



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E&L NO. 651 OF 2012

PAUL BETT KIPLAGAT.....PLAINTIFF

VERSUS

DAVID KIPRUTO SAUREI.....1ST DEFENDANT

ELIZABETH J. KIPRUTO.....2ND DEFENDANT

JUDGMENT

By a plaint dated 19th October 2010 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a. A declaratory order that the suit land belongs to the plaintiff and the defendants are trespassers.
- b. A permanent injunction do issue against the defendants restraining them from trespassing or acting in any manner likely to be prejudicial to the plaintiff's rights in respect of the suit land ELGEYO/MARAKWET/TURESIA/803.
- c. Mesne profits and interest.
- d. Costs of the suit.

The defendants filed the defence and counterclaim dated 29th October 2010 seeking dismissal of the suit, permanent orders of injunction, cancellation of the plaintiff's title and costs.

The plaintiff contemporaneously with the plaint filed an application for temporary orders of injunction which were granted vide an order dated 22nd October 2010. The matter was therefore set down for hearing.

PLAINTIFF'S CASE

PW1 gave evidence and stated that he is the sole registered proprietor of the suit land of which he produced a title deed to prove the same. It was his evidence that he acquired the suit land vide transmission having filed a Succession Cause in respect of the estate of her late grandmother namely SIAKWEI CHEPTALAM ALIAS CHEPTALAM.

He stated that the suit land belonged to the late grandmother who had been registered during the adjudication in 1979 as the owner of the suit and the title deed was issued posthumously in the year 2004 following a directive from the Commissioner of Lands to the District Land Registrar to issue title deeds that were due. A copy of the letter was annexed to the further affidavit of the plaintiff sworn on 17th November 2010.

PW1 stated that he stayed with the deceased from 1971 to 2001 when she passed on. That the grandmother had 2 daughters including the plaintiff's mother and that there was no claim to the land until after the demise of PW1's grandmother when the defendants emerged to claim the land.

PW1 further stated that he applied for grant of letters of administration of the estate of Siokwei of which he got letters of administration and later a confirmed grant in his name as the administrator. It was also his evidence that no objection was filed to the Succession Cause as provided for by the law and that the grandmother was buried on the suit land. PW1 stated that the defendants have unlawfully ploughed the suit land since 2002 to the time of filing the suit.

PW1 further testified that the land belongs to him and that it does not belong to the clan as claimed by the defendants in their counterclaim. That the matter was handled by the Chief and the elders who resolved that the land belongs to the plaintiff. He therefore urged the court to grant the orders as prayed in the plaint.

At the close of the plaintiff's case the defendant indicated that he be given time to sit down as a family to sort out the matter amicably but Counsel for the plaintiff indicated that the defendants had stated that they were ready to proceed and this being an old matter it should proceed as scheduled. The court ordered the matter to proceed but if they come up with a settlement then they can file a consent in court.

On cross examination by the defendant PW1 maintained that the land belonged to him having gotten the same from his late grandmother.

PW2 who was the area Chief testified that he handled a complaint by the plaintiff in 2004 that someone had encroached on his parcel of land. He confirmed that the elders had deliberated on the issue and resolved that the land belonged to the plaintiff. It was his evidence that the defendants had encroached on the plaintiff's land and that they have their own land. That was the close of the plaintiff's case.

DEFENCE CASE

DW1 testified that they have occupied the suit land since 1997 and that the land was registered in the name of the plaintiff's grandmother during adjudication and that she was the owner of the suit land. It was his evidence that his family moved to Turasha and left the plaintiff's grandmother to take care of the land.

DW1 stated that the clan had agreed that his father pays Kshs. 100/ so that the land could be returned to them and that he has been cultivating the same. He confirmed that the plaintiff filed a Succession Cause but they did not file an objection.

