



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 312 OF 2013

HARUN WATSULU SHITANDI ::::::::::::::::::::: PLAINTIFF

VERSUS

DAVID OYALO ANDATI)

ANTONY LITOKHO)

RAPHAEL WAMALWA) ::::::::::::::::::::: DEFENDANTS

CAROLYNE NAMWAYA ANDATI)

JUDGEMENT

The plaintiff’s case is that, the subject matter herein is agricultural land parcel No. BUTSOTSO/ESUMEYIA/1596 situated within Mushikhoni area, Butsotso location, Esumeyia sub location measuring 6.7 ha in area or thereabout. At all material times to this suit, the plaintiff is the registered owner of the whole of that parcel of land known as BUTSOTSO/ESUMEYIA/1596 measuring 6.72 Ha. The plaintiff avers that since the year 2005 to-date the defendants have without any colour of right trespassed onto his land Parcel No. BUTSOTSO/ESUMEYIA/1596 and have unlawfully put up structures, commenced cultivation thereon by planting sugarcane and food crops without the plaintiff’s consent and the plaintiff has and continues to suffer great economic loss for which he holds the defendants jointly and severally liable. The defendant’s unlawful actions have denied the plaintiff his legal right of possession and peaceful use of his parcel of land thereby occasioning the plaintiff great loss and damage. Further the plaintiff avers that attempts to have the defendants peacefully vacate Land parcel No. BUTSOTSO/ESUMEYIA/1596 have been met with great hostility from the defendants necessitating this suit. The plaintiff prays for judgment against the defendant for; An eviction order from Land Parcel No. BUTSOTSO/ESUMEYIA/1596. An order of permanent injunction restraining the defendants, their agents, servants, employees or anybody claiming through them from trespassing, laying claim, tilling, cultivating or in any way interfering with the plaintiff’s Land parcel No. BUTSOTSO/ESUMEYIA/1596. Mesne profits at the rate of Ksh. 800,000/= per year with effect from 2005 till the giving of vacant possession and costs of this suit.

PW1 the plaintiff testified that, he purchased land from GABRIEL ANDATI NANZUSHI in 1976. It was initially designed as land Parcel No. Butsotso/Esumeyia/1418. Gabriel Andati Nanzushi did carry out the sub divisions, signed transfer forms and before he appeared to the board, he died. He took up possession of the purchased parcel of land in 1976 and started cultivating sugarcane contracted to M/s. Mumias Sugar Company till 2005 when the defendants went to the Assistant Chief to ask him to leave the land. He refused to leave and they threatened to kill him if he set foot on the land. The defendants started cultivating the parcel of land that he purchased from the deceased by force The 1st defendant herein carried out succession cause and after the conclusion of the same he was given the land which he

purchased and got registered as the absolute registered owner of all that parcel of land known as Butso/Esimeyia/1596. The 1st defendant who is the father to the 2nd defendant has since planted private sugarcane on the said land. His son too stays on the same land. The 3rd defendant is a buyer. He purchased a different portion from the 1st defendant but was instead shown his parcel of land on which he has planted and put up a house.

The occupation by the defendants of the suit land is by force and thereby amounts to trespass. The defendants have since 1985 to-date denied the plaintiff the use of his land. The 1st defendant did agree that he has allowed his two sons, including the 2nd defendant to settle on the suit land. He has further been planting sugarcane on the suit land. He has defended his position by stating that he is following the boundary that was pointed out by the elders. He did not produce any documentation in court to show where this boundary is located. Besides elders have no jurisdiction over registered land and if they put any boundary then that is null and void. The 1st defendant while carrying out succession proceedings and giving the suit land to the plaintiff on transmission, was well aware of the boundaries marking the suit land. When the surveyors visited the land and made a report dated 17th July, 2014, the 1st defendant was present. The surveyor found that there exists a boundary marked as (C-D) on the sketch accompanying the report. Can the defendants then be trusted when they say that the boundary to the suit land is not marked? They are obviously feeding the court with lies. The conclusion that can be drawn is that the defendants are knowingly unlawfully trespassing onto the suit land. They are definitely being cheeky and stubborn yet the plaintiff has and continues to suffer great loss and damage. The plaintiff has shown to the court through the production of sugarcane deliveries that he was since 1985 a contracted farmer with M/s. Mumias Sugar Company Limited until his workers were ordered out of the suit land in 2005 (sletter dated 10/4/2005) produced as exhibit in this case.

The plaintiff submitted that, 1st defendant has been farming the suit land. He ought to compensate the plaintiff in mesne profits. The plaintiff would have made gain of Ksh. 800,000/= per year as pleaded in the plaint. This land is 16.8 acres. This given a production profit of Ksh. 47, 619 per acre per year which in fact is on the lower value. The 1st defendant has denied the plaintiff use of his land from 10th April 2005 to-date a period of 12 years and 8 months. This translates to Ksh. 10,133,333/= and they urge the court to award the plaintiff this sum as against the 1st defendant. One Carolyn Namwaya Andati sought and was enjoined in this case as an interested party but never sought any relief. She has not proved her claim at all. She however should bear the burden of costs. The 3rd defendant chose not to defend this claim and the orders sought against him ought to be allowed.

