



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 141 OF 2014

JUDETHEUS KIPLAGAT MALAKWEN.....PLAINTIFF

VERSUS

NORMAN KIBITOK KOGO.....DEFENDANT

RULING

Judetheus Kiplagat Malakwen (**hereinafter referred to as the plaintiff**) has sued Norman Kibitok Kogo (**hereinafter referred to as the defendant**) claiming that he is the registered owner of land reference No. Nandi/Kebulonik/251 and has been so registered since 1969. However, on or about the year 2013, the defendant moved into the plaintiff's land Nandi/Kebulonik/251 and started occupying a portion thereof measuring approximately $\frac{1}{4}$ an acre or thereabouts. The plaintiff has asked the defendant to move out of his land to no avail. The plaintiff avers that the defendant has no basis to occupy a portion of the plaintiff's parcel of land Nandi/Kebulonik/251 and he ought to vacate it as the plaintiff is entitled to exclusive use and occupation of land reference Nandi/Kebulonik/251. The plaintiff's ultimate claim against the defendant is for the defendant to move out of the land and an injunction preventing him from re-entering the parcel of land Nandi/Kebulonik/251. That the plaintiff avers that there is no suit pending nor are there previous proceedings between the plaintiff and the defendant over the same subject matter. The plaintiff further prays for *costs of the suit*.

The defendant filed defence stating that there is a dispute in the ownership of the said land reference No. Nandi/Kebulonik/251 which is still pending in superior courts. The defendant claims that this is family land and that he was born in the land, lived with his grandmother one Veronica Chebichii Kogo who is the bona fide owner. The defendant further avers that there are suits touching on the subject land that are pending such as Eldoret Civil Appeal No. 82 of 2006 between Joseph Malakwen Lelei and Judetheus Kiplagat Malakwen as appellants and Rift Valley Land Disputes Appeals Committee, Principal Magistrate, Kapsabet & Veronica Chebichii Korir as respondents. Eldoret Civil Case No. 82 of 2006 between Veronica Chebichii Korir and Joseph Malakwen Lelei & Judetheus Kiplagat Malakwen.

In his reply to defence, the plaintiff reiterates that he is the sole registered owner of the suit land which is not family property. The defendant encroached into the land in 2013 and occupies a portion thereof measuring approximately $\frac{1}{4}$ an acre. The defendant was not born on the suit land nor has he been thereon with Veronica Chebichii Kogo. Notice to have the defendant move out of the land has been issued to no avail. The defendant therefore has no right to be on the suit land and he ought to vacate it as the plaintiff is entitled to exclusive occupation and use of the suit land. That Eldoret Court of Appeal Civil Appeal No. 82 of 2006 has nothing to do with the defendant and it has been determined in the plaintiff's favour. That Eldoret Civil Case No. 82 of 2006 has no relationship with the plaintiff and the defendant and Veronica Chebichii Korir. That the defendant has no claim to agitate against the plaintiff nor does he have a valid defence to the suit. That the defendant has no claim to agitate over the suit land against Veronica Chebichii Korir.

By Notice of Motion dated 16.6.2014, the plaintiff prays that the defence herein be struck out as it does not disclose a reasonable defence to the plaintiff's claim on grounds that:

- (a) The plaintiff is the registered owner of the land.**
- (b) The plaintiff is entitled to exclusive enjoyment of the suit land.**
- (c) The defendant has trespassed into the plaintiff's parcel of land.**
- (d) The defendant's defence as set out is untenable.**

The application is supported by the plaintiff's affidavit sworn on 16.6.2014 where he states that the defendant trespassed into his land in the year 2013 and yet he is the sole registered owner of land reference Nandi/Kebulonik/251. He believes that the defendant has no right to be on his land as he has no legitimate claim over the suit land and that the existence of suits between him and Veronica Chebichii Kogo is no defence to the defendant in this claim. That it is obvious that he is the sole registered owner of the land and his title to the land has never been impeached. The defendant is not a member of his family and therefore has no legitimate claim to his land hence the defendant by virtue of being a trespasser into his land ought to vacate the suit land. That the defence raises no reasonable defence to the suit. That the impunity should not be countenanced by the court.

The application is opposed vide a replying affidavit of the defendant who states that the application is premature, unnecessary and a waste of court's time. That the issue of ownership is before this honourable court in Eldoret High Court No. 82 of 2006, Veronica Chebichii Korir and Joseph Malakwen Lelei. That he is advised by his advocate which advice he believes to be true that the object of the court is to hear the merits of the case and not to dismiss the cases on undue regard on technicalities. That the issue of whether or not he is a family member is a question of evidence which ought to be tried. That the applicant has not indicated to court whether he has closed his pleadings to enable him know all the parties and the kind of defence he will tender. That the issue of ownership by the plaintiff is in dispute as he could not possibly have acquired the land when he was about 9 years old which they intend to try it in the main case. That the application is intended to sanitize an illegality by the plaintiff and to defeat the intent to suit.

I have considered the applicant's supporting affidavit, replying affidavit and submissions of the parties and do find that the existence of the other disputes in court does not confer the defendant a right on the property. According to the defendant, there is a 3rd party known as Veronica Chebichii Kogo who is the bonafide owner of the property. The defendant is not claiming trust or adverse possession and has not applied for the amendment of the defence.

The defendant has referred to overriding rights on a title and customary trust and therefore, the court does not intend to shut out the defendant from the seat of justice, however, the defence as it stands does not disclose a cause of action but can be amended to bring out the issue of customary trust. The ***Court of Appeal Judges in Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR stated:***

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.“

The upshot of the above is that the defendant is given 10 days to amend and serve his amended defence to the plaintiff, failure of which the defence stands struck out with costs. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF FEBRUARY, 2016.

ANTONY OMBWAYO

JUDGE