DW2 testified that the land belonged to the Kapcherobon clan and had paid a goat for user rights. The charge was later discharged at Kshs. 100/ a value equivalent to the goat. It was his evidence that the reversionary interest reverted back to the defendant's family. DW3 testified that he witnessed the discharge after which the land reverted to Kapcherobon and the lessee Fredrick Sawe Kipkosgei started paying rent back to his late father Kipkoin Arap Keter. After the death of his father he began receiving rent from the lessee (DW4).

DW4 confirmed that he used to lease the property from Siokwei Cheptalam. He stated that he was informed by the deceased that the land had been discharged and she instructed him to pay the lease money to Kipkoin Arap Keter of the Kapcherobon clan. That he enjoyed the use of the land for 17 years before surrendering it to the defendants in 1997. The defendants closed their case after this witness.

PLAINTIFF'S SUBMISSION

The plaintiff cited Section 24, 25 and 26 of the Land Registration Act in support of the ownership of land.

The plaintiff submitted that the burden of proof on the counterclaim was on the defendants to prove that the title was acquired fraudulently and the same fell short of the proof that is required. Counsel submitted that the defendants never called the Land Registrar or a representative of the office to justify the allegations.

Counsel for the plaintiff further submitted that it was evident that the land had been acquired vide transmission and there had been no objection during the Succession proceedings. It was his submission that the plaintiff has proven the defendants are trespassers and therefore the plaintiff should be granted the orders as prayed in the plaint.

DEFENDANT'S SUBMISSION

Counsel for the defendants submitted that there existed a trust relationship between the estate of Siokwei Cheptalam (deceased) and Kapcherobon clan in relation to the suit land. It was further Counsel's submission that the defendants contended that the defendants have been in actual occupation of the suit land from 1984 and they have enjoyed quiet and uninterrupted occupation of the land from 1997 to 2010.

Counsel stated that the defendants have enforceable rights following intergenerational trust that existed before registration, moreso at the point of transmission the defendants were in actual occupation of the land. That the plaintiff had knowledge of the occupational and customary rights at the time of succession.

It was Counsel's further submission that the failure of Siokwei Cheptalam to disclose the trust at registration does not destroy the defendants' intergenerational right to ownership of their ancestral land.

Counsel relied on Section 62 of the Land Registration Act and submitted that Siokwei Cheptalam was a repository of the naked title which she could not dispose of save with the direction of the actual owners. Counsel cited the case of **Kanyi v Muthiora [1984] KLR 712** where the court found that the registration of the land in the name of the appellant did not extinguish the respondent's rights in customary law. He therefore urged the court to dismiss the plaintiff's claim and enter judgment in terms of the counterclaim for the defendants.

ANALYSIS AND DETERMINATION

The issues for determination in this case are as follows:

1. Whether the Plaintiff has indefeasible title to the suit land
2. Whether the ownership of the land reverted to the defendants at any point
3. Whether the suit land was held in trust for Kapcherobon clan

Whether the Plaintiff has indefeasible title to the suit land

Section 26 of the Land Registration Act provides;

(1) 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, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The plaintiff produced a title deed registered in his name as proof that he was the registered owner of the suit land. The plaintiff also produced a certificate of confirmation of grant and the grant of letters of administration intestate. The plaintiff submitted that there was a letter directing the issuing of the title deeds annexed to his affidavit dated 17th November 2010. This was to explain why the title deed was issued post-humously.

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.”

In this case it is clear that the process of acquisition of title was through transmission, the plaintiff having filed a Succession Cause procedurally and gotten a grant as required by law hence made an administrator of the estate. If the defendants had an interest in the estate, then they should have filed an objection to issuance of the grant to the plaintiff. This was not done. The defendants could also have filed summons for revocation of grant if they felt that there was non-disclosure of material facts in respect of the real beneficiaries. This was also not done. There is no evidence to show that there was fraud in the filing of the Succession Cause and that is not for this court to determine as it has no such jurisdiction to do so.

The defendants also confirmed that the title was registered in the plaintiff's grandmothers' name due to her possession of the land during the process of adjudication. This makes the acquisition process clean without procedural anomalies. There was no evidence of fraud or misrepresentation.

