



**REPUBLIC OF KENYA**

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

**E & L NO. 183 OF 2016**

**JOHN KIPELEL KIPCHUMBA.....PLAINTIFF**

**VERSUS**

**CATHERINE KABON.....1<sup>ST</sup> DEFENDANT**

**BEN K. MAIYO.....2<sup>ND</sup> DEFENDANT**

**SILAS K. MAIYO.....3<sup>RD</sup> DEFENDANT**

**KIBET MAIYO.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 4<sup>th</sup> July 2016 and amended on 17<sup>th</sup> December 2018, the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) A declaration that the defendants are trespassers on the plaintiff's land parcel number L.R No. LEMBUS/TORONGO/517
- b) A declaration that the plaintiff is the registered owner of all that parcel of land known as L.R No. LEMBUS/TORONGO/517.
- c) That upon the said declaration an order be issued directing the defendant to take out letters of administration and surrender the suit land to the plaintiff unconditionally.
- d) That the 1<sup>st</sup> to 4<sup>th</sup> defendant be ordered to compensate the plaintiff for the loss of expectation of intended harvest of the year 2016.
- e) Costs of the suit.

The defendants filed a defence and counterclaim and sought for the following orders;

- a) A permanent injunction restraining the plaintiff from the suit land.
- b) An eviction order against the plaintiff
- c) Costs of the suit

**PLAINTIFF'S CASE**

The plaintiff testified that he is the nephew to the deceased, the late Kimaiyo Kipelel who was the registered owner of land parcel number L.R No. LEMBUS/TORONGO/517 and land parcel number L.R No. LEMBUS/TORONGO/516 which were carved out of land parcel number L.R No. LEMBUS/TORONGO/88. He stated that the mutation process was commenced in 1983.

The plaintiff also stated that he has acquired the suit land by way of adverse possession as he has been on the suit land since 1982 and that adverse possession started to run 6 months from the date he paid final payment. That during the life of the deceased the plaintiff occupied the suit land uninterrupted and it was his evidence that the deceased did not have any intention of evicting him.

It was further the plaintiff's testimony that the deceased approached the him to purchase 6 acres of land from him known as Land parcel

number L.R No. LEMBUS/TORONGO/88 of which they applied for consent for subdivision on 6<sup>th</sup> June 1983. That they attended the Land Control Board on 27<sup>th</sup> October 1983 and obtained a consent and that the deceased had no family at the time.

The plaintiff stated that after subdivision, he remained in possession of the suit land and all that remained was that it be transferred and registered in his name. The deceased passed on before he was able to transfer the same but never resided on his portion of the subdivided portion.

It was the plaintiff's evidence that the defendants proceeded to register the land in their respective names when the suit was pending before the court to defeat the process and that the court should consider the merit of this case as it were as at the time of the filing of the suit.

PW2 gave evidence in support of the plaintiff's claim by stating that she was present when the land was offered for sale to the plaintiff. The plaintiff therefore urged the court to grant the orders as prayed in the plaint.

### **DEFENDANT'S CASE**

The defendants filed a defence and counterclaim whereby they sought for a permanent injunction and eviction of the plaintiff from the suit land. The defendants stated that the plaintiff's claim that he bought the suit land from the deceased in 1987 does not hold any water as he has not provided a sale agreement as an exhibit. Further that he has not provided any evidence of payment of the same to back his claim that he paid for the same.

The 1<sup>st</sup> defendant stated that her late husband did not sell the land to the plaintiff and that there was no Land Control Board consent to transfer the land. It was her evidence that her husband died in 2001 and that she filed a Succession Cause whereby she got a certificate of confirmation of grant in respect of his estate which she produced as an exhibit. She also produced a copy of a title deed in her name for the suit land and a certificate of official search

The defendant further testified that they had disputes with the plaintiff forcing her to go back to her home for two years and came back to the suit land. That the plaintiff wanted to evict her from the suit land but she maintained that her late husband did not sell the land. She therefore prayed that the plaintiff be evicted from the suit land.

