



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**ELC NO 31 OF 2013**

**JOSEPH KIPCHIRCHIR KOECH.....PLAINTIFF**

**VERSUS**

**PHILIP CHERUIYOT SANG.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff and Defendant herein are brothers. The Plaintiff instituted a suit against the Defendant for trespass on the plaintiff's property known as **KERICHO/KAITET/460**, measuring approximately **5.8 Ha** or thereabouts, hereinafter referred to as the suit property. The Plaintiff seeks several orders including; a declaration that the Defendant is a trespasser, an eviction order and a permanent injunction restraining the Defendant by himself, his agents, servants, employees or otherwise from interfering with and or doing any other act which is prejudicial to the Plaintiff's quiet enjoyment and occupation of the suit property.
2. The suit was defended vide a Statement of Defence and Counterclaim dated 26<sup>th</sup> June 2013. The Defendant denies the Plaintiff's claim to the suit property and alleges that the same is family land which was bought by their late father, one Kipkoech Arap Mabwai (deceased).
3. The suit was set down for hearing and both the plaintiff and defendant testified and called several witnesses.

**Plaintiff's Case**

4. It was the Plaintiff's testimony that he purchased the suit property from Kaitet Farmers' Co-operative Society Limited sometime in 1976 and completed paying the monetary consideration on 2<sup>nd</sup> December 1983.
5. The Plaintiff was subsequently issued with a share certificate which he produced as Plaintiff's exhibit 1. He stated that the property was later registered in his name and a title deed issued to him.
6. The Plaintiff stated that in the year 1993 or thereabouts, he consented to the Defendant temporarily entering the suit property for the purpose of assisting him with cultivation of food crops for his family for a limited period. He testified that he later asked the Defendant to move out of the suit land and the Defendant declined to do so.
7. He stated that thereafter, he approached an advocate and instructed him to draft a demand letter to the Defendant to vacate the suit land and allow the Plaintiff quiet possession of the same.
8. The Plaintiff denied the Defendant's allegation that the suit property belonged to their deceased father, Mr. Kipkoech Mabwai. He stated that their father had a separate parcel allocated to him by Kaitet Farmer's Co-operative Society Limited which was parcel no. 298. He denied that he had put up a boundary on the suit property as alleged by the Defendant in his counterclaim.
9. He stated that their late father was a polygamous man who had two wives and that he had several properties but the suit property was not part of his estate. He stated that the Defendant is the only brother who is claiming the suit property from him and that his other brothers occupy parcel no. 298 which belonged to their late father.
10. He further stated that his father's property known as **KERICHO/KANUSIN/195** was meant to be shared between him and the Defendant. He pointed out that his father also owned **KERICHO/KANUSIN/225**. The Plaintiff stated that a Succession Cause was filed at **Sotik law Courts (Succession Cause No. 28 of 2011)** where he was nominated as the administrator of their late father's estate. A grant was confirmed and the court distributed one parcel of land belonging to their deceased father which is a parcel known as **KERICHO/ KAITET/**

298.

11. The Plaintiff pointed out that the Defendant has never sued him in court asking him to subdivide the suit property. He stated that the Defendant never complained when he was issued with the title deed nor has he ever applied for a caution or a restriction on the suit property.

12. In cross-examination, the Plaintiff reiterated that the suit property which he owns is separate from the property owned by his deceased father. He stated that he paid for the suit property with his own money without any assistance from his father. He explained that the property known as **KERICHO/KANUSIN/225** which his father owned was not sold to raise funds to contribute towards the suit property but rather his father used the proceeds he got from selling that property for his own needs.

13. He stated that there was a meeting held on 9<sup>th</sup> April 2011 to try and resolve the dispute between the two brothers; the Plaintiff and the Defendants herein but pointed out that he was unaware of the verdict arrived at in the meeting.

14. He stated that he had reported to the police in a bid to evict the Defendant but no action was taken. He stated that the Defendant has constructed 3 houses on the suit land but he cannot recall the exact dates when the construction was done.

15. The Plaintiff stated that the Defendant moved to the suit land because their father's property, parcel no. 298 was squeezed as it was occupied by their other brothers.

16. He stated that his father was alive when he purchased the suit property and was issued with the title deed and he did not raise any complaints.

17. The Plaintiff and the Defendant's father passed away in 1998 and the dispute over the suit property commenced afterwards. The Plaintiff pointed out that their mother tried to reconcile the Plaintiff and the Defendant to no avail.

