



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E&L 256 OF 2013**

**EVANS MAIRURA OMWENGA.....PLAINTIFF**

**VS**

**DANIEL C. CHEBET.....DEFENDANT**

*(Suit by plaintiff to be declared proprietor of suit land; counterclaim by defendant for the same land; plaintiff having purchased the suit land from 2nd proprietor and being registered as owner; claim by defendant that he purchased the land from 1st proprietor and that plaintiff acquired ownership by fraud; no evidence of any fraud on the part of the plaintiff; agreement between defendant and 1st proprietor not attested; purported agreement having been entered after 1st registered owner had ceased to be owner; plaintiff declared owner of suit land; trespass; damages for trespass; award of Kshs. 200,000/= made; judgment entered for plaintiff; counterclaim dismissed)*

**JUDGMENT**

**A. INTRODUCTION AND PLEADINGS**

This suit was commenced by way of a plaint filed on 18 April 2013. In the plaint, the plaintiff pleaded that he is the registered proprietor of the land parcel Eldoret Municipality/ Block 14/783 (the suit land). He pleaded that in the year 2003, the defendant requested that he be allowed to graze his cattle on the said land until such a time that the plaintiff would need it back. However, in July 2012, the plaintiff noticed that the defendant had erected a stone wall and on inquiry, the defendant informed him that he has purchased the said land. In the suit, the plaintiff has asked for a permanent injunction to restrain the defendant from the suit land and a declaration that the plaintiff is the lawful owner of the suit land. He has also asked for mesne profits and general damages for unlawful encroachment.

The defendant filed a defence and counterclaim. In the defence, he denied that the plaintiff is the owner of the suit land. He also denied that he had requested the plaintiff to temporarily use the said land. He pleaded that the plaintiff fraudulently acquired title to the said land. Inter alia it is claimed that the plaintiff falsely presented false documents for registration before the land registrar, and also misled the land registrar to register him as proprietor, while it is the defendant who is the owner, through a sale agreement dated 22 July 2004, between himself, and one Paul Kibor Kemboi, the 1st owner of the property. In the counterclaim, he has asked that the title of the plaintiff be cancelled and the defendant be issued with title to the suit land. He has also asked for a declaration that he be declared the owner of the suit land.

**B. EVIDENCE OF THE PARTIES**

The plaintiff is a lecturer at the University of Nairobi at the Department of Urban and Regional Planning. He testified that he has been teaching at the university since the year 1988. He is also a practicing physical planner and engineer. He testified that in the year 1994-1996, he was engaged in a World Bank project for non-motorized transport where he was team leader. Part of the project involved work to be conducted in Eldoret. At Eldoret, they were working together with personnel from the Municipal Council of Eldoret. That is how he came to know the defendant, who at that time, was working as a community worker with the Municipal Council of Eldoret. The defendant was also engaged in the project as a social worker. He produced some photographs which were taken while he was engaged in the project.

While in Eldoret, he developed an interest in purchasing a plot and he approached one of his friends, Mr. Nyaundi advocate, who was an advocate with the law firm of M/s Nyaundi Tuiyott & Company Advocates. Mr. Nyaundi informed him that there was a plot being sold by one Joseph Ongoro. He was shown the lease and saw the property which is the suit land. He paid money directly to the law firm of M/s Nyaundi Tuiyott for the purchase price and legal fees. The lease was then transferred to him on 19 June 1996 and he was issued with a certificate of lease.

After he got title, he came to learn that the defendant was his immediate neighbor. He lived in Nairobi, and since he had become acquainted with the defendant, he allowed the defendant to make use of the property from about 2002/2003. They would communicate on phone, and he would also make occasional visits to the plot, where he would meet with the defendant. Alternatively they could meet in Eldoret town and have tea. The defendant at that time ran a business in town as he had retired from the Municipal Council.

All was well until the year 2012 when he was called by another of his friends who informed him that the suit land had been fenced. He called the defendant and that is when the defendant shocked him with the news that he had bought the land from a Mr. Kibor Kemboi. He also got a call from the police, of a complaint by the defendant, that he was causing him disturbance. He sent his advocate to the police station and his advocate was shown an agreement between the defendant and Mr. Kibor Kemboi which was drawn by a Mr. Chebii advocate. The plaintiff's advocate then engaged Mr. Chebii in various correspondences. They managed to obtain a copy of the agreement and copy of transfer executed between Mr. Kibor Kemboi and the defendant. The plaintiff placed security on the property but they were threatened by the defendant. He stated that he is now unable to utilize the property out of fear.

