



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 19 OF 2015

JAMES KIPTOO CHEMJOR.....PLAINTIFF

VERSUS

SIMION KIPROTICH.....DEFENDANT

JUDGMENT

James Kiptoo Chemjor (*hereinafter referred to as the plaintiff*) has sued Simion Kiprotich (*hereinafter referred to as the defendant*) claiming that the plaintiff bought and took possession of **the land Parcel No. Soy/Soy Block 10(Navillus)/2975** measuring 0.36 hectares which is a subdivision of **the land parcel no. Soy/Soy Block 10(Navillus)/2898** and **which borders the plaintiff's other land parcel No. Soy/Soy Block 10(Navillus)/2976** measuring 1.09 hectares which are also subdivisions of land parcel **No. Soy/Soy Block 10(Navillus)/2898** as per survey mutation forms.

That the plaintiff in a land sale agreement dated 30.12.2013 at the Lelmen Location Chief's Office bought the Land parcel No. Soy/Soy Block 10(Navillus)/2975 from and paid the consideration in full to Chepkonga Kigen who like the plaintiff is a member and shareholder of the Ngobitwa Farmers Co-operative Society Ltd as per the receipts of payments of shares and title processing fees dated 25.9.1996 and 11.12.2013 respectively.

The plaintiff avers that Soy/Soy Block 10(Navillus)2898 was a subdivision of the land parcels titles no. Soy/Soy Block 10(Navillus)139 And 140 and that the plaintiff used land parcel No. Soy/Soy Block 10(Navillus)/2975 on lease basis since the year 2000 until 30.12.2013 when the plaintiff and Chepkonga Kigen entered into the land sale agreement dated 30.12.2013 in which the plaintiff bought the land from, and paid the consideration in full to, Chepkonga Kigen who transferred the land to the plaintiff and left transfer process in favour of the plaintiff into the hands of the officers of the Ngobitwa Farmers Co-operative Society Ltd.

The plaintiff has been using the land parcel no. Soy/Soy Block 10(Navillus)/2975 ever since 2000 to date and was ready to use the land even in 2015 when on 7.1.2015, the defendant trespassed upon the land parcel No. Soy/Soy Block 10(Navillus)2975 by removing the fenced boundary between land parcel No. Soy/Soy Block 10 (Navillus)/2976 and land parcel No. Soy/Soy Block 10

(Navillus)/2975 on one part and by fencing the boundary between land parcel No. Soy/Soy Block 10 (Navillus)/2977 and Soy/Soy Block 10 (Navillus)/2975 on the other part and creating the defendant's land dispute with the plaintiff.

The plaintiff's complaint or dispute with the defendant was reported to the police at Soy, Soy Location Chief's office and Ngobitwa Farmers' Co-operative Society Limited office where a meeting over the land dispute took place in vain. Demand notice and Notice of intention to sue were issued to the defendant on 8.1.2015 and 16.1.2015 in vain.

The relief sought by the plaintiff against the defendant is for, inter-alia, an injunction to restrain the defendant from trespassing upon the suit land and other trespass activities including the defendant's fencing and to either stop any trespassing upon and other trespass activities in respect of and/or stop interfering with the plaintiff's use and other farming activities in the land parcel No. Soy/Soy Block 10 (Navillus)/2975. The plaintiff also prays for costs and interest.

The defendant filed a defence on 12th February 2015 whose import is that land parcel no. Soy/Soy Block 10 (Navillus)/2975 is his property having purchased the same from one Elias K. Kaino in 1997. The defendant states that Elias K. Kaino was a shareholder in Ngobitwa Farmers Co-operative Society Ltd and was allocated the land in 1997 at the time of sale of the Lonrho/Eatec Company Lands in Uasin Gishu County. The defendant states that the land in issue was sold by way of shares and he purchased the entire share of the said Elias K. Kaino in 1997.

The defendant further states that the plaintiff, together with officers of Ngobitwa Farmers Co-operative Society Ltd, purported to issue receipts on 11.12.2013 indicating that the alleged Chepkonga Kigen purchased land from Ngobitwa Farmers Co-operative Society Ltd and that he subsequently sold the same to the plaintiff, when the real motive is to enable the said Ngobitwa Farmers Co-operative Society Ltd to deprive the defendant of his rightful parcel of land being L.R. No. Soy/Soy Block 10 (Navillus)/2975.

