



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 133 OF 2014

SAMUEL MUTINDA MUCHINA.....PLAINTIFF

VERSUS

SAMUEL KIPTOO RUTO & 9 OTHERS.....DEFENDANTS

JUDGMENT

By a plaint dated 28th April 2014 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) A declaration that the defendants are trespassers on the land parcel known as UASIN GISHU/NDALAT/30 as they have no legally recognized interest therein coupled with eviction orders of the defendants themselves, their servants and/or agents from the land parcel known as UASIN GISHU/NDALAT/30, mesne profits and damages for trespass on the land.
- b) Costs of the suit.

PLAINTIFF'S CASE

The plaintiff gave evidence and stated that he is the registered proprietor of the suit land which measures 5.9 Hectares according to the title deed. That on 17th December 2001 the defendants purchased various portions from him, signed an agreement but did not complete the payments of the purchase price and in the process the transaction became voided within 6 months of the agreement as it was a controlled transaction.

It was the plaintiff's evidence that the defendants are trespassers on the suit land. **Analysis and Determination**

When this matter came up for hearing, Counsel for the defendant cross examined the plaintiff but indicated that the defendants have not been attending court therefore the defence case was closed and no evidence was tendered. They did not lead any evidence to establish the alleged trust for sale which was pleaded and dismissed with the counter claim. Counsel however filed submissions but I wonder on what basis he was filing the submissions and yet the defendants did not tender any evidence and as such the pleadings remained as mere unsubstantiated facts. Furthermore the counterclaim had also been dismissed. I will therefore not put any weight to the submissions by Counsel for the defendants.

The issues for determination is whether the plaintiff is entitled to the orders sought. The plaintiff's evidence is uncontroverted but that does not mean that he need not prove his case. It also does not mean that it is a walk in the park. The rules of the game of onus of proof still remain the same.

The plaintiff sought a declaratory order against the defendants to the effect that they were trespassers and he was entitled to damages and mesne profits. The defendants were given an opportunity to come to court to defend the claim and prosecute their counterclaim but did not show up. Their defence and counterclaim having been dismissed, the court cannot therefore adjudicate upon it.

The defendants also did not pay the full purchase price therefore even if they prosecuted the counterclaim they would not have benefited from the equitable remedy of specific performance. Having said that I find that the plaintiff has proved his case partially save for the prayer for mesne profits which is a special damage which must be specifically pleaded and specifically proved. The prayer for mesne profits therefore fails as it has not been proved.

I however find that the defendants are trespassers and therefore the plaintiff is entitled to general damages for trespass assessed at Kshs 200,000/ plus costs of the suit.

DATED and DELIVERED at ELDORET this 5TH DAY OF DECEMBER, 2019.

M. A. ODENY

JUDGE

JUDGEMENT read in open court in the presence of Miss.Kiptoo holding brief for Miss.Cheso for Defendants and Mr.Kagunza holding brief for Mr.Mogambi.

Ms. Christine – Court Assistant