



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 196 OF 2014**

JONATHAN KIPROTICH BARSULAI.....PLAINTIFF

VERSUS

JOHN KIPROP CHEMWENO.....1<sup>ST</sup> DEFENDANT

SARAH KAMAREI.....2<sup>ND</sup> DEFENDANT

KIPCHUMBA KIPROP.....3<sup>RD</sup> DEFENDANT

KIPKORIR KIPROP.....4<sup>TH</sup> DEFENDANT

KIPKEMOI KIPROP.....5<sup>TH</sup> DEFENDANT

KIPTOO KIPROP.....6<sup>TH</sup> DEFENDANT

KIPLAGAT KIPROP .....7<sup>TH</sup> DEFENDANT

KIPKOGEI KIPROP .....8<sup>TH</sup> DEFENDANT

**JUDGMENT**

**INTRODUCTION**

By a plaint dated 11<sup>th</sup> June 2014 the plaintiff herein sued the defendants seeking for orders for:

- (a) A declaration that Defendants are trespassers on land Parcel Number Mosop Kapchorua/978.
- (b) An Order of eviction against the Defendants, their agents, servants or assigns from the land parcel No. MOSOP/KAPCHORUA/978
- (c) An Order of Permanent Injunction against the Defendants their agents or assigns barring them from interfering with that plaintiff’s use of land parcel known as MOSOP/KAPCHORUA/978 and or refusing the plaintiff from using the said parcel of land as he deems fit.
- (d) General damages for trespass.
- (e) Mesne profits from 14<sup>th</sup> January 2013 to date.

(f) costs of the suit and interest thereof.

(g) Further or other relief as this Honorable court may deem fit.

This matter came up for hearing on 17<sup>th</sup> May 2017 when the plaintiff testified and was cross-examined by the defendants. It was later scheduled for defense hearing on 27<sup>th</sup> June 2017 when the 4<sup>th</sup> defendant gave evidence on behalf of all the defendants.

### **Plaintiff's Case**

It was the plaintiff's case that he entered into an agreement for sale of land with the 1<sup>st</sup> defendant who is the husband of the 2<sup>nd</sup> defendant and father of the 3<sup>rd</sup> to 8<sup>th</sup> defendants herein. The agreement dated 22/2/2012 marked as exhibit No. 1 was for the purchase of 2.51 hectares of parcel of land known as MOSOP/KAPCHORUA/978 for a consideration of Kenya Shillings Six Hundred and Seventy-Five Thousand only (Kshs. 675,000/) which amount was paid in full and acknowledged by the 1<sup>st</sup> defendant. The plaintiff stated that the 2<sup>nd</sup> defendant was present when they entered into the said agreement and did not have any objection.

The plaintiff further stated that he followed the requisite procedures and the land was transferred in his name. He produced the title deed registered in his name as exhibit No. 4. The plaintiff testified that he met with the defendants at the District officer's office whereby they agreed to the sale. He stated that he later received a call from the District Commissioner in respect of the suit land and that is when he decided to see his lawyers to issue demand letters to the defendants.

It was the plaintiff's evidence that the defendants were given three demand notices to vacate but they failed to do so prompting the filing of this case. The plaintiff also testified that he had to take a loan from the Kenya Police Sacco which was not enough therefore forcing him to sell his animals to top up for the purchase of the suit land. He stated that the loan was for Kshs. 575,000/ which he is still servicing. He produced a statement from the Sacco to show that he was still repaying the loan.

The plaintiff closed his case and urged the court to enter judgement against the defendants as prayed in the plaint.

On cross examination by the defendants he reiterated his evidence and stated that apart from the 1<sup>st</sup> and 2<sup>nd</sup> defendants being present, elders who are the uncles of the 3<sup>rd</sup> to 8<sup>th</sup> defendants were also there. He stated that the title was processed by the 1<sup>st</sup> defendant who had it in his possession until the plaintiff completed payment of the purchase price.

### **Defendants' Case**

The 4<sup>th</sup> defendant testified on behalf of the 2<sup>nd</sup> to 8<sup>th</sup> defendants. He stated that the suit land belonged to their deceased grandfather who transferred the same to their father who is the 1<sup>st</sup> defendant herein. It was his evidence that the 1<sup>st</sup> defendant had sold 5 acres to a Mr. Busienei who is their neighbor and had promised not to sell the remaining land.

The 4<sup>th</sup> defendant testified that they only became aware of the sale of the suit land in 2013 when the plaintiff came to their land to inform them that the same had been sold to him. He stated that they reported the matter to the Assistant Chief and involved some elders to arbitrate the matter. He told the plaintiff that they would only move after their father the 1<sup>st</sup> defendant had shown them where they would move to.

