



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO.213 OF 2012

KIBOIT KOSGEI CHEPSAIGUT.....PLAINTIFF

VERSUS

CHERUIYOT KIMETTO.....1ST DEFENDANT

PATRICK KOSGEL.....2ND DEFENDANT

JUDGMENT

By a plaint dated 4th July, 2005 and amended on 1st August, 2016 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- (a) A permanent injunction restraining the Defendants by themselves, their servants, agents and/or employees from trespassing, alienating, cultivating, planting, felling trees and/or in any other manner dealing with land parcel no. UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/951 measuring approximately 4.6 Ha.
- (b) A declaratory order that the Plaintiff is the rightful owner of L.R NO. UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/951 measuring approximately 4.6 Ha.
- (c) Eviction order in terms of paragraph 8
- (d) General damages
- (e) Mesne profits

The defendants were served with summons to enter appearance and filed a memorandum of appearance and defence. The 2nd defendant filed an undated replying affidavit alleging that they are legal allottees and owners of the suit parcel of land having occupied the same for over 12 years. This matter was filed vide a plaint and the 2nd defendant should have filed a defence and not a replying affidavit if he wanted to defend the claim by the plaintiff.

PLAINTIFF'S CASE

PW1 adopted his witness statement as his evidence in chief and stated that he was issued with an allotment letter dated 13th October 1997 and a title deed for parcel No. KIPKABUS SETTLEMENT SCHEME/951 measuring 4.60 Ha of which he produced as an exhibit in court

together with a certificate of official search. He therefore urged the court to order that the defendants be evicted from the suit land and pay general damages and mesne profits.

PW 2 gave evidence and stated that he the plaintiff is the owner of the suit land and that the defendants have encroached on the same. He prayed that the defendants who have destroyed the plaintiff's property be ordered to vacate the land as the plaintiff is sickly.

PW 3 also testified that he is a neighbor to the Plaintiff herein having lived with him at Kapchebelel within Elgeyo Marakwet County. He stated that the Plaintiff bought the suit parcel of land known as UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/951 measuring approximately 4.6 Ha while working as an Agricultural Officer in Nakuru and that the said parcel was vacant at the time of purchase.

The plaintiff therefore closed his case after PW3's evidence. The defendants were served with a hearing notice but failed to attend court to give evidence therefore the defence case was also closed.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff submitted that the subject matter of this is parcel No. UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/951 measuring approximately 4.6 Ha registered in the name of the Plaintiff and not Land Parcel No. UASIN GISHU/KIPKABUS

SETTLEMENT SCHEME/848 as alluded to by the defendants. That the 2nd defendant had alluded to in an affidavit that there exists HIGH COURT MISCELLANEOUS APPLICATION NO. 35 OF 2004 in respect of Land Parcel No. UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/848 in which orders of stay were issued in favour of the Applicants.

Counsel listed the following issues for determination by the court:

- (a) Whether this case meets the conditions for granting injunctions?
- (b) Whether the Plaintiff has proved his case on a balance of probabilities and is entitled to the reliefs sought?

Whether this case meets the conditions for granting injunctions

Counsel relied on the principles that must be met for an injunction to be granted as per the case of *Giella vs Cassman Brown* (1973) EA 361 which provides that an applicant must show that he or she has a prima facie case with a probability of success, that the applicant will suffer irreparable damage which cannot be compensated by an award of damages and if the court is in doubt then decide on a balance of convenience.

Counsel submitted that the plaintiff has established that he is the registered owner of the suit land and that the defendants did not rebut this evidence by producing evidence to the contrary. It was Counsel's further submission that the plaintiff has not been able to use the suit parcel of land since 2001 due to the trespass of the defendants and has lost a lot in terms of damages. He therefore urged the court to grant the plaintiff's prayers as per the plaint.

Whether the Plaintiff has proved his case on a balance of probabilities and entitled to the reliefs sought.

Counsel submitted that the plaintiff had proved his case on a balance of probabilities and relied on the case of **Eastern Produce (K) Ltd-Chemomi Tea Estate vs Bonfas Shoya, Justice H. A. Omondi** stated that:

"The burden of proof in civil cases on the balance of probability was defined in the case of **KANYUNGU NJOGU VS DANIEL KIMANI MAINGI 2000** that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other."

At para 17, the Honourable Judge further stated that:

"In civil cases, a Plaintiff is required to prove his claim against the Defendant on the balance of probabilities. This position was clearly stated in the case of **KIRUGI & ANO. VS KABIYA & 3 OTHERS (1987) KLR 347** wherein the Court of Appeal stated that the burden was always on the Plaintiff to prove his case on a balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.

