



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 74 OF 2013

WANYONYI CHEKERIE:.....PLAINTIFF

VERSUS

DOMIANO WANYONYI:.....1ST DEFENDANT

FRANCIS WANYONYI:.....2ND DEFENDANT

VICTOR CHRISTOPHR:.....3RD DEFENDANT

JUDGEMENT

INTRODUCTION

1. The plaintiff is the father of the first and second defendants. The third defendant is a grandson of the plaintiff. The plaintiff brought this suit against the defendants seeking a declaration that he is the sole legal owner of West Pokot/Siyoi“A”/5329 (suit-land) and for injunction restraining the defendants, their agents, servants and or anybody acting on their instructions from interfering with the suit land.

PLAINTIFFS CASE.

2. The plaintiff testified that he is the one who bought the suit land. That the defendants have been harassing him for the last five years demanding land. The defendants went to the District Officer and District Commissioner demanding for land from him forcing him to come to court for the orders he seeks in the plaint.

DEFENDANTS CASE

3. DW1 Domiano Wamalwa Wanyonyi testified that he and Francis Wanyonyi are brothers and sons of the plaintiff. The third defendant Victor Christopher is their nephew whose father was their brother who has since died. Their mother Marisiano Nabonya died in the year 2010 and was buried on the suit land. They have been staying on the suit land since childhood but that their father now wants to evict them from the suit land.
4. The plaintiff had two wives. The first wife is the mother to the first and second defendants as well as the father of the third defendant. The defendants went before the District Officer where it was agreed that the plaintiff sub-divides the suit land into two equal portions to be given to his two wives but the plaintiff declined to implement the agreement.

ANALYSIS OF EVIDENCE.

5. It is not contested that the plaintiff is the registered owner of the suit land. As at 29.3.2012, the suit land was known as LR. NO. West Pokot/Siyoi "A"/234 which was 7.2 hectares. In the year 2013, it was subdivided and a new title in the plaintiff's name issued on 16.5.2013 for 2.54 hectares. It is not known whether the plaintiff sold the rest of the land or he transferred, it to someone else. There is no evidence to shed light on this. This is what prompted the plaintiff to amend his plaint to reflect the new developments.
6. The plaintiff is alleging that the defendants are harassing him demanding land from him. That they took him before the District Officer and later to the District Commissioner. There was no evidence adduced by the plaintiff to prove his allegations that he was being harassed by the defendants. The defendants contend that they went before the District Officer and later to the District Commissioner where an agreement was reached that the plaintiff was to subdivide his land amongst his two wives. There is no evidence whether this agreement was in writing or verbal. Even if there was such an agreement, these were just attempts to solve a family dispute which cannot amount to harassment.
7. Under the Land Registration Act of 2012 customary trusts and other trusts are overriding interests which need not be noted in the register. The defendants are sons and grandson of the plaintiff. The case of Esiroyo -vs- Esiroyo (1973) EA 388 held that customary trusts are not overriding interests. That finding is no longer good law in view of the new Land Registration Act which expressly states that customary trust and other trusts are overriding interests.
8. There is evidence from the defendants which evidence was not challenged that the plaintiff wants to evict them from land they have known as their only home. There is no justification at all for the plaintiff seeking to evict or bar the defendants from the suit land. Even if the defendants do not have a portion of their land during the lifetime of the plaintiff, they will be entitled to it once he is gone. The plaintiff's lawyer has cited High Court decision in Nakuru Civil Case No. 94 of 2004 John Ndungu Muriithi -VS- Gideon Karegwa Ndungu & 5 others. This case cannot be applicable in the circumstances of the present case. In the above case the defendants who were all sons of the plaintiff were demanding that their father distributes his land to them during his life time. They were arguing that if their father did this, the action will avoid future conflicts when he is gone. They went further to threaten him with death and even there were cases in criminal courts against his sons. The court found that indeed the plaintiff needed protection and that no court could force the plaintiff to give his sons land during his lifetime. The sons were on the land only that they wanted it subdivided and given to them. The plaintiff had even pleaded with the court to allow him give his sons land but the court declined because there was no such prayer in the plaint.
9. In the present case, the plaintiff does not seem to even want to see the defendants on his land. Even in the case of Esiroyo -VS- Esiroyo, the sons of the plaintiff were demanding land from their father on ground that it was ancestral land. They were staying on it. The father had even applied for Land Control Board consent to subdivide the land among his sons but the application was rejected on the ground that it was going to reduce the 22 acre land into small portions which will not be economical agriculturally.
10. It is apparent that the plaintiff has embarked on transferring part of his land to third parties so as to disinherit the defendants. As I said hereinabove the plaintiff had 7.2 hectares. He has since transferred a huge portion of it and the suit land which is in his name is 2.54 hectares. He has not disclosed whether he sold the rest of the the land or he transferred it to someone else. This is not a person who should benefit from an equitable remedy of injunction.

DECISION

I find that the plaintiff has failed to prove a case against the defendants on a balance of probabilities. His suit is hereby dismissed with costs to the defendants.

Dated, signed, and delivered at Kitale on this 1st day of February, 2016.

E. OBAGA

JUDGE.

In the presence of Mr. Analo for Mr. Nyamu for plaintiff – Court Assistant – Isabellah.

E. OBAGA

JUDGE

1/2/2016