



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 317 OF 2016

TOROITICH SUTER.....PLAINTIFF

VERSUS

WILLIAM TOROITICH.....1ST DEFENDANT

BENJAMIN SUTER.....2ND DEFENDANT

UNDERSON MOSOP.....3RD DEFENDANT

EVANS BIWOTT.....4TH DEFENDANT

JUDGMENT

Toroitich Suter, (**hereinafter referred to as the Plaintiff**) has sued William Toroitich Benjamin Suter, Anderson Mosop and Evans Biwott (**hereinafter referred to as defendants**) claiming that the plaintiff is the legal and/or bona fide owner of all that parcel of land namely SAMBIRIR/SAMBIRIR/105 measuring at approximately (22 HA) 55 Acres. The 1st, 2nd, 3rd and 4th Defendant are close relatives (sons and grandchildren) of the Plaintiff. On or about the 27th day of August 2016, the Plaintiff in the company of some security officers, local authorities and family members went to the site in readiness to sub divide all that parcel of land known as SAMBIRIR/SAMBIRIR/105 measuring at approximately 55 acres as per the family consensus/wishes of the Plaintiff. The Plaintiff is an elderly citizen well above the age of 80 years and in exercising his wishes and desires inter vivos, he called for a family meeting where of he made a gift/donation to his surviving children.

On or about 26.04.2016, the Plaintiff held a family meeting where by consensus the defendants among other family members agreed to fulfil the wishes/desires of the plaintiff and or the proposed mode of sub dividing the suit parcel and distribute the same among his children. Pursuant to the meeting held on 26.04.2016 the plaintiffs land was to be demarcated/subdivided among the five (5) sons where each was to get 10 Acres and the remainder five (5) acres left to the Plaintiff. The Plaintiff avers that while the county surveyor was in the process of sub dividing and demarcating all that parcel of land known as SAMBIRIR/SAMBIRIR/105, the Defendants accosted the Plaintiff, surveyors and disrupted the demarcation exercise. The Plaintiff further avers that the Defendants without any lawful justification disrupted the peaceful process by causing chaos and havoc during the sub division process of all that parcel of land hence rendering the process futile and/or frustrating the wishes of the Plaintiff.

The plaintiff further states that the Defendant's without any lawful justification proceeded to place caution and/or encumbrance on the Plaintiff parcel of land. The Plaintiff's claim against the defendants is for a permanent injunction restraining the defendants, their servants, and/or agents from interfering with the sub division and/or demarcation and/or otherwise interfering with the Plaintiff's wishes/desires on the

distribution/allotment of the suit land namely SAMBIRIR/105 during his lifetime. The Plaintiff further prays for an order directing the Land Registrar to remove any encumbrances in form of caution, caveat or liability placed by the Defendants. The Plaintiff avers that there is no pending suit and there have been no previous proceedings between the parties herein over the same subject matter. Demand and notice of intention to use has been issued but the defendants have ignored the same. This honourable court has jurisdiction to hear and determine this matter.

The Defendants filed statements of defence admitting that the Plaintiff is the legal owner of the parcel of land but they denied that a meeting was held to deliberate on the mode of distribution of the said land No. SAMBIRIR/SAMBIRIR/105. They denied the particulars of paragraph 8 and more specifically that the parcel of land Known as SAMBIRIR/SAMBIRIR/105 measuring 55 acres was to be sub-divided among five sons each to get 10 acres.

The Defendants contend that the Plaintiff had three wives namely **Kabon Toroitich** (deceased) with two children, **Kobilo Toroitich** with six children and **Tala Toroitich** with two children and none was ever informed of the alleged meeting held on 26th April, 2016. The 1st Defendant further contends that they have never attended any land board meeting to deliberate on the issue of sub division and the 1st defendant was shocked when he saw the surveyor as stated in paragraph 9 of the plaint. The 1st Defendant further denies the contents of paragraph 10 and specifically states that he has never by himself caused chaos and invites the Plaintiff to strict proof. The second defendant denies all allegations of the plaintiff. In his reply to the statements of defence filed by defendants, the Plaintiff states that being the sole proprietor and registered owner of the suit land, he exercised his proprietary rights and gave as a gift the suit parcel of land among his five sons where each was to get 10 acres.

When the matter came for hearing the plaintiff testified that he is a male adult of sound mind aged 105 years and a farmer by profession. That he is the bona fide and registered owner of all that parcel of land namely Sambirir/Sambirir/105 measuring at approximately 22 (Ha) That it was his wish/desire to divide the same among his five sons, where each was to get ten (10) acres each and he remains with the 5(five) acres. That on 27.08.2016, he together with other family members and accompanied by security officers, local authorities visited the site with the sole purpose of sub-dividing the said parcel as per his father's wishes/desires. That however, it was to his utter shock and dismay when the Defendants disrupted the demarcation exercise when they caused havoc and chaos frustrating the whole process. That further, the Defendants proceeded and placed caution/encumbrances in the said parcel without any legal justification and or any colour of right. That this Honorable Courts intervention is necessary to help him enforce his rights as the registered owner. **On cross-examination**, he states that he called the defendants and distributed the land to them but they declined. He states that he wanted his land to be distributed according to his wish. Thus, each son to get 10 acres but the defendants want it to be distributed according to wives. The Plaintiff did not call any witness and upon the close of his case the Defendants gave the part of their story.

DW1 William Toroitich a son to the plaintiff states that he is a famer. He insists that the land belonging to his father be distributed accordingly to his mothers thus Kabon Toroitich, Kobilo Toroitich and tala Toroitich. **Kabon Toroitich** has one son and one daughter. **Kobilo Toroitich** has 3 sons and 3 daughters. **Tala Toroitich** has one son and one daughter. **DW2 Benjamin Suter** a son to the plaintiff states that he is a farmer by profession and that he does not agree with the plaintiff to distribute his parcel of land to his sons equally and states that the land ought to be distributed according to his wives. **DW3 was Anderson Mosop** a grandson to the plaintiff who testified that he is opposed to the land being subdivided and distributed according to the sons as the same should be distributed according to houses. DW4 Evans Biwott a grandson was of similar opinion.

I have considered the pleadings and evidence on record and do find that the Plaintiff is the registered owner of parcel of land No. SAMBIRIR/SAMBIRIR/105. He intends to distribute it to his sons who are five in number. The question is whether the children of a property holder have a known interest in the property.

Sections **24, 25 and 26 of the Land Registration Act no 3 of 2012** envisages the vesting of absolute

ownership of land to the person in whose name the property is registered together with all rights and privileges appurtenant thereto and that the rights of a proprietor should be protected as evidenced by the certificate of title unless acquired fraudulently or illegally. This sections provide that: -

24 Subject to this Act—

(a) 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; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of 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—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by [section 28](#) not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) 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 and 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 the ground of fraud or misrepresentation 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

The only known family interest in property is the spousal interest which is an overriding interest and vests in either the husband or wife of the registered owner of property. The defendants are not claiming spousal interest but are claiming that they are sons and grandsons of the property owner. I do find that children and grandchildren of a living title holder have no overriding interest in the property of their father or grandfather respectively. I do find in favor of plaintiff and do grant judgment in terms of a permanent order restraining the Defendants, their siblings, and/or any other persons from interfering with his lawful sub-division, demarcation, and/or doing any interruption in dealing with his parcel of land namely SAMBIRIR/SAMBIRIR/105 measuring at approximately 55 Acres and an order directing the Defendants

to remove any encumbrances in the parcel of land namely SAMBIRIR/SAMBIRIR/105. No order as to costs as this is a family dispute.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY, 2017.

A. OMBWAYO

JUDGE