



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 187 OF 2013

CHELIMO ROTICH KAINO.....PLAINTIFF

VERSUS

CHEMORIO CHRISTOPHER.....DEFENDANT

JUDGMENT

Chelimo Rotich Kaino, hereinafter referred to as the plaintiff has filed this suit against Chemorio Christopher, hereinafter referred to as the defendant claiming to be the absolute registered owner of all that parcel of land known as MOIBEN/MOIBEN BLOCK 3/KIPSILIAT/182 measuring approximately 17.54 Ha. That the defendant is related to him and came and stayed with him in the plaintiff's parcel on the understanding that the defendant would eventually look for his land and move on.

That it was in the aforesaid promises that the defendant occupied about 2 acres of the plaintiff's parcel of and with his permission to enable the defendant educate his children. That in the year 2009, he politely told the defendant to make arrangements to relocate and move out of his land.

That instead of moving out peacefully, the defendant started taking him to local administration staking claim over his land which culminated into a case which was filed by the defendant at Land Disputes Tribunal (Claim No. 13 of 2011). That the decision of Land Disputes Tribunal was quashed vide Eldoret High Court Judicial Review No. 60 of 2011 and the defendant was advised to seek legal address in a court of law.

That the defendant, instead of coming to court to ventilate his claim, forcefully and illegally moved into the plaintiff's parcel of land on 14th March, 2013 and cultivated around 10 acres threatening violence against the plaintiff.

That the defendant has no right whatsoever over his parcel of land and all he is doing is abusing the plaintiff's hospitality. That apart from the cases aforementioned there is no other pending suit between the plaintiff and the defendant over the same subject matter. That this honourable court has jurisdiction to entertain this suit.

The plaintiff prays for a permanent injunction against the defendant, his agents, assigns or servants from encroaching, interfering or any other way dealing with plaintiff's parcel of land known as MOIBEN/MOIBEN BLOCK 3/KAPSILIAT/182. An eviction order to remove the defendant from the plaintiff's parcel of land. Costs of this suit.

The defendant filed defence and counterclaim denying the contents of the plaint and stating that the said suit land MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/182 measuring approximately 17.54 Ha was jointly bought by both the parties herein in the ratio of 18.24 acres between the plaintiff and the defendant respectively in the year 1971.

The defendant states that in the year 1984 the plaintiff himself subdivided the suit land into two (2) portions measuring twenty one (21) acres each and it is where the defendant lives with his family to-date now a period of almost twenty eight (28) years whereas the plaintiff resides on the one half equally measuring twenty one (21) acres.

That in the year 2009, the defendant asked the plaintiff to transfer unto him his portion which the plaintiff rightfully agreed at the family meeting later he changed his mind whereupon the plaintiff pursued his right starting from the local avenues which culminated into LDT NO. 13 of 2011 which awarded him twenty-one (21) acres and the plaintiff twenty-one (21) acres equally though the defendant had paid Kshs.4,000 whereas the plaintiff paid Kshs. 3,000 to buy the land.

The defendant counter-claimed to be awarded and registered on one half of the share, that is, twenty-one (21) acres out of the MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/182 measuring approximately seventeen decimal five four (17.54 Ha) he bought with Kshs. 4,000 in 1971 and been living on the said portion of twenty one (21) acres uninterrupted since 1984 to-date.

The defendant prays for a declaration order that the plaintiff was registered in his own interest and as a trustee for the defendant herein in equal shares and a vesting order do issue compelling the plaintiff to transfer one half share of 21 acres in parcel land MOIBEN/MOIBEN

BLOCK 3 (KAPSILIAT)/182 to the defendant herein and that the court do extend the period within which the Land Control Board consent shall be obtained and to compel the plaintiff to execute the requisite transfer documents and in the alternative the Deputy Registrar do execute them in place of the plaintiff herein.

The defendant prays that the suit be dismissed and the counterclaim be allowed. The plaintiff replied the defence and counterclaim and prayed for dismissal of the counterclaim.