Section 107 of the Evidence Act provides;

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The burden of proof is upon the defendants who filed a counterclaim that the suit land belonged to them and that the same was held in trust for them. They sought cancellation of the title which requires proof that the same was acquired illegally. They have not presented any evidence to prove their claims.

The defendants claimed that adjudication was done and it was agreed by the family and clan members. There were no minutes or any evidence to corroborate the claim that this was the agreement.

In the premises, the defendants have failed to prove that the title held by the plaintiff was obtained fraudulently.

Whether the ownership of the suit land reverted to the defendants at any point

The defendants claimed that there was a charge on the suit property and the same was discharged for the value equivalent to the price of a goat. Section 109 of the Evidence Act provides;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

The burden of proof is upon the defendants to prove that the said charge existed and was discharged. Other than testimony from the witnesses, there was no documentary evidence to corroborate the evidence of payment of Kshs 100/ as claimed.

There is no proof that the rent was indeed surrendered to one Kipkoin Arap Keter who is deceased. There is no evidence that the deceased Siokwei Cheptalam directed DW4 to remit the rent to the deceased Kipkoin Arap Keter.

The defendants failed to prove a balance of probabilities that the suit land reverted to them at any point in time. The defendants also claimed that they are in occupation of the suit land which was controverted by the statement of one Joseph Kipsat Kandie who was the area chief. He stated that there was a dispute over the suit land and the clan had directed that the 1st defendant leave the suit land and move to their own parcel of land.

Whether the suit land was held in trust

The defendants relied on customary trust which is a fact which must be proved. There was no such evidence to show that such trust existed.

In **Peter Gitonga v Francis Maingi M'Ikiara [2007] eKLR** the court held;

A "trust" can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this;

"Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged." See HCCC 1400 of 1973 as quoted in *Mwangi vs Mwangi* [1986] KL R 328 at 332, by Shah J.A.

The circumstances are not indicative of whether the intention of registering the suit land in the name of the deceased or of the plaintiff was for the property to be held in trust. The claims of discharge of the suit land have not been proved by uncontroverted evidence therefore there was no trust existing between Siokwei Cheptalam and the defendants. The defendants also admitted that the land was registered in the name of Cheptalam during adjudication as she was the owner of the suit land.

The court is also alive to creation of customary trusts as overriding interests which can either be noted in the Registrar or not. In the case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR** the Supreme Court held that:

"Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in **Kiarie v. Kinuthia**, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group."

The current case does not meet the threshold to qualify as land held in trust for the family or the defendants. I have considered the pleadings the evidence on record and the submission by Counsel and come to the conclusion that the plaintiff has proved his case against the defendants and that the defendants have failed to prove their counterclaim and is dismissed with costs to the plaintiff.

The plaintiff prayed for general damages and mesne profits. Mesne profits is a special damage which must be specifically pleaded and proved. I find that this limb fails as it was not proved. As for damages for trespass I find that the defendants are trespassers on the plaintiff's suit land and therefore must pay general damages. It is trite law that trespass is actionable per se and there is no need to prove the damage caused. I therefore award the plaintiff minimal damages of kshs 150, 000/. I therefore make the following orders:

- a. A declaratory order is hereby issued that the suit land belongs to the plaintiff and the defendants are trespassers.
- b. An order of a permanent injunction is hereby issued against the defendants restraining them from trespassing or acting in any manner likely to be prejudicial to the plaintiff's rights in respect of the suit property ELGEYO/MARAKWET/TURESIA/803.
- c. General damages of Kshs 150,000/

d. Costs of the suit to the plaintiff.

e. Counterclaim dismissed with costs.

Dated and delivered at Eldoret on this 18th day of June, 2019

M.A. ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence of the parties and Mr.Sambu holding brief for Mr.Tum for defendants.

Mr.Emmanuel – Court Assistant