In cross-examination, the plaintiff testified that he came to know that the defendant was his neighbor in the year 2003 and that is when he granted him permission to use the suit land. There was however no formal agreement. He was asked where his own sale agreement was but he stated that the same could not be traced. He testified that the name of Paul Kemboi (Mr. Kibor) still appears in the County records as the rate payer although he (the plaintiff) has been paying rates. He stated that he has not yet followed up to change the name of the rate payer. He stated that he purchased the property from Mr. Ongoro who was the second registered proprietor after Mr. Kibor Kemboi.

PW-2 was Dr. Samuel Obiero also a lecturer at the University of Nairobi, Department of Urban and Regional Planning. He testified that he was also engaged in the World Bank project mentioned by the plaintiff and it is from his engagement in the project that he and the plaintiff came to know the defendant.

With that evidence, the plaintiff closed his case.

The defendant testified as DW-1. He testified that he retired from the Municipal Council of Eldoret in the year 2003 where he was working as Deputy Director in the Department of Social Services and Housing. He testified that he met the plaintiff while working on the World Bank project but stated that he had no idea that he had a plot next to him. It is in 2004 that he noticed the name Mairura Omwenga at the records of the lands office after Paul Kibor Kemboi sold to him the plot and he intended to transfer the same to himself. He however did not connect that name to the person that he had met at the World Bank project.

He testified that it is Paul Kibor Kemboi who also sold to him the land that he owns which is parcel No. 472. This was in 1984. He fenced it in the year 1986. Kemboi asked him to also fence the plot No. 473

(the suit land) as he intended to sell it to one Joseph Leting. The plot remained that way until the year 2003 when Kemboi informed him that Mr. Leting was no longer interested in the property and asked him whether he can buy it. They talked and agreed. The consideration was to be 6 dairy cows valued at Kshs. 180,000/= ,which he gave Mr. Kemboi, and cash of Kshs. 200,000/=. They went to the offices of Mr. Chebii advocate. They did not find Mr. Chebii, but one of the clerks, Mr. Komen, who drew the agreement. They signed the agreement and left it for Mr. Chebii to come to attend to it. After 2 weeks, he went to Mr. Chebii's office and collected a copy of the agreement and transfer, but the same had not been signed by Mr. Chebii. When he went to register the transfer, he discovered that the property is registered in the name of another person. He informed Mr. Kemboi and together they went to the lands office. Mr. Kemboi wrote a letter asking for the particulars of the person who had been registered as proprietor.

According to the defendant, no one had come claiming to be owner of the land, and he then put up a permanent wall in the year 2004. But no one came forward until the year 2010 when the plaintiff surfaced and informed him that he (the defendant) was developing his (plaintiff's) plot. They then agreed to meet Mr. Kemboi together but Mr. Kemboi was not within town on that day. They agreed that the plaintiff would come back but he never did until the year 2012 by which time a demand letter had already been written asking the defendant to vacate the suit land. The defendant then reported the matter to the police and wrote a statement. He stated that the plaintiff was summoned to record a statement but never did, and instead opted to sue him in these proceedings. He testified that the matter was still the subject of police investigation. He denied that he ever had a discussion with the plaintiff to take care of the suit land on his behalf. In his view, the plaintiff ought to have sued Mr. Ongoro, the person who sold the land to him.

In cross-examination, the defendant agreed the agreement that he had with Mr. Kemboi is not attested. He explained that they waited from the year 2004 to 2012 to lodge a complaint with the police because they did not know of the identity of the proprietor. He agreed that it was after he received a demand letter that he reported to the police. He also agreed that at some point, the plaintiff informed him that he had been conned by Mr. Kemboi and out of pity, was willing to refund him the money that he paid to Mr. Kemboi. He agreed that at the time they wrote the agreement with Mr. Kemboi, the land was already registered in the name of the plaintiff. He testified that originally, it was Mr. Kemboi who owned around 500 acres of the area where the suit land is now situated. He proceeded to sub-divide the land into 1/2 acre plots and sold them. He did not do a search before entering into the agreement with Mr. Kemboi because he trusted that the plot was in his name. He stated that his counterclaim is based on the sale agreement that he had with Mr. Kemboi.

DW-2 was one Festus Kiptoo Kemboi. He testified that he is a son to Paul Kemboi. He stated that Paul Kemboi died on 17 October 2013. He is aware that his father signed a statement in respect to this suit. He testified that his father knew the defendant but he himself was not privy to their dealings.

