



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND CASE NO. 129 OF 2012

JOHN CHERUYIOT CHEPKISA.....PLAINTIFF

VERSUS

FESTUS KIPLAGAT.....DEFENDANT

JUDGMENT

By a plaint dated 25th April 2016 the Plaintiff herein sued the defendant herein for a permanent injunction to prevent the defendant his agents and/or servants from re-entering trespassing ploughing, constructing thereon, and/or in any other manner dealing with plot **No. 290 KIMNAI/MOIBEN** and an eviction order. He also prayed for the costs of the suit.

This matter proceeded for hearing on 18th October 2017 when the plaintiff gave evidence in support of his case and called one witness. It was the plaintiff's case that he owns Plot **No. KIMNAI/MOIBEN** which he inherited from his father. He stated that the defendant is not his biological son as the wife who was PW 2 came with him when he married her but the biological father took him away in 2004.

The plaintiff testified that the defendant stayed with his biological father until 2014 when he came back to harass the plaintiff on the suit land. He stated that the defendant's father is known as Francis Chelanga. The plaintiff further stated that the defendant came back and constructed a house on his plot without the plaintiff's consent. The plaintiff also stated that the defendant beat him up and had to seek for medical treatment. He produced a treatment sheet dated 14/11/03 as exhibit No.1 . The plaintiff also produced a demand letter dated 19/3/15 to the defendant informing him to vacate the plaintiff's land. He urged the court to order the defendant out of the suit land and go to his father's land. He also prayed for costs of the suit.

On cross examination by the defendant, the plaintiff stated that the defendant is not his son and should go to his biological father who is known as Chelanga. During re examination by Mr. Chepkwony, the plaintiff reiterated his evidence and stated that the defendant was expelled from school after he stole from the school.

PW2 Salina Cheruyiot who is the wife of the plaintiff testified in support of the husband's case. She confirmed to the court that she had not been forced to give evidence by the plaintiff and that it was her own volition. She stated that the defendant is her 1st born son and that his father is known as Francis Chelanga who has his own land. She further stated that Francis Chelanga stays in Mogelgo, Kerio Valley and that the defendant should go and stay with the father. She stated that the defendant has been harassing them and they cannot stay in peace. It was her testimony that the defendant left school and the father Francis Chelanga took him away.

On cross examination by the defendant, PW2 stated that the defendant's father took him away when he had left school. She further confirmed that she had not been forced to give evidence. The plaintiff closed his case at that juncture.

The court noted that the defendant did not file any defence but the court allowed him to testify in the interest of justice as this is a family matter and the fact that he was present in court. The court invoked its inherent jurisdiction and allowed the defendant to testify. Counsel for the plaintiff had no objection to this.

The defendant testified and stated that he stays in Kuserno Location in Elgeyo Marakwet and that the plaintiff is his father and should therefore give him land to stay on. He stated that he has nowhere to go.

On cross-examination by Mr. Chepkwony, the defendant stated that his ID got burnt in his house in 2017. He stated that he forgot to bring the ID waiting card to court. He also stated that he was born in 1987. The defendant admitted that it is his mother(PW2) who knows his father and that he has not bought any land for himself. He finally stated that he has never known the said Francis Chelanga who is alleged to be his father.

Plaintiff's Counsel's submissions

Mr. Chepkwony filed his submissions and reiterated the plaintiff's evidence. He submitted that it was on record from the plaintiff's evidence that they had a bad relationship with the defendant and the PW2 who is the mother wanted the defendant to move out of the suit land and go to his biological father's land. Counsel submitted that since the evidence is uncontroverted and the plaintiff has proved his case as required by law , the plaintiff should be granted the orders as prayed for in the plaint.

Analysis and determination

The issues for determination are as to whether the plaintiff has proved his case as per required standard according to law. The plaintiff filed this suit for orders of a permanent injunction restraining the defendant from interfering with the suit land and an eviction of the defendant herein.

It is clear from the evidence on record that there has been bad blood between the plaintiff and his biological mother who has decided to through him under the bus due to his unruly behavior. The mother who testified to support the plaintiff's case stated that the defendant is not the biological son of the plaintiff and that his father is known as Francis Chelanga.

It is further not disputed that the suit land belongs to the plaintiff who inherited it from his father. The plaintiff however did not produce any evidence to show that he is the registered owner of the suit land. He has just stated that he inherited it from his father and has been in occupation ever since. The plaintiff also testified that the defendant has been harassing them on the suit land which was confirmed by PW2 who is the mother of the defendant. This was corroborated by a treatment sheet to show that the plaintiff had been assaulted. The defendant on being cross examined confirmed that it is the mother of a child who knows the father of the child. The mother confirmed this in court by stating that the defendant is not the biological child of the plaintiff and that his father is known as one Francis Chelanga who he has been staying with.

The defendant cannot be allowed to benefit from a man who does not recognize him as his child having not taken parental responsibility. The Children's Act sets out three conditions that must be met on issues of parental responsibility. The three conditions are that the parties must have been married at the relevant time, the father must have assumed parental responsibility and the father must have accepted parental responsibility and assumed it. This should have been done while the defendant was still a child, as we write this judgement the defendant is now an adult of 30 years old. He is even lucky that the mother has been kind enough to disclose the name of the father. Most children born out of wedlock are not lucky to know the names of their biological fathers forcing them to take a winding journey to discover their roots. I find that these conditions have not been met as per the law.

The defendant has his biological father who should be able to give him land. If the plaintiff had taken parental responsibility or adopted the defendant then he would not escape providing for the defendant. This position is confirmed by PW2 who stated that she gave birth to the defendant before she got married to the plaintiff and that the father of the defendant one Francis Chelanga took the defendant as his biological son. He should therefore provide for him if he so wishes.

I have considered the pleadings together with the evidence and submission of counsel and find that the plaintiff's case succeeds. I therefore make the following orders.

1. A permanent injunction is hereby issued preventing the defendant his agents and/or servants from re-entering trespassing ploughing, constructing thereon, and/or in any other manner dealing with **plot No. 290 KIMNAI/MOIBEN**.
2. That the defendant do give the plaintiff vacate possession of the suit land within 45 days upon service of this judgment or decree, in default of so vacating, an order of eviction be issued against the defendant from parcel of land known as **plot No. 290 KIMNAI/MOIBEN**.
3. The defendant to pay costs of this suit.

Dated and delivered at Eldoret on this 23rd day of November, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Miss Ondeyo holding brief for Chepkonga for Plaintiff

Mr. Koech: Court Assistant

No appearance for defendant.