



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 352 OF 2012

JACKSON ARAP CHUMO.....PLAINTIFF/RESPONDENT

VERSUS

WILLIAM MALAKWEN CHERUIYOT.....1ST DEFENDANT/APPLICANT

SAMWEL KIPTOO RONGOEY.....2ND DEFENDANT/APPLICANT

DANIEL KINGU ONYANGO.....3RD DEFENDANT/APPLICANT

SOLOMON FUTWA.....4TH DEFENDANT/APPLICANT

SEDRIC WEINE.....5TH DEFENDANT/APPLICANT

VINCENT ODHIAMBO.....6TH DEFENDANT/APPLICANT

WILLY MBITHI.....7TH DEFENDANT/APPLICANT

MBUGUA THUO.....8TH DEFENDANT/APPLICANT

DAMARIS IMINZA MWILITZA.....9TH DEFENDANT/APPLICANT

SCOLASTICA WANGARE GATHURU.....10TH DEFENDANT/APPLICANT

MARGARET WANJIRU GATENGU.....11TH DEFENDANT/APPLICANT

ROSE MUMBI KANYALI.....12TH DEFENDANT/APPLICANT

JUDGMENT

By a plaint dated 23rd May 2007, the Plaintiff herein sued the defendants for a permanent injunction restraining them from interfering in any manner with the Plaintiff's occupation of ELDORET MUNICIPALITY/BLOCK 20 (KAPYEMIT) 195 and the eviction of the defendants from the suit land.

The Plaintiff filed an application for a temporary injunction contemporaneously with the plaint. The same was heard and the court gave the following orders:

1. An injunction will issue to all the respondents restraining them from any further development of the respective portions each one of them occupies until the suit herein is heard and determined.
2. The 1st respondent is restrained from any further subdivisions and sale of the suit land until the suit herein is heard and determined.
3. The 1st respondent is restrained from any further use of the suit land until the suit herein is heard and determined.
4. The parties herein will use the suit land in the presence of their counsel and/or in person for those who act in person in a

convenient dated to be agreed between the parties with a view to ascertaining the status quo and which status quo shall be maintained until the suit herein is heard and determined.

This matter proceeded for hearing on 16th May, 2017 when Mr. Chepkwony for the Plaintiff informed the court that the 4th defendant has since vacated the suit land. He was represented by Obudho & Co. Advocates who were served with a hearing but did not attend court.

The 3rd defendant who acts in person was present in court. Counsel submitted that the 7th and 12th defendants died in 2014 but were not substituted therefore, the suit abated in respect of the said defendants. He stated that the 8th 9th & 13th defendants have also vacated the suit land. The 1st and 2nd defendants are represented by Karira & Co. Advocates who were served but did not attend court. Counsel also stated that the 10th defendant was present in court and acts in person.

Counsel filed an affidavit of service and stated that he was ready to proceed with the hearing. The 3rd and 10th defendants also indicated that they were ready to proceed with the hearing.

The plaintiff gave evidence and relied on his statement filed in court dated 1st February, 2014. It was his evidence that he owns parcel No. ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)195 and produced a copy of title deed in respect of the suit land. He also produced a copy of official search as exhibit before the court.

It was the plaintiff's evidence that he got the suit land through transmission as the land belonged to his late mother. He stated that it was vide succession cause No. 215 of 2004 whereby he produced a copy of certificate of confirmation of grant as an exhibit.

The plaintiff further testified that the 1st defendant stays on his parcel of land but asked his son to encroach on the plaintiff's land. He also stated that the 1st defendant sold land to the 3rd defendant without consulting him.

He stated that the 2nd defendant stays on the suit land and that the 4th defendant is not on the suit land. It was his evidence that the 6th & 8th defendants have since vacated the suit land and that the 7th defendant is deceased and was buried in his homeland in Kisumu.

The Plaintiff further testified that the 9th defendant is not on the suit land but he had sued him because he had sent his grandson to live on the suit land but the grandson is no longer on the land.

It was his testimony that the 10th defendant who was in court was purportedly sold land by the 1st defendant and that she does not stay on the land but has a kiosk and a house. He stated that the 11th defendant does not stay on the suit land and that the 12th defendant died 2 years ago and was buried in Kiambu. That the 13th defendant has since vacated the suit land.

The plaintiff therefore prayed for an order for eviction of the defendants who are still on the suit land and a permanent injunction restraining the defendants from interfering with the suit land and costs of the suit.

The plaintiff stated that the 3rd defendant is not a beneficiary as they do not have any relation with the 3rd defendant. The plaintiff confirmed that the 1st defendant is his cousin but they have their own parcel of land and that the 2nd defendant is not entitled to inherit land from the plaintiff's late mother. It was the plaintiff's evidence that the defendants have not filed a counterclaim to the suit land.