18. The Plaintiff called Kipsang Arap Maritim as PW2 who stated that he served as the Treasurer at Kaitet Farmers Society from 1983 for 2 ½ years. He stated that he received money from the Plaintiff for the suit property. PW2 stated that both the Plaintiff and his deceased father were members of Kaitet Farmers Society but pointed out that the suit property is owned by the Plaintiff and not the deceased father. He confirmed that the Defendant currently resides in the suit property.

19. Mr. Joseph Ngeno testified as PW3. He acknowledged that he knew both the Plaintiff and the Defendant who are brothers. He stated that he bought land in Kaitet which is parcel no. 459. He stated that the Plaintiff's parcel is no. 460 which borders his own land. PW3 explained that he bought his parcel of land on the same day the Plaintiff bought his from Kaitet Farmers Society. He said that both he and the Plaintiff paid for their respective parcels over a period of time between the 1970s and 1983. He said that the suit property is owned by the Plaintiff and the Defendant moved in after the Plaintiff had purchased the land.

20. PW3 denied attending the family meeting held on 9<sup>th</sup> April 2011 aimed at resolving the dispute between the Plaintiff and the Defendant. He stated that the Plaintiff's father informed him that the suit property belonged to the Plaintiff a day before he passed away. He stated that apart from minor quarrels, the Plaintiff and the Defendant generally lived in peace.

#### **Defendant's Case**

21. The Defendant testified as DW 1 and acknowledged that that the Plaintiff is the sole, absolute and registered owner of land parcel **KERICHO/ KAITET/460**. However, he alleged that the Plaintiff never bought the suit property from Kaitet Farmers Cooperative Society Limited but rather that the same is family land which was bought by their father, Mr. Kipkoech Arap Mabwai (deceased).

22. He stated that their deceased father sub-divided the suit property between the Plaintiff and the Defendant and the Plaintiff holds the suit property in trust for their family. He explained that both he and the Plaintiff were settled on the suit property in 1983 by their late father.

23. The Defendant said that they had been living peacefully in the suit property with the Plaintiff in their allocated shares for over 30 years and that there is a fence between their two portions.

24. He testified that the family had a meeting where it was resolved that the property was family land and the verdict was that the same should be shared equally between the Plaintiff and the Defendant.

25. The Defendant stated that he occupies approximately 2.9 Ha of the suit property and he had constructed a total of 9 houses in his portion of the land, grazed his cattle on the property and also cultivated part of the land.

26. The Defendant claimed that the Plaintiff went to the Land Registrar with the intention of sub-dividing the suit property into various portions for his children and when he learnt of this he decided to lodge a caution over the suit property.

27. In cross-examination, the Defendant reaffirmed that the Plaintiff is the first registered proprietor of the land. He clarified that he did not plead that the Plaintiff fraudulently registered himself as the proprietor.

28. He said that in was excluded as a beneficiary of his deceased father's estate in the Grant obtained in **Sotik law Courts (Succession Cause No. 28 of 2011)**. He explained that he did not apply for revocation of the Grant after he learnt that he had been excluded as a beneficiary of the estate because he already had his share in the suit property

29. The Defendant testified that their deceased father sold one of his properties known as **KERICHO/ KANUSIN/225** to one Arap Taa in order to buy the suit property.

30. He stated that he had no grudge against his brother and all he wanted was a share of the suit property given to them by their late father. He also claimed that he never lodged a complaint against the Plaintiff because he had no money and they were living in harmony.

31. The Defendant averred that he has not taken advantage of the Plaintiff's physical disability. He said that the dispute over the suit property started in 2011 though he does not know what prompted it.

32. Mr. Kiprotich Langat testified as DW2. He stated that he was the Chief of Rongena location and both the Plaintiff and the Defendant were his subjects. He admitted that he did not know when the Plaintiff and the Defendant bought their land. His evidence was therefore not useful.

33. Jonathan Koech, who is a brother to both parties in the suit, testified as DW3. He said that he was aware that both the Plaintiff and their late father were allocated separate plots by Kaitet Farmers Cooperative Society Limited. He then elaborated that the plot given to his deceased father was plot no. 299 whereas the title in respect to **KERICHO/KAITET/460** was given to the Plaintiff herein.

