



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 13 OF 2015

FAITH CHEMUTAI

MAINA:.....:PLAINTIFF

VERSUS

JULIUS KIPRONO

MAINA:.....:DEFENDANT

R U L I N G

The plaintiff has come to court by plaint dated 20th of January 2015 and filed on the same date claiming that at all material times he was the duly registered owner, and therefore entitled to possession, of property known as Soy/Kipsomba Block 1 (TARAKWA) 14. He claims that he is the legal owner and sole proprietor of that land parcel known as **SOY/KIPSOMBA BLOCK 1(TARAKWA)14** having acquired the land parcel as a gift via succession cause No. 265 of 1996 - Estate of Chepkonga Maina wherein he was one of the beneficiaries. His brothers namely Willie K. Maina and Paul C. Limo petitioned for grant of probate over the estate of Chepkonga Maina who was the plaintiff's father and successfully obtained order to manage the deceased estate. His father died testate however Messrs. Kirui and Company Advocates erroneously completed an affidavit in support of petition for letters of administration intestate.

That by virtue of the above stated succession proceeding and her father's will, she was awarded 10 acres out of land parcel Ziwa Holdings Limited Block 7, which share in the will was not expressly provided at the time of distribution since she was a minor, however through the will her late mother in consultation with their clan members were vested with power to allocate land in a manner deemed appropriate when the plaintiff attained the age of majority. She claims to have been in peaceful occupation of the parcel of land until sometime in the year 2013 when Julius Kiprono the defendant in this matter without any colour of right encroached upon her land.

It is alleged that on or about the year 2013, the defendant without any colour of right encroached upon the plaintiff's land Tarakwa/41, took possession of the suit property and have thereafter wrongfully remained in possession thereof and have thereby trespassed and continued to trespass thereon. The plaintiff claims that the defendant forcefully cultivated upon the aforementioned land depriving the plaintiff of the use and enjoyment of the property and that there have been constant confrontation between the plaintiff and the defendant in respect of the suit property. Accordingly the plaintiff avers that the defendant has never enjoyed peaceful, uninterrupted or exclusive occupation of the suit property and a such cannot claim any right to the suit property.

She further claims that the defendant threatens and intends unless restrained by this honourable court, to continue to remain in wrongful occupation of the suit property and to trespass thereon. The plaintiff avers that the acts of the defendant are unlawful for the reasons that the plaintiff is the absolute

an indefeasible owner of the suit property hence the acts of the defendant are inconsistent with the plaintiff proprietorship interest. The plaintiff has been deprived of the use and quite enjoyment of the suit property and to worsen the situation, the defendant has threatened the plaintiff with physical violence whenever the plaintiff attempts to enter the suit property despite the fact that the defendant does not possess any title document to the suit property and can therefore not claim any proprietary right to the said suit property as he can only be described as a trespasser.

The plaintiff prays for an orders that a declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that land known as SOY/KIPSOMBA BLOCK 1(TARAKWA)/41 and that the defendant whether by themselves or their servants or agents or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly trespassers on the same. She prays for a permanent injunction restraining the defendant whether by himself or his servants or agents or otherwise howsoever from remaining on or continuing in occupation of land parcel SOY/KIPSOMBA BLOCK 1(TARAKWA)/41 and an order of eviction of the defendant from Land Parcel SOY/KIPSOMBA BLOCK 1(TARAKWA)/41 Last but not least , she prays for General damages for trespass and Costs of this suit with interest thereon at such rate an for such period of time as this Honourable Court may deem fit to grant.

On the 12/2/2015, the defendant filed a notice of preliminary objection whose basis is that the plaintiff in paragraph 3, 4 and 5 of their application is seeking orders that are already in dispute in a matter, High Court Succession Cause No. 265 of 1996, in the Matter of the Estate of the Late Chepkong'a Maina and therefore this Honourable Court has no jurisdiction to entertain this matter, since there is a Succession Matter pending at the High Court Probate and Administration Division. That the Plaintiff is seeking injunctive order at Paragraphs 3,4, and 5 of the application which prayers are contradictory to the prayers sought vide the Defendant's application dated 19th February, 2013 in which the Honourable Court issued order to the effect that status quo be maintained. That the application is therefore res-subjudice.

On the 16th March 2015 one Ursela K. Jelagat swore an affidavit stating that the dispute herein is ownership of land Registration No. SOY/KIPSOMBA BLOCK 1(TARAKWA)14. She further deponed that an order of status quo in the succession cause has been vacated by the court citing incapability of being executed since the Estate had been wound up. She believes that the suit herein competent as the issue before the court is ownership of the property and not distribution. The court in the succession cause confirmed grant of probate to Willie Maina and Paul C. Maina on 21/3/2002.

She states that the deceased disposed off his property through a valid will when all the beneficiaries were named therein and that the plaintiff is guilty of inordinate delay since she was aware that there were succession proceedings all along but kept quiet until the year 2013 when he commenced proceedings for annulment of grant of probate.

The *gravamen* of **Mrs. Isiahos** submissions is that the purported ownership of the land registered in the name of Plaintiff emanates from a purported will which is still the subject of the objection proceedings filed by the defendant vide succession case No. 265 of 1996 which are still undetermined and therefore this court lacks jurisdiction.

Mrs. Kimaru opposed the preliminary objection on grounds that the executors of the will allocated the property to the plaintiff after being given authority to do so by the court. She argued that the issue before the court is ownership and therefore the court has jurisdiction.

I have considered the preliminary objection and the rival submission of the parties and do find that the issue before court is whether the court has jurisdiction to entertain the suit. The question one should ask is whether the said preliminary objection would determine this matter. I do find that the alleged title to property was issued after a succession cause was determined, however, there are objection proceedings commenced by the defendant in the succession cause No. 265 of 1996 in the matter of the Estate of Chepkonga Maina filed by the defendant herein against Willie K. Maina and Paul C. Limo. Does this deny this court jurisdiction to entertain this suit ?, I believe not.

Article 162(2) (b) of the Constitution of Kenya 2010 provides that Parliament shall Establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use, and occupation of , and title to, land.

Pursuant to the above provisions of the Constitution of Kenya, parliament enacted the **Environment and Land Court Act No. 19 of 2011** which is an Act of Parliament to give effect to **Article 162(2)b of the Constitution of Kenya**; to establish a superior court to hear and determine disputes relating to the Environment and the use and occupation of, and title to, land and to make provision for its jurisdiction, function and powers and for connected purposes. **Section 13 of the Act Provides as follows:**

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law

applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b)relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d)relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean

and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

The plaintiff seeks order related to his entitlement to the use and occupation, and title to, land. In my view the preliminary objection has no basis as the court has jurisdiction to entertain this suit which is based on the plaintiff's alleged right to use and occupy the suit parcel of land. However, this court finds that the defendant has commenced objection proceedings in the succession cause mentioned herein which is pending interparte hearing. The record shows that the matter was in court last on the 23/2/2013 when the respondent was granted 14 days to file and serve a replying affidavit. The matter was last marked for hearing on 13th May, 2013. The defendant alleges that they have been in occupation of the suit property from the year 1991 before the succession cause No. 265 of 1996 was instituted to-date.

In my view, It would be prudent and proper to stay proceedings in this matter until the objection

proceedings are heard and determined due to the fact that the objection proceedings seek to annul revoke grant of probate. If the same were to succeed, the suit herein would be affected substantially. The upshot of the above is that the suit herein is stayed for a period of 60 days to await the outcome of the objection proceedings.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF MAY 2015

ANTONY OMBWAYO

JUDGE