When the matter came for hearing, the plaintiff stated that he resides at Kapsiliat Moiben. Christopher Chemorio (defendant) is his friend. They are just friends and not related. The suit land measures 42 acres and belongs to the plaintiff. He produced the title deed. He claims that he bought the land and paid Kshs.70,000. He produced the plot allocation card for Plot No. 182. He paid the money alone. Mr. Chemorio Christopher, the plaintiff was not a member of the Society but entered the land in 1986. His father registered for 2 acres to make a living but the plaintiff added him three acres to sustain him. In 1996, he told him to vacate but he declined. The defendant has planted 21 acres. The plaintiff was using the land for grazing. The village elders have never summoned him. He has been paying rates. The defendant stays on the land with his children. The defendant is not a relative and that he does not deserve the land. He bought the land when the defendant was a small boy.

PW2, Francis Kimutai Kiberos states that he is the son to the plaintiff. The plaintiff and the defendant came from the same village. The suitland belongs to his father and not the defendant. His father got the land in 1971. He allowed the defendant to farm 2 acres but the defendant has now divided the land into two and is now utilizing 15 acres. On cross examination, he states that the land has not been subdivided officially. He states that Chemorio has lived on the land since 1987 and not 1984. The title was issued in 1997 whilst survey was done in 1992.

The defendant on his part testified that Land No. Moiben/Moiben/3 Kapsiliat was bought by the two parties. He wanted the plaintiff to be evicted. They bought the land for Kshs.7,000. He paid Kshs.4000 whilst the plaintiff paid Kshs.3000. He is entitled to 24 acres whilst the plaintiff is entitled to 18 acres. He is in possession of his share since 1984. They are each occupying 21 acres. He prays for 21 acres.

On cross examination, he states that his father and the plaintiff's father were family members. He was not a member of the Kapsiliat Ranch Ltd but enjoyed membership through the plaintiff. The parcel of land is in the name of the plaintiff. He entered the plot in 1984. Survey was done in 1992. Members entered in 1983. Mr. Kaina entered in 1984. The defendant entered in 1984. He started to cultivate 6 acres. He asked for the title but the plaintiff told him to leave. In 2009, he asked for the title when he was tilling 8 acres. The land between his and the plaintiff is fenced.

DW2 is Benedict Kipkoech Arusei, the Assistant Chief for Kapsiliat sub-location, Moiben location, Moiben Division, Moiben sub-county, Uasin Gishu County. He has been the assistant chief for almost 10 years. He knows both parties. They were in Merimet and moved together in Kapsiliat in 1984. They bought the land in 1976. Eventually was given as per share. Many people bought in partnerships. In respect of the suit land, he states that Chelimo Rotich Kaina was the first to enter the land. He states that the parties herein got 21 acres each in 1984. The dispute herein started in 2009 but the Assistant chief could not resolve it. He referred it to the District Officer. The matter was ultimately lodged with the Tribunal which gave an award that was ultimately quashed by the High Court.

On cross examination, he states that he was born in 1974. Members applied for land in 1976. He was two years old. He came to know the process from the documents. He agrees that there is no agreement between the plaintiff and defendant. On re-examination, he states that when he was 10 years old, he knew that the land belonged to both parties because he saw their houses, cattle and saw them tilling the land. The defendant lives peacefully in his land and does not live by force.

DW3 is Fredrick Kipkemoi Kiboros who lives in Kapsiriot. He is the secretary, St. Teresa Girls Kabatek. He is a son to the plaintiff of the 1st wife. He states that the plaintiff and defendant are friends and bought the disputed land together. They were given 3 acres and shared. The defendant took a white cow whilst the plaintiff took a brownish cow. The bull was sold and they shared the proceeds. The land was subdivided and shared equally in 1984. He lives on the Chelimo's side. The parties are related. He states that his brother takes advantage of the age of their father.

On cross examination, he states that he never saw the defendant give the plaintiff any money but they entered the land at the same time. He has never seen any agreement. The survey fees were paid by his father. His father gave the land to the defendant. The defendant has been utilizing the land but his father has never complained.

On re-examination, he states that the land was subdivided by the plaintiff. He was not forced to do so. The same was allocated by the plaintiff to the defendant.

DW4, Yego Cheptoo Komen who states that the parties are neighbours. When he called the surveyor to survey his land, the two parties were in occupation. The plaintiff called them to survey his land and it was surveyed and subdivided into two. They occupy the land equally. There is a barbed wire separating the two parcels of land.

