



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

E.L.C CASE NO 37 OF 2012

KIPLANGAT CHESENGE.....PLAINTIFF

VERSUS

JOSEPH ROTICH.....1ST DEFENDNT

DAVID ROTICH.....2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff is the registered proprietor of land parcel no. KERICHO/KAPSAOS/320. On 12th May 2012 the plaintiff instituted this suit against the defendants who are his cousin's sons, claiming that they trespassed on his land and they have been in unlawful occupation of two acres thereof since 1999.
2. In their brief defence dated 20th June 2012, the defendants merely denied that they have trespassed onto the plaintiff.
3. The suit was set down for hearing on the 13th March 2018 and despite being served with a hearing notice, the defendants did not attend court. The case therefore proceeded ex-parte.
4. The plaintiff testified that he is the registered owner of the suit property. He produced the title deed thereof and certificate of official search as exhibits. He explained the he inherited the suit property from his grandfather who was the defendant's great grandfather. He stated that the defendants' father was given his share of the ancestral land but the subsequently sold it.
5. The plaintiff called one witness David Cheruiyot Langat, who is one of his 5 sons. David corroborated the plaintiff's testimony.

Issues for Determination

6. I have evaluated the pleadings, evidence on record and the plaintiff's counsel's submissions and the following issues arise for determination:
 - i. Whether the Plaintiff is the registered proprietor of the suit property
 - ii. Whether the defendants have trespassed onto the suit property measuring 2 acres
 - iii. Whether the plaintiff is entitled to the reliefs sought.

Analysis and Determination

7. As submitted by counsel for the plaintiff, section 24 of the Land Registration Act No 3 of 2012 provides as follows:

“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.”

8. Section 25 (1) of the said Act further provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.

9. Section 26 of the same Act provides that the certificate of title issued by the Registrar upon registration, 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 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 grounds of fraud, or misrepresentation to which 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.

10. Since the plaintiff's evidence was not challenged at the hearing, it is my finding the plaintiff is the absolute proprietor of the suit property. He is therefore entitled to protection of the said title as provided for under the Land Registration Act No. 3 of 2012.

11. Additionally, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.

12. The second issue is whether the plaintiff has proved that the defendants trespassed onto his land. The Plaintiff testified that he has notified the defendant to vacate the suit land but the Defendant has refused. In the case of **Nyangeri Obiye Thomas V Yunuke Sakagwa Nyoiza ELC Case No.277 of 2018** Okong'o J observed as follows:

Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows:

“Any unjustifiable intrusion by one person upon land in possession of another.”Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

13. From the evidence on record, it is my finding that the defendants are unlawfully occupying the suit property. This amounts to trespass to land.

14. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks two main remedies; a permanent injunction against the defendants and in default thereof an order of eviction against them.

15. The principles that guide the court in granting an order of injunction are set out in the celebrated case of **Giella V Cassman Brown & Company Limited 1973. E.A 358** as follows:

“First, the applicant must show that he has 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 be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

16. From the Plaintiff's evidence stated above, it is my finding that he has met the threshold for the grant of an injunction. Similarly, the Plaintiff is entitled to an eviction order in the event that the Defendants do not vacate the suit property.

17. The upshot is that the Plaintiff has proved his case on a balance of probabilities. I therefore enter judgment for the Plaintiff and make the following final orders:

- a. A permanent injunction is hereby issued restraining the Defendants from trespassing upon, causing to be sub-divided, ploughing or doing any other acts which are prejudicial to the plaintiff's proprietary interest in land parcel number L.R No. KERICHO/KAPSAOS/320.
- b. The Defendants are hereby ordered to vacate the suit property within three months from the date hereof failing which the Plaintiff may apply for an eviction order.
- c. The costs of this suit shall be borne by the Defendants.

Dated, signed and delivered at Kericho this 18th day of June 2018

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J.M ONYANGO
JUDGE

In the presence of:

1. Miss Sitati for the Plaintiff
2. N/A for the Defendant
3. Court clerk - Rotich