



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E&L 85 OF 2015

JOSEPH KIPCHOGE BIRIR.....PLAINTIFF

VERSUS

JOSPHAT KIPKORIR TUWEI.....DEFENDANT

JUDGEMENT

INTRODUCTION

By a plaint dated 24th March 2015 the plaintiff herein sued the defendant seeking for orders for:

- a. A temporary injunction barring the defendant and or his agents, servants and or employees from interfering and or ploughing, planting encroaching upon parcel of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)/271.
- b. In the alternative, an order to refund the defendant Kshs. 78.500/.
- c. An order for forceful eviction upon and or against the defendant his agents and or employees from that said parcel of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)/271.
- d. Costs of this suit
- e. Any other relief that this Honorable Court may deem fit to grant.

The plaintiff contemporaneously filed a notice of Motion under certificate of urgency seeking for a temporary injunction restraining the defendant and his agents from interfering with parcel of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)/271 until this suit is heard and determined. The application was heard and the court ordered that the status quo be maintained until this matter is heard and determined.

The Plaintiff further filed an application for leave to amend his plaint on 10th February 2016 which application was allowed on 12th May 2016. The plaintiff filed an amended plaint dated 30th May 2016 whereby the plaintiff particularized the defendant's acts of trespass and particulars of loss and damage together with an order for a permanent injunction. The defendant having been served filed his defence and counterclaim where he sought for a declaration that he is the legal owner of 3 acres of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)/271. In reply to defence and counterclaim the plaintiff denied the contents of the defendant's counterclaim and urged the court to dismiss it with costs.

Plaintiff's Case

This matter came up for hearing on 27th March 2017 when the plaintiff testified and called three witnesses and closed his case. The plaintiff also relied on his statement dated 24th March 2015 and filed in court as evidence before the court. It was the plaintiff's case that he is the registered owner of all that parcel of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)/271. The plaintiff produced a copy of a title deed and an extract of the green card which were marked as exhibits nos. 3 & 4 respectively before the court. He stated that he bought the land from one Ole Kisee and he was subsequently registered as owner on 23rd February 1998. The plaintiff produced the sale agreement and an acknowledgement of the purchase price between him and the seller dated 19th January 1998 and the same were marked as exhibits nos. 5a & 5b respectively. The plaintiff testified that the defendant did not contribute to the purchase of the suit land.

The plaintiff stated in his evidence that he had employed the defendant herein who is his nephew to operate a Posho mill in 1989. He further stated that he had promised to help him secure a parcel of land and the defendant therefore accumulated Kshs. 50,000/ from the said employment. The plaintiff averred that he secured 1 ½ acres which was to be excised from the 3 acres in MOSOP/METKEI FARM. The plaintiff further stated that the defendant paid an additional Kshs. 28,500/ in the year 2002 to complete the purchase price of the parcel of land.

It was the plaintiff's case that the defendant instead of taking possession of the 1 ½ acres of the MOSOP/METKEI FARM, he encroached on the plaintiff's parcel of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)/271. The plaintiff testified that he has tried to use all means to ask the defendant to move out of the suit land but the defendant has been adamant therefore necessitating the filing of this suit.

The Plaintiff adduced evidence that he wrote demand letters to the defendant through his lawyers but the defendant did not move out of the suit land. The plaintiff produced two demand letters dated 24th October 2005 and 15th August 2007 respectively as exhibit nos. 1 and 2.

The plaintiff also stated that the defendant has ploughed his parcel of land and planted crops on it. The plaintiff prayed for an order of eviction of the defendant, mesne profits and costs of the suit.

On cross examination by the defendant the plaintiff reiterated his evidence in chief and stated that the defendant is his nephew who worked for him for four years in his farm. He stated that there was no agreement with the defendant to allow him to stay on his parcel of land. He stated that the defendant had asked him for shelter on his farm as he was his nephew but not to take his land away from him.

During re-examination, the plaintiff stated that after the defendant left work at his place he went to work at Kruger farm and went to live in Tugen estate. The plaintiff further stated that he allowed the defendant and his father to temporarily stay on his farm as he worked at Kruger farm. He stated that he now seeks that the defendant vacates his parcel of land.

PW 2. Jairo Kiprono Tirop relied on his statement dated 23rd December 2015 as evidence in support of the plaintiff's case. He stated that he knows both the plaintiff and the defendant as he was the one who replaced the defendant as a posho mill operator having been employed by the plaintiff herein. He stated that he still works for the plaintiff as a tractor driver. PW2 further stated that he used to plough and plant the plaintiff's parcel of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)/271 without any interruption from 1998 to 2014 or thereabout measuring 7 ½ acres. PW2 also stated that early 2014 he went to plough the suit land and the defendant chased him away together with the plaintiff's sons. He confirmed that he is well conversant with the suit land and that it belongs to the plaintiff.

On cross examination by the defendant, PW 2 confirmed that he knew both the plaintiff and the defendant who worked in a posho mill as an employee of the plaintiff. He further confirmed in re – examination that the suit parcel of land belonged to the plaintiff.

