



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

ENVIROMENT AND LAND COURT MIGORI

ELC CASE NO. 261 OF 2014

(Formerly Kisii Elc Case no 43 of 2016)

SABASTIAN OTIENO OMARI

PETER ODOYO OMARI

D O O – Minor

N O O – Minor.....PLAINTIFFS/APPLICANTS

Suing through brother and next friend SABASTIAN OTIENO OMARI

VERSUS

DEREK OTIENO OLUOCH.....RESPONDENT/DEFENDANT

JUDGMENT

1. By a plaint dated 10th March 2011 and filed on the even date, the plaintiff through Oguttu Mboya and Company Advocates have sued the defendant claiming ownership of the suit land namely LR NO. WEST KASIPUL/KONYANGO KOKAL /219 measuring approximately 0.34 hectares. It is alleged that pursuant to first registration, the suit land was initially lawfully registered in the name of Okwany Ogwang, the grandfather of the plaintiffs (Deceased 1). Subsequently the suit land was registered in the name of John P. Omari Okwanya (deceased 2) by way of gift from deceased 1. On the 15th October 2008 the 1st plaintiff and beneficiaries of deceased 2 acquired the land by way of transmission further to a grant of letters of administration issued in Oyugis Principal Magistrate's Court Succession cause No. 25 of 2007.

2. It is further claimed by the plaintiffs that in the year 2006, the defendant lodged a complaint at Rachuonyo Land Disputes Tribunal claiming ownership of the suit land. The complainant was arbitrated and dismissed. In spite of the determination of the complaint, the defendant trespassed upon the suit land and commenced cultivation of a substantial portion of it in December 2010 without the consent of the plaintiffs. Following the defendant's trespass upon the suit land, the plaintiffs filed a report with the area Chief, Kowidi Location who warned the defendant from acts of trespass.

3. The defendant temporarily stopped trespass upon the suit land. However, he reverted to the land and cultivated the same. Therefore, the plaintiffs are seeking the following reliefs.

i. Declaration that the plaintiffs are the Bona-fide and registered owners of LR NO. WEST KASIPUL/KONYANGO KOKAL/219.

ii. Permanent injunction restraining the defendant either by himself, agents, servants and /or anyone claiming under the defendant from re-entering into, trespassing onto building cultivating, interfering with and /or in any other manner dealing with the suit land, that is LR NO, WEST KASIPUL/KONYANGO KOKAL/219.

iii. General damages for trespass.

iv. Costs of this suit be borne by the defendant.

v. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.

4. The defendant who is represented by G.S. Okoth and Company Advocates denied the plaintiffs claim in his statement of defence and counterclaim dated 29th April, 2011. He stated that the land disputes Tribunal referred his claim to the High Court as the tribunal lacked jurisdiction over the matter regarding registered land. That he discovered in 1998 that deceased 1, had fraudulently registered the suit land that had been bequeathed to him by his late father, Oluoch son of Okumu.

5. The defendant further stated that deceased 1 abused his fiduciary duty and registered a portion of the suit of the defendant in his own name hence he held the said land in constructive and resulting trust for the defendant. He sought dismissal of the suit with costs and sought orders in the counter claim as follows:-

a. THAT the defendant's claim is barred and/or prohibited by Section 4 (1) of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

b. The defendant herein lacks the requisite locus standi, to commence, originate and/or maintain the counterclaim.

c. The counter claim by the defendant is barred by the provisions of Section 82 of the law of Succession Act, Chapter 160, Laws of Kenya.

d. The defendant's claim founded and/or based on trust is premature, misconceived and legally untenable.

e. The defendant and counterclaim herein are invalid and bad in law.

f. The counterclaim herein contravenes the provisions of Order 7 Rule 5 of the Civil Procedure Rules, 2010.

g. The defendant is non-suited.

6. The plaintiffs filed a reply to defence and defence to counterclaim dated 14th May 2011 whereby they denied the defendant's counterclaim. They stated that the initial registration and subsequent transaction in favour of deceased 1 and deceased 2 are vindicated by Section 143 (1) of the Registered Land Act (Cap 300 repealed Act). They also termed the defendant's counterclaim time barred.