The defendant states that by claiming that the said Chepkonga Kigen purchased land from Ngobitwa Farmers Co-operative Society Ltd on 11.12.2013, when then the said Co-operative Society had no more land to sell and no more shares to give, the plaintiff was guilty of fraud. Moreover, by colluding with officers of Ngobitwa Farmers Co-operative Society Ltd to transfer the alleged land to himself fraudulently and purporting to claim that he had entered the said land and taken possession when the defendant has been in actual use, possession and occupation of the same since 1996 to date were acts of fraud. The defendant claims that he has been in continuous use, possession and occupation of Soy/Soy Block 10(Navillus)/2975 from 1996 to date and he cannot be said to have trespassed onto the same. The defendant further states that the boundary on the said land is intact since 1996 to date. He contends that the dispute between the parties is a dispute between the members of Ngobitwa Farmers Co-operative Society Ltd along with the Co-operative Society itself and that the Environment and Land Court has no jurisdiction to determine this matter at this stage as it is the Co-operative Society which the matter should address the members concerns failing which the matter should rest with the Co-operative Tribunal. The defendant further states that the suit is a non starter since Ngobitwa Farmers Co-operative Society Ltd has not been joined as a party.

In the reply to defence, the plaintiff denies that the land parcel No. Soy/Soy Block 10(Navillus)/2975 is the property of, and was purchased by, the defendant from Elias K. Kaino in 1997 and denies the allegation that Elias K. Kaino was a

shareholder in the Ngobitwa Farmers Co-operative Society Ltd and was allocated the land in 1997 at the time of sale of the Lonhro/Eatec Company Lands in Uasin Gishu County.

The matter came up for hearing on the 3/3/2015 when the plaintiff adopted his statement dated 21.1.2015 as his evidence in chief, the plaintiff states that he is a member of the Ngobitwa Farmers Co-operative Society Ltd and the owner of Soy/Soy Block 10 (Navillus)/2975 and Soy/Soy Block 10 (Navillus)/ 2977 measuring one (1) acre and four (4) acres respectively. He bought and paid for the land parcel No. Soy/Soy Block 10(Navillus)/2975 from Chepkonga Kigen.

The land Parcel No. Soy/Soy Block 10 (Navillus)/2976 belongs to the defendant and borders his land parcels No. SOY/SOY BLOCK 10 (NAVILLUS)/2975 and 2977. Before he bought Plot No. 2975 from Chepkonga Kigen, he was using the same land on lease basis since 2000 until 30.12.2013 when his land sale agreement dated 30.12.2013 with Chepkonga Kigen was entered into in which he paid the consideration in full. There has been no dispute over the suit land ever since 2000 and/or 30.12.2013 until on 7.1.2015 when the defendant trespassed upon the said Plot No. 2975 by removing the plaintiff's fence between the defendant's Plot No. 2976 and his Plot No. 2975 and by fencing the boundary between Plot No. 2975 and Plot No. 2977. He complained to the Soy Police Station, Soy location chief's office and Ngobitwa Farmers Co-operative Society Ltd where there was a meeting on 8.1.2015 in which the defendant was given seven (7) days notice to remove the fence. The defendant has failed, neglected, refused or ignored to do as directed on 8.1.2015 and confirmed on the ground on 15.1.2015.

The plaintiff produced the agreement between himself and Chepkonga Kigen and Isaac Chepkonga dated 30.12.2013. In the said agreement, the plaintiff is the buyer whilst the sellers are the Chepkonga's at a consideration of Shs.200,000/= . The parcel of land under sale is referred to as No. Plot 189. The plaintiff further produced receipts issued to Chemweno Kigen indicating the shares Mr. Kigen held in the company and a further receipt for processing of title deed. He produced the map of the area and mutation forms for 2975, 2976, 2977. He testified that parcel No. 2975 was excised from 2898. On cross examination by Mr. Chebii, the plaintiff admitted that the title deed for 2975 was being processed and that the same is not yet available.

