



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 17 OF 2017

LAWRENCE P.B. ODUNGA.....PLAINTIFF

VERSUS

THOMAS KANDETE.....1ST DEFENDANT

DONALD MASAKARI.....2ND DEFENDANT

ELIZABETH AKINYI.....3RD DEFENDANT

PETER NASASA.....4TH DEFENDANT

JUDGMENT

1. The plaintiff vide an amended plaint dated 2nd November 2017 and filed in court on 8th November 2017 instituted the present suit against the defendants seeking for judgment against them jointly and severally for:-

- (a) A declaration that the 2 acres comprised in land parcel no. 5777/3 CHEPKOROK belong to the plaintiff to the exclusion of the defendants and any other third parties.
- (b) An order for the eviction of the defendant from the 2 acres comprised in land parcel no. 5777/3 CHEPKOROK FARM which belong to the plaintiff.
- (c) An order of a permanent injunction restraining the defendants, their agents and/or servants and /or anybody claiming through them from ever trespassing upon the plaintiff's said 2 acres comprised in land parcel no. 5777/3 CHEPKOROK FARM.
- (d) Any other relief or reliefs that this court deems fit and just to grant.
- (e) Costs of this suit with interest at courts rate.

2. By the amended plaint, the plaintiff states that he is the legal owner of **two (2) acres** comprised in land parcel No. 5777/3 **Chepkorok Farm** in Trans Nzoia County; that the defendants have forcefully trespassed onto and taken possession of part of the plaintiff's said **two(2) acres** comprised in land parcel no. 5777/3 **Chepkorok Farm** which they are forcefully occupying leaving the plaintiff with only **0.3 acres** or thereabouts; that the Plaintiff's claim against the defendant is for a declaration that the **two (2) acres** comprised in plot No. 5777/3 **Chepkorok Farm** belong to the plaintiff to the exclusion of the Defendants or any other 3rd parties.

3. The defendants entered appearance, and filed statements of defence. All the defendants filed their defences on 17th March 2017 where they denied the contents of the plaint and averred that the plaintiff's claim that he is the legal owner of the alleged plot No. 5777/3 Chepkorok Farm is based on an agreement of 21st December 1986 between the Plaintiff and one Selina Nakhumicha which has been caught up by limitation of action hence unenforceable.

4. In his evidence, the plaintiff testified inter alia that he purchased two acres in Chepkorok Farm which he took possession, from Selina Nakhumicha vide an agreement which he produced as **P.Exh.1**; that the said Selina, now deceased, was a member of Chepkorok Farm and her membership number was 16. That Selina had bought 6 acres as a member sometimes in April 1972; that in the year 2012, the three

defendants were brought onto the land by the 4th defendant who had been elected to as the plot committee member to cater for members welfare; and that the plaintiff only realized his land had been invaded when he came back from Bungoma where he works as a teacher and found that people had settled on his land. It was the plaintiff's contention that he instructed his advocate to write a demand letter which he produced as **P.Exh. 3**.

5. According to the plaintiff, the 1st, 2nd and the 3rd defendants have occupied 1.7 acres of his land leaving him with 0.3 acres and that when they invaded on his land, he had not fenced it but had planted sisal plants all round; that they have planted maize and built temporary structures and are living on the land.

6. On cross-examination the plaintiff mentioned that the suit land had not been demarcated and he does not have a plot number.

7. **PW-2** was one **Josephine Kageha**. She stated that she is the wife of the plaintiff and that she and the plaintiff bought 2 acres on 21/12/1986. She testified that they paid Kshs. 26,000/= to Selina Nakhumicha in the presence of the elders and the agreement was made in house of Selina. She stated that she appended her signature on the agreement and confirmed that her ID. Number is 69700045. She mentioned that the elders present were Meshack, Stanley and Tenge and that Meshack and Tenge are still alive. It was her testimony that out of the 6 acres Selina owned, she sold 2 acres to them, 2 acres to a Mr. Wafula, 1 acre to a Mr. Maritim and Mr. Barasa ¼ an acre and other persons she could not recall.

8. **PW-3** was **Patrick Kiseswa**, the son to Selina Nakhumicha. He stated that he was present when his mother sold land to the plaintiff and that the consideration of Kshs. 26,000/= was paid in cash. It was his evidence that he was a witness to the agreement between his mother and the plaintiff and that he signed his part on the said agreement.

