



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 93 OF 1997**

**OBED READON ONYANGO.....PLAINTIFF**

**VERSUS**

**FLORENCE JUMA NABISWA**

**SARAH CHEPKEMBOI NABISWA.....DEFENDANTS**

**JUDGMENT**

**Introduction**

1. In this case, I am required to write a judgment based on the evidence of the plaintiff and his 3 witnesses and the evidence of the 1<sup>st</sup> defendant taken by Justice E. Obaga on **18/9/2014, 14/1/2015, 23/6/2015** and **16/2/2016**. I only took the evidence of the 2<sup>nd</sup> defendant (DW2).

**Plaintiff's Case**

2. The plaintiffs commenced this suit by plaint dated **1<sup>st</sup> March, 1995** against the defendant, **John Juma Nabiswa** who upon his demise was substituted with his widows and legal representatives, **Florence Juma Nabiswa** and **Sarah Chepkemboi Nabiswa** as 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaint was amended and further amended. In the further amended plaint dated 13<sup>th</sup> February, 2014, it is the plaintiff's case that at all material times, the plaintiff was a member of **Chepkorok Farm Limited** in which he held **one (1) share** valued at **Kshs.2,000/=**. The plaintiff avers that he is the owner of land parcel No. **225** measuring **11.26 acres** and which parcel is part of the land known as LR No. **5777/3** (Chepkorok Farm) which land was previously described as Plot No. **46** and also Plot No. **232** (hereinafter the suit property).

3. The plaintiff states that he bought the suit property from one **Kuna Arap Cheboiboch** (now deceased) for a consideration of **Kshs.150,000/=** following a sale agreement entered into between the plaintiff and the said Kuna Arap Cheboiboch executed on 1/11/1987, 12/12/1987, 9/10/1988 and 28/1/1989 and took possession until sometime in the year 1996 or thereabouts. The plaintiff states that the suit land was acquired by the said Kuna Arap Cheboiboch through an award adopted by the Rift Valley Land Disputes Tribunal in respect to the proportion of shares he held in Chepkorok Farm Limited to which the plaintiff and one Johnstone Juma Nabiswa (now deceased) were also members. The plaintiff further states that the said Johnstone Juma Nabiswa was also allocated by the said Tribunal 11.26 acres out of the said farm being the proportion of the shares held therein, but subsequently sold a substantial portion thereof to third parties.

4. The plaintiff states that on diverse dates between 8<sup>th</sup> December, 1994 and 6<sup>th</sup> January, 1995, the said Johnstone Juma Nabiswa (deceased) and the defendants forcibly, unlawfully and without justifiable cause entered upon the plaintiff's said parcel of land and while thereon curved therefrom 3 acres and began to erect structures and took possession of the same despite protestation by the plaintiff. The plaintiff further states that the defendants gradually encroached into his land until they unlawfully occupied the whole portion measuring 11.26 acres or thereabouts and have unlawfully occupied and remained thereon. The plaintiff states that the defendants continued occupation of his land amounts to trespass.

5. The plaintiff avers that upon entering his land, the defendants wantonly and recklessly destroyed and uprooted and devoured the plaintiff's properties and developments which were on the land and as a result the plaintiff has suffered loss and damage. The plaintiff has pleaded special damages totaling Kshs.83,900/=.

6. The plaintiff's claim against the defendants jointly and severally as follows:

**(a) Special damages in the sum of Kshs.83,900/=.**

- (b) General damages for trespass
- (c) Mesne profits from the date of entry and occupation of his parcel of land until the date of delivery of vacant possession
- (d) A declaration that the plaintiff is the lawful owner of all that parcel of land known as Plot No. 225 measuring about 11.26 acres, which parcel of land is part of the land known as LR. No. 5777/3 (Chepkorok Farm), and which was also previously described as Plot No. 46 or Plot No. 232.
- (e) A declaration that the defendants' occupation of the suit property is unlawful and that the same amounts to trespass.
- (f) An order of eviction directed against the defendants to vacate the suit property and give vacant possession to the plaintiff.
- (g) A permanent injunctive order directed against the defendants, their agents or servants, restraining them from trespassing upon, destroying the plaintiff's properties, alienating or in any other manner dealing with the plaintiff's land parcel or any part thereof.
- (h) Costs of this suit plus interest.
- (i) Any further relief this honourable court deems just to grant.

