



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E&L NO. 113 OF 2016**

**PRISILA JESONDIN CHUMO.....PLAINTIFF**

**VERSUS**

**NELLY JEBOR.....DEFENDANT**

**JUDGMENT**

By a plaint dated 10<sup>th</sup> May 2016, the plaintiff herein sued the defendant for the following orders:

- a. A declaration that the plaintiff is the absolute registered owner of all that parcel of land known as TURBO EAST/SOSIAN BLOCK I(SUGOI)12 and therefore the defendant is a trespasser thereof hence in total breach of the plaintiff's appurtenant and exclusive ownership rights.
- b. Mesne profit from the time when she commenced demanding for vacant possession of the suit parcel of land and loss of user from the time vacant possession ought to have been given to the plaintiff.
- c. An order of eviction of the defendant, her agents and or servants from the suit parcel of land and subsequently an order of a permanent injunction restraining her from further intermeddling, interfering, trespassing and or in any way adversely dealing with the suit parcel of land.
- d. Costs and interest of this suit.

The plaintiff simultaneously filed an application for a temporary injunction against the defendant whereby the court gave an order for status quo to be maintained pending the hearing of the suit. This matter came up for hearing on 24<sup>th</sup> January 2018 whereby the plaintiff testified.

The plaintiff stated that she bought the suit parcel of land together with her late husband Agui Chumo. That she filed a Succession Cause and was given a confirmation of grant which she produced as an exhibit.

The plaintiff further stated that the land was transferred to her name and given a title deed dated 23/2/16 which she produced as exhibit no. 2. She stated in her statement which was adopted as part of her evidence that her late son who died on 6/11/09 was married to Hellen Chepkosgei and that the marriage was solemnized in 2003 where dowry was negotiated and paid.

She further stated that her deceased son together with the wife Hellen Chepkosgei were blessed with three issues namely Caroline Jepkoech, Linet Jelimo and Collins Kiprop who are beneficiaries/successors. It was her evidence that the defendant was not part of the succession cause and that she tried to file an objection which was unsuccessful. She stated that the defendant never filed an appeal.

The plaintiff therefore prayed that the court finds that the suit land belongs to her and the defendant be ordered to vacate the suit land. She also prayed for costs of the suit.

On cross examination the plaintiff stated that the defendant resides on the suit land. She further stated that the defendant did not stay with her son and that when the son died is when she was asked to come for the burial. The plaintiff stated that she did not evict the defendant because there was an order for status quo to be maintained. The plaintiff therefore closed her case.

**Defendant's Case**

He defendant gave evidence and stated that the plaintiff is her mother in law being the mother of her late husband who died in 2009. She stated that in 2010 there was a marriage ceremony at her home and that she stays on the suit land where she had been shown by her father in law.

It was her evidence that the plaintiff told her to move out of the suit land but she still stays on it. She urged the court to dismiss the plaintiff's case with costs.

On cross examination the defendant stated that the suit land is registered in the name of the Plaintiff and that the house she is staying in was built by her late husband. She therefore closed her case.

### **Plaintiff's Counsel's Submissions**

Plaintiff's Counsel filed written submissions on behalf of the plaintiff and gave brief facts of the plaintiff's case. Counsel submitted that the basis of the plaintiff's ownership of the land is as per the pleadings, evidence and exhibits produced to prove her case. He stated that the defendant alleges that she has a share of her deceased husband and that the land was registered in the plaintiff's name in trust for the defendant. Counsel submitted that this allegation was never proved by way of evidence.

Counsel submitted that the issues for determination by the court are:

- a. Whether the plaintiff actually acquired and holds an indefeasible title over the suit land reference no. TURBO EAST/SOSIANI BLOCK 1 (SUGOI)12.
- b. Whether there existed any trust between the plaintiff and the defendant over the suit parcel of land?