34. DW4, one Mr. David Koskei, who is a member of Kaitet Farmers Cooperative Society Limited and a neighbour to both parties, said that the suit property was family land and it was sub-divided between the Plaintiff and the Defendant by their late father. He said that the deceased father informed him that he had given the Plaintiff the money that was used to purchase the suit property. He confirmed that the Plaintiff and the Defendant had been living together on the suit property.

35. Mr. Samsom Techkutwo testified as DW5 and similarly stated that the suit property was registered in the Plaintiff's name but explained that the property was paid for by the Plaintiff and Defendant's deceased father. He attended the meeting held on 9<sup>th</sup> April 2011 to resolve the dispute between the parties herein over the suit property, where it was decided that the land should be divided between the two brothers since the land was paid for by the late Arap Mabwayi.

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

36. Regrettably, the Plaintiff's counsel did not file their written submissions.

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

37. The learned Counsel for the Defendant in his submissions recapitulated the proceedings and highlighted the testimonies of each witness from both parties. He submitted the prayers sought by the Plaintiff in the Plaintiff have no merit and cannot succeed because the suit property was family property which was registered in the name of the Plaintiff to hold in trust for other family members. He argued that the property ought to be sub-divided into two equal portions of 2.9 Ha each (for the Plaintiff and the Defendant) because the Defendant has been living peacefully in his share of the land parcel **KERICHO/KAITET/460** for over 30 years since their father settled them on the land. He added that the Defendant has permanent developments on the suit property.

38. Counsel relied on two Court of Appeal authorities in which suits had been instituted as a result of an alleged trespass. They include:

**1. Chevron (K) Ltd (formerly known as Caltex Oil Kenya Limited) v Harrison Charo Wa Shutu [2016] eKLR**

**2. Gulam Miriam Noordin v Julis Charo Karisa [2015] eKLR**

39. The glaring difference between these two Court of Appeal cases and the current suit is that in both those matters, the Respondents claimed adverse possession whereas in this suit the defendant's claim is based on customary trust. That being the case, the said authorities do not offer much guidance in the instant case.

#### **Issues for Determination**

40. Having scrutinized the pleadings by both parties, the evidence adduced and the submissions presented before the court, the following issues emerge for determination:

- i. Who is the proprietor of L.R No. **KERICHO/KAITET/460**?
- ii. Is the plaintiff holding the suit property in trust for the defendant?
- iii. Whether the Defendant is trespassing on the suit property?
- iv. Is the Plaintiff entitled to the reliefs sought?
- v. Is the Defendant entitled to the reliefs sought in his Counterclaim?

#### **Analysis and Determination**

41. The first issue I have to determine is whether the suit property belongs to the Plaintiff herein or it is family property which belonged to his late father and therefore forms part of his estate. The answer to this question from the evidence adduced by both parties appears clear cut. The plaintiff testified that he is the registered owner of land parcel **L.R NO. KERICHO/KAITET/460**. The Plaintiff testified that he purchased the suit property from Kaitet Farmers Cooperative Society Limited in the year 1976 or thereabouts and completed payment for the same in 1983 and he was subsequently issued with the title deed in his name. He stated that the said title deed was charged to Tenwek Hospital to secure payment of a hospital bill.

42. The Defendant by his own admission in his witness statement submitted as his evidence in chief acknowledged that the Plaintiff is the sole, absolute and registered owner of the suit property. Despite his evidence that that the suit property is family land, the defendant did not produce any document to counter the plaintiff's evidence. It is also clear from the evidence on record that the title to the suit property was issued when the plaintiff's father was still alive. If indeed the suit property was paid for by the deceased, it would have been registered in his name alongside the other parcels he bought from Kaitet Farmers Cooperative Society Limited.

43. Section 24 of the Land Registration Act 2012 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.”**

44. 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.”**

45. Additionally, Section 26 of the same 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 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.”**

46. It is therefore my finding the plaintiff is the absolute proprietor of the suit property. Consequently, he is entitled to protection of the said title as provided for under the Land Registration Act No. 3 of 2012.

