



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 95 OF 2013

PHILIP KIPKEMBOI LETTING.....PLAINTIFF

VERSUS

BARNABAS NYAKUNDI.....DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit by way of a plaint dated **10th July, 2013**. The plaintiff is seeking for judgment against the defendant for:

- (a) **A declaration that the plaintiff is the legal registered owner of land parcel No. Cherangani/Nzoia Block 5/Tulon Farm/52 measuring 5 acres or thereabouts.**
- (b) **General damages for non user of the suit land.**
- (c) **The defendant be restrained permanently from the use of 0.68 acres or any part of the plaintiff's said piece of land.**
- (d) **Costs of the suit.**
- (e) **Any other relief the Honourable Court deems fit to grant.**

2. The plaintiff's case is that at all material time, the plaintiff is the registered owner of land parcel No. **Cherangani/Nzoia Block 5/Tulon Farm/52** measuring **5 acres** or thereabouts and which land borders or is adjacent to the defendant's land parcel No. **Cherangani/Nzoia Block 5/Tulon Farm/51**. That sometime in early **2003**, the defendant, without any reason and without any colour of right encroached and/or trespassed onto the plaintiff's land and started using and continued to use part thereof measuring **0.68 acres**.

3. The plaintiff avers that sometime in or about May, 2013 the District Surveyor, Trans-Nzoia vide a report dated 8th May, 2013 confirmed that the defendant had encroached and/or trespassed on the plaintiff's land and was using 0.68 acres of it and that the defendant was ordered to surrender the same to the plaintiff. It is the plaintiff's contention that the defendant has no colour of right over the said 0.68 acres or any part thereof and should therefore surrender it to the plaintiff. The plaintiff further contends that by reason of the defendant's unlawful actions of trespass, the plaintiff has not enjoyed quiet, peaceful, uninterrupted and/or exclusive use of the suit property and has suffered and continues to suffer loss and damage.

4. The plaintiff called one witness, **Geoffrey Tiongoria** who testified as PW1 and told the court that he works at the Ministry of Lands, Survey Section. He stated that pursuant to an order from the court he visited both parcel Numbers Cherangani/Nzoia Block 5/Tulon Farm/51 and Cherangani/Nzoia Block 5/Tulon Farm/52 on 28/1/2016 to determine their boundaries and that he carried out measurements in the presence of both parties. In his findings, he found that the plaintiff is occupying 1.37 hectares while the map acreage is 1.78 hectares. The defendant was in possession of 1.63 hectares while the map acreage is 1.08 hectares. From his findings, PW1 found that Plot No. 51 had more land comparatively both as per the map and the area list while Plot No. 52 had less land relative to the ground and the area list. PW1 added that whereas the total ground area was 3.0 hectares, the total area list was 3.237 hectares. Accordingly, the area list was in excess by 0.237 hectares. He concluded that the excess area was to be deducted from the area list proraterally so that parcel No. 51 becomes 1.13 hectares while parcel No. 52 becomes 1.87 hectares. He recommended that 0.5 hectares was to be subtracted from parcel No. 51 while 0.5 hectares was to be added to parcel No. 52. PW1 produced the report dated 15th February, 2016 as P. Exhibit 1.

5. On being cross-examined by Mr. Onyancha, learned counsel for the defendant, PW1 stated inter alia, that when he asked the parties for their supporting documents, he found out that the plaintiff was a son to the owner of parcel No. 52, Peris Chepkoech Leting who was not present during the exercise. PW1 stated that he found that the plaintiff is the one staying on the land. He confirmed that he was not shown the sale agreement in which the defendant had purchased 1.6 acres in 1999. He stated that he found out that the defendant was occupying

1.63 hectares which is approximately 4.028 acres. He further stated that the source of information in the map is digitalization of the map while the source of the area list is the details prepared by the surveyor with the help of the farm directors.

6. In his evidence, the plaintiff who testified as PW2 stated that he owns parcel No. 52 which is in the name of his mother, Peris Chepkoech Leting and that the land is adjacent to the defendant's parcel No. 51. He stated that he has filed the suit in his name because his mother is unwell and unable to talk well, adding that he had a Special Power of Attorney dated 5/2/2013 which he produced as P. Exhibit 2. He also produced a letter dated 23/12/2009 (P. Exhibit 3) in which his mother gave him the plot as a gift. In addition, PW2, produced the Tulon Farm Area List as P. Exhibit 4. He stated that he sued the defendant for encroaching on his plot a fact confirmed by a Government Surveyor who went to the ground. He added that the defendant did not agree with the survey report and removed the survey marks which prompted the plaintiff to report the matter to the police who came and arrested the defendant. He urged the court to grant him the prayers sought in the plaint.

7. When cross-examined by Mr. Onyancha, PW2 stated that the defendant encroached on his plot in 2001. He admitted that he does not live on the suit land, adding that he had leased it out and has even sold part of it. The plaintiff admitted that he did not issue the defendant with a demand notice before filing suit. He stated that the Special Power of Attorney should have been registered with the Registrar of Titles and that the same did not show the thumb that was used on 5/2/2013. He confirmed that the stamp on the Special Power of Attorney (P. Exhibit 2) bears the date 13/9/2013 while this suit was filed on 11/7/2013. He did not have a receipt for payment of stamp duty on the document.