On the 1<sup>st</sup> issue whether the plaintiff acquired and holds an indefeasible title over the suit land parcel no. TURBO EAST/SOSIANI BLOCK 1 (SUGOI)12, Counsel cited the provisions of section 26 (1) (a) and (b), of the Land Registration Act of 2012 on indefeasibility of title which provides that; 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.

It was Counsel's submissions that, the Land Registration Act 2012 under the above cited provisions provide for two instances when an indefeasible owner of the land can be challenged. In a nutshell, where the alleging party i.e. defendant in the instant case can prove that the plaintiff acquired title through fraud or misrepresentation or a corrupt scheme.

Counsel submitted that the defendant has not proved that the plaintiff acquired the title by way of fraud or misrepresentation as contemplated by the Act. Counsel cited the case of ESTHER NDEGI NJIRU & ANOTHER =VS= LEONARD GATEI [2014] eKLR where the court held that :

**-----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 a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.**

On the second issue on whether there existed a trust between the plaintiff and the defendant over the suit land, Counsel stated that the defendant alluded to the fact that, the plaintiff was the trustee of the defendant's late husband in the registration of the suit parcel of land but did not give any tangible evidence to support her claim.

Counsel submitted that the trust would not exist since the alleged co-trustee to the defendant is coming too late to try and invoke the doctrine of trust when her hands are tainted after losing the battle before the probate and administration cause court. He stated that the doctrine of trust is an equitable remedy that demands that he who invokes it must demonstrate beyond doubt that he has done equity himself. He further stated that he who comes to equity must come with clean hands and that equity aids the vigilant and not the indolent. Counsel therefore urged the court to find that the plaintiff has proved her case against the defendant and enter judgement as prayed in the pleadings.

### **Defendant's Counsel's Submissions**

Counsel filed written submissions and gave brief facts of the case and stated that the defendant is the widow of the late Nicholas Cheboiywo Sawe the son of the plaintiff herein. Counsel stated that the plaintiff had acknowledged in her testimony that the defendant was married to her son and that she has been utilizing a portion of the suit land.

Counsel filed separate issues for determination by the court:

1. Whether the suit parcel of land is customarily held by the plaintiff.
2. Whether the defendant is customarily entitled to a portion of the suit parcel of land.
3. If 2 above is in the affirmative, what is the defendant's entitlement.

Counsel submitted that it was not in dispute that the plaintiff obtained registration by way of transmission after filling a Succession Cause for the estate of her deceased husband. It was Counsel's submission that the plaintiff acknowledged that the late husband showed the son where to stay and he built a house on that portion.

Counsel further cited the provisions of Section 28(b) of the Land Registration Act, 2012, where trusts including customary trusts are recognized. It is his submission that a trust arises from the possession and occupation of the land by an heir to the property which has legal protection as contemplated by Section 28(1) and that such trusts may arise out of customary rights such as rights to inherit coupled with occupation.

Mr. Ngetich further submitted that it is also not in dispute that at the time the plaintiff obtained registration to the said parcel of land, the defendant was in occupation together with her children and had undertaken considerable development on the land and had a genuine expectation that she would inherit the portion which she was occupying. He stated that such possession and occupation of part of the registered land taken together with the fact that the defendant is married in the family in accordance with Nandi Customs gives rise to a trust which is capable of protection under Section 28(b) of the land Registration Act. Counsel cited the case of *Mukangu Vs Mbui (2004)2 KLR 256, O'Kubasu, Githinji & waki JJA held;*

**However since the registration recognizes trusts in general terms without specifically excluding trusts originating from customary law and since African customary laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws in the piece of land registered in his name under the Act with the relevant instrument of an acquisition either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Act because, such registration does not "relieve a Proprietor from any duty or obligation to which he is subject as a trustee .**

It was further Counsel's submission that the trust so created does not require to be noted on the register and the Honourable Court is justified to take judicial notice of the fact that the concept or notion of trust is inherent in African Customary Law, Nandi Customary Law is no exception.