DW1 the 1st Defendant gave evidence and admits that the plaintiff is the registered proprietor of the suit land but dispute hectares averred therein and the plaintiff. The 1st and 2nd defendants deny that sine the year 2005 to date, they have without any color of right trespassed onto L.R. NO. Butso/Esimeyia/1596 owned by the plaintiff and have unlawfully put up structures, commenced cultivation thereon by planting sugarcane and food crops without his consent as alleged or at all, deny that he continues to suffer or any or economic loss for which he holds them jointly and severally liable as alleged or at all that they occupy and work, constructed and cultivated L.R. NO. Butso/Esimeyia/4309. He denied that any or any alleged unlawful actions have denied the plaintiff any or any legal right of possession and peaceful use of his parcel of land thereby occasioning him great loss and damage as alleged or at all, aver that they have not done or engaged in any or any unlawful actions in respect of the plaintiff's parcel of land. The 1st and 2nd defendants deny they have been any attempts to make them peacefully vacate L.R. No. Butso/Esimeyia/1596 as alleged or at all, further they deny being hostile to such efforts as alleged or at all and aver that they have nothing to do with L.R. No. Butso/Esimeyia/1596 and are staying within the boundaries shown by the elders. The 1st and 2nd defendants aver that they stay on L.R. NO. Butso/Esimeyia/4309 where they have constructed houses, cultivate the same and not the plaintiff's L.R. No. Butso/Esimeyia/1596.

The 3rd defendant offered no defence to be considered. One Carolyn Namwaya Andati sought and was enjoined in this case as an interested party but never sought any relief. She has not proved any claim at

all.

This court has carefully considered both the plaintiff's and the 1st and 2nd defendants' cases and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, 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.”

Section 26 (1) of the Land Registration Act states as follows:

“The 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 and indefeasible owner... 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.”*

This court in considering this matter referred to the case of **Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR** where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. **Hon Justice Munyao Sila** in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.

The plaintiff brought this suit against the defendants claiming for the following relief:-

- (a) An eviction order from Land parcel No. BUTSOTSO/ESUMEYIA/1596.
- (b) An order of permanent injunction restraining the defendants, their agents, servants, employees or anybody claiming through them from trespassing, laying claim, tilling, cultivating or in any way interfering with the plaintiff's Land parcel No. BUTSOTSO/ESUMEYIA/1596.
- (c) Mesne profits at the rate of Ksh. 800,000/= per year with effect from 2005 till the giving of vacant possession.
- (d) Costs of this suit.
- (e) Any other relief this honourable court deems fit to grant.

It is not disputed and it has been proved in evidence that the plaintiff is the absolute registered owner of the whole of that parcel of land known as BUTSOTSO/ESUMEYIA/1596 as is properly demonstrated by a copy of the register produced herein as plaintiff's exhibit – 1 hereinafter referred to as the suit land. The plaintiff purchased the suit land from the 1st defendant's father once GABRIEL ANDATI NANZUSHI – (deceased) from the original title number BUTOSOTSO/ESUMEYIA/1418 in the year 1976. The 1st defendant followed due procedure in carrying out succession proceedings in Kakamega High Court Succession Cause No. 134 of 2009 which led to the plaintiff being registered as proprietor in the year 2012. These facts are not disputed by any of the defendants. This being the position, I find that the plaintiff is entitled to enjoy his interest and rights as the registered proprietor of the suit land as set out

under Section 24 and 26 of the Land Registration Act 2012. The suit land is clearly marked on the ground as can be seen from the mutation forms, the area map and the surveyor's report dated 17th July, 2014 all these documents having been produced among the exhibits in this case (PEx 3 and 13).

The principals governing the grant of interlocutory injunction are clear beyond peradventure. As stated in the case of **Giella vs. Cassman Brown (1973) EA 358**.

"The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Furthermore, as elaborated in the case of **Mrao Ltd vs. first American Ban of Kenya Ltd & 2 others {2003}** Hon Bosire J.A. held that:

"So what is a prima facie case? I would say that it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

Further he goes on to state that *"..... a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."*

In the instant case the 1st and 2nd defendants aver that they stay on L.R. NO. Butso/Esusemyia/4309 where they have constructed houses, cultivate the same and not the plaintiff's L.R. No. Butso/Esusemyia/1596. The plaintiff's title to the land has not been challenged. I find that the plaintiff has shown he will suffer irreparable injury, which would not adequately compensated by an award of damages if a permanent injunction is not granted.

On the issue of mesne profits the plaintiff has shown to the court through the production of sugarcane deliveries that he was since 1985 a contracted farmer with M/s. Mumias Sugar Company Limited until his workers were ordered out of the suit land in 2005 (seen in letter marked PEx12). It is his evidence that the 1st defendant has been farming the suit land. He therefore ought to compensate the plaintiff in mesne profits. The plaintiff would have made gain of Ksh. 800,000/= per year as pleaded in the plaint. The land is 16.8 acres. This given a production profit of Ksh. 47, 619 per acre per year which in fact is on the lower value. The 1st defendant has denied the plaintiff use of his land from 10/4/2005 to-date a period of 12 years and 8 months. This translates to Ksh. 10,133,333/= and they urge the court to award the plaintiff this sum as against the 1st defendant. The defendant has denied this. PEx14 the receipts produced to prove the said loss of income are not legible and the court cannot determine the contents. The quantum cited cannot be justified. I find that the plaintiff has failed to prove the same on a balance of probabilities on the issue of mesne profits and the same will not be awarded. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendants are to vacate the said Land Parcel No. BUTSOTSO/ESUMEYIA/1596 within the next 3 (three) months from today's date and in default an eviction order to issue forthwith.
2. An order of permanent injunction restraining the defendants, their agents, servants, employees or anybody claiming through them from trespassing, laying claim, tilling, cultivating or in any way interfering with the plaintiff's Land parcel No. BUTSOTSO/ESUMEYIA/1596.
3. Costs of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF
JANUARY 2018.**

N.A. MATHEKA

JUDGE