8. PW2 stated that his mother did not know how to write though he gave him the Power of Attorney and the letter dated 23/12/2009 which he stated was written by some old men while the translation was done by one Elphas Tanui. The plaintiff stated that the defendant lives on Plot No. 51 which is owned by one Philip Sirima Mais. He admitted that the report dated 9/5/2013 was not made pursuant to a court order as the same was done under the instructions of the District Officer. He stated that the defendant entered the land in 1999 and has been using it ever since. The plaintiff testified that he came to learn of the encroachment in 2009. He confirmed that title deeds have not been issued in respect of the whole farm because of disputes over the area list.

9. The defendant opposed the plaintiff's suit and filed a defence dated 13th August, 2013 and filed on 14th August, 2013. He denied the existence of land Title Number Cherangani/Nzoia Block 5/Tulon Farm/52 registered in the plaintiff's name. He further denied the existence of a registered title in his name known as Parcel No. Cherangani/Nzoia Block 5/Tulon Farm/51. The defendant denied encroaching or trespassing onto the plaintiff's land. The defendant averred that the plaintiff lacked the *locus standi* or capacity to sue. It was the defendant's contention that he is lawfully occupying and using his 1.6 acres which he purchased in the larger Tulon Farm. The defendant denied that the plaintiff has suffered loss and damage and contended that the plaintiff's claim is incompetent, misconceived, premature, unsustainable and ambiguous and sought to have it dismissed with costs.

10. The defendant (DW1) adopted his witness statement dated 13/8/2013. He stated that he bought his plot measuring 1.6 acres in 1999 from one John Siundu Nabacha and was shown the boundary. He produced the sale agreement as D. Exhibit 2. He stated that title deeds for the entire farm have not been issued because of boundary disputes.

11. When shown D. Exhibit 1 by Mr. Waweru, counsel for the plaintiff during cross-examination, DW1 stated that he bought 1.6 acres but the agreement does not indicate the plot number. He stated that he purchased the plot from John Siundu Nabacha who had also purchased from somebody else, though he did not have the agreement. He further stated that he bought his plot when the same had been surveyed though he brought a local surveyor to confirm it. DW1 admitted that he was present when PW1 visited the suit properties.

12. After the close of the plaintiff's and the defendant's cases, both parties filed written submissions through their respective counsel. The plaintiff's advocates filed their submissions on 2nd November, 2018 while the defendant's advocates filed theirs on 9th November, 2018.

13. I have considered the pleadings on record, the evidence and the submissions made. In my view, the issues for determination are whether the plaintiff has the *locus standi* to bring the suit; whether the defendant has trespassed on the plaintiff's parcel and whether the plaintiff is entitled to the prayers sought.

14. In this case, the plaintiff has stated that he is the son and suing on behalf of his mother Peris Chepkoech Leting who is the owner of the suit parcel No. 52. The plaintiff has stated that because of her advancing age, his mother surrendered to him the 5 acre plot in the year 2009. He produced a note dated 23/12/2009 (P. Exhibit 3) written in Kalenjin with an English translation attached. The plaintiff admitted that his mother was illiterate. It is not shown who wrote the letter dated 23/12/2009 and who made the purported translation as there was no certificate attached.

15. The plaintiff is also relying on a Power of Attorney (P. Exhibit 2) allegedly given to him by his mother. There is no doubt that the same was not registered as required. Moreover, the said Power of Attorney was stamped on 13th August, 2013 whereas this suit was filed on 11th July, 2013. There is no doubt therefore that at the time the suit was filed, the plaintiff had no capacity to sue as the Special Power of Attorney had not been donated. In my view, the plaintiff cannot be regarded as having the legal capacity to sue on behalf of his mother who is the owner of the suit property. The Power of Attorney given cannot act retrospectively. Moreover the plaintiff has admitted that he is not in possession as he lives and stays in Eldoret.

16. From the evidence on record, it is not in dispute that the suit parcels are not yet registered. PW1 testified that he carried out the measurements and confirmed that his source of information in the map is the digitalization of the map and the area list whose details were prepared by the surveyor with the help of the farm directors. PW1 however failed to show any map showing the extent and shape of the two plots. At the very least, he should have produced a topographical survey drawing for the two parcels of land to guide the court on the alleged encroachment. Furthermore, the witness failed to tell the court whether the dimensions and boundaries of the two parcels of land had been defined and verified and the features that demarcated the boundaries that were allegedly encroached. In the absence of such features, this court is left with the plaintiff's word against that of the defendant. From the area list alone, the court cannot be able to find that there is encroachment when there is no map or feature defining the boundaries of the two parcels that was fixed such as fences, hedges, stones, pillars, beacons, walls and other features that demarcate boundaries.

17. From the material on record, I am not satisfied that the plaintiff has proved his case on a balance of probabilities. Accordingly, and for the reasons stated, the plaintiff's suit is dismissed with costs.

Dated, signed and delivered at Kitale on this 15th day of July, 2019.

C. K. YANO

JUDGE

15/7/2019

Coram:

Before - C. K. Yano, Judge

Court Assistant - Collins

Kaosa holding brief for Onyancha for defendant

Okumu holding brief for Waweru for Plaintiff.

ORDER

Judgment delivered in open court in the presence of the advocates for both parties.

C. K. YANO

JUDGE

15/7/2019