Counsel further cited the case of **Shaneebal Limited vs County Government of Machakos (2018), where Odunga. J at paragraph 23** stated that:

"...Although there was clear evidence of admission of the contract and proposals from the Defendant to make good the default, the Defendant did not adduce any evidence in support of its pleadings. That averments in pleadings are not evidence was appreciated in **Francis Otile vs Uganda Motors Kampala HCCS No. 210 of 1989** where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute thereof.

Further that the Honourable Judge quoted the case of **CMC Aviation Ltd vs Cruisair Ltd (No. 1) KLR 103; (1976-80) 1 KLR 835**, wherein Madan, J (as he was then) expressed himself as hereunder:

"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of 'evidence' as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evidence to the mind that it is truth. "

Counsel therefore urged the court to enter judgment in favour of the plaintiff as prayed.

ANALYSIS AND DETERMINATION

This is very old matter that should have been out of the court system a long time ago. The plaintiff has always been desirous of this matter being heard and determined but there were delays mainly occasioned by the defendants.

The defendants were served with a hearing notice but failed to attend court to defend the claim against them. On the day of the hearing the matter was heard and placed aside for further hearing at 3 pm but the defendants never showed up. The matter was fixed for mention for filing of submissions and Counsel for defendant did not file any submissions.

The issues for determination are as to whether the plaintiff has proved his case that he is the registered owner of the suit land and whether he is entitled to the orders of eviction of the defendants, general damages and mesne profits as claimed in the plaint.

The 2nd defendant in this suit failed to file a defence and opted to file an undated replying affidavit which the court is at a loss what he was replying to. It is therefore clear that there is no defence on record. Furthermore the defendants failed to attend court during the hearing. The consequence of failing to adduce evidence during the hearing of a case was stated in the case of Motex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 548 of 1998 Lesiit, J citing the case of Autar Singh Bahra and Anor vs Raiu Govindii, HCCC No. 548 of 1998 that:

"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated... "

Further in the case of Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 wherein the learned judge in citing the same decision stated that:

"It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged. "

This is exactly what the defendants' defence is as they are mere statements which are not tested by way of evidence and cross examination. They are unsubstantiated. The plaintiff's claim is uncontroverted but this does not mean that the court would grant orders if the plaintiff does not prove his case on a balance of probability.

The plaintiff testified and gave a background on how he acquired the suit land and produced a letter of allotment, title deed registered in his name together with an official search which confirmed that he is the registered owner of the suit land. He is the indefeasible owner of the suit land as provided for under the Land Registration Act 2012.

There has been no question about the indefeasibility of the plaintiff's title as per sections 24, 25 and 26 of the Land Registration Act which allows the court to revoke the title if it is proven that the same was procured fraudulently, illegally or through misrepresentation. The defendants never gave any evidence to controvert the plaintiff's evidence. I find that the plaintiff has proved that he is the owner of the suit land.

On the issue of general damages for trespass, it is trite law that trespass is actionable per se and once the same is established there would be no need to prove the damage suffered. Having found that the plaintiff is the registered owner of the suit land and that the defendants are trespassers on the plaintiff's suit land, I find that the plaintiff is entitled to general damages which assess at Kshs. 200,000/

On the issue of mesne profits, the court finds that mesne profits is a special damage which must be specifically pleaded and specifically proved. The plaintiff pleaded for mesne profits but did not indicate the amount and further he did not lead any evidence to prove the same. I therefore decline to grant this limb which cannot be granted together with general damages.

I have considered the pleadings, the evidence adduced together with submissions by Counsel and come to the conclusion that the plaintiff has proved his case against the defendants on a balance of probabilities and make the following orders:

- (a) A permanent injunction is hereby issued restraining the Defendants by themselves, their servants, agents and/or employees from trespassing, alienating, cultivating, planting, felling trees and/or in any other manner dealing with land parcel no. UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/951 measuring approximately 4.6 Ha.
- (b) A declaratory order is hereby issued that the Plaintiff is the rightful owner of L.R NO. UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/951 measuring approximately 4.6 Ha.
- (c) The defendant to give the plaintiff vacant possession within 30 days failure of which an eviction order to issue
- (d) General damages of Kshs. 200,000/ to be paid by the defendants.
- (e) Claim of mesne profits is declined.
- (f) Costs of the suit

Dated and delivered at Eldoret on this 24th day of July, 2019.

M.A. ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence of Miss.Rono for the Plaintiff and the absence of Dr.Chebii for the Defendants.

Mr.Mwelem – Court Assistant