



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 99 OF 2018

(Formerly Kitale HCC No. 97 of 2007)

WILSON KIPKOECH LELEI -----PLAINTIFF

VERSUS

STEPHEN KIPSANG -----1ST DEFENDANT

LYDIA JEPNGETICH LELEI ----- 2ND DEFENDANT

JUDGMENT

A. Introduction

1. In this case, I am required to write a judgment based on the evidence of the plaintiff taken by Justice J. R. Karanja on 28/3/2012. the Plaintiff seeks the following orders from the court:

- a) **An order of eviction to issue against the 1st and 2nd Defendants jointly and severally.**
- b) **Without prejudice, an order of eviction to issue against the 1st defendant.**
- c) **An order of permanent injunction to issue restraining the 1st and 2nd defendants from harassing, threatening, intimidating and or in any other way obstructing the plaintiff from accessing, using, utilizing and or developing his suit land as he deems fit.**
- d) **General damages**
- e) **Costs of the suit**
- f) **Any other relief this court deems fit and just to grant.**

B. The Plaintiff's case

2. In the plaint dated 13th June, 2007 and filed on 15th June, 2007, the plaintiff avers that he is the legal and registered owner of all that parcel of land known as KAPLAMAI/SIRENDE BLOCK 2/NGONYEK/162 measuring 9.105 hectares or there abouts. The plaintiff had caused the suit land to be subdivided into four portions of 6 acres, 6 ares, 4 acres and 2 acres. The plaintiff intended to transfer the two (2) acre portion to a third party whom he had sold it. The plaintiff avers that the 1st and 2nd defendants who are his son and wife respectively harassed him and have even chased him out of the suit land with threats to harm the plaintiff. In consequence, the plaintiff avers that he has been illegally denied his rightful access to his land and or enjoyment of the same and has therefore suffered loss and damage. On the strength of those pleadings, the plaintiff claims the prayers sought in the plaint.

3. In his evidence the plaintiff stated that he owns the suit land measuring twenty three (23) acres and that he purchased the land in the 1980's and was registered as proprietor on 11th November, 1991. He produced the title Deed in his name as P. Exhibit 1. The plaintiff stated that due to illness he decided to sell two (2) acres of the said land in order to raise the medical expenses. He sold the two (2) acres to one Moses Kipchumba and his wife. He produced the sale agreement as P. Exhibit 2.

4. The plaintiff testified that the defendants resisted the sale of the two (2) acres and prevented the purchaser from taking possession. The plaintiff stated that due to threats and intimidation by the defendants, the plaintiff left the land and went to live in Eldoret. He reiterated that the land belonged to him and had purchased it using his own money. That he never got financial assistance from anybody to purchase the

land.

5. When cross-examined by Mr Kaosa , learned counsel for the defendants, the plaintiff confirmed that the 1st and 2nd defendants were his son and wife respectively. That he married the 2nd defendant in 1964. He stated that they first lived in Nandi in his father's land and thereafter he purchased the suit property. He added that the 1st defendant was born in 1968. The plaintiff stated that his father had given him and his wife four (4) acres to cultivate and earn an income.

He further stated that he had land in Cherengany measuring twenty one (21) acres which he was cultivating with the 2nd defendant before exchanging it with the suit property. He stated that the defendants live in and occupy the suit property. The plaintiff testified that he had another son by the name Julius whom he gave four (4) acres of the suit property but he sold his portion and went to live in Eldoret. He denied giving the 1st defendant four(4) acres and further denied selling two (2) acres out of the alleged four (4) acres. He stated that he sold the two (2) acres because he was unwell. The plaintiff added that he lives In Eldoret with is second wife and maintained that the suit property belonged to him and was not family land.

6. On being re-examined by Mr Chelashaw, counsel for the plaintiff, the plaintiff stated that he purchased the land at Cherengany with his own money and later exchanged it with the suit property. He stated that he hived four (4) acres Of the land and allocated it to his son by the name Julius while the 1st defendant purchased two (2) acres from him (the plaintiff), though that portion was yet to be transferred.

C. Defendant's case

7. In their statement of defence dated and filed on 19th July, 2007, the defendants state that the suit property was acquired jointly with the 2nd defendant and that the plaintiff has been selling without recognizing the 2nd defendant's rights. They deny harassing or chasing the plaintiff out of the suit property. They further deny that they are occupying the suit land illegally, arguing that they have acquired some rights over the suit property which should not be overlooked.

8. When the matter came up for defence hearing, neither the defendants nor their advocates attended court despite having been duly served with a hearing notice. The defendants' case was therefore closed without them adducing any evidence.

D. Submissions of counsel

9. In their submissions, counsel for the plaintiff submitted that the plaintiff is the registered proprietor of the suit land and that he solely acquired it. It was submitted that Section 24 of the Land Registration Act vests in the person registered as proprietor of land the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto while Section 26 reiterates that a certificate of title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner. Counsel further submitted that Article 40 (3) of the Constitution guarantees the proprietors rights of every person, and that no person shall be deprived of property or any interest in or right over property without prompt and just compensation.

