



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 902 OF 2012**

**MESHACK KIPYATOR BOIT.....PLAINTIFF**

**VERSUS**

**ELIZABETH CAROL ADOYO AURA.....1<sup>ST</sup> DEFENDANT**

**FREDRICK OTIENO ONYANGO.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

Meshack Kipyator Boit (*hereafter referred to as the Plaintiff*) has come to court against **Elizabeth Carol Aura** and **Fredrick Otieno Onyango** (*herein after referred to as defendants*) claiming that he was lawfully allocated land parcel previously known as Old Uganda Road Site 'V' Plot 399 and now referred to as Uganda Road/B11/563 measuring approximately 1/8 acre (*hereinafter referred to as the suit land*) by the Municipal Council of Eldoret sometime in June 1986.

The Plaintiff avers that sometime in 1994, the defendants herein trespassed and fraudulently transferred the suit land into the 1<sup>st</sup> defendant's possession without lawful authority and/or justification. The particulars of fraud are preparing a forged agreement purporting to sale the suit land herein, appending a forged signature purporting to belong to the plaintiff, presenting a forged and falsified transfer documents purporting to change ownership of the suit, dealing with the suit land without the authority of the plaintiff, misrepresenting to the Municipal Council of Eldoret that they had the plaintiffs' authority to transfer the suit land to them, demolishing the plaintiffs' structures in the suit land without lawful authority.

The Plaintiff avers that the 2<sup>nd</sup> defendant who is currently in occupation of the suit land, has restrained and/or obstructed the plaintiff's entry and enjoyment thereof and that that as a result of the defendant's actions he has suffered loss and damage hence entitling him to compensation.

The Plaintiff further seeks to be restored back to the suit land and the defendant's or their agents restrained permanently from interfering with and or trespassing upon the suit land hereof.

The Plaintiff avers that there is no other suit pending before this honourable court, neither has there been any suit in a court of law between the parties herein over the same subject matter.

Demand and notice of intention to file suit has been issued in vain. The plaintiff further avers that all efforts to mediate arbitrate or resolve the dispute herein out of court has been frustrated by the Defendants. The cause of action arose at Eldoret within the jurisdiction of this court.

The Plaintiff prays for an order directing cancellation of all and any title document issued to the defendants in respect of ownership and possession of the suit land.

He prays for an order of eviction and mesne profit and a permanent injunction restraining the Defendant's, their agents, employees, servants or any other persons from interfering with the Plaintiff's quiet possession, occupation and use of the suit land. He prays for costs of this suit and Interest.

The defendants on their part filed a joint defence vehemently denying in toto that the Plaintiff was lawfully allocated land parcel previously known as old Uganda Road site 'B' Plot 399 and now referred to as Uganda Road/B11/563 measuring approximately 1/8 acre by the Municipal Council of Eldoret sometime in June, 1986.

The defendants further deny the contents of paragraph 4 of the Plaintiff specifically that sometime in 1994 the Defendants trespassed and fraudulently transferred the suit land into the 1<sup>st</sup> Defendant's possession without lawful authority and or justification. The particulars of fraud thereunder are wholly denied. The Plaintiff is put to strict proof thereof.

The defendants aver that the Plaintiff vide an agreement executed in the year 1994 sold to the 1<sup>st</sup> Defendant ELDORET MUNICIPALITY/OLD UGANDA ROAD/B11/563 measuring 1/8 of an acre at a consideration of Kshs. 100,000.

The Plaintiff was paid the consideration in full receipt of which he acknowledged. The 1<sup>st</sup> Defendant through its lawyers sought the consent of the Municipal Council of Eldoret to have the suit land transferred from the Plaintiff to the 1<sup>st</sup> Defendant and which consent was duly granted. The 1<sup>st</sup> Defendant on 11th January, 1999 got registered as the proprietor of the leasehold interest in ELDORET MUNICIPALITY/BLOCK 11/563. The sale agreement in respect thereof was voluntarily signed and the allegation of fraud is a flat lie.