7. **PW1 Obed Readon Onyango** testified that in 1987 he bought 10 acres of land from one Kuna Cheboiboch out of land called Chepkorok Farm, LR. No. 5777/3 at Sidhendu. He testified that he was not a member of Chepkorok Farm, but when he bought the 10 acres, he became a member because the 10 acres represented one share. He stated that Mr. Kuna Cheboiboch was member number 46. He testified that Mr. Kuna's share was 11.26 acres, but the agreement they entered into was for 10 acres because 1.26 acres were to go towards public utilities. That the purchase price was Kshs.150,000/= which he paid by installments and produced the agreements as P. Exhibit 1.

8. PW1 testified that he took possession of the land in 1988 and continued to utilize it until 1995 when the late Johnson Nabiswa Juma invaded it. That the late Juma moved to the land with his first wife. That he first invaded 3 acres, prompting the plaintiff to file suit and obtained a temporary injunctive order restraining the deceased from using the 3 acres, but the deceased ignored the court order. Instead, he occupied the whole land, denying the plaintiff enjoyment of the land since then. He testified that the late Juma was member No. 59 at Chepkorok Farm. PW1 stated after the farm was surveyed, his plot changed from Plot No. 46 to Plot No. 52 and later to Plot No. 232. The plaintiff testified that he was given allotment letter for 11 acres in respect of Plot No. 232 on 6/2/1998. He produced the allotment letter as P. Exhibit 2.

9. PW1 testified that the initial shareholders of the farm were 126 members but the number continued to swell until 856 members. That there was a final survey which was carried out and all 856 members got their individual titles. That the plot numbers changed once more and Plot No. 232 became Plot No. 225. He testified that after the demise of Mr. Juma, he filed a dispute at Kimilili Land Disputes Tribunal. That the dispute was heard and the verdict was adopted as judgment of the court before the court in **Kitale SRMC No. 24 of 2003**. He produced the proceedings and ruling and decree as P. Exhibit 5 and 6 respectively. He stated that he was aware that the widows of the late Juma filed a Judicial Review Application in the High Court seeking to quash the decision of the Tribunal but is not aware if that decision was later overturned. He testified that he was given clearance by Chepkorok Farm Management and has been paying land rent. He produced the receipts as P. Exhibit 7. He further stated that consent to subdivide the farm was given by the Kiminini Land Control Board. He produced the letter dated 17/10/2006 as P. Exhibit 9.

10. When cross-examined by Mr. Onyancha Counsel for the defendants, PW1 stated inter alia, that Chepkorok Farm belonged to Chepkorok Farm Company Limited but did not know if the company had a company seal. That he was not an original member of that company and was not aware if original shareholders had share certificates. He confirmed that the agreement he entered with Mr. Kuna Cheboiboch was for 10 acres and the land had not been surveyed. He stated that he stays on 10 acres at Chepkorok Farm but on a different parcel. He explained that survey was done twice, first was in respect of 126 members and the second was in respect of 856 members. He further explained how his plot number changed from 46 to 52 and finally 232. When shown the clearance certificate given to him by the company, PW1 confirmed that the same did not have a seal or stamp of the company, neither did it show the acreage. He stated that it is only that 1<sup>st</sup> defendant who stays on his land but he has sued the 2<sup>nd</sup> defendant because she is one of the administrators of the estate of the late Juma.

11. **PW2, Esther Chepkoech Murei** testified that she is the widow of Mr. Cheboiboch who was a shareholder of Chepkorok Farm and owner of Plot No. 46 and who sold it to the plaintiff. She was a witness to the sale agreement and confirmed that the plaintiff paid a total of Kshs.150,000/=. She confirmed that the plaintiff was not taken to the Land Control Board in respect of the 10 acres sold to him.

12. **PW3, Philomena Murei** who is also a widow to the late Cheboiboch confirmed that her late husband sold the plaintiff the suit land for Kshs.150,000/= and she was a witness to the sale agreement.