DW-3 was Samwel Kimaiyo Kosilei. He testified that sometimes in the year 2010, he met a gentleman who asked for the home of Mr. Chebet. DW-3 showed him the home of the defendant. He asked them to go round and stated that he owned the plot. The defendant at that time was not around. He accompanied the person to the defendant's office in town. The defendant did not recognize him but he left them to discuss their matters. He stated that as a resident of the area, he identifies the defendant as owner of the suit land.

After DW-3 had testified, the defendant's counsel applied to call two more witnesses and introduce additional documents. The application was objected to by counsel for the plaintiff and I upheld the objection.

The defendant then closed his case.

### **C. SUBMISSIONS OF COUNSEL**

Mr. J.K. Kiplagat for the defendant, submitted that there was nothing to show that there was ever an agreement between Mr. Kemboi, the first registered proprietor, and Mr. Ongoro, the 2nd registered proprietor. He submitted that when the defendant took possession in the year 2004, no complaint was

raised. He submitted that the plaintiff obtained title fraudulently as proper procedure was not followed. He submitted that the plaintiff had failed to demonstrate the process followed in obtaining his title. He submitted that the defendant had demonstrated good ownership of the suit land. He referred to an investigation report by a Corporal Owaga which he said was filed in court and submitted that the matter was under investigation. He submitted that a case will soon be filed in the criminal court against the plaintiff for obtaining a title deed fraudulently through forged documents.

Mr. Nyachiro for the plaintiff on the other hand submitted that the defendant has no locus to allege fraud as the agreement between the defendant and Mr. Kemboi was not valid. He submitted that no evidence has been tendered to suggest that the plaintiff should not be deemed as owner of the property. He asked this court to assess a figure as mesne profits and Kshs. 500,000/= for trespass.

#### **D. DECISION**

I have looked at the pleadings, the evidence and submissions of counsel. First I think I need to address an issue raised by Mr. Kiplagat, that there is a criminal case soon to be filed against the plaintiff, and that there is an investigation report filed by Corporal Owaga in the court file. Parties are supposed to tender their evidence through witnesses unless parties agree by consent to adduce certain evidence. The court does not consider any document or any comment made by a person who has not been called as a witness. If a party intends to rely on a document, or testimony of a person, it is the obligation of that party to present such document as an exhibit, or call such person as a witness to adduce evidence. This is so as to ensure that the other party has opportunity to cross-examine and test the evidence being tendered. I cannot therefore consider any document filed without leave of the court and not tendered as evidence in this matter. Neither can I consider comments that have been made by a person who has not been called as a witness. Mr. Kiplagat submitted that soon a criminal charge will be opened against the plaintiff, but I have no evidence of this, and I will therefore proceed to disregard such submission.

The case of the plaintiff, as I gathered it, is that he purchased the suit land from one Mr. Ongoro in the year 1996. He dealt directly with the law firm of M/s Nyaundi Tuiyott and all payments were made through the said law firm. He produced the receipts of the money paid to the said law firm. The property was then transferred to him and he was registered as proprietor of the leasehold title on 19 June 1996. It is his position that the defendant has no claim whatsoever over the suit land.

The case of the defendant on the other hand is that he purchased the said land from Paul Kibor Kemboi through the sale agreement of 22 July 2004 between himself and the said Paul Kibor Kemboi. I have looked at the sale agreement. The same is not attested. One cannot even tell where the document emanated from as the drawer of the document is not indicated. The document provides that Paul Kibor Kemboi has sold the suit land to the defendant for a consideration of Kshs. 380,000/=. If it is on the basis of this document that the defendant alleges title to the suit land, I am afraid that he cannot succeed. The agreement in the first place is unenforceable for want of compliance with the provisions of Section 3(3) of the Law of Contract Act (CAP 23) Laws of Kenya which provides as follows :-

*(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-*

*(a) the contract upon which the suit is founded-*

*(i) is in writing;*

*(ii) is signed by all the parties thereto; and*

*(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party;*

*Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.*

The agreement between the defendant and Mr. Kemboi is not attested and therefore the defendant cannot sustain a suit based on that contract.

I have also looked at the transfer instrument produced by the defendant, which the defendant stated was the instrument that was intended to transfer the property to him. That transfer instrument is similarly not attested and is therefore of no consequence. There is therefore no document tendered by the defendant which is capable of transferring the suit land to him.

In any event, at the time that the agreement between Mr. Kemboi and the defendant was entered into, the plaintiff was already the registered proprietor of the suit land. I have seen that Mr. Kemboi was the first registered proprietor on 28 April 1987. His interest was transferred to Joseph Ongoro on 23 July 1987. The plaintiff herein became registered as proprietor on 19 June 1996. Mr. Kemboi was not the proprietor on 22 July 2004 when the purported agreement was entered into, and he had no capacity to transfer the suit land to the defendant. If the defendant had performed any due diligence, he would have discovered that Mr. Kemboi did not have proprietorship over the suit land and could not sell the said land in the year 2004. He would also have discovered that the plaintiff had been proprietor for at least 8 years to that period.