47. With regard to the second issue, the Defendant alleged that the property was family land and the Plaintiff merely held it in trust for the family. It is trite that he who alleges must prove. This principle is clearly captured in Section 107 (1) of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, which provides:

**107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

48. Similarly in sections 109 and 112 of the Act provides as follows:

**109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

**112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**

49. The burden of proving that the suit property was family property therefore fell on the Defendant once he questioned the legitimacy of the Plaintiff's title. The Defendant failed to produce any substantive evidence to prove his allegation whereas the official search indicated the Plaintiff as the registered owner. All the evidence adduced in court indicates that the Plaintiff is in fact the proprietor of the land parcel known as **KERICHO/KAITET/460**. I therefore find and hold that the issue of trust does not arise.

50. The third issue I must address is whether the Defendant trespassed on the suit property. It is evident from the Plaintiff that the alleged trespass in this instance is a continuous one. The Plaintiff in paragraph 6 of the Plaintiff pleads thus:

**“Despite the Defendant being asked to move out of the Plaintiff's parcel of land herein the said Defendant has continued and persisted in trespassing onto and occupation of the Plaintiff's aforesaid parcel of land whereby he has constructed 2 semi permanent houses thereon without the Plaintiff's consent and permission thereby denying the Plaintiff's right of use and occupation of his parcel thereby occasioning the Plaintiff to suffer irreparable loss and damages.”**

51. According to ***BLACK'S LAW DICTIONARY 8<sup>TH</sup> EDITION***, Trespass is defined, in the strictest sense, as:

***“An entry on another’s ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property”***

52. A continuing trespass is defined as:-

***“A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property”***

53. Both the Plaintiff and the Defendant have admitted that they lived on the suit property in peace and harmony for a period of 30 years or thereabouts before their dispute arose. This evidence was corroborated by their witnesses who testified that the two parties have been living together on the suit property for a long time. The Plaintiff in paragraph 5 of the Plaintiff pleads that he authorized the Defendant, albeit for a temporary period, entry into the suit property. By demand letters dated 24<sup>th</sup> May 2012 and 4<sup>th</sup> June 2012, the Plaintiff asked the Defendant to vacate the suit property. I can therefore infer from this that the consent which the Plaintiff had granted the Defendant was officially revoked on 24<sup>th</sup> May 2012. The Defendant therefore had no authority to be on the suit property once the Plaintiff demanded his eviction from the land and his mere denial of the Plaintiff’s right of proprietorship does not negate the trespass. In view of this, I find that the Defendant’s continued occupation of the land after he was asked to vacate the same constitutes trespass upon private land.

54. The fourth issue for determination is whether the Plaintiff is entitled to the reliefs sought and is linked to the third issue. It is therefore dependent on my findings mentioned herein above. In his plaint the plaintiff seeks a declaration that the defendant is a trespasser on the plaintiff’s parcel of land, an order of eviction and injunction to restrain the defendant from remaining on the plaintiff’s land as well as general damages for trespass. It is trite law that trespass to land is actionable *per se* (without proof of any damage). See the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014)** eKLR where **J.M Mutungi J.**, stated:-

**“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ..”**

55. I have already determined that the Defendant’s actions amounted to trespass to private land. It therefore follows and I do find that the Plaintiff has suffered loss and damage, to wit: quiet enjoyment of his property through the unwarranted interference of his property by the defendant. No evidence is required before damages for trespass to land can be awarded. However, considering the peculiar circumstances of this case where the plaintiff initially invited his brother (the defendant) to use and cultivate the suit land, I will award only minimal damages.

56. The fifth final issue to be determined is whether the Defendant is entitled to the reliefs sought in his Counter Claim. The Defendant has failed to prove on a balance of probabilities that the suit property is family land and inevitably his counter claim is dismissed.

57. In the upshot, I enter judgment for the plaintiff and make the following final orders:

- a) A declaration is hereby issued that the defendant is a trespasser on the plaintiff’s parcel of land known as **L.R No. KERICHO/KAITET/460**.
- b) The defendant shall vacate the suit land within 90 days from the date hereof failing which the plaintiff may apply for an eviction order.
- c) A permanent injunction is hereby issued restraining the defendant from remaining on, cultivating, interfering with or doing any other act which is prejudicial the plaintiff’s quiet enjoyment and occupation of **L.R No. KERICHO/KAITET/460**.
- d) Kshs. 75,000 general damages.
- e) This being a suit between brothers, each party shall bear their own costs.

**Dated, Signed and Delivered, at Kericho this 16th Day of November, 2018.**

**J. M. ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Bii for the Defendant
2. Miss Kitur for the Plaintiff
3. Court assistant - Rotich