13. **PW4 Boinito Hussein** is the County Surveyor. He confirmed that their office carried out survey work for LR No. 5777/3 twice. The first survey resulted in 126 sub-titles and the second resulted in 856 portions. He produced the map as P. Exhibit 4. On being cross-examined by Mr. Onyancha, he agreed that a subdivision map must be accompanied by a letter of consent. There was a letter of consent to subdivide the land into 126 portions but none for the 856 portions. He stated that no titles have been issued to the members of Chepkorok Farm and agreed that there was total confusion regarding that Farm.

14. On being re-examined by Mr. Ingosi, Counsel for the plaintiff, PW4 stated that the map subdividing the land to 856 portions was pursuant to a consent given by Kiminini Land Control Board. That the Director of Survey is the one who sanctioned the subdivision of the land into 856 portions vide letter dated 31/10/2011. This marked the close of the plaintiff's case.

## Defendants' Case

15. The defendants filed defence dated 8<sup>th</sup> March, 1995 which was later amended and further amended. In the further amended defence dated 25<sup>th</sup> February, 2014, the defendants have denied the plaintiff's claim. The defendants aver that if there was an agreement between the plaintiff and the late Cheboiboch, the same is null and void for lack of Land Control Board Consent as required by law. The defendants have denied trespassing/encroaching into the plaintiff's land or destroying/damaging properties as alleged. It is the defendants' contention that they are confined and working on their lawful land.

16. **DW1, Florence Juma Nabiswa** testified that they entered the farm in 1972 and that they are occupying Plot No. 99 measuring 11 acres. She stated that she knew the plaintiff who stays at Chepkorok Farm on his own land that he bought from a member of the Farm. She denied that they have trespassed into the plaintiff's land. She testified that the decision of the Tribunal that the plaintiff had obtained was later quashed by the High Court and produced the ruling as D. Exhibit 1.

17. DW1 stated that she is aware that the main title of Chepkorok Farm changed and is now **LR. No. Saboti/Shikendu Block 5(Chepkorok)** and her late husband's plot is **Plot No. 99**. She stated that she paid the survey fees in the name of Johnson Juma Nabiswa and produced the receipt as D. Exhibit 4, and the clearance form as D. Exhibit 5, adding that their entitlement is 11 acres. She wondered why the plaintiff's plot kept on changing from No. 52, then 232 and finally 252 and that though he stated that he bought 10 acres, he is claiming 11.26 acres, yet the area list shows 3.84 hectares which is about 9.48 acres. The witness stated that her late husband has not trespassed on the plaintiff's land or destroyed his properties and stated that she cannot be evicted from their land. She further testified that the 2<sup>nd</sup> defendant who is her co-wife stays on plot No. 80 a distance from plot No. 99 but on the same farm.

18. On being cross-examined by Mr. Ingosi, DW1 stated that her late husband had one share at Chepkorok Farm. She stated that each share was equivalent to 11 acres and that her co-wife occupies 5 acres. She further stated that she did not know how her co-wife's land was obtained. She stated that she did not know the owner of plot No. 59 but denied that the same was supposed to be for her late husband.

19. **DW2, Sarah Chepkemboi Nabiswa** is the 2<sup>nd</sup> defendant. She testified that before the demise of her late husband, they were staying on different plots. That she lives in plot No. 80 together with three others and her share is 6.5 acres. She produced the receipt as D. Exhibit 6 and the clearance form as D. Exhibit 7. She testified that the plaintiff was living about 4 kilometres away from her plot and denied encroaching on his plot. She stated her late husband was never charged with damaging anybody's properties before his demise. She testified that titles have not been issued for the entire farm.

20. On being cross-examined by Mr. Ingosi, DW2 stated that the plot she lives in is the one that her late husband was entitled to, adding that she did not know how the plot the 1<sup>st</sup> defendant is staying on was acquired. She stated that her husband died in 1997 and she did not know how many acres he was entitled to. The defendants did not call any other witness and therefore closed their case. Both parties filed their written submissions.

21. In his submissions, Mr. Ingosi submitted inter alia, that the defendants did not account how their deceased husband acquired the second portion of land when he was only entitled to 11 acres. It was his submission that the defendants trespassed onto the plaintiff's land. Mr. Ingosi further submitted that the sale agreement between the plaintiff and the late Kuna Arap Cheboiboch has not been impugned and is not subject to any challenge and that the plaintiff has not sought performance of the said agreement against the defendants. That the plaintiff's claim against the defendants emanates from the trespass on the suit land and not enforcement of the agreement with the late Kuna Arap Cheboiboch. It was his submission that the defendants were trespassers on the plaintiff's land and that the plaintiff has proved his case against the defendant and therefore is entitled to the prayers sought.