The plaintiff called **Chepkonga Kigen as PW2** who testified that he hails from Kaptuktuk Location in Baringo North sub district. He paid Kshs.45,000/= through his brother Chemweno Kigen. He paid a further Kshs.4,000/= to the Society for title processing as a result of which the society gave him the parcel of land in 1999 before he leased the land to the plaintiff in the year 2000 until the 30th December 2013 when he sold the property to the plaintiff. He later heard that there was a dispute between the plaintiff and the defendant.

PW3, Benjamin Kangogo Kendagor knows Chepkonga Kigen very well. He testified that Chepkonga Kigen sold the parcel of land to the plaintiff at the time when it was known as Land Parcel 189. He further stated that he was a committee member of Ngobitwa Co-operative Society representing the Baringo group and that he was aware that Chepkonga Kigen sold his land to the plaintiff. He reiterated that the society gave the plaintiff the land in dispute and denied knowing Mr. Elias Kiptoo Kaino but knew Chemweno Kigen and Chepkonga Kigen who were brothers.

PW4, Jona Kimetich, a farmer by profession living at Chemoset knows the plaintiff and defendant as members of Ngobitwa Co-operative Society. He states the original number for the disputed plot was 189 before it became known as 2975 after survey

and subdivision. According to the witness, the land belonged to Chepkonga Kigen who gave it to the plaintiff. He states that Elias Kiptoo Kaino a member of the Chebiemit Group was given land elsewhere in Chebiemit, whilst the land in dispute was in Baringo and was given to Chepkonga Kigen.

The Defence on the other hand called the defendant and one witnesses. The defendant, **Mr. Simion Kiprotich**, a Government officer in the Kenya Prisons offering correctional services states that the plaintiff is his neighbour of 25 years. He moved into the area in 2005 and was given Land No. 2898 in 2002 and used it for ploughing until 2007. He was shown the land by Ngobitwa Co-operative Society's representative known as Willy which he fenced and relaxed. He was informed that his shares were less Kshs.10,000/= and therefore was supposed to pay failure off which he would be allocated land in Chemoiset centre in Uasin Gichu County. He did not pay the Kshs.10,000/= and when he went back he found the land subdivided. He was told to look for any member with shares to enable him buy the said shares. He identified Elias Kiptoo Kaino who he gave his land. However he was unable to pay and therefore left the land to Elias Kaino. The Ngobitwa Co-operative Company however, took the land by force and gave it to someone else. He was told to make a complaint which he did and claimed the land meant for Elias Kaino. He claimed that the land was allocated to the plaintiff and yet the same belonged to Elias Kaino who had given it to the defendant. The defendant produced receipts issued to Elias Kaino by the Ngobitwa Co-operative Society and a sale agreement between the defendant and the said Elias Kaino.

The Defence called Mr. Elias Kiptoo Kaino who testified that Simion Kiprotich is his neighbour and occupies land No. 2975. He claims to be the registered owner of Plot No. 2975 while the defendant is the registered owner of 2976 but did not produce any title deed. He relies on receipts that were issued by Ngobitwa Co-operative Society. On cross examination by the counsel for the plaintiff, he admitted that the receipts do not mention the parcel of land. This witness produced receipts of a parcel of land that is not identified. He produced an agreement that only refers to shares and not land and that the same has been interfered with to the extent that the dates of the agreement are not discernible as to whether it was 24.12.2012 or 24.12.2014. Moreover, there is no consideration mentioned in the receipts.

Mr Cheptarus for the Plaintiff submits that Ngobitwa Farmers Co-operative Society Ltd subdivided the society's land parcel No. Soy/Soy Block 10(Navillus)/2898 into portions including Soy/Soy Block 10(Navillus) 2975, 2976 And 2977 which are in the names of Chepkonga Kigen, Simion Kiprotich and James Kiptoo Chemjor as members of shareholders of the society. The society's land aforesaid was a product of the subdivision of Soy/Soy Block 10 (Navillus)/139 and Soy/Soy Block 10 (Navillus)/140.

Mr. Cheptarus further submits that Block 10(Navillus)/2898 created 2975 amongst others which was allocated to Chepkonga Kigen by the society who sold it to the plaintiff on 30.12.2013. Prior to the sale, the plaintiff had entered into a verbal lease agreement with Chepkonga Kigen in the year 2000. The plaintiff has been in possession as lessee since the year 2000 and as a purchaser since 30.12.2013 to the date of the date of the order. He submits that the defendant has trespassed on the land removing the fence of the boundary between his land 2976 and the suit land 2975. The plaintiff submits that the defendant has not discharged the burden of proof on allegations that he bought the land from Elias K. Kaino. On the other hand, he submits that the plaintiff has proved his case on a balance of probabilities and is entitled to an order of permanent injunction sought.