On cross examination, he states that he lives in Marakwet East whilst the parties live in Marakwet West. However, he has land at Kapsaliat in Uasin Gishu in the same area who the parties herein. He does not know why Chelimo wants Chemorio to vacate the land. He states that DW3 does not have a good relationship with his father and brothers. Chemorio has been using the land for a long period of time. He entered the land in 1983, Chelimo entered in 1983 and Chemorio who entered the land in 1983.

On re-examination, he states that his plot in Kipsilot is adjacent to the parcels of land of the plaintiff and defendant.

I have considered the plaintiff's claim as pleaded, evidence adduced and submission and the defence filed by the defendant, his evidence and submissions and do find that the plaintiff is registered as the absolute proprietor of the suit land. The two parties were once friends. They

occupy the suit parcel of land equally. The title deed is registered in the names of the plaintiff. The plot allocation card is in the names of the plaintiff. The defendant entered the land before the year 1986 and has been living there to-date. When the suit was filed, he was living on the land. The plaintiff claims that the defendant visited him and was allowed to stay on the land temporarily out of the plaintiff's humanity but when asked to vacate, he refused. The defendant on the other hand, states that they bought the land jointly and that the plaintiff gave him possession of his share but refused to transfer the same into his name. This court has to grapple with the evidence and find out who is saying the truth.

To begin with, the plaintiff does not explain why it took him 27 years from 1986 to 2013 to apply for the eviction of the defendant. The allegation by the plaintiff's son DW3 that the plaintiff and defendant used to "walk together" and that they were given 42 acres which they shared equally and sold the land at Kshs. 3,000 and shared the proceeds equally and shared the land equally indicates that the two parties were great friends. I believe the evidence of the plaintiff that he paid part of the purchase price and that is why the plaintiff allowed him to occupy part of the suit-land. This evidence points to the fact that there existed a constructive trust between the plaintiff and the defendant and that the defendant holds the land in dispute for himself and for the defendant.

PW2 states that the land belonged to his father but does not explain the long period of occupation by the defendant. The defendant's explanation that though he was not a member, he paid through the plaintiff for 2 acres is sufficient explanation as to how he found himself to be in possession of the land. The fact that the plaintiff subdivided the land and put the defendant in possession demonstrates that there was an implied or constructive trust, thus the plaintiff was registered as trustee on behalf of the defendant. The evidence of the Assistant Chief, DW2 confirms the allegation that the plaintiff bought the land on his behalf and on behalf of the defendant. He states that both parties entered the land in 1984. However, the plaintiff declined to transfer to the defendant his share.

The evidence of Fredrick Kimutai Kiboros was that the two parties have been utilizing the land equally and that the defendant has been cultivating and burning charcoal. Yego Cheptoo K. now lives at Kapsabet and a neighbour to the parties' states that he brought a surveyor to do survey on the land and Chelimo approached the surveyors to survey his land. The land was subdivided into two. The parties occupy equal shares of the subdivided land.

This court finds that the act of subdividing the land into two equal shares and putting the defendant into possession of half share and allowing him to utilize the same from 1986 to the time of filing the suit implied that the portion of land that the plaintiff put the defendant in possession belonged to the defendant and therefore the plaintiff was impliedly registered as trustee for the defendant.

The upshot of the above is that the defendant has demonstrated that the plaintiff holds 21 acres of land in trust for the defendant. The counterclaim thus succeeds and it is declared that the plaintiff was registered in his own interest and as a trustee for the defendant herein in equal shares and a vesting order is hereby issued compelling the plaintiff to transfer one half share of 21 acres in parcel land MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/182 to the defendant herein. The Deputy Registrar do execute the necessary documents to actualize the transfer in place of the plaintiff herein. The defendant to be registered as proprietor of one half of the share, that is, twenty-one (21) acres out of the MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/182 measuring approximately seventeen decimals five four (17.54 Ha).

Costs of the counterclaim to the defendant. The plaintiff's claim is dismissed with costs. Orders accordingly.

Dated and delivered at Eldoret this 21st day of December, 2018.

A. OMBWAYO

JUDGE