On cross examination by the 3rd defendant, the plaintiff stated that he told the 3rd defendant who entered the suit land in 2004, that the land does not belong to the 1st defendant and that he was sued for trespassing on the Plaintiff's land.

On cross examination by the 10th defendant the plaintiff stated that he had told him that the land belongs to him and did not allow her to build on the suit land. The plaintiff therefore closed his case.

Defence Case

DW1 the 3rd defendant testified and stated that he bought the land on 3rd February 2004 from the 1st defendant William Malakwen Cheruiyot who is a cousin to the plaintiff. He stated that he entered into a land sale agreement with the 1st defendant and took possession on 14th April 2004 and has since been staying on the suit land.

It was his evidence that the title deed was in Malakwen's Mother's name who was to inherit. It was further the 3rd defendant's evidence that the plaintiff filed the succession cause while he had taken possession of the suit land. He therefore prayed that the plaintiff's suit be dismissed with costs as he has nowhere to go.

On cross examination by Mr. Chepkwony he stated that he did not conduct a search to the suit land to find out who the owner was and that the plaintiff was not present when he entered into a sale agreement with the 1st defendant and that the deceased did not sign the agreement.

He also admitted that he did not file a counter claim for the ¼ acre that he is claiming to be occupying. He also confirmed that he does not know the biological mother to the plaintiff and that he was not aware of the succession cause that was filed in court until he was served with summons. He stated that he filed an objection to the cause but does not know what the outcome was. He also confirmed that the 1st defendant does not stay on the suit land.

DW2 the 10th defendant also stated that she bought the suit land from the 1st defendant for Kshs 25,000/=. She stated that the plaintiff is a cousin to the 1st defendant and that she has been staying on the suit land since then.

On cross examination by Mr. Chepkwony she stated that she did not file any defence and did not produce the agreement that she is referring to. She also stated that the plaintiff was not present when she entered into a sale agreement with the 1st defendant. She stated that she did not conduct a search to the suit land and that she came to realize that they were living on someone's parcel of land when they were served with summons. She stated that the 1st defendant had promised to give her a title deed.

Analysis and determination.

Before the delivery of Judgment that was scheduled for 27th July 2017; the firm of Seneti Oburu & Co. Advocates filed an application dated 20th July, 2017 praying for stay of the delivery of judgment under certificate of urgency. The same was certified urgent and a date given for inter parte hearing.

The application came up for hearing on 19th September 2017 but counsel for the applicant applied for adjournment on the grounds that he had just been served with a replying affidavit. The court gave a hearing date on 23rd October 2017 when Mr. Ayieko stated that the 1st defendant is deceased and will be making an application for leave to substitute him.

Mr. Chepkwony for the plaintiff informed the court that the 1st, 7th and 12th defendants are also deceased and that Mr. Karira was acting for the 1st defendant. There was no change notice of change of Advocates for the 1st defendant therefore Karira & Co Advocates were still on record for the 1st defendant. The defendant was given 30 days to substitute but the same has never been done to date.

The application for stay of delivery of judgment was fixed for hearing on 20th June 2018 but Counsel for the applicant was not present to prosecute the application. Counsel for the plaintiff urged the court to dismiss the same which the court did and fixed a judgment date for 12th July 2018.

On the eve of delivery of judgment, Mr. Ayieko filed another application for stay of delivery of judgment which the court looked at and dismissed as an abuse of court process.

The issues for determination are as to whether the defendants are trespassers and ought to be evicted from the suit land. Whether the plaintiff has proved his case against the defendants.

It is not in dispute that the Plaintiff is the registered owner of the suit land. It is also not disputed that the Plaintiff got the suit land vide transmission from the late mother. The Plaintiff does not deny that the 1st defendant is a cousin. He denies that he was a beneficiary of the suit land.

From the evidence on record it is clear that the 1st defendant did not have authority to sell land that did not belong to him therefore the sale to the defendants was null and void. You cannot pass good title in what you did not own or possess.

The defendants also did not file any counterclaim to the portions that they claim to be occupying. The only remedy that they have is to seek for refund or redress from the 1st defendant who sold the land to them.

I find that the plaintiff has proved his case against the defendants and order that a permanent injunction is hereby issued against the defendants, their servants or agents from interfering with the suit land.

The defendants to vacate the suit land within 30 days. Failure of which an eviction order to issue. The defendants to pay the costs of the suit.

Dated and delivered at Eldoret this 16th day of July 2018.

M.A ODENY

JUDGE

Judgment read in open court in the presence of Mr. Chepkwony for the Plaintiff and in the absence of Sereti Oburu for Defendants.