



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 345 OF 2013

SAMSON KIPKOSGEI CHEPKONG'A.....PLAINTIFF/APPLICANT

VERSUS

CHEPKONGA CHEBIEGO.....DEFENDANT/RESPONDENT

JUDGMENT

Samson Kipkosgei Chepkong'a (hereinafter referred to the plaintiff) has sued his father **Chepkong'a Chebiego (hereinafter referred to as the defendant)**. It is alleged that in between the year 1998 and 2000, the Plaintiff did some developments on UASIN GISHU/AINABKOI WEST/142 AINABKOI SETTLEMENT SCHEME which is a family property. That some of the developments the Plaintiff did included planting of over 4000 trees of cypress, blue gum, pines and gravellier species which developments were done between the year 1998 and 2012.

The Defendant at the time the developments were done was not staying on that particular land but when he saw that the trees had grown and they were ready for harvesting he started claiming the same. The defendant demanded to be allowed to harvest the entire plantation, however, on family meeting, the defendant was allowed to harvest 20 trees but he proceeded to harvest another 93 trees.

The family have been having disagreements concerning the same and family meetings have been held but no agreement has been reached. That they have intervened through the Area Chief, Senior Chief and the District Officer but all in vain.

The Plaintiff states that the defendant has on several occasions threatened to disinherit the plaintiff and his brothers who are against the defendant's actions. The plaintiff states that, the land under which the plantation is on, is registered in the name of the defendant who is holding the same in trust of the plaintiff and others who are the sons of the defendant deceased wife. That there is no other suit pending in any court of law touching on the subject matter. That the cause of action arose within the jurisdiction of this Honourable Court.

The plaintiff prays for a permanent order of injunction barring the defendant/agents from interfering and or harvesting trees on plot number UASIN GISHU/AINABKOI WEST/142 planted by the plaintiff and others.

A declaratory order to confirm that the plaintiff is the owner of the plantation and the Defendant be condemned to return the value worth of 93 trees that he harvested without the consent of the plaintiff. Costs of this suit.

The defendant states in his written statement of defence that he is the registered owner of all that piece or parcel of land known as Uasin Gishu/Ainabkoi West/142 measuring 16.0 Hectares or thereabouts and further avers that that he purchased the same in the year 1963 from M/S Settlement Fund Trustees and continued on his own to repay the loan and on completion thereon he was issued with a Land Certificate on 23.9.1986.

That in the course of his life, he married three wives and between them and himself they were blessed with 18 children whom he has single handedly educated including his own two brothers who were dependent on him and hence owes none of them any further duty of care as they can fend for themselves and also learn to be self-reliant and not to continue relying on the Defendant's sweat and properties.

That out of the three wives he had married, two of them have passed on and for easier management of his family he has allocated his last wife 12 acres of land and the house of the second wife 10 acres and the area for the first house 10 acres and has retained for himself and his own use 10 acres thereof though the entire title is still registered in his name as he had not subdivided his land.

That all material times, he has planted cypress trees and blue gums in the entire parcel of land and on the growth maturity of these trees he has harvested the same starting with the portion where the third house portion of land is situated and has partially harvested the trees which are growing on the portion where the second house is situated and will continue harvesting the same until he has cleared his trees.

He has fully grown cypress trees as blue gums on the portion allocated to the first house of 10 acres and his retained portion of 10 acres and these are the trees when he started harvesting the plaintiff created unnecessary claim over them by stating that he has carried out

developments on his land by planting over 4000 cypress trees.

The trees growing therein are his and when he was ready to harvest the same he applied for a permit as is currently allowed by the Law and the plaintiff went and influenced the area Assistant Chief to deny him the said permit leading to the Defendant seeking further protection from the area District Officer who ordered the Assistant Chief to grant the Defendant the requisite permit.

The Defendant further avers that instead of the Area Assistant Chief issuing him with a full Permit, he later realized that he had been issued with permits to harvest limited Number of trees.

That the defendant further avers that the Plaintiff in collusion with the Assistant Chief caused some Askaris to visit him in his farm fully armed with rifles and handcuffs to harass the Defendant as if he had committed a felonious Act.

That it is the Plaintiff and some of his brothers who have engaged in the family disagreements forgetting that the defendant is their father alive and kicking and as the registered owner of the land has all the rights and privileges which flow from such registration.

That he has no intention of disinheriting any of his children but what is at stake is the children's attitude towards him.

That he purchased the said land on his own and hence it is not ancestral land and even if he was holding it in trust for the family he cannot be prevented from using his own land. The Plaintiff is not entitled to the orders sought and more specifically to injunctive orders and or for the declaratory orders to return the value of 93 trees.

That Defendant admits the jurisdiction of this court and further agrees that there is no pending suit in court between the parties over the same subject matter. Save as herein expressly admitted, the defendant denies each and every allegation of fact or facts as if the same were specifically set forth and traversed seriatim.

