



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 962 OF 2012

Formerly HCC 183 of 2012

FRANCIS KISERA CHELELGO & ANOTHER.....PLAINTIFFS

VS

BARNABAS KIPNGE'TUNY TIEMOI.....DEFENDANT

JUDGMENT

The plaintiffs instituted this suit by way of Plaint. They have pleaded that they are the legitimate registered owners of the land parcel Baringo/Kapropita/168 having acquired it through an order issued in Kabarnet Land Dispute Tribunal No. 9 of 2004. They have pleaded that in August 2012, the defendant without any colour of right entered the suit land and started constructing a house. They have averred that despite numerous demands, the defendant has remained adamant. They have thus sought orders to have the house constructed by the defendant demolished and also for a permanent injunction to restrain the defendant and his employees/agents and/or servant and/or relative and any other person claiming for and on behalf of the defendant from stepping and/or constructing any structures and/or dealing with anything on the suit land. They have also asked for costs and general damages.

The defendant never entered appearance and never filed a statement of defence. At some point there was an application filed by one Bennadine Jepkoech Tiemoi to be enjoined as an interested party to this suit. The application was however not prosecuted.

The matter proceeded for hearing with the two plaintiffs being the only witnesses. PW- 1 was the second plaintiff. She testified that the 1st plaintiff is his first cousin. She stated that the defendant is a son to one of another of her cousins. She testified that the suit land is owned jointly by herself and the 1st plaintiff. The Title Deed and the certificate of official search were produced as an exhibits. PW-1 stated that the defendant started developing a house on the suit land in the year 2012 which house is now complete. She testified that apart from the defendant there are also other persons on the land being her mother and the mother to the defendant. The only person with authority to be on the land is the 2nd plaintiff's mother. The mother of the defendant is residing on the land in a separate house that was constructed by her late husband, one Jacob Tiemoi (deceased). She testified that they had a dispute with the late Tiemoi over the ownership of the suit land that was heard before the Land Disputes Tribunal and decided in their favour. The decision of the Tribunal was filed in Kabarnet LDT Case No. 9 of 2004 and adopted. The order of the Kabarnet court was produced as an exhibit. PW-1 stated that there is no appeal from the said order. She asked for orders to have the defendant evicted alongside his mother and for orders to have them restrained from interfering with the land.

PW-2 was the 1st plaintiff. He testified that the 2nd plaintiff is her cousin. He adopted the evidence of the 2nd plaintiff. On his part, he does not live on the land but affirmed that only the mother of the 2nd plaintiff is on the land with their permission. He stated that Joseph Tiemoi (deceased) had other land in Kipkabus and the defendant who is son to Tiemoi ought therefore to move to Kipkabus.

With that evidence, the plaintiffs closed their case. As earlier stated, the defendant never entered appearance and never filed defence. The evidence of the plaintiffs is therefore uncontroverted.

I have seen from the Certificate of Title and the Certificate of Official Search produced as exhibits that the plaintiffs are jointly registered as proprietors of the land parcel Baringo/Kapropita/168. As proprietors, they are entitled to all proprietary rights that vest on the suit land. These rights are set out in Section 25 and 26 of the Land Registration Act, Act No. 3 of 2010, which provide as follows :-

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.

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

It will be seen from the above two sections that the rights of a proprietor acquired on first registration or subsequently for valuable consideration or by an order of court are not to be defeated except as provided in the Act. Under Section 26, the Certificate of Title is prima facie evidence of ownership. The rights of a proprietor can only be defeated on proof of fraud or misrepresentation to which the person is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The plaintiffs testified that they obtained title through an order of court which has not been set aside. The defendant has not brought any material to demonstrate that the plaintiffs obtained title by fraud or misrepresentation, or that the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. Neither has he brought forth any pleadings nor evidence to demonstrate that he has a competing claim to the suit land.

From the material before me the plaintiffs are the registered proprietors of the suit land and I am of the opinion that they have proved their case on a balance of probabilities against the defendant. I therefore order the defendant his servants/agents and/or assigns to vacate the suit land within a period of 30 days from the date of service of this judgment or decree.

The plaintiffs pleaded that the order ought also to apply to the defendant's relatives. On my part I do not think so unless of course the said relatives are assigns of the defendant and their occupation on the suit land is really that of the defendant. If the plaintiffs want orders against other persons, then it is incumbent upon them to file suit separately.

The plaintiffs also claimed general damages costs and interests. Not much evidence was led as to the nature of the land, how the land is used and what loss the plaintiffs have suffered for being unable to use it. There is very little evidence that would have enabled me make a fair assessment in general damages. In the premises, I will only award a token of Kshs. 10,000/= as general damages for trespass, in appreciation of the fact that the defendant has indeed been a trespasser on the suit land.

The plaintiffs shall also have cost and interest from the date of this judgment.

I therefore make the following final orders

- (1) I order the defendant to vacate the suit land forthwith and no later than 30 days from the service of this judgment or decree and in default the plaintiffs be at liberty to apply for an order of eviction.
- (2) I issue an order of permanent injunction restraining the defendant from entering, developing, or being upon the suit land.
- (3) I award the plaintiffs Kshs. 10,000/= as general damages for trespass.
- (4) I award the plaintiff costs and interest.

It is so decreed.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF AUGUST 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. A.T. Kiboi present for the plaintiffs