I have not been given any document or evidence to demonstrate that Mr. Kemboi was alarmed at the registration of Mr. Ongoro, or the plaintiff, as proprietor of the suit land and that he took steps to assert his own title to the land. He did not file any suit against the plaintiff, or Mr. Ongoro, to claim that the two irregularly obtained land that properly belonged to him. Neither was any caveat nor restriction placed by Mr. Kemboi in the register of the said title. He seems to have been very comfortable with the registration of Mr. Ongoro and later the plaintiff as proprietors of the suit land. There was mention of a restriction, but the only restriction placed, provides that there should be no dealings until valuation is carried out. It is not clear who has placed that restriction and I do not think that it is the subject of these proceedings. Suffice it to state that the said restriction does not in any way purport to demonstrate that Mr. Kemboi or the defendant had lodged any complaint on the title of the plaintiff or that of Mr. Ongoro.

From the evidence, it appears to me that Mr. Kemboi no longer had any interest in the land. That is why he never complained about the proprietorship of Mr. Ongoro or that of the plaintiff. If Mr. Kemboi had no complaint, I am at a loss as to why the defendant feels that he can sustain any claim based on a fraud that was purportedly committed against Mr. Kemboi. It was claimed that the plaintiff obtained title by forging documents. The documents alleged to be forgeries were never tabled before this court. In essence there is absolutely no evidence tendered that the plaintiff's registration as proprietor of the suit land was made fraudulently. It is trite law that he who alleges must prove.

I must say that I was impressed by the demeanour of the plaintiff and his witness. He gave good evidence of how he came to be proprietor of the suit land. I believe his evidence that he allowed the defendant to use the land as licensee. They knew each other, and he trusted that his "good friend", would keep watch over the property. On the other hand, I do not believe the defendant, that he did not know of the interest of the plaintiff over the suit land. I think he did, but he wanted to keep the property for himself given its proximity with the land that he already owned.

The plaintiff as the registered owner of the suit land is entitled to exclusive possession of the suit land. The defendant having not demonstrated any sustainable interest in the suit land must keep off the said land. I do not hesitate to issue the order of permanent injunction restraining the defendant from occupation or use of the suit land.

The plaintiff also claimed mesne profits and general damages for unlawful encroachment. On mesne profits, no evidence was led as to any specific loss suffered by the plaintiff by the occupation of the defendant. The land is a vacant plot for which the plaintiff had allowed the defendant use of. I do not think the plaintiff has demonstrated to me that he has suffered any loss of user for which he would sustain a claim for mesne profits.

But there is no doubt that the defendant continued with interference despite his licence being cancelled.

He erected a wall and placed a gate without the permission of the plaintiff. Neither did he attempt to make amends when confronted by the plaintiff. He continued to keep his livestock and utilize the land. He had no respect at all for the proprietary rights of the plaintiff. The defendant in fact had to engage the services of a security company in an attempt to secure the suit land. These were acts of trespass for which general damages are awardable. A statement must be made that it is time people learnt to respect the property of others and that it does not pay to seize possession of land that is not owned by oneself. Considering the nature of the suit land, which is a residential plot in a prime area of Eldoret, and the conduct of the defendant, in my discretion, I make an award of Kshs. 200,000/= in favour of the plaintiff against the defendant as general damages for trespass.

I also award the plaintiff costs of both the main suit and the counterclaim together with interest at court rates.

In summary, I enter judgment for the plaintiff against the defendant in the following terms :-

*(a). As against the defendant, the plaintiff is hereby declared to be the rightful proprietor of the land parcel Eldoret Municipality/Block 14/783.*

*(b). A permanent injunction is hereby issued, stopping the defendant and/or his servants/agents from entering, being upon, grazing, keeping livestock, cultivating, developing, interfering with any structures, or in any other way dealing and/or interfering with the land parcel Eldoret Municipality/Block 14/783.*

*(c). An award of general damages in the sum of Kshs. 200,000/= is made in favour of the plaintiff against the defendant.*

*(d). No award is made as damages for mesne profits.*

*(e). Costs of both main suit and counterclaim to the plaintiff.*

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF NOVEMBER 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Delivered in the presence of:***

***Mr. Jones Nyachiro for the plaintiff.***

***Mr. J.K. Kiplagat for the defendant.***