



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 57 OF 2014

ANDREW MARITA KEBASO 1ST PLAINTIFF

ELIJAH ONCHONGA KEBASO 2ND PLAINTIFF

VERSUS

CHRISTOPHER GETUNO ONKEO DEFENDANT

J U D G M E N T

1. The plaintiffs by a plaint dated 13th February 2014 claim that they are the registered owners of land parcel **West Mugirango/Bomanono/ 2262** and **2263** respectively (“the suit property”). They allege that on about 30th December 2013 the defendant unlawfully trespassed onto the suit properties started utilizing the suit properties claiming they belonged to him. The plaintiffs seek judgment and orders thus:

(a) A permanent injunction restraining the defendant, his agents, servants from trespassing or dealing in any way with the plaintiffs parcels of land.

(b) Costs of the suit.

(c) Any other relief this honourable court may deem fit to grant.

2. Simultaneously with the plaint, the plaintiffs filed a Notice of Motion application seeking injunctive orders against the defendant barring the defendant from in any manner interfering with the suit properties. This application was however abandoned in favour of the suit proceeding to full hearing on merits.

3. The defendant in his filed defence dated 5th March 2014 denied having trespassed onto the plaintiffs land averring that he has continuously occupied the land since 1984 after purchasing the property from the plaintiffs’ father.

4. The plaintiffs are brothers and the 1st plaintiff Andrew Marita Kebaso testified on behalf of himself and the 2nd plaintiff. He stated that his father Kebaso Nyangori was the registered owner of land parcel **West Mugirango/Bomanono/1990** which he subdivided into six parcels (**2260-2265**) as per the copy of the mutation form attached to the plaintiffs’ bundle of documents (PEx.2). The witness stated that their father transferred land parcels **2262** and **2263**, each measuring 0.05Ha. to him and the 2nd plaintiff respectively and that after due process, they were each issued with titles to their respective parcels. Copies of the consent to subdivide and transfer are attached to the plaintiffs’ bundle of documents as are copies of the title deeds for land parcels **2262** and **2263**. The witness further stated that their father

retained land parcels **2264** and **2265** after the subdivision of land parcel **1990**.

5. According to the 1st plaintiff, the defendant had leased land parcel **1990** from their father and was farming thereon as their father was residing in a different parcel of land. The 1st plaintiff denied that the defendant had purchased the land. The witness however indicated the defendant had built on land parcel **2265** but was using the plaintiffs land. After obtaining title the plaintiffs requested the defendant to move out of land parcel **2262** and **2263** but the defendant declined to do so. The plaintiffs further stated the defendant has fenced off a portion of their respective parcels of land and seek orders that the defendant moves out and he be restrained from further trespassing thereon.

6. In cross examination the 1st plaintiff stated that before subdivision the defendant was using the whole of land parcel 1990. The witness further stated that subdivision was carried out in 2010/2011 and the beacons for each parcel were placed but the defendant removed them. The 1st plaintiff denied that he was aware of any sale agreement between his father and the defendant. The witness when showed a copy of a 1981 agreement stated that the agreement did not refer to any specific parcel of land and was for a portion of land measuring 100ft by 50ft and another for a portion measuring 84ft by 46ft.

7. The defendant testified as DW1. He stated that he purchased the land he occupies from the plaintiffs' father. The land belonged to the plaintiffs' father's brother one, Change Nyagori who died leaving no family. The defendant stated that he purchased two portions of land under an agreement dated 20th September 1981 (DEx2) and another agreement dated 27th July 1984 (DEx3) measuring 50ft by 100ft and 46ft by 84ft respectively. The defendant further stated that at the time of entering into the two agreements the plaintiffs' father and his brother were present during the first sale but the plaintiffs' father's brother Change Nyagori had died by the time of the 2nd agreement. The defendant stated that the plaintiffs' father has not transferred the land to him. He further stated he has constructed a permanent house on the plot he bought first where he resides and averred that the 1st plaintiff claimed a portion of this plot while the 2nd plaintiff laid claim to the portion where he (the defendant) farms.

8. In cross examination, the defendant admitted the agreements he was relying on do not make any mention of the particulars of the land they related to. The defendant affirmed he was not making any claim to the shares of the plaintiffs' parcels of land. He admitted the plaintiffs are presently the registered owners of land parcels **2262** and **2263** respectively. The defendant stated he purchased two separate parcels of land from the plaintiffs' father.

9. At the close of the defence case the parties agreed that as it appeared that there could be an issue of identification of the parcels of land on the ground a joint survey be carried out by a joint independent surveyor and a report be filed in court to form part of the record and evidence. The court issued directions to that effect and the joint report dated 9th May 2017 prepared by Fred Anunda of Prime Line Surveys was filed in court on 11th May 2017.