PW 3 Mathew Kimeli Choge stated that he knew both the plaintiff and the defendant and relied on his statement dated 23rd March 2015 as evidence before the court. He stated that he had been approached by the plaintiff on or about 6th March 2015 to go and plough his parcel of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)/271 but the defendant restrained them from ploughing the said land. He stated that the defendant created disturbance thereby forcing them to report the matter to Moiben Police station but the OCS advised them to file a civil suit in court for redress.

During cross examination by the defendant, PW 3 confirmed that the defendant was ploughing and staying on the plaintiff's land. On re-examination by the plaintiff's lawyer he stated that the defendant was given land to stay on and not to own.

PW4 Sila Kipkoech gave evidence and relied on his statement dated 24th March 2015 as evidence before the court. He stated that he is conversant with the suit land which belongs to the plaintiff herein. He confirmed that he was one of the people who went with the plaintiff and PW3 to the suit land to plough but were chased away by the defendant.

PW4 was cross examined by the defendant whereby he stated that he knows the defendant as his cousin. He stated that the defendant was given temporary shelter on the suit land but he ended up building a house without permission of the plaintiff. That the defendant was allowed temporary shelter as he looked for his own parcel of land.

The plaintiff closed his case after the evidence of PW4.

Defendant's Case

The defendant stated that he was ready to proceed with his defence as per his statement dated 7th May 2015 but requested that he be allowed to bring his witnesses. The application was opposed by counsel for the plaintiff on the ground that the witnesses had not filed witness statements as required by procedure and that the plaintiff would not be in a position to interrogate such testimony. Counsel urged the court to order the defendant to proceed with the hearing as the case was a claim for ownership of land and there would be no reason to adjourn the matter.

The court considered the application for adjournment and ordered that the defendant proceeds with his evidence.

It was the defendant's case that he entered into an agreement with the plaintiff dated 27th January 2000 at the chief's office. He further stated that when his father died in 2015 they sat as a family and buried him on the suit land. He testified that the land in Mossop belongs to his brother Stanley.

The defendant stated that he is the one who met the person known as Ole Kisee who agreed to sell to him the suit parcel of land at Kshs 50,000/ per acre. He stated that he gave the plaintiff Kshs. 38,000/ and Kshs. 2000 to the seller, Ole Kisee. He further stated that they went to Birech & Company Advocates where they wrote a sale agreement. The defendant averred in his statement that in 1999 the plaintiff persuaded him to exchange his 3-acre farm being the suit land with 1 ½ acre parcel namely MOSOP /METKEI FARM which proposal he rejected. The defendant urged the honorable court to help him get the title to the suit land namely SERGOIT/KARUNA BLOCK 3 (TUGEN) 271. He claimed that the plaintiff held the title to the suit land in trust and refused to transfer to him.

On cross examination by counsel for the plaintiff the defendant admitted that he did not have any documents to prove what he had just stated. He confirmed that he was not a party to the agreement that was prepared at the Advocates' offices. He claimed that he did not chase away the plaintiff with a machete and that he does not own land in Mosop.

The defendant closed his case after testifying.

Analysis and Determination

The parties neither filed issues for determination nor submissions in this case. I have considered the pleadings, the evidence, exhibits herein and in my view the issues for determination are:

1. Whether plaintiff is the rightful owner of parcel of land known as SERGOIT /KARUNA BLOCK 3 (TUGEN) 271.
2. Whether the defendant is entitled to 3 acres of the parcel of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)271 as claimed.
3. Whether the plaintiff should refund the defendant kshs. 78,500/
4. Whether the plaintiff is entitled to the order of eviction of the defendant and damages for trespass.

I now turn to the analysis of the issues. On issue no. 1, as to **whether the plaintiff is the rightful owner of parcel of land known as SERGOIT /KARUNA BLOCK 3 (TUGEN) 271.** The plaintiff produced a copy of a title deed and an extract of the green card which showed that he is the registered owner of the suit land. This evidence was adduced to prove ownership which I consider as sufficient proof of ownership. There is no evidence on record from the defendant to controvert the plaintiff's assertion that he is the registered owner of the suit land. The defendant did not produce any evidence or documents to support his claim that he is the one who bought the suit land. The defendant alluded to an agreement drawn by Birech & Co Advocates which he was not a party to. The Defendant neither produced nor attached the said agreement in his list of documents.

The plaintiff's rights are protected under section 24 and 26 of the Land Registration Act 2012 which vests absolute proprietorship to an individual so long as it is not fraudulently obtained.

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.

There was no evidence that the plaintiff obtained the title fraudulently. The issuance of title to the plaintiff is prima facie evidence that he is the absolute owner of parcel of land known as SERGOIT /KARUNA BLOCK 3 (TUGEN) 271 as provided for under section 26 of the Land Registration Act 2012.

26. (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.