On cross examination the defendant reiterated her evidence and that her deceased husband did not evict the plaintiff from the suit land. DW2 also gave evidence that the deceased did not sell the land to the plaintiff and did not know how the plaintiff got onto the suit land. That was the close of the defence case.

### **PLAINTIFF'S SUBMISSION**

The plaintiff's Counsel submitted that the counterclaim for eviction and permanent injunction does not arise as they are statute barred as it was brought after the 12-year period and became extinguished by operation of the law.

Counsel submitted that the plaintiff chose to file a plaint instead of an originating summons as the issues for determination were complex. It was his submission that the plaintiff has acquired the suit land by way of adverse possession as he has been on the land since 1982.

Counsel cited the case of **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR and Chevron(K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** .

Counsel further submitted that the defendants went ahead to obtain title deeds to the suit land to defeat the court process. He therefore urged the court to grant the orders as prayed in favour of the plaintiff.

### **DEFENDANTS' SUBMISSIONS**

Counsel submitted that the plaintiff did not comply with section 3(3) of the law of Contract Act. The defendant relied on the cases of **Daudi Ledama Morintat v Mary Christine Karie & 2 others [2017] eKLR, Kimani Kabogo v William Kabogo Gitau [2018] eKLR and Schoon Noorani v Damji Ramji Patel & 2 others [2006] eKLR** to buttress the point that the suit must fail for the reason that there was no written agreement produced to evidence the transaction.

It was Counsel's submission that the plaintiff has not produced any evidence to demonstrate that the 1<sup>st</sup> defendant's title was obtained fraudulently or through misrepresentation. If the plaintiff felt threatened when Succession proceedings were instituted over the deceased's estate, then he should have filed objection proceedings or registered a caution over the property. That the plaintiff is a trespasser and further that there are no particulars of fraud in the plaint.

Counsel further submitted that the plaintiff claims to have bought the land in 1983 but cannot give an exact date and month for the same. That he alleges that he paid a consideration of Kshs. 1000/- per acre but cannot provide any proof of the same. That the same applies to the survey and subdivision which ought to have been done after the completion of payment.

Further that the mutation dated 17<sup>th</sup> January 1983 and mutation forms which were marked as Plaintiff exhibits 3 and 6 and plaintiff exhibit 2, a consent for subdivision show the deceased procured consent for subdivision but no consent was procured from the Land Control Board for transfer of the parcel in issue. That from the evidence it is clear the deceased had no intention of transferring the suit land.

The defendant relied on the case of **Danson Muniu Njeru v William Kiptarbei Korir & 6 others [2014] eKLR** to buttress the point on the

importance of the Land Control Board Consent.

The defendant submitted that the plaintiff admitted at paragraphs 13-18 that the defendants have continuously asserted their rights over the suit property and continuously required him to vacate the suit land. That the defendants have never been dispossessed of the land or abandoned the land and that the plaintiff has never taken exclusive peaceful possession of the suit land.

It was Counsel's submission that the plaintiff has not pleaded adverse possession in the plaint and his claim is based on contract. He is unable to prove that he purchased the land. The prayer for mesne profits is without basis since he has not attached any document or report from the agricultural officer to that effect. Counsel therefore urged the court to dismiss the plaintiff's claim and allow the defendants' counterclaim with costs.

### **ANALYSIS AND DETERMINATION**

I have considered the pleadings and the evidence on record and come to the conclusion that the issues for determination are as follows:

- a) Whether the plaintiff is the registered owner of the suit land
- b) Whether the Defendants are trespassers on the suit land
- c) Whether the Defendants should compensate the Plaintiff for the loss of the expected harvest of the year 2016
- d) Whether the Court should issue a permanent injunction against the plaintiff
- e) Whether the Plaintiff should be evicted from the suit land

### **WHETHER THE PLAINTIFF IS THE REGISTERED)OWNER OF THE SUIT LAND**

The plaintiff sought that the court make a declaration that he is the owner of the suit land.

### **PROOF OF PROPRIETIRSHIP OF 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.**

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 has not produced any title or document to show that he is the registered proprietor of the suit land. Further, he has not provided any documentary proof that he had an agreement to purchase the suit land or that there were any payments made to the deceased with regards to the suit land. There is no sale agreement or transfer therefore the plaintiff has not proven that there was any transaction in motion.

