



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 157 OF 2013

CHERONO KOMEN.....PLAINTIFF

VS

ESTHER OSAMA MACHARIA.....DEFENDANT

(Suit by plaintiff for eviction; parties previously having been members of a co-operative society; parties having occupied ground on a temporary basis pending survey; survey and titles issued which necessitated change in occupation; defendant now occupying plaintiff's land; whether defendant should be evicted; order that defendant be evicted; plaintiff's suit succeeds).

JUDGMENT

The plaintiff instituted this suit seeking orders to have the defendant evicted from the land parcel Ngeria/Kesses Block 5 (Bayete)/18 (the suit land) and to have her restrained from the said land. In the plaint, he pleaded that he is the registered proprietor of the suit land which measures 3.24 hectares or thereabouts, and that the defendant is the registered proprietor of the land parcel Ngeria/Kesses Block 5 (Bayete)/19. It is pleaded that the defendant has encroached into the plaintiff's land and has been cultivating the same to the detriment of the plaintiff. It is stated that the plaintiff has made several attempts to have the defendant move out but in vain. It is for that reason that he has sought the orders which I have set out above. Upon being served with summons, the defendant entered appearance but I have not seen a statement of Defence.

At the hearing of the suit, the plaintiff testified that he owns the suit land and he produced the title deed as an exhibit. He testified that the land is 8 acres but that the plaintiff occupies 5 acres of it. He got his land as a member of Bayette Farmers Co-operative. He entered the land in 1968 and was given 4 acres to occupy. He stated that this was a temporary arrangement pending survey. Survey was done on various occasions to enable each member get his land and beacons were finally placed. He got his 8 acres. The result of this survey meant that the occupation of the members on the ground was affected, as some occupied more or less, than they were entitled to. He was initially occupying 4 acres but his entitlement was 8 acres as per the title deed issued. This meant that the defendant now occupied 5 acres of his land. He produced several correspondences showing that he asked the defendant to move out but the defendant has been adamant. He testified that the defendant has 5 acres of her land which is parcel No. 19 and ought to move to occupy it.

PW-2 corroborated the evidence of the plaintiff. He testified that he is the one who invited the husband to the defendant to Bayette area, one Macharia, who is brother to his wife. He elaborated that the dispute arose when the land was surveyed, as part of what the defendant occupied and where she buried her husband, fell within the boundaries of the title of the plaintiff. He stated that some people were not happy with the survey and filed a case.

With that evidence, the plaintiff closed his case.

The defendant testified and called one witnesses. In her evidence, the plaintiff testified that they moved to Bayette in the year 1967 and settled on the land that she occupies to date. They settled on 5 acres and built a home. She stated that survey was done but she has not collected her title deed because her exact portion has not been showed to her. She however agreed in cross-examination that her title requires her to move from the area that she occupies, but she does not wish to move out of what she has been occupying, as it will be difficult for her to move to new ground. She stated that she and others were not happy with the survey exercise since they wanted titles issued according to their occupation on the ground. She however affirmed that she has not filed any suit to contest the survey.

DW-2 gave history of how the land was originally purchased by two groups, one called Bayette Farmers Co-operative Society, and the other Wendani Farmers Co-operative Society. The two societies split the land into two and each person went to occupy the area in which he was a respective member. He also gave a history of the several surveys done in the area, and what emerged, was that the survey of the area has been turbulent. He asserted that not all land has been surveyed and that he himself has no title to his land. In cross-examination, it emerged that DW-2 was actually a member of Wendani FCS and not Bayette FCS. He agreed that no survey has ever been done on the Wendani portion of the land. He stated that the members of Wendani have not been given titles because they contest the original division of the land between the two groups, as in their view, Bayette FCS got a bigger share than they deserved. He stated that he is fighting for the rights of those dissatisfied with the survey exercise who are 19 in number. He alluded to a case that was filed in 1980 touching on the dispute but no evidence of such suit was adduced. He contended that any member of Bayette FCS who has a title deed does not hold a genuine title.