The defendants deny the allegations that as a result of the Defendants' actions the plaintiff has suffered loss and damage hence entitling him to compensation thereof and that the Plaintiff can be restored back to the suit land and the Defendant's or their agents be restrained permanently from interfering with and or trespassing upon the suit land hereof.

***The Plaintiff, Meshack Kipyator Boit***, testified in chief that he was given land by the Eldoret Municipal Council in 1976. He constructed a temporary structure in 2001. He met somebody at Tusky's supermarket who asked him whether he had sold the suit land. The person informed him that someone had bought the land.

The plaintiff denies ever entering into an agreement with the 1<sup>st</sup> defendant and that he has ever sold the parcel of land and states that the agreement was forgery. He prays that the title be cancelled and the land registered in his name.

The plaintiff produced before court a letter of allotment indicating that the land was allocated to him. He produced several letters indicating that the title deed would be processed.

On cross examination by Mr. Kagunza, he states that the agreement was forged. He reported the forgery to the police but was not given the OB No. He knew the 1<sup>st</sup> Plaintiff by face only and that she worked with EATEC.

The plaintiff denies that he instructed Kalya to transfer the land from himself to the 1<sup>st</sup> Defendant. He states that Kalya has never prepared agreements for him.

***DWI, Mr Fred Otieno Onyango***, a donee of a power of Attorney testified that the 2<sup>nd</sup> defendant is the registered owner of the parcel of land. He produced the certificate of lease. He produced the receipt for rate payments. He produced the consent to transfer.

***DW2, Barnabas Cheruiyot*** an employee of the Uasin Gishu County Government states that the initial owner was the plaintiff but sold to the 1<sup>st</sup> defendant. There was a request for consent to transfer and the same was granted on 28.12.1998. The land was transferred to the 1<sup>st</sup> defendant.

I have considered the pleadings, evidence on record and submissions by both parties and do find that it is not in dispute that the plaintiff was allocated the suit land by Eldoret Municipal Council and that he was waiting for the title deed to be prepared. The gist of this matter is the agreement dated 20<sup>th</sup>/1994, the month is not clear. The 1<sup>st</sup> defendant heavily relies on the agreement which was produced by the plaintiff.

According to the agreement, the 1<sup>st</sup> defendant paid the plaintiff Kshs.100,000 upon the signing of the agreement for the purchase of the suit land. The signatures on the agreement allegedly signed by the plaintiff resemble his signature in the plaint and the signature in letter requesting that he sues as a pauper. There is no evidence that the signature was forged. The plaintiff did not call a document examiner to contradict the 1<sup>st</sup> defendant that the plaintiff signed the agreement. I am convinced that the plaintiff signed the agreement.

The cause of action arose in 1994 when it is alleged that the 1<sup>st</sup> defendant trespassed into the Plaintiff's land. The plaintiff came to court in 2012 almost 18 years after the cause of action. Trespass is a tort whose time limit is 3 years.

Section 4 of the Limitation of Actions Act provides that: -

**4. Actions of contract and tort and certain other actions**

**(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—**

**(a) actions founded on contract;**

**(b) actions to enforce a recognizance;**

**(c) actions to enforce an award;**

**(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;**

**(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by**

**this Act or by any other written law.**

**(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:**

**Provided that an action for libel or slander may not be brought after the end of twelve months from such date.**

However, it might be argued that this is a matter for recovery of land and that a claim for recovery of land expires after a period of 12 years.

**Section 7 of the Limitation of Actions Act provides for the limitation period for actions to recover land and rent. It precisely provides that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.**

The cause of action herein accrued in 1994 and the suit was filed in 2012 almost 18 years after the cause of action accrued and therefore the cause of action is time barred.

In conclusion, I do find that the title to property in dispute was properly registered in the names of 1<sup>st</sup> defendant and that the plaintiff's suit is time barred even if the court computed time from the date of registration of the 1<sup>st</sup> defendant as the proprietor of the land. The upshot of the above is that the suit is dismissed with costs.

**Dated, delivered and signed at Eldoret this 28<sup>th</sup> day of September, 2018.**

**A. OMBWAYO**

**JUDGE**