However, it is evident that there was an application for a Land Control Board Consent for subdivision of the land from which the suit land arose on 6<sup>th</sup> June 1983. The board consented to the sub-division and issued a title deed to the deceased as per the certificate of official search wherein entries were reflected to have been made on 29<sup>th</sup> June 2016. The title to the suit land was issued to the deceased on 5<sup>th</sup> March 2014. The consent to subdivide the land is not conclusive proof that the subdivision was being done for the benefit of the plaintiff.

Section 3(3) of the Contract Act does not apply to this suit as the agreement was made before the amendment that required dispositions in land to be in writing came into effect. That notwithstanding, the plaintiff has not expressly proven that there was an oral agreement or that there were payments made pursuant to the agreement.

In the absence of any transfer or proof of any consideration having been paid to the deceased, the plaintiff cannot claim he had purchased any interest in the suit land and is therefore not a registered proprietor of the suit land.

### **WHETHER THE DEFENDANTS ARE TRESPASSERS ON THE SUIT LAND**

The 10<sup>th</sup> Edition of Black's Law Dictionary defines trespass as follows;

*“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.*

In Clerk & Lindell on Torts (17<sup>th</sup> Edition) para 17-01 Trespass is defined thus

*“An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass”*

In order for trespass to have occurred, the plaintiff must prove that he is the owner of the land which has been trespassed upon. The plaintiff has not produced any proof that he is the registered owner of the suit property and therefore the claim for trespass fails.

#### **WHETHER THE DEFENDANTS SHOULD COMPENSATE THE PLAINTIFF FOR THE LOSS OF THE EXPECTED HARVEST OF 2016**

The plaintiff has not proven that there was any loss incurred on any harvest. There is no evidence of any losses and he has not pleaded what was lost. How then is the court to determine whether there has been any loss incurred by the plaintiff? The plaintiff has not clarified whether the damages sought are general or specific. I find that the defendants are in no way obligated to compensate the plaintiff.

#### **WHETHER THE COURT SHOULD ISSUE A PERMANENT INJUNCTION AGAINST THE PLAINTIFF**

The Plaintiff has failed to prove that he is the registered owner of the suit land. The 1<sup>st</sup> defendant has proven that the suit land was registered in the deceased's name and that she is an administrator of the deceased's estate alongside the 3<sup>rd</sup> defendant. Further, that she holds the title in trust for the dependants of the deceased.

The plaintiff did not file an objection during the Succession Cause filed by the defendants and the confirmation of grant. He has no proof of any payments made and has therefore failed to establish whether he had any rights over the suit land. He is therefore not entitled to the orders sought.

#### **WHETHER THE PLAINTIFF SHOULD BE EVICTED FROM THE SUIT LAND**

Given that it has been proven that the 1<sup>st</sup> defendant is the registered owner of the suit land, the plaintiff should vacate the premises.

The claim for adverse possession fails as the plaintiff has not pleaded it in the plaint to begin with. Parties are bound by their pleadings and the court can only grant what a party has sought for in the pleadings. The court cannot guess what the party is seeking for. Further, under order 37 Rule 7 of the Civil Procedure Rules a claim for adverse possession must be instituted by way of Originating Summons.

The plaintiff is claiming adverse possession to the suit land but he is not being very outright in the pleadings. I find that the plaintiff has not proved adverse possession and therefore the case is dismissed with costs to the defendants. There was no order barring the defendants from obtaining the title deed while the case was pending before the court.

The defendants having proved that they are the registered owners of the suit land, they are entitled to an order of a permanent injunction against the plaintiff restraining him from interfering with the suit land.

The plaintiff to give vacant possession of the suit land within 45 days failure of which an eviction order to issue.

**Dated and delivered at Eldoret on this 16<sup>th</sup> day of July, 2019.**

**M.A. ODENY**

**JUDGE**

**JUDGMENT READ in open court** in the presence of the Plaintiff and Miss.Lelei holding brief for Mr.Kibii for Defendants.

Mr.Mwelem – Court Assistant