When the matter came up for hearing, **PW1, Mr. Samson Kipkosgei Chepkong'a** testified that between the year 1998 and 2012, with his younger brother they planted trees on UASIN GISHU/AINABKOI WEST/142 AINABKOI SETTLEMENT SCHEME with the consent of the Defendant who is his father and in the presence of family members. That he has done developments on the said land and there have been disputes concerning the owner of the trees.

That the Defendant herein has claimed ownership of the trees and he is in fact in the process of marketing the same. That earlier, he had requested that he be allowed to harvest 20 cypress trees but instead he went further and harvested 93 trees. That the said cypress trees are in risk of being harvested by the Defendant. That they have been having family meetings concerning the said matter and also the administration have been involved including the Area Chief, Senior Chief and the District Officer but all have been in vain.

PW2, Michael Kipkorir Chepkong'a testified that he is a step-brother to Samson Chepkonga. That their father had 3 wives and the said land was the family property whereby he subdivided the land according to the three homesteads. That after sub-dividing the same, he gave them authority as his children to do developments according to their own homesteads.

That since the year 1998, Samson Chepkonga has been planting trees on their portion of land and the same applies to them and his brothers. That their brother used to bring trees for planting whereon he came home and he planted on their portion on number UASIN GISHU/AINABKOI WEST/142 AINAPKOI SETTLEMENT SCHEME with the consent of family members. That their father wants to cut the trees that belongs to Samson and this has been the cause of the dispute. That meeting to resolve the same have been held but no agreement has been reached.

PW3, Daisy J. Chepkong'a testified that she is a step-sister to Samson K. Chepkonga. That she resides at Kamwosor but before then, she was staying at home on parcel number UASIN GISHU/AINABKOI WEST/142 AINAPKOI SETTLEMENT SCHEME. That their father had 3 wives and he had portioned the said land according to the three houses.

That after division of the said land, each child of the said three houses developed their portions. That Samson Chepkong'a used to bring trees every weekend and planted on their portion of land together with his brothers.

That they have been living peacefully until the year 2005 when an issue arose between house girl who had been employed and their father.

That they realized that the house girl and their father had an affair and Samson Chepkong'a chased the house girl away. That is where a grudge between the two started. That the trees belong to Samson Chepkonga and their father wants to take what belongs to Samson due to the said grudge.

That they want their father to show them the trees he planted.

PW4, Samuel Ekai Ewoi states that he is a resident of Kamosop within Elgeyo Marakwet County in the Republic of Kenya. That between the year 2001 and 2013, he was an employee of one SAMSON KIPKOSGEI CHEPPKONG'A.

That he took care of his household, farm work and milking of cows at his farm.

That when he came to work in the said farm, they had planted some trees and continued planting trees.

That Samson Chepkonga who had moved to Chepkanga, used to come with trees of which whenever he used to come over, he had to alert

him so that he makes ready holes for planting of the trees.

That the home comprised of three (3) wives of Mzee Chepkonga Chebiego in which the said Chepkonga Chebiego had done distribution of the land amongst the wives thus, 1st, 2nd and 3rd wife respectively.

That SAMSON KIPKOSGEI CHEPKONGA did plant trees on land belonging to his mother of which during his time as a farm hand did help in the planting of the same. That during the life time of Samson's mother, the family had employed a maid who cared for her welfare.

That Samson's mother passed on without knowing what was going on but then it was discovered that the Mzee Chepkonga Chebiego had an affair with the said maid.

That at the time Samson's mother passed on without knowledge of the interest of her husband on the maid, and when Mzee Chepkonga Chebiego discovered that he had an interest in the maid as well, he beat him up. He had to call upon Samson Chepkonga of which after mediation, he decided to leave Mzee Chepkonga Chebiego's homestead after informing his son Samson Chepkonga.

That when Samson Chepkonga and his brothers came to know of what had happened, they decided to relinquish off the said maid's employment something that angered Mzee Chepkonga Chebiego.

That he knows that during his tenure of employment at the said home, Samson Chepkonga did plant trees of different species i.e cypress, pine, blue gum which included wattle trees which he found growing on the farm which forms part of the parcel that belonged to Samson's mother.

That what he concludes with is that all the controversies arose on the fact that the maid whom Mzee Chepkonga Chebiego had an interest in had been relieved of her duties/services. That is all he knows and wish to state concerning the standing dispute between Samson Chepkonga and Mzee Chepkonga Chebiego.

That any other further information to be adduced at the hearing hereof.

PW5, Daniel Chepkong'a states that he is the younger brother to Samson Chepkonga. That their father had 3 wives and the said land was the family property whereby he subdivided the land according to the homesteads.

That since the year 1998 upto last year 2012, he and his brother have been planting trees in parcel number UASIN GISHU/AINABKOI WEST/142 AINABKOI SETTLEMENT SCHEME with the consent the family members.

