



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

E.L.C CASE NO. 50 OF 2017

SAMWEL CHELULE KOECH.....PLAINTIFF

VERSUS

KENYA FOREST SERVICES.....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff instituted this suit by way of Plaint dated 5th May 2017 claiming that the Defendant had trespassed on his property known as KERICHO MUNICIPALITY L.R NO. 631/1570. In the said Plaint he seeks the following reliefs against the Defendant:

- a. A permanent injunction restraining the Defendant by itself, its agents, servants, employees and/or assigns or any other party acting on behalf of the Defendant or under the instructions of the Defendant from entering into the Plaintiff's plot, erecting structures, fencing off, demarcating or dealing in any way against the wishes of the Plaintiff over plot no. KERICHO MUNICIPALITY L.R NO 631/1570
- b. Damages
- c. Costs of the suit
- d. Any other relief that this Honourable court may deem just and fit to grant.

2. Contemporaneously with the suit, the Plaintiff filed an application for a temporary injunction pending the hearing and determination of the suit. The court granted the said application as it was undefended.

3. The Defendant filed a Defence dated 31st May 2017 in which it denied the Plaintiff's claim and stated that the suit land forms part of the Defendant's sub-county office premises which include offices, staff residential quarters and a tree nursery. The Defendant averred that it had been in possession of the suit property since 1932. The defendant further stated that the Plaintiff's suit was time barred as 12 years had elapsed since the cause of action accrued. The defendant also faulted the sale of the suit property to the Plaintiff as no consent was obtained from Commissioner of Lands before the same was sold to the Plaintiff.

4. The suit was set down for hearing and both parties testified.

Plaintiff's Case

5. The Plaintiff who was the sole witness testified that he bought the suit property from Joel Kipsiele pursuant to a sale agreement dated 24th July 1995. He produced a copy of the said agreement as Plaintiff's Exhibit 1. He stated that the suit property was allocated to Joel Kipsiele by the Municipal Council of Kericho. The said Joel Kipsiele later obtained a title in his name under the Registration of Titles Act Cap 281 of the Laws of Kenya (now repealed). The Plaintiff testified that he took possession of the suit property in 1995 and later fenced it in 2015. He stated that there were no structures on the suit property.

6. Upon cross-examination he stated that no consent had been obtained from the Commissioner of Lands before the land was sold to him by Joel Kipsiele. He said he was not aware if the conditions stipulated in the letter of allotment had been fulfilled. He stated that the suit property was next to the Defendant's offices but the two plots are separated by an access road.

Defendant's Case

7. The Defendant called one witness Fredrick Mirambo who is the Kericho East Sub-County Forest Officer. He stated that the suit property forms part of the Defendant's property measuring 4.78 hectares which comprises of their sub-county offices, staff quarters and a tree nursery. He stated that the Defendant had been in occupation of the suit property since the 70s and no one had ever laid claim to it. He said that when he saw the Plaintiff fencing the property in 2015, he warned him that the same belonged to the Defendant.

8. Upon cross-examination, he stated that he was not aware whether land rates had been paid and that he had not conducted an official search at the Lands office to establish the ownership of the land. He also stated that he did not know whether the Plaintiff had a title to the suit property. He however, stated that if the Plaintiff had a title, then the same may have been acquired illegally. He further stated that there were no structures on the suit property. He admitted that he had not produced any documents showing that the defendant owned the suit property.

Issues for determination

9. Having considered the pleadings, evidence and rival submissions the following issues fall for determination:

- i. Whether the Plaintiff's suit is time barred.
- ii. Whether failure to obtain consent from the Commissioner of Lands rendered the sale agreement unlawful
- iii. Whether the Plaintiff has proved trespass
- iv. Whether the Plaintiff is entitled to the reliefs sought.

Analysis and Determination

Whether the plaintiff's suit is time barred

10. In its defence, the Defendant pleaded that the suit was statute-barred as 12 years had elapsed since the cause of action accrued. The Defendant invoked section 7 of Limitations of Actions Act Cap. 22, Laws of Kenya. The said section provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”

11. In the instant case the Defendant contends that it has been in possession of the suit property since 1932 and is still in possession thereof to date as the suit land is considered as part of the defendant's institutional land measuring 4.8 Hectares. That being the position, the purported act of trespass would be said to be continuous. This therefore dislodges the assertion that the suit is statute barred.