The defendant through **Mr. Chebii**, submits that the plaintiff has not proved his

case on a balance of probabilities as there is no evidence that Chepkonga Kigen had any land or share or interest in Ngobitwa Farmers Co-operative Society Ltd. The receipts produced as evidence were in respect of Chepweno Kigen who was not called to give evidence moreover, he submits that the agreement shows the sellers as Isaac Chepkonga and Chepkonga Kigen. He argues that there is doubt that the property belonged to Chepkonga Kigen as there is no explanation as to how Isaac Chepkonga and Chemweno Kigen came into the picture. He argues that Plot No. 189 is not identified in all the documents except the agreement alone.

I have considered the evidence on record and submissions of counsel and do find that the following issues ripe for determination:

- 1. Whether the court has jurisdiction to entertain the dispute**
- 2. Whether the plaintiff has proved on a balance of probabilities that the land in issue belonged to Chepkonga Kigen?**
- 3. Whether the defendant has proved on a balance of probabilities that the land belonged to Elias K. Kaino?**
- 4. Whether there is a valid agreement of sale from Chepkonga Kigen to James Chemjor?**
- 5. Whether there is a valid agreement of sale between Simion Kiprotich and Elias Kaino?**
- 6. Whether a permanent injunction should issue?**

On the issue of jurisdiction, this court holds that the system of courts is clearly enshrined in Article 162. (1) of the Constitution of Kenya which provides that the superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2) of the article which provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations; and ***the environment and the use and occupation of, and title to, land***. The Article provides further that Parliament shall determine the jurisdiction and functions of the courts contemplated in clause 2.

Parliament enacted the Environment and Land Court Act which is an Act of Parliament to give effect to Article 162(2) (b) of the Constitution 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 functions and powers, and for connected purposes . The Act established the Environment and Land Court, a superior court of record with the status of the High Court that has and should exercise jurisdiction throughout Kenya. Section 13 of the Act gives the court jurisdiction by providing that:

- 3. (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.

The dispute herein relates to the use and occupation of, and title to, land, being Soy/Soy Block 10(Navillus) 2975 which both the plaintiff and the defendant claim ownership having allegedly purchased the land from shareholders of a cooperative society. I have perused the Co-operative Societies Act and do find that nothing therein stops this court from entertaining this dispute. This court holds that there is a strong presumption that civil courts have jurisdiction to decide all disputes of a civil nature. The exclusion of jurisdiction of civil courts is therefore not to be readily inferred and that such exclusion must be either explicitly expressed or clearly implied. This principle by no means can be whittled down. The existence of jurisdiction being the general rule and exclusion being the exception, the burden of proof is on the party alleging that the court lacks jurisdiction. This burden has not been discharged in my view.

On the issue as to whether the plaintiff has proved on a balance of probabilities that the land in issue belong to Chepkonga Kigen, it was the testimony of the secretary of Ngobitwa Farmers Co-operative Society Ltd that the society consists of groups including Baringo and Chebiemit groups. The plaintiff and Chepkonga Kigen belong to the Baringo group whereas Elias Kaino belongs to the Chebiemit group in the County of Elgeyo Marakwet, Soy/Soy Block 10(Navillus)/2898 of approximately 80.94 hectares was subdivided into many portions including Soy/Soy Block 10/(Navillus) 2975, 2976 and 2977 in the names of Chepkonga Kigen, Simion Kiprotich and James Kiptoo Chemjor respectively. They were given to use on temporary basis the said portions of land until 2005 when proper survey was done and after the society's loan was repaid.