That his brother did developments on their land including a semi-permanent house two roomed, semi-permanent toilet, fence running 2000 meters, bore-hole, Napier grass plantations of 3 acres, sheep of about 15 in number, cows 20 in number and planted over 4000 trees of cypress, blue gum, pines and gravellier.

That there has been family dispute concerning the ownership of the trees by our father and meetings to resolve the same have been held but no agreement has been reached.

The plaintiff closed his case and the defendant was called upon to defend himself.

DW1, Chepkonga Chebiego states that he lives at Ainabkoi West Scheme in Uasin Gishu County. That he is the registered owner of parcel Number Uasin Gishu/Ainabkoi West/142 measuring 42 acres or thereabouts. That this land was allocated to him in the year 1963 and he continued repaying the loan until he completed and he was issued with the Land Certificate in the year 1986.

On this parcel of land, he has resided with his three wives two of whom have passed on being the first and the second wife the one still alive is the third and last wife.

He has used the proceeds from the farm and from his own sweat to educate all his children being 18 in number and they are all now able to fend for themselves plus his two brothers and he owes them nothing in his life.

In the cause of living on this land, he planted cypress trees on certain portions of land plus some blue gums trees.

At one point, he allocated the land in three portions with the last house being allocated twelve (12) acres and the second house getting a portion of ten (10).

That on the land where the first house is going to get, he all allocated Ten (10) acres, and he has retained ten acres for his own use. he had harvested trees on the land he has allocated to the third house and the children in that have started planting their own trees.

That on the land allocated to the second house, he has harvested his trees to some extend and he still have more to harvest and the children in that house have also started planting their own trees.

That on the 20 acres in which he will allocate 10 acres to the first house, he has his trees which he personally planted and he has every right to harvest his trees.

That at one point in time, he approached the area chief to be allowed to harvest his trees in his farm and he was surprised to hear that the Area Chief had written that he was allowed to harvest only 20 trees.

The Plaintiff went and influenced the chief to harass him and Askaris were sent to his farm with express instructions to arrest him, handcuff him and take him to a police station armed with guns. He protested against the said move and told them the trees he was harvesting were from his farm and not a government forest and it was not fair to harass him over his property.

He went and informed the area District Officer and he was allowed to transport the timber from the harvested trees which he used the proceeds thereof to buy himself a motorbike for his transportation and a solar system to light his house.

That he is surprised that the Plaintiff is claiming that the trees on his farm were planted by him. That the trees are his and are on his land and he cannot be prevented from utilizing his trees.

The gravamen of the plaintiff's submissions is that the land belongs to the defendant but the defendant allows him to plant trees on the said land and therefore, the trees belong to the plaintiff. The defendant helped the plaintiff to plant the trees but the trees belong to the plaintiff.

On the other hand, the defendant submits that he owns the land and therefore, everything on the land belongs to the defendant. He relies on section 24, 25 and 26 of the Land Registration Act.

I have considered the submissions and the evidence on record and do find that the land in issue belongs to the defendant whilst the trees were planted by the plaintiff with the permission and help of the defendant. The defendant assisted the plaintiff to plant trees.

Section 24 (a) of Land Registration (Act No.3 of 2012) provides that: -

“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.”

The registration of the plaintiff as proprietors of the suit land, gives the plaintiff absolute proprietorship for the said parcel of land. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

S.25 (i) **“The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by 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, subject;**

(a) to 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.

The plaintiff's complaint is that the defendant is converting his trees to be his property. The defendant has produced the title deed duly registered as evidence of ownership and in terms of Section 26 (1) of the Act;

“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 and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except—

a. On the ground of fraud or miss-representation to which the person is proved to be a party to;

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The defendant is the registered owner of the suit land and therefore has an indefeasible right over the property. The defendant's rights as proprietor of the land is clearly protected in law and the defendant has no reason to trespass thereon and the law allows the plaintiff to challenge the Defendant's ownership on grounds of illegality, unprocedural acquisition or corrupt scheme.

However, I do find that by the defendant allowing the plaintiff to plant 4000 trees on the land, the plaintiff became a licensee and remains so as long as the trees are still on the land and therefore has an overriding interest pursuant to the provisions of **Section 28 of the Land Registration (Act No.3 of 2012)**. The license was to be extinguished upon the harvesting of the trees on the suit land. The defendant is the owner of the land and took care of the trees and in fact planted some of the trees and therefore has an entitlement in the trees. I do find that both parties are entitled to half of the trees in issue and therefore, I do grant orders that the trees to be valued by the government valuer and be harvested by the plaintiff and both parties to share the proceeds equally. No order as to costs as the parties herein are family members. Orders accordingly.

Dated and delivered at Eldoret this 28th day of May, 2019.

A. OMBWAYO

JUDGE