Whether failure to obtain consent from the Commissioner of Lands rendered the sale agreement unlawful

12. According to the title produced by the Plaintiff (in the name of Joel Kipsiele) as Plaintiff's Exhibit 4, particularly at clause 9 of the special conditions, it is clear that consent of the Commissioner of Lands was a requirement before the suit property could be sold to the plaintiff. The said clause provides in part as follows:

“The Grantee shall not sell, transfer, sublet, charge or part with the possession of the land or any part thereof or/and buildings thereon except with the prior consent in writing of the Commissioner of Lands.”

13. The Plaintiff testified that the vendor, Joel Kipsiele did not obtain the consent of the Commissioner of Lands before he sold the suit property to him. Furthermore, he did not submit plans, drawings, elevations and specifications of the buildings to the Commissioner of Lands within 6 months in accordance with clause 2 of the Grant. Counsel for the Defendant cited the case of **Bernard Alfred Wekesa V John Muriithi Kariuki & 2 others [2000] eKLR** where the court held that :

“For consent to be granted, building plans had to be submitted to the Local Authority within six months.”

14. From the foregoing it is my finding that failure to comply with the terms of the Grant renders the said sale unlawful and therefore the Plaintiff cannot base his claim on an illegal sale agreement.

Whether the plaintiff has proved trespass

15. In the case of **Nyangeri Obiye Thomas V Yunuke Sakagwa Nyoiza ELC Case No.277 of 2018** Okong'o J cited Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 where the learned authors defined trespass as:

“Any unjustifiable intrusion by one person upon land in possession of another.” ...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

16. In his Plaintiff the Plaintiff has alleged that the defendant has trespassed on his land. It is trite law that he who alleges must prove the allegations. **Section 107 (1) and (2)** of the **Evidence Act** provides that:

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.

Similarly, **Sections 109 and 112** of the said **Act** provides as follows:

109. 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.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

17. Additionally, in the case of *Kirugi & Another v Kabiya & 3 others [1987] KLR 347*, the Court of Appeal held that:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.” Likewise, failure by the defendants to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

18. The Plaintiff’s claim is that he is the legal purchaser of the suit property. He produced a copy of a sale agreement as evidence that he purchased the suit property from one Joel Kipsiele. However, despite having purchased the land on 24th July 1995, he has never had it registered in his name and the title is still in the name of Joel Siele. The Plaintiff claims to have taken possession immediately after the purchase. This was however, disputed by the Defendant’s witness who testified that the Plaintiff has never been in possession of the property. DW1 testified that the person from whom the Plaintiff purchased the suit property had never laid a claim against the Defendant over the suit property nor had he taken possession thereof. DW1 however, conceded that the Plaintiff attempted to fence the property in 2015 and was warned that the land was government land. It is interesting to note that this was being done about 15 years after the Plaintiff allegedly bought the land.

19. Counsel for the Defendant has submitted that the purported sale of the suit land was illegal for lack of consent of Commissioner of Lands. It is trite that registration of land is what confers ownership or title to land. The suit land was registered under the Registration of Title Act (Cap 281) (repealed). As correctly submitted by counsel for the Plaintiff, Section 23(1) of the said Act provides that a certificate of title issued to a purchaser shall be taken by the court as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner and the title shall not be challenged, except on the grounds of fraud or misrepresentation.

20. In the instant case, the Plaintiff did not produce any document of title as evidence that he is the proprietor of the suit property. The fact that the suit property was not transferred to his name shows that he cannot prove that he has a proprietary interest in the suit land capable of being protected by the Court. To make matters worse the Plaintiff’s has never taken possession of the suit property and neither did the previous buyer. Perhaps it would have helped his case if the plaintiff had called the vendor, Joel Kipsiele to shed light on some of these questions, particularly, how he acquired the suit land in view of the fact that the defendant which is a public body established under statute claims ownership of the said land. The plaintiff’s evidence as presented makes it difficult for him to sustain a claim for trespass to land.

Whether the plaintiff is entitled to the reliefs sought.

21. Having held that the plaintiff has failed to prove trespass as he did not produce any title to prove ownership of the suit land, he is not entitled to the reliefs sought.

22. The upshot is that the Plaintiff has failed to prove his case on a balance of probabilities and it is hereby dismissed with costs to the Defendant.

Dated, signed and delivered at Kericho this 12th day of July, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. C. Koech for Mr. R. Langat for the Defendant
2. Plaintiff present in person
3. Court assistant – Rotich