Counsel stated that overriding interests refers to the substantial rights of ownership or proprietorship which are otherwise unregistered. They are overriding interests of possession and actual occupation which arise without legal title and are equitable rights which are binding on the land and therefore on the registered owner of the suit parcel of land. They possess legal sanctity without being noted on the register.

Counsel submitted that the defendant has been in occupation of 3.8 acres of the suit parcel of land and therefore the same should be awarded to the defendant.

### **Analysis and determination**

This is a case of a registered proprietor of a suit land by transmission against her "estranged" daughter in law. It is not in doubt that the plaintiff is the registered owner of the suit parcel of land. It is further not in dispute that the plaintiff got registered as the owner of the suit parcel of land vide transmission after getting grant of letters of administration of the estate of her late husband.

Since it is not in doubt that the plaintiff is the registered owner of the suit land and there was no evidence to the effect that the land was registered fraudulently or with misrepresentation as per section 24, 25 and 26 of the Land Registration Act 2012, I find that the plaintiff has proved that she is rightfully registered as such. The plaintiff produced a copy of the title in her name and there was no evidence of any encumbrance or a caution or restriction on the said title.

The issue for determination that the court must deal with is whether the plaintiff held the suit parcel of land in trust for the defendant. The defendant alleged to be the widow of the late son of the plaintiff and that the plaintiff held the land in trust for her and her children. The plaintiff got the land vide transmission and if the defendant was entitled then she should have been provided for in the Succession Cause which had been filed for the distribution of the property of the deceased. There was evidence that the defendant filed an objection to the Succession Cause but it was unsuccessful and that she never appealed.

The plaintiff also gave evidence that the three children of her late son with one Hellen Chepkosgei are already provided for in the estate. The defendant did not lead any evidence to show that the plaintiff holds the land in trust for her. It is also on record that the defendant filed a defence without a counter claim on the rights that she is alleging. The defendant stated in her defence that the court should declare that she is entitled to a portion of the suit land and a determination of the share for her children.

The new Land Registration Act 2012 makes it very clear in Section 28 that unless the contrary is expressed in the register, all registered land shall be subject to various overriding interest without their being noted on the register and one such interest is a trust including customary trust. Even though the law is clear about overriding interests which need not be noted on the register, the same must be proved. The person alleging customary trust must prove that he or she is entitled to the customary trust. The existence of the customary trust was not clear from the evidence adduced by the defendant. The marriage of the defendant to the plaintiff's son was also not fortified by evidence. The plaintiff adduced evidence that the son was married to one Hellen Chepkosgei who had three children with the son who are already provided for.

Having considered the evidence on record together with the submissions of both Counsel, I find that the plaintiff did not hold any trust on behalf of the defendant and therefore the defendant is not entitled to a share of the suit land. The defendant did not file a counter claim for the land she is claiming and as such the court cannot grant such orders. Further the defendant failed to prove the marriage and the trust that she was claiming. I find that the plaintiff has proved her case against the defendant but has failed to prove the claim for mesne profits. Mesne profits are special damages which must specifically be pleaded and specifically proved. The plaintiff neither stated the amount she claimed as mesne profits in the plaint nor led any evidence to prove the same. I find that this limb of her claim fails.

The court therefore makes the following orders.

- a. A declaration that the plaintiff is the absolute registered owner of all that parcel of land known as TURBO EAST/SOSIAN BLOCK I(SUGOI)12 and therefore the defendant is a trespasser.
- b. That the defendant do give vacant possession of the suit land within 45 days form the date of this judgement or decree failure of which an order of eviction to issue against the defendant.
- c. An order of a permanent injunction restraining the defendant her agents and or servants from intermeddling, interfering, trespassing and or in any way adversely dealing with the suit parcel of land.
- d. The defendant to pay costs of this suit.

**Dated and delivered at Eldoret this 17<sup>th</sup> day of April, 2018**

**M.A ODENY**

**JUDGE**

Judgment read in open court in the presence of Mr. Omusundi for Plaintiff and in the absence of Counsel for the defendant.

Mr. Koech – Court Assistant.