



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE No. 661 OF 2017

ELIUD KIMOTHO CHABI.....PLAINTIFF

VERSUS

SANKALE OLE LANKAS.....DEFENDANT

JUDGEMENT

By a Plaint dated the 20th June, 2014, the Plaintiff is seeking for judgement against the Defendant as follows:

- a) A declaration that the Plaintiff is the lawful owner of land parcel number Kajiado / Olchoro Onyore / 173
- b) An order evicting the Defendant, his servants or agents from Land Parcel Number Kajiado/ Olchoro Onyore / 173
- c) Costs

The Defendant entered appearance and filed a Defence dated the 28th July, 2014 where they denied the averments in the Plaint and stated that he has never trespassed, encroached as well as put up structures on land parcel number Kajiado/ Olchoro Onyore/ 173. He contended that he is the registered owner of land parcel number Kajiado/ Olchoro Onyore / 259, which was subsequently subdivided into 1429 and 1430 respectively.

The Plaintiff filed a reply to Defence where he reiterated that the Defendant has encroached on his land. He admitted that the Defendant is the owner of land parcel number Kajiado/ Olchoro Onyore/ 173 which was subsequently subdivided into Kajiado /Olchoro Onyore/1429 and 1430 respectively but denies there is a road separating his land and the Defendant's.

The matter proceeded to hearing on 11th October, 2017 with the Plaintiff only calling one witness. The Defendant's Counsel did not participate in the proceedings and later on 7th November, 2017, they filed an application to cease acting for the Defendant claiming they did not have sufficient instructions, and on 23rd January, 2018 they informed Court that the Defendant was well aware the matter had proceeded to full hearing.

Evidence of Plaintiff

PW1 Eliud Kimotho Chabi who is the Plaintiff herein adopted his witness statement dated the 20th January, 2014. He produced his title deed to the suit land as exhibit '1'. He stated that the dispute

determined by the Land Disputes Tribunal vide Cause No. 346 of 2006 and produced the proceedings therefrom as exhibit '2'. He produced the report from the District Surveyor Kajiado dated the 16th May, 2011 as exhibit '3' and the Summons from the Land Registrar Kajiado dated the 14th February, 2011 as exhibit '4'. He contended that the District Surveyor and the District Land Registrar visited the suit land, adjudicated and found that it was in the rightful place confirmed it is the Defendant who had trespassed thereon. Further that in the report, they stated that the illegal structures by the Defendant should be removed. He sought for the Court to grant him the prayers as stated in the Plaint.

The Plaintiff thereafter closed his case as well as the Defendant's and filed written submissions on 24th October, 2017 that I have considered.

Analysis and Determination

After perusal of the pleadings including documents filed herein and upon hearing the testimony of PW1, I find that the following are the issues for determination:

- Whether the Plaintiff is the legal proprietor of land parcel number Kajiado / Olchoro Onyore / 173
- Whether the Defendant has encroached on land parcel number Kajiado / Olchoro Onyore / 173
- Whether the Defendant and or his agents/servants should be evicted from land parcel number Kajiado / Olchoro Onyore / 173
- Who will pay for the costs of the suit

It is not in dispute that the Plaintiff is the registered proprietor of land parcel number Kajiado/ Olchoro Onyore / 173 since the 14th February, 1985 as evidenced by the title deed which PW1 produced as exhibit '1'. The Defendant did not deny in his Defence that the Plaintiff is the proprietor of the suit land.

Section 26(1) of the Land Registration Act 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. '

Based on the evidence adduced above, and in relying on section 26(1) of the Land Registration Act, the Court takes cognizance of the fact that the Plaintiff was issued with a title deed on 14th February, 1985. The Defendant did not adduce any evidence to rebut this position. I find that the Plaintiff is indeed the legal proprietor of the suit land as the title deed is prima facie evidence of the same.

As to whether the Defendants have encroached on the suit land, the PW1 adduced evidence that the Defendant had encroached on his land and put up illegal structures thereon. He further stated that the District Land Registrar and District Surveyor, visited the suit land, adjudicated on the dispute and found that his land was indeed in its rightful place but it is the Defendant who has trespassed and encroached thereon, The Defendant claimed in his Defence that he owns land parcel number Kajiado/ Olchoro Onyore / 259 which was subsequently subdivided into Kajiado / Olchoro Onyore / 1429 and Kajiado /

Olchoro Onyore /1430 respectively. Further, the Defendant stated that there is a road separating his land and the Plaintiff, a fact which the Plaintiff denied. I note that as per the District Land Registrar's report (exhibit 3) it was concluded that all illegal structures constructed on or encroaching on land parcel number Kajiado/ Olchoro Onyore / 173 (New numbers 7506 – 7513) should be removed. The Defendant did not appeal against the said decision and neither did he controvert this evidence. I note that the presence of the Defendant's structures in itself on the suit land is already proof of encroachment. It is against the foregoing that I find that the Defendant had indeed encroached on the Plaintiff's land.

As to whether the Defendant and or his agents/servants should be evicted from land parcel number Kajiado / Olchoro Onyore / 173, I note that the dispute between the Plaintiff and the Defendant was a boundary one which had been adjudicated by both the District Land Registrar and District Surveyor in 2011. Since the Defendant did not controvert the Plaintiff's evidence that he had encroached on the suit land and based on the findings of the District Land Registrar, Kajiado dated the 24th May, 2011, that there were illegal structures on the suit land, I find that the Plaintiff is entitled to protection of the law.

Section 24 (a) of the Land Registration Act stipulates that '**Subject this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

In the case of Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR Justice J.M. Mutungi stated that '**the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law**'.

In relying on the above provisions and this Judicial authority, I find that these legal provisions empower the Plaintiff by virtue of being the registered owner of land parcel number Kajiado / Olchoro Onyore / 173 with vested rights and privileges therein and which no person including the Defendant should interfere with. I further find that since the Defendant did not prove their claim over the suit land, he should be hence therefrom to enable the Plaintiff enjoy peaceful and quiet possession of it.

I will further grant the Plaintiff costs of the suit for the inconvenience he has suffered on the hands of the Defendant.

In the circumstances, I find that the Plaintiff has proved his case on a balance of probability and proceed to enter judgement in his favour as against the Defendant.. I further make the following order:

- a) A declaration be and is hereby made as against the Defendant that the Plaintiff is the absolute proprietor of land parcel number Kajiado/ Olchoro Onyore/173.
- b) An eviction order be and is hereby issued against the defendant, his servants or agents from the parcel of land known as Kajiado/ Olchoro Onyore/173.
- c) Costs of this suit is awarded to the Plaintiff.

Date signed and delivered in open court at Ngong this 4th day of April, 2018.

CHRISTINE OCHIENG

JUDGE