It was the plaintiff's submissions that as the legal and registered owner of the suit property , he is entitled to deal with it as he wishes and has the right to determine who will live on his land. That he also has the right to subdivide, use, sale and develop it as he wishes. It was submitted that the land was not ancestral land, therefore no trust established.

10. It was further submitted that the plaintiff has been denied his rightful access to his land and enjoyment of the interest on it and has therefore suffered loss and damage. The plaintiff relied on the following authorities, *Vincent Koskei -V- Benard Kosgei [2018] eKLR*; *Benjamin Kibiwott Chesulut -V- Mary Chelangat & Another [2015] eKLR*; *Giella – V- Cassman Brown Co. Ltd [1973] EA 358 and Mrao -V- First American Bank of Kenya Ltd [2005] eKLR*.

e. Issues for Determination

11. From the pleadings and the evidence as well as Counsel's submissions, in my view, the following issues emerge for determination:

- (i) Whether the Plaintiff is the registered proprietor of the suit property.**
- (ii) Does the plaintiff have a right to subdivide, use, develop and even sell the suit land without the defendants' say?**
- (iii) have the defendants harassed, threatened intimidated and chased away the plaintiff from the suit property?**
- (iv) is the plaintiff entitled to the reliefs sought?**
- (v) Who meets the costs of the suit?**

12. i. Whether the plaintiff is the registered proprietor of the suit property.

The plaintiff has demonstrated that he is the absolute and indefeasible owner of the suit property by producing the title deed in his name. Section 26(1) of the land Registration Act provides as follows:-

“ 26 (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 certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

13. Further more, Section 24 of the Land Registration Act provides as follows;

“ subject to this Act -

a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

14. Section 25(1) of the said Act further provides that “the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenance belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances set out in this Section.

15. Since the plaintiff's evidence was not challenged at the hearing, it is my finding that the plaintiff is the absolute proprietor of the suit property. He is therefore entitled to protection under the Land Registration Act. Additionally, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.

16. Regarding the second issue whether the plaintiff has the right to deal with his property without interference from the defendants, it is my view that as the owner of the suit property, the plaintiff is entitled to deal with it as he wishes and he has a right to determine whom to give the right of ingress and egress. If he wants to sell, as he said has already done to get money to treat himself he has the absolute right to do so. Moreover, the plaintiff has clearly stated that he only sold a portion of the suit property, measuring 2 acres to raise monies to meet his medical expenses. The defendants have no right whatsoever from preventing him from doing so for his own benefit. After all it is his property, and he has every right to decide what he wants to do with it.

17. The third issue is whether the defendants have harassed, threatened and intimidated the plaintiff and whether they have chased him away from the suit property. The plaintiff stated that the defendants actions made him relocate to Eldoret. Since the plaintiff's evidence was not controverted, it is my finding that the defendants have committed the said acts thus denying the plaintiff the use and enjoyment of his property.

18. I now need to determine whether the plaintiff is entitled to the orders sought. In the suit, the plaintiff has sought orders of eviction, permanent injunction and general damages. There is no doubt that the defendants are the son and wife of the plaintiff. I believe that as members of his nuclear family, they are entitled to occupy the suit property.

In my view, they cannot be evicted from the property they regard as their home. However, the defendants have no right to remain in the portion of the suit land measuring two (2) acres which the plaintiff has already sold to a third party. Further I am unable to conclude that the defendants are trespassers in the suit land to warrant award of general damages, except for the two (2) acres which was sold to a third party. In my view the plaintiff has proved that the defendants are trespassers in a portion of the suit land measuring two (2) acres which the plaintiff had already sold and not the remainder of the land.

In the instant case and considering the unique circumstances of this case, I consider that an award of Kshs 200,000/- to be adequate compensation for the defendants' infringement on the said two (2) acres.

19. The upshot is that the plaintiff has proved his case on a balance of probabilities. I therefore enter judgment for the plaintiff and make the following final orders:

a) I direct the defendants jointly and severally to move out of the two (2) acres of land parcel NO. KAPLAMAI/SIRENDE BLOCK 2/NGONYEK/162 which was sold by the plaintiff to one Moses Kipchumba and Mrs Jepchumba Misoi, and if they do not then the plaintiff is at liberty to apply for their eviction.

b) A permanent injunction do and is hereby issued restraining the defendants by themselves, their agents or anyone acting on their behalf from trespassing upon the two (2) acres referred to in prayer (a) above.

c) A permanent injunction do and is hereby issued restraining the defendants from harassing, threatening, intimidating and or in any other way obstruction the plaintiff from accessing, using, utilizing and or developing land parcel Number KAPLAMAI/SIRENDE BLOCK 2/NGONYEK/162 as he deems fit.

d) Kshs 200,000/- general damages for trespass.

e) The costs of the suit to be borne by the defendants jointly and severally.

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

C.K. YANO

JUDGE

15/7/19

In the presence of:-

Kaosa for Defendants

None appearance for the plaintiff

Court Assistant - Collins

Judgment delivered in open court in the presence of the Advocate for the Defendants and in the absence of the Plaintiff.