22. Mr. Onyancha, learned counsel for the defendants submitted inter alia, that the claim for special damages of Kshs.83,900/= was not proved as no receipts were produced to support it, adding that the acts complained of by the plaintiff are criminal in nature, yet the deceased defendant was never charged with any criminal offence. He further submitted that the claim for mesne profit ought to fail also for lack of evidence. It was further his submissions that the plaintiff failed to discharge the burden of proof for the claim for trespass, arguing that the defendants are occupying their plots, and not the plaintiff's. Mr. Onyancha submitted that the plaintiff's evidence was contradictory and that the plaintiff has failed to prove his case on a balance of probabilities and urged the court to dismiss the suit with costs.

## Determination

23. The court has carefully considered the pleadings, the evidence adduced and the rival submissions. I find the following as the issues for determination:

*(i) Whether the plaintiff is the legal proprietor of the suit land.*

*(ii) Whether the defendants have encroached on the suit land.*

*(iii) Whether the plaintiff is entitled to the reliefs sought.*

24. It is evident that the defendants' late husband, Johnson Juma Nabiswa was a member of Chepkorok Farm LR No. 5777/3 and had one share equivalent to 11 acres or thereabouts. It is also evident that the plaintiff who was a member of the said Farm, bought the share of another member, the late Kuna Arap Cheboiboch. The plaintiff produced the sale agreements between him and the late Kuna Arap Cheboiboch. The said agreements were also witnessed by the widows of the late Kuna Arap Cheboiboch who testified as PW2 and PW3. The plaintiff testified that the plot he purchased was plot No. 46 measuring 11.26 acres at a cost of Kshs.150,000/=. He took possession in 1988 and utilized the said parcel of land after the seller and his family relocated to Cherangany until 1995. It is the plaintiff's evidence that in 1995, the late Johnson Nabiswa Juma invaded the plaintiff's land and moved into it together with the 1<sup>st</sup> defendant. The plaintiff then filed

this suit against the late Johnson Nabiswa Juma. However, upon the demise of the late Johnson Nabiswa Juma, his widows and legal representatives of his estate were substituted as defendants.

25. The plaintiff explained that following surveys, his plot number changed, as were those of other members, including Mr. Juma's. The plaintiff's plot changed from plot No. 46 to plot No. 52 then to plot No. 232 and finally to plot No. 225. The plaintiff produced the allotment letter in his name given on 6/2/1998 indicating that the plaintiff was legible to 11 acres. His evidence was that one share was 11.26 acres.

Whereas the defendants have denied the plaintiff's claim, in their evidence they both admit that the plaintiff has a plot in Chepkorok Farm. It is therefore my finding and I do hold that the plaintiff is the owner of the property known as Plot No. 225 measuring 11.26 acres or thereabouts which was previously described as Plot No. 46 or plot No. 232 and which is part of LR No. 5777/3, Chepkorok Farm.

26. Regarding the issue whether the defendants have encroached or trespassed on the plaintiff's said plot, the court notes that in her evidence, the 1<sup>st</sup> defendant (DW1) testified that her late husband's plot is not plot No. 99 measuring 11 acres. She produced the clearance form as D. Exhibit 5. I have perused the said clearance form. I note that the area of plot No. 99 is indicated as 7.07 hectares which translates to about 17.675 acres. The 1<sup>st</sup> defendant was categorical that her late husband's entitlement is 11 acres. From the evidence on record, this translates to one share in Chepkorok Farm.

27. On her part the 2<sup>nd</sup> defendant (DW2) when cross-examined by Mr. Ingosi, counsel for the plaintiff, she confirmed that their deceased husband had one share at Chepkorok Farm and that each share was equivalent to 11 acres. DW1 confirmed that her co-wife (DW2) occupies 5 acres which she did not know how she acquired.