10. The parties filed their written submissions as directed by the court. The defendant's submissions were filed on 27th June 2017 while the plaintiffs' submissions were filed on 18th July 2017. I have considered the pleadings, the evidence and the parties submissions and the issues that arise for determination are as follows:-

(i) Whether the plaintiffs are the registered proprietors of land parcels West Mugirango/Bomanono/2262 and 2263 respectively?

(ii) Whether the defendant has encroached onto the plaintiffs said parcels of land and if so whether he ought to be ordered to vacate therefrom?

(iii) Whether the defendant's occupation of the suit properties, if at all, is lawful?

(iv) Who bears the costs of the suit?

11. On the evidence adduced by the plaintiffs, there can be no dispute that the plaintiffs are the registered proprietors of land parcels **West Mugirango/Bomanono/2262** and **2263** respectively. The plaintiffs testified that they were given the said parcels of land by their father after he subdivided land parcel **1990** as their respective shares and that due process was followed. A copy of the mutation for the subdivision of land parcel **1990** into six (6) portions was tendered in evidence. The consents for the subdivision and for transfer of the respective parcels of land to the plaintiffs were equally produced in evidence. The plaintiffs further produced copies of their duly registered titles in respect of land parcels **2262** and **2263** in their respective names as evidence of ownership. The defendant himself affirmed that the plaintiffs were in fact the registered owners. The first issue accordingly is answered in the affirmative that the plaintiffs are the registered proprietors of the suit properties.

12. On the 2nd issue as to whether the defendant has encroached onto the plaintiffs land parcels, the evidence of the joint surveyor vide his report dated 9th May 2017 is clear that the occupant of land parcels **2264** and **2265** who he identified in the report as the defendant, Christopher Getuno had encroached onto land parcels **2262** and **2263** by about 49 feet or 15metres. On the basis of the defendant's evidence, he purchased two plots from the father of the plaintiffs but the same have not been transferred to him. There is no evidence that the defendants said plots were surveyed and identified physically on the ground before he occupied the same. The evidence available vide the mutation form for land parcel **1990** is that the plaintiffs father subdivided the land into six (6) subtitles (**2260-2265**). The independent joint surveyor who carried out the inspection confirmed that the defendant actually occupies land parcels **2264** and **2265** but had encroached onto land parcels **2262** and **2263** to the extent of about 15 metres as illustrated in the sketch plan attached to the report.

13. It is not clear why the defendant has not pursued to obtain title from Kebaso Nyang'ori, the plaintiffs father who allegedly sold the two parcels of land to him yet he is alive. In the instant suit the defendant did not plead a counterclaim against the plaintiffs father and hence the court cannot make any orders against him in favour of the defendant as the defendant invites the court to do in his submissions when he submits thus:-

“May the court make finding that the defendant has occupied the two parcels of land (2264 and 2265) and should be left to enjoy quiet possession of the same. The purported registered owner of 2264 and 2265 should surrender title to the defendant who happens to be the father to the plaintiffs.”

14. The plaintiffs being the registered owners of land parcels 2262 and 2263 are in terms of sections 24, 25 and 26 of the Land Registration Act, 2012 vested with absolute rights of ownership and are entitled to exclusive possession and right to use their said parcels of land without hinderance from anybody. The defendant has without any lawful authority encroached onto the plaintiffs said parcels of land as confirmed vide the report of the independent joint surveyor. Having found that the defendant's encroachment onto the plaintiffs land parcels is unlawful and therefore constitutes trespass, I have no hesitation in answering issue number (ii) in the affirmative. The defendant should yield vacant possession of the portions of land parcels **2262** and **2263** that he is occupying unlawfully.

15. As I have resolved issues (i) and (ii) in the affirmative it follows that I have to answer issue number (iii) in the negative. The defendant's occupation of portions of land parcels **2262** and **2263** belonging to the plaintiffs is not lawful. The defendant's claim, if any, is against the plaintiffs' father who is not a party in these proceedings. The defendant ought to pursue the plaintiffs' father to give him title to land parcels **2264** and **2265** which he claims to have purchased and which he is in occupation of.

16. Considering the totality of the evidence, I am persuaded that the plaintiffs have proved their case against the defendant on a balance of probabilities and I enter judgment in favour of the plaintiffs in the following terms.

(1) That the defendant has unlawfully encroached onto the plaintiffs land parcels West Mugirango/Bomanono/2262 and 2263 and is hereby ordered to vacate and yield vacant possession of the portion he has encroached into forthwith.

(2) A permanent injunction be and is hereby issued restraining the defendant, his agents and servants from trespassing or dealing in any way with the plaintiffs parcels of land number West Mugirango/Bomanono/2262 and 2263 respectively.

(3) The costs of the suit are awarded to the plaintiffs.

Judgment dated, signed and delivered at Kisii this 24th day of November, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

M/s Momanyi for Nyambega for the 1st and 2nd plaintiffs

N/A for the defendant

Ms. Milcent court assistant

J. M. MUTUNGI

JUDGE