



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 392 OF 2015

(Formerly Eldoret Hccc No. 1 of 2006)

FANKIWA LIMITED.....PLAINTIFF

VERSUS

GEORGE KIPTABUT LELEI.....1ST DEFENDANT

JOHN ARAP SAINA.....2ND DEFENDANT

JUDGMENT

Fanikiwa Limited, (hereinafter referred to as the Plaintiff) has sued **George Kiptabut Lelei** and **John Arap Saina, (hereinafter referred to as defendants)** claiming that he is the registered absolute owner of title numbers Pioneer/Ngeria Block 1(EATEC)/1389, Pioneer/Ngeria Block 1(EATEC)/1388, Pioneer/Ngeria Block 1(EATEC)/1387, Pioneer/Ngeria Block 1(EATEC)/1386, Pioneer/Ngeria Block 1(EATEC)/1385, Pioneer/Ngeria Block 1(EATEC)/1384, Pioneer/Ngeria Block 1(EATEC)/1381, Pioneer/Ngeria Block 1(EATEC)/1380, Pioneer/Ngeria Block 1(EATEC)/1379, Pioneer/Ngeria Block 1(EATEC)/1378, Pioneer/Ngeria Block 1(EATEC)/1374, Pioneer/Ngeria Block 1(EATEC)/1376, Pioneer/Ngeria Block 1(EATEC)/1375, Pioneer/Ngeria Block 1(EATEC)/1382 and Pioneer/Ngeria Block 1(EATEC)/1383.

That it acquired proprietorship of the said parcels for valuable consideration, having paid the full purchase price to M/s Lonrho Agribusiness East Africa Limited, the previous proprietors of the same and that the defendants are illegally staying on the plaintiff's parcels of land and have without any colour of right or any other justification entered into and taken possession of the said parcels of land and have continued to occupy them to-date. That at the time of purchase of the suit land, the defendants expressly agreed to vacate the suit land for other parcels of land. That contrary to the defendants' express agreement, the defendants went back to the suit land and occupied the same to the exclusion of the plaintiff.

The plaintiff's prayer against the defendants, their servants and/or agents jointly and severally therefore is for a declaration that the defendants are trespassers over land parcel numbers Pioneer/Ngeria Block 1(EATEC)/1389, Pioneer/Ngeria Block 1(EATEC)/1388, Pioneer/Ngeria Block 1(EATEC)/1387, Pioneer/Ngeria Block 1(EATEC)/1386, Pioneer/Ngeria Block 1(EATEC)/1385, Pioneer/Ngeria Block 1(EATEC)/1384, Pioneer/Ngeria Block 1(EATEC)/1381, Pioneer/Ngeria Block 1(EATEC)/1380, Pioneer/Ngeria Block 1(EATEC)/1379, Pioneer/Ngeria Block 1(EATEC)/1378, Pioneer/Ngeria Block 1(EATEC)/1374, Pioneer/Ngeria Block 1(EATEC)/1376, Pioneer/Ngeria Block 1(EATEC)/1375, Pioneer/Ngeria Block 1(EATEC)/1382 and Pioneer/Ngeria Block 1(EATEC)/1383.

The plaintiff further prayer against the defendants, their servants and/or agents is for a mandatory injunction directing the defendants, their families, servants and/or agents to immediately vacate from the suit lands and in default of so vacating the defendants, their families, servants and or agents be evicted therefrom forthwith. The plaintiff prays for judgment for mesne profits over the suit property wrongfully occupied by the defendants from the date of registration of the plaintiff as the proprietor thereof to such a date as the defendants may vacate therefrom.

The defendants filed defence and counterclaim and denying the contents of the plaint and claiming that the plaintiff was fraudulently registered as property and that they are *bonafide* purchasers for value.

When the matter came up for hearing on 18.3.2009, the plaintiff called PW1 **Mr. Mark Too**, the Director of the plaintiff a farmer by occupation who testified that he bought the suit properties from Lonrho Agribusiness in 2003 wherein the defendants were squatters then and that as now the plaintiff is the registered owner of the land. He produced the titles in respect of 14 parcels of land as ***PEx No. 1(a)*** to ***PEx No. 1(b)***. He states on oath that the defendants had agreed to move out of the land but failed to do so, even after being given notices. He denied having acquired the property by fraud.

On cross examination by Mr. Obudho, learned counsel for the defendants, he states that the defendants are sons of people who used to work on the farms and that they have no claim in the property. Moreover, that he obtained title to the property without any fraud.