In the case of *Mbira v Gachuhi 2002 1 EA Page 138* Kuloba J. held that, "Where there were two

persons on a piece of land, one of whom was the registered proprietor, and even asserted that the land was theirs and did some act in assertion of that right, then, if the question was which of those two was in actual possession, the person with the title was in actual possession and the other was a trespasser”.

Having said that, I find that the plaintiff is the registered owner of the suit land and the defendant is therefore a trespasser who ought to be evicted.

Whether the defendant is entitled to 3 acres of the parcel of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)271 as claimed.

The defendant in his defence and counterclaim averred that he is entitled to 3 acres of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)271 being the suit land herein. In his evidence, he did not produce any documentation to support his claim. The defendant also did not adduce any evidence in terms of how he bought or acquired the 3 acres that he is claiming. A mere claim without supporting proof does not entitle a person to what he or she is claiming. He or she who alleges must prove the allegation.

The defendant also claimed that the plaintiff held title No. SERGOIT/KARUNA BLOCK 3 (TUGEN)271 in trust for him. From the evidence on record, I do not see anything to suggest that this was the position or any intention to create such trust. I therefore find that the defendant is not entitled to 3 acres of the suit land as claimed. This in effect dismisses the defendant’s defence and counterclaim.

Whether the plaintiff should refund the defendant Kshs. 78,500/

The plaintiff in his amended plaint dated 10th February 2016 prayed for an alternative order to refund the defendant Kshs. 78,500/. The defendant however in his defence and counterclaim rejected the proposal for a refund and urged the court to make a declaration that he is the legal owner of 3 acres of land known as SERGOIT /KARUNA BLOCK 3 (TUGEN) 271. From the evidence on record, the defendant has not produced any documentation to prove that he is the legal owner of the suit land. He did not also adduce any evidence to convince the court that he is the one who bought the suit land. The plaintiff testified and called 3 witnesses who supported his case and confirmed that he is the registered owner of the suit land. The plaintiff also produced documentary evidence to support his claim. The plaintiff further admitted that he owed the defendant Kshs. 50,000/ as his salary plus an additional Kshs 28,500/ which the defendant paid in purchase of the Mosop/ Metkei farm making a total of Kshs. 78,500/. I find that the plaintiff should refund the said amount as it not disputed that he owes the defendant Kshs. 78,500/

Whether the plaintiff is entitled to the order of eviction of the defendant and damages for trespass

The plaintiff narrated the background of the case and how the defendant’s encroachment on the suit land necessitated the action before the court. The plaintiff has proved that he is the registered owner of the suit land and the defendant has also admitted that he is in occupation of part of the land. The plaintiff stated that he has asked the defendant to vacate but he has been adamant. He wrote demand letters through his lawyer but the defendant ignored. The defendant does not have any valid defence or counterclaim to continue occupying the suit land. Having said that, I find that the plaintiff is entitled to an order of eviction of the defendant from the suit land.

On the prayer for mesne profits and damages incurred, no evidence was tendered to prove the amount of mesne profits or damages the plaintiff would be entitled to. The plaintiff particularized the loss of damage but did not produce any proof for the amounts that he is seeking for. In his evidence in chief and upon cross examination, the plaintiff did not touch on the issue of loss of damage. Mesne profits are special damages which must be specifically pleaded and specifically proved. The plaintiff did not state how long the defendant has been in occupation and how much he would require in terms of compensation. The amount of general damages is subject to the discretion of the court in which factors such as the duration of time that the defendant has been in occupation may be considered. The amount to be awarded also ought to take into account any award for mesne profits. The plaintiff stated that the defendant has been ploughing and planting on the suit land. It would therefore be in order to presume that the suit land is agricultural which can be used for economic activity. I am alive of the fact that the plaintiff is entitled to

general damages for trespass, I will therefore award a token which I quantify at Kshs. 20,000/=.

The plaintiff having established a case against the defendant is also entitled to a permanent injunction barring the defendant and or his agents, servants and or employees from interfering and or ploughing, planting encroaching upon parcel of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)/271.

I have considered all the pleadings, the evidence and the exhibits in support and against this case and I am satisfied that the plaintiff has established his claim against the defendant with respect to the suit land.

I therefore make the following orders:-

1. That the defendant do vacate the suit land within 30 days upon service of this judgment or decree. In default of so vacating, an eviction order be issued permitting the plaintiff to evict the defendant from the suit land.
2. That a permanent injunction is hereby issued barring the defendant and or his agents, servants and or employees from interfering and or ploughing, planting encroaching upon parcel of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)/271.
3. The plaintiff do refund the defendant Kshs. 78,500/ within 60 days.
4. That the prayer for mesne profits is disallowed as the same was not proved.
5. That general damages for trespass in a token sum of Kshs. 20,000/= be paid to the plaintiff.
6. The costs of this suit shall be to the plaintiff.

Dated and delivered at Eldoret this 17th day of May, 2017

M.A ODENY

JUDGE