The defendant further stated that they escalated the matter to the District Commissioner who advised them to convene a meeting and give him the minutes which he said he did not have in court. The defendants closed their case and urged the court to dismiss the plaintiff's case.

On cross examination by the plaintiff's counsel the defendant stated that they did not know that their father the 1<sup>st</sup> defendant herein had sold the land to the plaintiff. He further confirmed that they have alternative land elsewhere which is forest land. He also stated that the suit land was sold to the plaintiff and transferred to him. The defendants testified that they had not lodged any caution in respect of the suit land.

### **Plaintiff's Counsel's Submission**

Plaintiff's Counsel filed written submissions on 12<sup>th</sup> July 2017 in support of the plaintiff's case. Counsel submitted that there were only two issues for determination namely:

- a) Whether the Plaintiff bought the parcel of land known as Mosop/Kapchorua/978 for valuable consideration and subsequently transferred and registered in his name.
- b) Whether the Plaintiff is entitled to the reliefs sought.

Counsel submitted that in answer to the first issue it was clear from the sale agreement dated 22<sup>nd</sup> February 2012 between the plaintiff and the 1<sup>st</sup> Defendant John Kiprof Chemweno that he sold a parcel of land known as Mosop/Kapchorua 978 measuring Two Decimal One Five (2.15) Hectares to the Plaintiff. She further submitted that there was evidence of payment in full of the purchase price as per the exhibits of acknowledgment of receipts culminating to the transfer of the title to the plaintiff. The transfer was done after obtaining the Land Control Board Consent as required.

Miss Tum stated that the Plaintiff also confirmed on cross-examination that he indeed visited the ground, confirmed the beacons and further that the Defendants knew that he wanted to buy the land known from their father. She submitted that it was clear that the defendants were aware of the transactions and their claim that they were not consulted is baseless.

It was Counsel's submission that the Plaintiff bought the parcel of land for valuable consideration and had the title deed transferred to his name. The 1<sup>st</sup> Defendant, the previous owner did not enter appearance to rebut the agreement and the subsequent transfer.

In response to the question as to whether the Plaintiff is entitled to the relief sought, Counsel submitted that the Defendants are trespassers and therefore ought to be evicted from the plaintiff's suit land and a permanent injunction issued against them.

Miss Tum also submitted that the Plaintiff borrowed a loan from his Sacco in Order to pay for the purchase price which he continued servicing without using the land therefore suffered damages. Counsel urged the court to exercise its discretion to award damages and mesne profits from 14<sup>th</sup> January 2012 to date.

Counsel also invoked the provisions of section 24, 25 and 26 of the Land Registration Act. She specifically singled out Section 25 which provides that

*"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 the proprietor together with all other interests and claims whatsoever"*

Section 26 of the Land Registration Act 2012 further provides: -

*"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 conditions contained as endorsed in tile certificate and the title for 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, un-procedurally or through a corrupt scheme.”*

Counsel further submitted that the Plaintiff being the registered proprietor has an absolute indefeasible title to the property which could only be challenged on grounds of fraud and misrepresentation which the defendants neither pleaded nor demonstrated. She relied on authorities which I will analyze shortly.

### **Joint Submissions for the 2<sup>nd</sup> to 8<sup>th</sup> Defendants**

The defendants filed their joint written submissions on 10<sup>th</sup> July 2017 whereby they prayed that the 1<sup>st</sup> defendant be ordered to refund the plaintiff his money and the sale agreement cancelled. They submitted that they have lived on the suit land for over 30 years and that the law on adverse possession should be applied. They also stated that there was no due process followed in the transaction.

### **Analysis and Determination**

I have considered the pleadings, the evidence, exhibits, the submissions and the cases relied upon in support and against and I have come to the conclusion that the issues for determination in this case in this case are:

- a) Whether the Plaintiff bought the parcel of land known as Mosop/Kapchorua/978 from the 1<sup>st</sup> defendant.
- b) Whether the Plaintiff is entitled to the reliefs sought.

It is worthy to note that the 1<sup>st</sup> defendant who entered into an agreement for sale with the plaintiff neither entered appearance nor filed a defense in this matter. It is also clear that the defendants filed a defense but did not file any counterclaim. If the defendants had filed a counterclaim then I could have dealt with their allegation of adverse possession in their submission. The other claim that the plaintiff acquired the suit land through dubious means in their defense and evidence was also not particularized as required by law and procedure therefore I will not delve into the issues of fraud. This leaves the two issues for determination as stated above.