Mr. Miyianda for the plaintiff, submitted that the plaintiff has proved his case and that he was properly entitled to occupy the land in which he holds title. He pointed out that the defendant has not filed any defence to this suit and neither has she demonstrated any suit challenging the title of the plaintiff. Mr. M.K. Mutai, Counsel for the defendant, on the other hand, submitted that the surveys are disputed and the plaintiff's claim of encroachment will lead to displacement and loss of property. It was further submitted that the continuous stay by the defendant on the suit land gave the defendant prescriptive ownership and that more particularly, her husband who is dead must be left to rest.

It is with the above pleadings, evidence and submissions that I have to make a decision in this matter. It is not in doubt that the plaintiff has title to the suit land. The defendant does not also dispute owning the neighbouring parcel. The only issue that the defendant is averse to, is that the title of the plaintiff falls within an area that she has occupied for a long time. It was explained that the members of Bayette FCS were initially allowed to occupy some ground, pending survey, and issuance of title. Inevitably, once survey was done, persons had to be displaced, since some occupied portions not commensurate with their entitlement. The initial occupation on the ground could not have been meant to be permanent and the members knew or ought to have known that they would be moved when titles were issued. It was therefore wrong for the defendant to imagine that her temporary occupation gave her a right to remain on the same for good. That occupation was subject to change, and the defendant ought not to have been too comfortable with it. The defendant called evidence in an attempt to demonstrate that the survey that brought forth the titles was flawed. However, no surveyor was called as a witness by the defendant. The only witness was a witness from the neighbouring Wendani FCS, who themselves, have been unable to demarcate their land to their members. I do not think that a witness from Wendani FCS could shed light as to the problems facing the Bayette members. No member of Bayette FCS was called forth to state that the titles issued are in dispute. Although the defendant also alluded to some cases having been filed challenging the titles, no evidence of the existence of such cases was produced. Neither have I been shown any evidence that the survey of the land was challenged and reversed.

The title of the plaintiff is therefore a good title and ought to be respected. Title is empty if it does not carry with it the right of occupation. The plaintiff therefore has a right to occupy the whole of the 8 acres comprised in his title. His full rights are contained in Section 25 of the Land Registration Act, Act No. 3 of 2012 which provides as follows :-

S. 25. (1) *The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Although the defendant averred that she has acquired prescriptive rights over the suit land, no counterclaim was raised. In fact I have not seen any statement of defence filed by the defendant. The defendant has therefore failed to demonstrate that she has any rights over the suit land that are capable of protection. The defendant has her own land and I see no lawful reason why she wants to insist on occupying land that does not belong to her. All she needs to do is to move and occupy the land to which she has title. I understand that some hardship will be occasioned to her, but the title of the plaintiff must be respected, and as I said earlier, the defendant ought to have known better than to get too cosy in the temporary occupation pending survey and issuance of titles.

I see no reason why I ought to deny the plaintiff the orders sought. I allow the plaintiffs suit and make the following final orders.

1. I declare the plaintiff the rightful proprietor of the land parcel Ngeria/Kesses Block 5 (Bayete)/18.
2. I declare that the defendant has no rights over the land parcel Ngeria/Kesses Blok 5 (Bayete) /18.
3. I order the defendant and her servants/agents and assigns to vacate the land parcel Ngeria/Kesses Block5 (Bayete)/18 forthwith and no later than 14 days and in default the plaintiff be at liberty to apply for her eviction.
4. I issue an order of permanent injunction restraining the defendant her servants/agents and assigns from interfering with the plaintiff's possession of the land parcel Ngeria/Kesses Block 5 (Bayete)/18.
5. The defendant shall pay the costs of this suit.

It is so declared and ordered.

DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in open court in the presence of:

Mr. B.K. Langat holding brief for Mr. Miyienda of Ms Miyienda & Co for the plaintiff

Mr. H.K. Koros of Ms Chepkitway & Co present for the plaintiff