



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 483 OF 2012

(Formerly HCC 21 of 2009)

NAOMI CHELIMO TARUS.....PLAINTIFF

VS

NOAH SAMOEI & 3 OTHERS.....DEFENDANT

(Suit by the plaintiff to have the defendants declared trespassers; suit land previously owned by the plaintiff's husband; plaintiff having acquired suit land by way of transmission after her husband was declared dead; plaintiff being sole proprietor of suit land; defendants raising counterclaim that suit land is family land; at day of hearing only plaintiff attending; no evidence tendered by the defendants; no reason as to why plaintiff's suit cannot succeed; plaintiffs suit succeeds with costs; counterclaim dismissed with costs)

JUDGMENT

This suit was commenced by way of plaint filed on 10 February 2009. In the suit paper the plaintiff has pleaded that she is the sole registered proprietor of the land parcel Uasin Gishu/Tapsagoi/109 (the suit land) measuring 8.9 Hectares. It is further pleaded that the defendants have without any colour of right trespassed into the said land and have proceeded to cultivate and construct structures on part of it. The plaintiff has therefore sought for a declaration that she is the sole and absolute proprietor of the suit land and that the defendants are trespassers. She has also sought for orders of eviction to eject the defendants from the suit land.

The defendants filed a joint statement of defence and counterclaim. They denied that the plaintiff is the sole proprietor of the suit land. They also denied having illegally trespassed into the suit land. They averred that if any title deed over the suit land was issued to the plaintiff, then the same was obtained through fraud. They contended that the suit land is family land which was acquired after the family sold another farm in Aldai. They have stated that the plaintiff is sister-in-law to the 2nd, 3rd, and 4th defendants and that they own the land jointly with the husband of the plaintiff. They have pleaded that the husband of the deceased, one Wilson Kipyego Tarus disappeared in 1992 and has never been confirmed dead and that his share of the suit land is only 4 acres. They have pleaded particulars of fraud against the plaintiff, inter alia, that the plaintiff secretly filed a succession cause being Eldoret Succession Cause No. 142 of 2005 and claimed that the entire land was owned by her husband while in the knowledge that he was only entitled to 4 acres. They have asserted that they have been on the suit land since 1985 and were shocked when they were served with the suit papers herein.

The plaintiff filed a reply to defence and defence to counterclaim in which she traversed the claims of the defendants. Later, the defendants filed a third party notice against William Chepkwony Busienei and Nicholas Misoi. The claim against the two was for a refund of the purchase price, damages, and

compensation for investments undertaken on the suit land. The third parties never entered appearance to this suit.

On the day in which the matter was fixed for hearing, counsel for the defendant applied for adjournment which I declined. Counsel then opted not to participate any further in the proceedings. The defendants were also absent. The plaintiff then proceeded to give evidence as the sole witness. Inter alia, she testified that she is wife of Wilson Kipyego Tarus who disappeared in the year 1992 during clashes and has never been seen to date. She produced an order made vide Eldoret High Court Miscellaneous Probate & Administration Cause No. 223 of 2003, in which an order was made that the said Wilson Kipyego Tarus be presumed dead and the plaintiff was allowed to commence succession proceedings. Succession proceedings were then filed vide Eldoret High Court, Succession Cause No. 142 of 2005. The plaintiff was issued with letters of administration which were confirmed on 18 December 2007. In the confirmed grant, the plaintiff was declared the sole proprietor of the suit land. The defendants never raised any objection to the succession proceedings. The plaintiff also produced a Title Deed of the suit land, which shows that she became registered as the sole proprietor of the suit land on 19 February 2008. She testified that when her husband was present, the defendants never came to the land but came to occupy it after the disappearance of her husband. She testified that the 4th defendant is a brother to her husband, the 3rd defendant is son to a brother of the plaintiff's husband, and that the first two defendants are not related to her but were brought to the suit land by her brothers in law. She never welcomed any of the defendants to settle on the suit land. She denied that the suit land is family land and asserted that her husband was the sole owner.

The only evidence on record is that tendered by the plaintiff. I have no reason to doubt it. The same shows that the suit land belonged to the husband of the plaintiff who was presumed dead. The land then devolved to the plaintiff through transmission. The defendants have not presented any evidence to rebut that of the plaintiff and to support their pleadings. I have no material before me which would make me come to the conclusion that the suit land was family land and that the only entitlement that the plaintiff has is of 6 acres. Neither have any of the particulars of fraud alleged against the plaintiff been supported by any evidence. I have seen that the plaintiff is the sole registered proprietor of the suit land. As proprietor, she is entitled to the whole of the bundle of rights that vest upon any proprietor, including the right of exclusive use and possession of the suit land. These rights are set out 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.

The defendants have not demonstrated any right or interest that nullifies or limits the proprietary rights of the plaintiff. They had a counterclaim which they failed to support by way of evidence. Neither is their claim against the 3rd parties supported.

I see no reason why the plaintiff's suit cannot succeed. I therefore enter judgment for the plaintiff as prayed and dismiss the counterclaim and Third Party Notice of the defendants with costs. I make the following final orders :-

1. I declare the plaintiff as the sole registered proprietor of the land parcel Uasin Gishu/ Tapsagoi/ 109.

2. I declare that the defendants are trespassers on the land parcel Uasin Gishu/Tapsagoi/109.
3. I order the defendants to vacate the suit land within 30 days of service of this judgment or decree and in default the plaintiff be at liberty to apply for an order of eviction.
4. I award the plaintiff the costs of this suit.
5. I dismiss the counterclaim and Third Party Notice of the defendants with costs to the plaintiff.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 11TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:-

Mr. S.M. Kagunza holding brief for Mr Chanzu for the plaintiff.

N/A for Ms Kimaru Kiplagat & Co for defendants

N/A for 3rd parties who never entered appearance.