From the pleadings and the evidence on record, it clear that the 1<sup>st</sup> defendant and the plaintiff entered into a sale agreement for land parcel known as Mosop/Kapchorua/978 for a consideration of Kenya Shillings Six Hundred and Seventy-Five Thousand only (Kshs. 675,000/) which amount was paid in full as per the acknowledgement receipts which were produced as exhibits before the court. The plaintiff further produced exhibits to show that he was subsequently registered as the owner of the suit land after following the processes laid down including obtaining a land control Board consent. It is also on record from the evidence that it was the 1<sup>st</sup> defendant who processed the transfer for the plaintiff and retained the title until he paid the purchase price in full.

The plaintiff further produced an official search and the title deed of the suit land indicating that he is the registered owner. The official search showed that there were no any encumbrances or a caution lodged on the title.

Section 26 of the Land Registration Act 2012 is very clear on indefeasibility of title. Once “a 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 conditions contained as endorsed in tile certificate and the title for 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, un-procedurally or through a corrupt scheme.”

In the current case, there was no proof that the title was acquired fraudulently or by misrepresentation. The defendants did not particularize the allegations of fraud or misrepresentation. The defendants further did not adduce any evidence to prove the same.

In the circumstances, the court must find that in the absence of any proof of fraud in the plaintiff's acquisition of title to the suit land, the same is valid and indefeasible as provided for under the law. This is purely a case where a party has sold land and does not want to part with the possession.

I had earlier alluded to the issue of adverse possession which I said that I would not delve into because it was not pleaded by way of counterclaim. It was just an afterthought to try and put up a spirited defense. This would not have succeeded as it was also not proved that they have had peaceful uninterrupted occupation of the suit land for the period mentioned. In the defendants' submission, they had urged the court to order the 1<sup>st</sup> defendant to refund the money to the plaintiff and cancel the agreement for sale of the suit land. This plea is neither here nor there as I do not see where it stands or coming from.

On the issue whether the plaintiff is entitled to the reliefs sought, I would say that the plaintiff has proved that he entered into an agreement for sale of 2.51 hectares of land with the 1<sup>st</sup> defendant, paid the purchase price of Kshs. 675,000/ in full which was acknowledged, obtained a land Control Board Consent, and the title transferred in his name.

The plaintiff has also demonstrated that he took a loan to buy the suit land and that in May 2013 when he went to take possession he was repulsed by the 2<sup>nd</sup> to 8<sup>th</sup> defendants. This was confirmed by the defendants that they knew about the sale in May 2013 when the plaintiff went to take possession. This shows that he had been denied the right to access and enjoy the land that he had rightfully purchased.

It is trite law that no evidence is required to be adduced before damages to trespass on land can be awarded. In the case of *Duncan Nderitu Ndegwa v. KP& LC Limited & Another* (2013) eKLR P. Nyamweya J. held:-

*“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass”*

This court will also not deviate from the established law on the issue of award of damages to trespass on land. The plaintiff is therefore awarded Kshs. 150,000/ as damages for trespass on his suit land.

On the issue of mesne profits, I wish to state that these are special damages which have to be pleaded and specifically proved. The plaintiff just sought for an order of mesne profits from 14<sup>th</sup> January 2014 without stating how much. He also did not lead any evidence to help the court arrive at a figure. I have stated in my other judgements that this limb of claiming for mesne profits has always been poorly addressed in pleadings by lawyers and litigants thus failing in most cases. In this particular one it also fails.

Having analyzed the pleadings, evidence, exhibits, submissions and the judicial authorities I hereby enter judgement for the plaintiff and make the following orders:

a) That it is hereby declared that Defendants are trespassers on land Parcel Number Mosop Kapchorua/978.

b) That the defendants are hereby ordered to vacate land parcel No. MOSOP/KAPCHORUA/978 within

45 days upon service of this judgment or decree, in default of so vacating, an eviction order be issued against the defendants from the suit land.

c) That a Permanent Injunction is hereby issued against the Defendants their agents or assigns barring them from interfering with the plaintiff's use of land parcel known as MOSOP/KAPCHORUA/978.

d) General damages for trespass of Kshs. 150,000/

e) The plaintiff shall have the costs of the suit.

Dated and delivered at Eldoret on this 18<sup>th</sup> day of September, 2017.

**M.A ODENY**

**JUDGE**

**Read in open court in the presence of:**

Miss Tum for the Plaintiff

Defendant in person

CC: Koech