. She produced receipts in favour of the late Samuel Kiprono Langat in respect of the building plan, land rent, stamp duty, certificate of title, opening of a new register and processing of a lease. The same were not challenged by the defendants. The plaintiff went beyond the instrument and proved the legality of how the title was acquired. The defendants have neither provided any proof that they have title to the suit land nor any proof that the land which they occupy is distinct or that it is Eldoret Municipality block 12/337.

Based on the evidence adduced together with the documentary evidence produced in court, I find that the plaintiff is the rightful beneficial owner of Eldoret Municipality Block 12/288.

The defendants claimed that they bought the suit land from one Silas Kipchilat whom they sated in their defence and counterclaim that they would be enjoining as a party to the suit but never did so. The defendants also did not call the said Silas Kipchilat as a witness to state what he knows about the suit land. His evidence would have helped the defendants on where to get the land that he sold to them. The defendants only produced a sale agreement and nothing else to prove their counterclaim.

#### **WHETHER THE DEFENDANTS ARE IN OCCUPATION OF ELDORET MUNICIPALITY BLOCK 12/288 OR ELDORET MUNICIPALITY BLOCK 12/337**

The defendants have not provided any proof that the land they occupy is indeed Block 12/337. They have also not tabled any evidence to prove that the two parcels are distinct or whether Block 12/337 even exists.

The defendants only provided a sale agreement as proof of their ownership of Eldoret Municipality Block 12/337. How is the court to determine that the parcel exists based on an agreement? Further, the vendor in the sale agreement wrote a letter to the plaintiff clarifying that the allocation was erroneous and that the defendants do indeed occupy the defendants' land. I find that the defendants have failed to prove that they are in occupation of Block 12/337.

#### **WHETHER THE DEFENDANTS HAVE ACQUIRED ELDORET MUNICIPALITY BLOCK 12/337 BY ADVERSE POSSESSION**

The ingredients of adverse possession that must be established by a claimant are now settled. The Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2005) eKLR** held that:

**“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take an action against such person in assertion of his title for a certain period, in Kenya 12 years.”**

In the case of *Chevron (K) Ltd vs. Harrison Charo Wa Shutu* (2016) the Court of Appeal stated as follows:

**“It is a settled principle that a claim for adverse possession can only be maintained against a registered owner...**

The defendants are claiming adverse possession over Eldoret Municipality block 12/337. They have not provided any proof that the Plaintiff is the registered owner or that the parcel even exists. The defendants would have been better placed to claim adverse possession of the suit land that the plaintiff has proven ownership of. The defendants mention the land registered in the plaintiff's name in the reply to the defence to the counterclaim which contradicts their counterclaim where they seek a declaration that they occupy a distinct parcel over which they claim adverse possession. The claim of adverse possession by the defendants on Block 12/377 is not tenable as the plaintiff is claiming Block 12/288. To which land are they claiming adverse possession.

Adverse possession is an equitable doctrine which dispossesses the rightful registered owner of land and grants it to a trespasser if the said trespasser has proved all the ingredients. Proving adverse possession is not a walk in the park where anyone wakes up one morning and claims another person's land and it is granted. The court must ensure that no injustice in occasion by this doctrine of equity. The court will also not hesitate to grant the orders if the same has been proved according to the law. In this case I find that the defendants have not met the threshold for grant of the orders of adverse possession.

#### **WHETHER THE DEFENDANTS SHOULD BE EVICTED**

I had earlier stated that the parties consented to dispensing with the surveyor's report which could have shed more light on the issue as to whether the defendants plot exists. That notwithstanding, the defendants have failed to prove that they occupy land which is distinct from that which the plaintiff claims. Further, the acknowledgment by Mr. Kipchillat, who sold the land to the defendants, is proof that the land was erroneously allocated as Eldoret Municipality Block 12/337.

The defendant has failed to prove that the suit properties are distinct properties. Further, that the acquisition of the parcel known as Eldoret Municipality Block 12/337 was properly acquired. They have also failed to prove that they are in occupation of a different parcel of land. In his witness statement, the 1<sup>st</sup> defendant mentioned the presence of a copy of the lease of the land they purchased yet there is none on record. There is also mention of all the government processes that were undertaken but no evidence of the same was produced.

I find that the plaintiff has proved her case against the defendants and the defendants should therefore be evicted from the plaintiff's parcel of land known as Eldoret Municipality Block 12/288.

#### **WHETHER THE PLAINTIFF IS ENTITLED TO DAMAGES FOR TRESPASS AND MESNE PROFITS**

The Plaintiff prayed for damages for trespass and mesne profits. The Court of Appeal in the case of **Peter Mwangi Mbuthia & another v Samow Edin Osman [2014] eKLR** was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows:-

**“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”**

The plaintiff did not place any material demonstrating any amount claim for mesne profits therefore the prayer cannot be granted. Mesne profits is a special damage which must be specifically pleaded and specifically proved. There was no evidence led to prove the mesne profits it therefore fails.

On the prayers for damages for trespass the court may consider the principles set in **Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & another [2013] eKLR** where the court held;

**The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land, and not both. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm. The test that guides the court in deciding which of the two measures of damages to employ is the reasonableness of the said reinstatement in light of the extra costs that may be incurred by the Defendant in this regard.**

Trespass is actionable per se and once a party proves trespass then there is no need to prove general damages. I find that the plaintiff is entitled to general damages for Kshs 150,000/ being a nominal figure which I find reasonable. I therefore make the following orders.

- a) A declaration that the Plaintiff is the rightful beneficial owner of land parcel reference no. Eldoret Municipality Block 12/288
- b) The defendants to give vacant possession of the suit land within the next 30 days failure of which eviction order to issue against the defendants.
- c) General damages for trespass of Kshs. 150,000/
- d) Costs of the suit
- e) Defendants counterclaim dismissed with costs to the plaintiff.

**Dated and delivered at Eldoret on this 29<sup>th</sup> day of May, 2019.**

**M.A. ODENY**

**JUDGE**

**JUDGMENT READ IN OPEN COURT** in the presence of

Mr.Kandie holding brief for Mr.Yego for Plaintiff

and

Mr.Kibii holding brief for Mr.Andambi for the Defendants.