The society gave Chepkonga Kigen as the owner of land parcel No. 2975 which was in hands and use of James Kiptoo Chemjor on the basis of the land lease and sale agreements between Chepkonga Kigen and James Kiptoo Chemjor. This evidence of the secretary of the Ngobitwa Co-operative Society corroborates the evidence of the plaintiff that parcel of land No. 2975 which is in contention was allocated to Chepkonga Kigen who sold it to the plaintiff. This court finds that the receipts produced by both the plaintiff and defendant in the names of Chepkonga Kigen and Elias K. Kaino respectively do not identify the land parcel number for obvious reasons that the land had not been surveyed and subdivided when the receipts were issued and therefore, it is only the management of the Ngobitwa Co-operative Society that can identify the owners of the parcels of land. This was done by Benjamin Kangogo Kendagor who adopted the statement made on behalf of the society. He reiterates that the land in dispute was allocated to Chepkonga Kigen who sold it to the plaintiff. Though the receipt that was produced indicates that the shares were bought by Chemweno Kigen a brother of Chepkonga Kigen, I am

satisfied with the explanation that the shares were bought by Chemweno Kigen on behalf of Chepkonga Kigen and that there is no dispute between Chemweno Kigen and Chepkonga Kigen.

I have considered the sale agreement produced by the plaintiff and do find plot No. 189 as referred to by parties was the plot number allocated to the suit parcel before survey and subdivision. The sellers are disclosed as Isaac Chepkonga and Chepkonga Kigen. There is no dispute between Isaac Kigen and Chepkonga Kigen or between Isaac Kigen and the plaintiff. The parcel of land described as 189 was sold for a consideration of Kshs.200,000/= and witnessed by the chief Lelmen Location.

PW2, Mr. Chepkonga Kigen stated that he paid for the shares through his brother Chemweno Kigen. He paid Kshs.45,000/= for the shares and Kshs.4,000/= for survey and sold the said plot to the plaintiff. I do believe this witness because it was not disputed that Chemweno Kigen was Chepkonga Kigen's brother.

The burden of proof shifted to the defendant to prove that there was an agreement between himself and Elias Kiptoo Kaino for the sale of the disputed land. The agreement between the two reads:

SIMBI SERKOET NGOBITWA CO-OPERATIVE SOCIETY

P. O. BOX 134, ELDORET P. O. BOX 117, MOIBEN

“I, Elias Kiptoo Kaino, ID. No 6208059 has surrendered my share to Simon Kiprotich of ID. No. 8033452. In turn I have received the agreed amount of Kenya shillings equivalent to my shares. I have given my receipts as proof of my acceptance.”

.....

To begin with, the agreement does not indicate clearly when it was signed and how much was paid. Moreover, it is for transfer of shares and does not disclose the land that was being purchased. The receipts produced by the defendant are in respect of purchase of shares and survey fees. The land parcel number is not disclosed.

I do find that the defendant should have called an official of Ngobitwa Co-operative Society to give evidence in court and to inform the court the proprietor of the land parcel No. 2975 according to their records. The officials of the co-operative society who testified gave evidence that the land belonged to Chepkonga Kigen who sold it to James Kiptoo Chemjor. I am inclined to believe the evidence of Jonah Kipkoech, the Secretary of Ngobitwa Co-operative Society (who stated that the land belonged to Chepkonga Kigen initially but he sold it to the plaintiff. I do find from the evidence on record that the plaintiff has proved his assertions.

In ***Miller Vs Minister of Pensions (1947) 2 ALL ER 372***, Lord Denning said in respect of burden of proof in Civil Cases that:-

“It must carry a reasonable degree of probability not so high as required in criminal cases. If the evidence is such that the tribunal can say we think it is more probable than not, the burden is discharged but if the probabilities are equal, it is not”.

On the issue of failure to enjoin Ngobitwa Farmers' Cooperative Society I do find that there was no need to enjoin the society because it had already made a decision

that the property was owned by the plaintiff and that the officials of the Ngobitwa Cooperative Society testified in court. Moreover, misjoinder or non-joinder of a party to a suit perse does not in itself render such suit fatally defective. Indeed, Order 1 rules 9 and 10 of the Civil Procedure Rules 2010 provide therein that no suit shall be defeated by reason of the misjoinder or non-joinder of parties.

Consequently, I do grant a permanent injunction restraining the defendant from trespassing upon and committing trespass activities such as illegal fencing and other development activities in respect of the plaintiff's parcel No. Soy/Soy Block 10(Navillus) 2975.

Costs of the suit plus interest are awarded to the plaintiff. Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 9TH DAY OF OCTOBER, 2015.

ANTONY OMBWAYO

JUDGE