7. In his reply to defence to counterclaim and plaintiffs' reply to defence filed on 1st July, 2011, the defendant further reiterated wholly his counterclaim. He denied the plaintiffs' suit, sought its dismissal and that Judgment be entered in terms of his counter claim.

8. I have considered the pleadings, reports dated 5th December 2017 and the 6th December 2017 by Rachuonyo East South and North sub counties' Land Registrar and surveyor respectively as well as oral submission of the plaintiffs' counsel that the reports be adopted and judgment be entered in terms of the plaint. I bear in mind the decision in **Galaxy Paints Ltd –v- Falcon Grounds Ltd (2000) 2EA 385** on issues for determination in a suit. Accordingly, I embrace a statement of agreed issues (plaintiffs version) dated 23rd January 2013.

9. On 18/9/2017, by consent of the parties to this suit, this court ordered for reports from the Land Registrar and surveyor regarding the boundaries of the suit land and LR NO. KASIPUL/KONYANGOKOKAL/220. The plaintiffs' counsel submitted that the reports be adopted by the court.

10. The said reports revealed that there was no boundary between the two parcels of land. Therefore new boundary was marked by use of euphorbia plants as per land registration reports reads:-

“ On the map, the boundary was a straight line but after our exercise, there was a slight shift ad this was explained to the parties in the dispute. We planted about five euphorbia plants to mark the new boundary”

11. The Land Registrar's report was confirmed by the surveyor's report which states in part:

“As result of that the boundaries between the two parcels West Kasipul/Konyango Kokal/220 and 219 had to shift slightly from point a1 to b1 on one side and point c1 to d1 on the other side to conform with the ground situation. The shift being agreed upon by all the parties.”

12. In that regard, the boundary of the suit land and LR NO. KASIPUL/KONYANGO KOKAL/220 were established in accordance with sections 18 and 19 of the Land Registration 2012. The plaintiffs' counsel urged this court to adopt the report and enter judgment for orders sought in the plaint.

13. On 15th May, 2018 the court directed and ordered that the reports be served on the parties for their response or reaction. The defendant was duly served with the reports as shown on affidavits of service sworn on 19th October 2018 by a licensed process server, Joshua Otieno Okeyo. There was no response to the reports.

14. It is worth to note that this court does not have the expertise to determine land boundary disputes. That mandate is bestowed upon Land Registrar under sections 18 and 19 of the Land Registration Act, 2012. The reports of land registrar are by their nature opinion or expert evidence.

15. **Sections 48 and 54 of the Evidence Act (Cap 80)** make provision for evidence of expert witnesses. However, as a general rule opinion

or expert evidence is not binding on the court which is at liberty to accept or reject it depending on the facts and circumstances of the case before it; see **CD Desouza –v- BR Sharma (1953) 26 KLR 41 at 42 and Amasom Builders Developers Ltd –v Gachie and 2 others (2009) KLR 468.**

16. In the premises, I find the reports dated 5th December 2017 and 6th December 2017 presented by the Land Registrar and the Surveyor respectively to be sound and unchallenged. I adopt the same accordingly.

17. The plaintiffs claim general damages for trespass against the defendant. Trespass has been defined as any unjustified intrusion of one person upon the land in possession of another see; **Zacharia Onsongo Momanyi –v- Evans Omurwa Onchagwa (2014) eKLR.**

18. The torts of trespass is actionable per se. The plaintiffs are entitled to at least, some amount in respect of the claim for general damages for trespass. I think an amount of **Kshs. 80,000/=** would be appropriate in the circumstances.

19. I find that the plaintiffs have proved their claim against the defendant on a balance of probability.

20. The defendant's counterclaim dated 29th April 2011 stand unsubstantiated. I dismiss it.

21. Accordingly I enter Judgment for the plaintiffs against the defendant in terms of orders (i), (ii) and (iii) sought in their plaint dated 10th March 2011, as well as an award of general damages for trespass at **Kshs. 80,000/=**

DELIVERED, DATED and SIGNED at MIGORI this 13TH day of DECEMBER 2018.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Olando learned counsel for the plaintiff.

None appearance for the defendant.

Tom Maurice – Court Assistant.