



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KITALE
LAND CASE NO. 66 OF 2004

SAMUEL POSHIO KAPTIBIN.....PLAINTIFF

VERSUS

ELIZABETH CHESANG.....1ST DEFENDANT

JOSEPH ROTICH.....2ND DEFENDANT

JACKSON KIPLAGAT.....3RD DEFENDANT

ERICK SIKUKLUU.....4TH DEFENDANT

ENOCK KIPKOECH.....5TH DEFENDANT

JACOB RUTO.....6TH DEFENDANT

RULING

1. Judgement in this matter was delivered on **22/4/2015**. The court found that: the plaintiff had proved his case on a balance of probabilities; that he is the registered owner of the land; that the actions of the defendants of preventing the plaintiff from utilizing his **11 acres** are unlawful; that a permanent injunction would issue to restrain the defendants from interfering with the plaintiff's user and occupation of the 11 acres. The court found that as the parties are family members there shall be no orders as to costs

2. The defendants/applicant's application dated 24/2/2017 which is signed by all six applicants now seeks the following orders:-

1.spent

2. **That the court do order the implementation of the decree herein dated 12/6/2015.**

3. **That the Trans-Nzoia County Surveyor, and/or any other registered surveyor to carry out survey exercise on the suitland and curve (sic) out 11 acres out of the Land Parcel Number West Pokot/Siyoi/327 – measuring 30 acres or thereabouts in favour of the plaintiff/respondent and the remaining land be left and shared among the defendants/applicants as per the terms of the decree made on the 12th day of June, 2015 and any other related documents.**

4. That the plaintiff/respondent has colluded with the County Surveyor of West Pokot County (Mr. Lumasayi) on several occasions thus rendering the cited land not to be subdivided among the parties herein as per the terms of the decree dated 12/6/2015 of this honourable court.

5. That we are worried in that the plaintiff/respondent can quietly dispose off (sic) the land thus rendering us homeless since the County Surveyor has really decided and/or ignored, neglected, refused to help us, despite our numerous unpicked phone calls to the said Surveyor (Mr. Lumasayi) and unattended visiting (sic) at the court (sic) surveyor's office.

6. That in the interest of justice (sic) is that both parties be present and O.C.S Kapenguria police station to provide security during the exercise of the implementation of decree.

7. That despite the fact that the County Surveyor of West Pokot County (Mr. Lumasayi) purporting that he has already visited the above land and subdivided the same among the parties herein, the truth of the matter is that he is yet to visit the same and even the neighbours can bear witness.

8. That the costs of this application be provided for.

3. As one may instantly see from its face the one great difficulty the applicants will have to surmount in this application is the existence of the orders stating that the applicants are restrained by way of a permanent injunction from interfering with the plaintiff's user and occupation of 11 acres; and that the respondent, who is their father, is still the registered owner of the land. In the plaint dated 31/5/2004 the plaintiff does not deny the applicants are members of his family. He states that he has always reserved a total of 11 acres for use by himself to pay school fees and take care of other needs of his family. He pleaded that since the year 2002, the applicants have unlawfully prevented the plaintiff from using the land and have caused physical injury to the plaintiff. It was on this basis that he sought orders of injunction and declaration.

4. The application is opposed by the respondent, who filed his sworn affidavit dated 10th March, 2017. He refers to the applicants as "ungrateful adults" whom he has educated but who "instead of looking for their own land, want to continue frustrating" him. He states that the intention of the applicants is to dictate to him as to how he should use and subdivide his land. He reiterates his position as outlined in the plaint; that he has decided to retain eleven (11) acres for himself and subdivide the remaining nineteen (19) acres among his dependants who include the applicants. He adds that the subdivision process is already complete and only the titles for the resultant subdivisions are being awaited from the Land Registrar's Office. However, he states, the applicants have "gone to the Lands Registrar's Office and prevented" him from being issued with title deeds. The documents which are annexed to the replying affidavit support his assertions that the surveyor work is complete.

5. The land subject matter of the suit was registered and a Land Certificate issued on 29/11/1979 to the respondent under the Registered Land Act. Under that Act, he was the absolute proprietor thereof as provided under Section 28 of the said Act (now repealed) which states as follows:-

"The rights of a proprietor whether acquired on first registration or whether acquired 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 liable by the proprietor together with all the privileges and appurtenances belonging thereto free from all other interests and claims whatsoever but subject to:-

a. Leases, Charges and other encumbrances and to the conditions and restrictions if any, shown on the register, and

b. Unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register

Provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee”.

In exercise of his power under this Section the plaintiff as proprietor has decided to subdivide the land among his dependants, or so he says, who include the applicants. Indeed in the judgement this court states that:-

“It is apparent that the plaintiff is ready and willing to give land to the defendants”.

6. This court notes that the respondent’s sworn affidavit dated 10/3/2017 that the respondent is still willing to give land to his dependants who include the applicants. There is no evidence on the record to controvert this. What the court notes is the intent on the part of the applicants that the land be subdivided in a certain manner that they want. Indeed the survey report dated 11th March, 2016 has this passing remarks:-

“A subdivision was done and all the parties (plaintiff and defendants) were interested in the portion where the 11 acres lied” (sic).

This is what this court was alluding to when it stated in the judgement:-

“It would appear that the defendants do not want what the plaintiff is proposing”.

7. I think the main issue that arises in the application now under consideration is already determined in the judgement when the court states as follows:-

“The question which then arises for determination is whether children of a parent who is alive can dictate to the parent on how he should subdivide his land. I do not think that children of a surviving parent can dictate to him on what they want. The plaintiff has already given 19 acres to them. The plaintiff has reserved 11 for his use. He is utilizing this land to raise fees to educate his children. There is no claim that the plaintiff is intending to dispose of the 11 acres. The defendants who are wife and children of the plaintiff have a right as licencees to utilize the land of the plaintiff. They have no right to claim a share of it during his lifetime. It is wrong for the defendants to prevent the plaintiff from utilizing the 11 acres”.

8. Any order made upon this application having a negative bearing on the respondent’s use and occupation of the 11 acres would go contrary to the very decree that the applicants are purporting to seek to enforce by way of their application dated 24/2/2017. This court notes that the prayers Nos. 2 and 3 of the said application (which incidentally are the only ones capable of being termed as prayers) appear innocuous enough. However the question that arises is why there should be another survey at the instance of the applicants when the land owner, in exercises of his proprietorship rights has already caused a survey from which the applicants stand to benefit? There is no proper explanation forthcoming from the applicants. The applicants should be advised that short of an order on a successful appeal, no other order of court can or will interfere with the decree of the court given on 22/4/2015.

9. I therefore find that the application dated 24/2/2017 is without merit and I hereby dismiss it with costs to the respondent.

Signed, dated and delivered at Kitale on this 29th day of May, 2017.

MWANGI NJOROGE

JUDGE

29/05/2017

Before - Mwangi Njoroge Judge

Court Assistant - Isabellah

Mr. Lowasikou holding brief for Ms. Arunga for the plaintiff

N/A for the defendant

Application dismissed with costs to the Respondent. Ruling read in open court.

MWANGI NJOROGE

JUDGE

29/05/2017