



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

E&L CASE NO. 186 OF 2016

CHARLES CHEBORE CHELIMO.....1ST PLAINTIFF

LYDIA JEROTICH CHEPSAIGUT.....2ND PLAINTIFF

VERSUS

JACKSON CHERONO.....DEFENDANT

JUDGMENT

By a plaint dated 6th July 2016 the plaintiffs herein sued the defendant seeking for an order for a permanent injunction restraining the defendant by himself, his servants and/or agents from interfering, trespassing, intermeddling and or in any other manner dealing with the plaintiff's use, possession and or ownership of the parcel of land known as LAND PARCEL NO. BARINGO/KIBOINO 'A'7 MEASURING 0.58ha or thereabout plus costs of the suit.

PLAINTIFF'S CASE

The plaintiff gave evidence and stated that he has a power of attorney from the 2nd plaintiff who is his wife to testify on her behalf. It was his evidence that he is the registered owner of the suit land and that the defendant has encroached on the same. He produced a copy of the title, an official search, payment receipts, pin certificate, consent application forms, consent, and survey map as exhibits.

It was further the plaintiff's evidence that the land initially belonged to the family but it was later registered in the name of the company and a notice of cessation of business was filed and minutes of the resolution to sub divide the land was produced by the plaintiff. The plaintiff therefore prayed for judgment to be entered as prayed in the plaint.

PW2 gave evidence and reiterated the evidence of the plaintiff. The plaintiff closed his case after the testimony of PW2 and the defence case was also closed as the defendant was not present though served with a hearing notice.

Parties filed submissions in respect of their cases.

Counsel for the plaintiff submitted that the plaintiffs have proved that they are the bona fide owners of the suit land by production of a title registered in their names and the documents in respect of how the title was acquired. That the plaintiff's have further demonstrated that the defendant is a trespasser on the suit land

Counsel relied on the provisions of section 24, 25 and 26 of the Land Registration Act on indefeasibility of title and that there has been no question about the indefeasibility of title.

Further that in the absence of any challenge to the validity of the title of the plaintiffs, counsel urged the court to grant the orders as prayed in the plaint. Counsel relied on the case of **Alexander Sakari Majani v Joyce Ayuma Agalomba, Eldoret case No. 848 of 2012.**

DEFENDANT'S CASE

The defendant filed a written statement of defence and counterclaim. But did not come to court to defend the claim against him and prosecute the counterclaim Having not done so it goes without say that the claim is uncontroverted.

Analysis and determination

The defendant was served with a hearing notice but did not attend during the hearing to defend the claim against him. He also did not prosecute the counterclaim. It seems he was not interested in the case. The defence and counterclaim were therefore dismissed.

It follows that the plaintiff's claim is uncontroverted. The issues for determination are as to whether the plaintiffs are the bonafide owners of the suit property, whether the defendant is a trespasser and whether the plaintiff is entitled to the prayers sought in the suit.

On the first issue as to whether the plaintiffs are the bona fide owners of the suit land, the plaintiffs produce a title deed in their names and documents to show the process of acquisition and registration of the suit land. The process and the title has not been challenged to have been unprocedural or fraudulent. I find that in the absence of such, the plaintiffs are the bona fide owners of the suit land.

Section 26 of the Land Registration Act provides;

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

In the case of **Munyu Maina.Vs.. Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Appeal Court held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

The plaintiff produced the title to the suit land as PExh-2. It shows that the plaintiffs were jointly registered as the proprietors of the suit land. PExh-3 is a certificate of official search that indicated that the plaintiffs are the registered owners of the suit land. the plaintiff produced as PExh-4 the mutation form which shows how the suit land came into being after being subdivided from the main block that was BARINGO/KIBOINO/A1. The application for Consent from the land Control Board was produced as PExh-6(a) and is proof that the plaintiff's made an application for the same to be transferred from Kabarnet Quarry Ltd.

On the second issue as to whether the defendant is a trespasser, from the evidence on record it is clear that the defendant is a trespasser as he is not the owner of the suit land.

The plaintiffs pleaded that the defendant had threatened to displace them from the suit land. There have also been disputes over the possession and occupation of the suit land. According to the **10th Edition of Black's Law Dictionary** trespass is defined as follows;

“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason”.

I find that the defendant has no right on the suit land and is therefore a trespasser and that the plaintiff is entitled to the orders sought. A permanent injunction is hereby issued restraining the defendant by himself, his servants and/or agents from interfering, trespassing, intermeddling and or in any other manner dealing with the plaintiff's use, possession and or ownership of the parcel of land known as LAND PARCEL NO. BARINGO/KIBOINO 'A'7 MEASURING 0.58ha or thereabout plus costs of the suit. The defendant's counterclaim is hereby dismissed with costs to the plaintiff.

DATED and DELIVERED at ELDORET this 4TH DAY OF DECEMBER, 2019.

M. A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr.Kagunza for the Plaintiff's and in the absence of Mr.Wambeyi for the Defendant.

Ms.

Christine

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Court

Assistant