9. **PW-4** was **Patrick Lubonga**, who stated that he was related to the plaintiff and that he got into Chepkorok Farm in 1981. That he together with others paid the loan from AFC and took 6 acres though he was given 4 acres. He stated that the plaintiff entered into the suit land in 1986 after buying the land from Selina Nakhumicha and that he was the one who introduced the plaintiff to the seller. He also testified that the plaintiff planted sisal on the boundaries. It was testimony that surveyors came to the land under one Johnstone Juma but the survey process was stopped after members complained. That some people invaded the plaintiff's land and the matter was reported to the chief.

10. With the above evidence, the plaintiff closed his case.

11. The defendants on their part testified in furtherance of their case. **DW1** - was one **Thomas Kandete**. On his part, he stated that he did not know the plaintiff and did not know anything about the case in court. He stated that he does not know that the plaintiff owns 2 acres of land and that no title have been issued by Chepkorok Farm.

12. **DW-2** was **Peter Nasasa Opilo**, the 4th defendant. He testified that he lives in Chepkorok Farm. He knows the plaintiff and that no titles had been issued in the farm as surveys have been done but not approved.

13. **DW-3** was **Donald Masakari** the 2nd Defendant who stated that he did not know the plaintiff and that he had not been showed any evidence in court that the plaintiff owns land in Chepkorok Farm. He averred that he owns 0.4 acres of land in Chepkorok Farm and he has lived there from 27/4/2008. He stated that he has never received any letter to the effect that he was trespassing on anyone's land. On cross examination, he stated that surveys on the land had been done twice and that he had documents showing how he got the land though the same had not been tendered before court.

14. With the above evidence, the defendants closed their case as the third defendant could not be traced.

15. The Plaintiff filed his submissions dated **20th September 2019** on the same date. I have perused the court file and found no submissions filed on behalf of the defendants.

16. I have considered the plaintiff's case as pleaded and the evidence tendered in support thereof. The plaintiff's claim against the defendant is based on the tort of trespass. Trespass has been defined as any unjustifiable intrusion by one person upon the land in the possession of another. **See Clerk & Lindsell on Torts, 18th Edition** at page 923. The onus is on the plaintiff to prove that he is the owner of the suit property and that the defendant has invaded and occupied the same without any justifiable cause.

17. I am satisfied on the material presented before me that the plaintiff bought the suit land from one Selina Nakhumicha sometimes in 1986. The plaintiff tendered in evidence a copy of the agreement and this evidence was supported by **PW3** the son of the said Selina Nakhumicha.

18. The defendants on the other hand, neither denied that the suit land in question belonged to the plaintiff nor claimed ownership over the same. All the defendants stated was that no titles had been issued in Chepkorok Farm.

19. The plaintiff's claim over the suit property is therefore not challenged. In the absence of such challenge, I am enjoined by law to take the plaintiff on the basis of the evidence presented before me. As the absolute proprietor of the suit property, the plaintiff is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party. The plaintiff has asserted that the defendants entered the suit property forcefully and started utilizing his property and further went ahead to build other semi- permanent structures in the suit property.

20. The plaintiff's evidence has not been challenged and on the basis of the unchallenged evidence, I am satisfied that the plaintiff has proved that the defendant entered the suit property unlawfully. The defendants having unlawfully entered the suit property without the permission of the plaintiff is a trespasser on the suit property and the plaintiff is entitled to judgment against him for eviction and for a permanent

injunction to restrain any further acts of trespass.

21. From the foregoing I enter judgment for the plaintiff against the defendants in the following terms: -

(1) The plaintiff is entitled to the 2 acres comprised in land parcel No. 5777/3 CHEPKOROK to the exclusion of the defendants.

(2) An order of eviction of the defendants from the 2 acres comprised in land parcel no. 5777/3 CHEPKOROK FARM which belong to the plaintiff.

(3) A permanent injunction be and is hereby issued restraining the defendants, their agents and/or servants and /or anybody claiming through them from trespassing upon the plaintiff's said 2 acres comprised in land parcel no. 5777/3 CHEPKOROK FARM.

(4) The plaintiff shall have the costs of the suit.

Dated, signed and delivered at Kitale on this 19th day of November, 2019.

MWANGI NJOROGE

JUDGE

19/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi holding brief for Okile for plaintiff

N/A for the defendants

COURT

Judgment delivered in open court.

MWANGI NJOROGE

JUDGE

19/11/2019.