Upon the close of the plaintiff's case, the defence called **John Arap Saina** (DW1) who testified that he has his Identity Card at home and he is a resident of Kambi Nandi and that Kambi Nandi is in Kapsaret division, Kabogo sublocation. He knows this case and knows the plaintiff as Fanikiwa Limited. Mr. Mark Too is the proprietor. He knows Mark Too since 1982 upto now. Mr **John Arap Saina** was in Kambi Nandi as a squatter. He has lived there as a squatter since 1982 and that the plaintiff found him on the land. He was given land (2) acres by the tanning Company as a squatter without paying anything. He was given 19/20. He is occupying the land he bought thus Ngeria Block 1 (EATEC/1388, 1387, 1378, 1376, 1385, 1386, 1379, 1380, 1381, 1382, 1384, 1383, 1374, 1375. These are their parcels of land previously referred to as Kambi Nandi. Mr. Mark Too told them to vacate the land measuring 90 acres bought by the defendants and money paid to Tanning. They paid to the bank and took the bank slip to the company. They did not pay all the money as they were told not to pay. His parents entered the land earlier in 1971. He was a young boy.

They did not do any agreement but they have receipts. He does not have the original receipts. He does not know when he did the last payment. The last payment could have been in 2003. They had paid almost Kshs.9,000,000/=. They were told that the land would be given to Mark Too. They went to Chebii and he does not remember what they discussed at Chebii. He has stayed on the land since 1971. He prays for the reliefs in the defence and pray for costs in the counterclaim.

DW2, **George Lelei** testified that he does understand the case before court and does understand the properties. The land in issue is known as Nandika (it means hoes). He used to stay on the parcel of land and was born on the said land. When Tanning was selling the land, he decided to buy amongst others. Everybody bought five acres. He knows that he has been sued because of land. The land belonged to Tanning. Mr. Mark Too told them to take 2 acres. However, Mr. Mark stopped them when his attitude changed. He was the chairman of Lonrho E. A. Limited. They went to their advocate Mr. Chebii and did a caution. They went to Tanning and said they could not leave the land. They pray that their land be registered in their names.

I have considered the pleadings, evidence on record and submissions and do find that there is no dispute that the plaintiff is the registered owner of the suit parcels after due process. The plaintiff has satisfied this court on a balance of probabilities that he is the legal owner of the land in dispute.

Section 24 (a) of Land Registration (Act No.3 of 2012) provides that: -

ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

The registration of the plaintiff as proprietor of the suit land, gives the plaintiff absolute proprietorship for the parcel. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

S.25 (i) “The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by 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, subject;

(a) to 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.

The defendants have come forward to say that their claim is based on fraud. The plaintiff has produced the title deeds and the certified copies of the green cards as evidence of ownership and in terms of Section 26 (1) of the Act;

“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 and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or miss-representation to which the person is proved to be a party to;
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The plaintiff is the registered owner of the suit parcels of land and therefore has an indefeasible right over the property. The plaintiff's rights as proprietor of the suit parcels of land are clearly protected in law and the defendant has no reason to trespass thereon and the law allows the Defendants to challenge the plaintiffs' ownership on grounds of illegality, unprocedural acquisition or corrupt scheme.

The defendants' defense is that they have been on the suit parcels for more than 51 years, however, they lived on the said suit parcels with permission of the EATEC and therefore, cannot claim any right over the property. Moreover, the defendants did not file a suit based on a claim for adverse possession. The allegations of fraud have not been proved and therefore, the same are not well founded.

I do find that the plaintiff has proved his claim on a balance of probability and therefore, I do grant judgment as follows:

(a) a declaration is hereby issued that the defendants are trespassers over land parcel numbers Pioneer/Ngeria Block 1(EATEC)/1389, Pioneer/Ngeria Block 1(EATEC)/1388, Pioneer/Ngeria Block 1(EATEC)/1387, Pioneer/Ngeria Block 1(EATEC)/1386, Pioneer/Ngeria Block 1(EATEC)/1385, Pioneer/Ngeria Block 1(EATEC)/1384, Pioneer/Ngeria Block 1(EATEC)/1381, Pioneer/Ngeria Block 1(EATEC)/1380, Pioneer/Ngeria Block 1(EATEC)/1379, Pioneer/Ngeria Block 1(EATEC)/1378, Pioneer/Ngeria Block 1(EATEC)/1374, Pioneer/Ngeria Block 1(EATEC)/1376, Pioneer/Ngeria Block 1(EATEC)/1375, Pioneer/Ngeria Block 1(EATEC)/1382 and Pioneer/Ngeria Block 1(EATEC)/1383.

(b) a mandatory injunction is hereby issued directing the defendants, their families, servants and/or agents to immediately vacate from the suit lands and in default of so vacating the defendants, their

families, servants and or agents be evicted therefrom after expiry of 45 days from the date of judgment.

(c) The prayer for mesne profits is disallowed as it was not proved. Orders accordingly.

(d) Costs of the suit are granted to the plaintiff plus interest at court rates.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE, 2017.

A.OMBWAYO

JUDGE