28. In her evidence DW2 testified that she lives on plot No. 80 measuring 6.5 acres. Whereas it was her testimony that she was given a clearance form for plot No. 80 (D. Exhibit 7), DW2 when cross-examined stated that the plot she lives in is the one her late husband was entitled to. She further stated that she did not know how the plot the 1<sup>st</sup> defendant is staying on was acquired. From the evidence on record, both defendants agree that their late husband was entitled to one share in Chepkorok Farm. As already stated, one share was about 11.26 acres. However, it is apparent that from their own evidence, the defendants are occupying over 22 acres, which is about two shares. If their entitlement was one share which translates to about 11 acres or thereabout, it is apparent that they are also occupying 11 acres, or thereabouts, over and above their entitlement of about 11 acres. In my view, the only logical conclusion one can make in the circumstances is that the defendants, besides occupying their plot measuring about 11 acres, have in addition encroached on the plaintiff's plot measuring 11 acres or thereabouts. I say so because from their own evidence, the defendants were categorical that their late husband's entitlement was one share, which is 11.26 acres. The plaintiff testified that he bought the entire one share of the late Kuna Arap Cheboiboch. This means the plaintiff's entitlement is 11.26 acres. Of course the plaintiff testified that some portion of his land went to public utilities, leaving him with about 10 acres. It is therefore the finding of this court that the defendants have trespassed on the plaintiff's parcel of land.

29. The plaintiff testified that he utilized his land until 1995 when the defendants' deceased husband and the 1<sup>st</sup> defendant invaded and occupied it. It was his evidence that he has not enjoyed use of the land since then. The defendants have not denied using the said land since 1995. They are still in occupation.

30. In the case of **Entick -vs- Carrington [1765] Lord Caudem CJ** had this to say:-

**“Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave.”**

31. Trespass is the act of unauthorized and unjustifiable entry upon the land in another's possession. The wrong of trespass is actionable regardless of the extent of the incursion and without any necessary showing of injury or damage to the claimant. In this case, the defendants entered the plaintiff's land in 1995 and they are still in occupation. The defendants have not shown the court the justification for their continued occupation of the plaintiff's land. It is rather obvious that the plaintiff has been deprived the possession of his land from 1995 to date. Granted that trespass is actionable per se, the court has noted that the plaintiff has not given any sums to guide the court in assessing general damages for trespass. The court would have expected the plaintiff to inform the court the use and benefit he had for the land from 1988 to 1995 when he was in possession. That would have represented the opportunity cost of the deprivation of the use of the land by the defendants continued occupation from 1995 to date. Even without evidence of loss, the court is obliged to assess damages. Noting the duration of the trespass and the size of the land, the court awards a figure of Kshs.2,000,000/= being a nominal award of general damages in this case.

32. In respect to prayer (c) it is trite law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. See Court of Appeal decision in **Kenya Hotel Properties Ltd -vs- Willesden Investment Ltd [2009] KLR 126**.

33. In answer to prayer (a), the court notes that the plaintiff did not lead any evidence to support the claim of special damages of Kshs.83,900/=. It follows therefore that none shall be given by this court in a vacuum. Special damages are accordingly declined.

34. In the result, I do find that the plaintiff has proved his case on a balance of probabilities and I make the following orders:

**(a) A declaration that the plaintiff is the lawful owner of all that parcel of land known as Plot No. 225 measuring about 11.26 acres which parcel of land is part of the land known as LR No. 5777/3 (Chepkorok Farm) and which was also previously described as Plot No. 46 or Plot No. 232.**

**(b) A declaration that the defendants' occupation of the suit land is unlawful and that the same amounts to trespass.**

**(c) An order of eviction to issue against the defendants to vacate the suit property and give vacant possession to the plaintiff.**

(d) An order of permanent injunction to issue against the defendants, their agents, or servants restraining them from trespassing upon destroying the plaintiff's properties, alienating or in any other manner dealing with the plaintiff's said parcel of land or any part thereof.

(e) General damages for trespass in the sum of Kshs.2,000,000/=.

(f) Costs of the suit shall be paid by the defendants.

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

C. K. YANO

JUDGE

15/7/2019

Coram:

Before - C. K. Yano, Judge

Court Assistant - Collins

Kaosa holding brief for Ingosi for plaintiff

Kiarie holding brief for Onyancha for defendants

**ORDER**

Judgment delivered in open court in the presence of the advocates for the plaintiff and for the defendants.

C. K. YANO

JUDGE

15/7/2019