



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC. NO. 225 OF 2009

HANNINGTON NYANDIKO ODONGO..... PLAINTIFF

VERSUS

PHILEMON ABUTO OKWENGU.....1ST DEFENDANT

RUSANAEL AKELO LIECH.....2ND DEFENDANT

ALEX ACHOLA CHOKA.....3RD DEFENDANT

JUDGMENT

The facts giving rise to this suit are to a large extent not in dispute. The Plaintiff was at all material times registered as the proprietor of all that parcel of land known as West Kasipul/Konyango Kokal/ 2236 (“the suit Property”). The Defendants on the other hand were at all material times leasehold owners of commercial plots known as plot numbers 1,2,3A and 3B (hereinafter “the disputed plots”) which were said to be situated at Ruga Market on the parcel of land known as West Kasipul/KonyangoKokal/597 (“Plot No. 597”) registered in the name of the defunct County Council of South Nyanza. Plot No. 597on which the disputed plots were said to be situated is adjacent to the suit property.

The Plaintiff brought this suit against the Defendantson 6/11/2009 seeking an order for the eviction of the Defendants from the suit property and a permanent injunction to restrain the Defendants from trespassing onto or remaining in possession of, or in any manner interfering with the suit property. The Plaintiff also sought general damages for trespass.

In his plaint dated 4th November 2009, the Plaintiff averred that he wasat all material times the registered owner of the suit property and that between the years 2004 and 2009 the Defendants forcibly entered and occupied portions of the suit property claiming that the same belonged to them. The Plaintiff averred upon entering the suit property, the Defendantsstarted constructing permanent buildings thereon.

The Defendants filed a joint statement of defence on 17/11/2009 in which they denied the Plaintiffs’ claim in its entirety. The Defendants averred that the suit property shares a common boundary with Plot No. 597 on which Ruga Market is situated.The Defendants averred that they were the owners of the disputed plots which are situated at Ruga Market on Plot No. 597.The Defendants averred that the disputed parcels of land were allocated to them by the Town Council of Oyugis, the successor in title to the defunct County Council of South Nyanza which was registered as the owner of Plot No.557. The Defendants denied that they had trespassed on the suit property between the years 2004 and 2009 as had been claimed by the Plaintiff or at all.

The Defendantsaverred that they had constructed permanent structures on the disputed plots with the

approval of the relevant authorities. The Defendants averred that the Plaintiff had brought an earlier suit namely, **OyugisSRMCC.NO. 60 OF 1995** against the 2nd Defendant's deceased husband one, David Liech Ogilo over the same subject matter which suit was dismissed. The Defendants averred that the dispute herein concerns the boundary between the suit property owned by the Plaintiff and Plot No. 597 owned by the Town Council of Oyugis which was the successor in title to South Nyanza County Council. The Defendants averred that this court had no jurisdiction to entertain the Plaintiff's claim which amounts to an abuse of the process of the court.

When the suit came up for hearing, the Plaintiff gave evidence and did not call any witness. For the Defendants, the 1st Defendant gave evidence on his own behalf and on behalf of the other Defendants. The Defendants called one witness. In his evidence, the Plaintiff reiterated the averments contained in the plaint which I have highlighted herein earlier. The Plaintiff maintained that the Defendants trespassed on the suit property in the year 2009 and started putting up structures thereon. In his evidence which he gave on behalf of all the Defendants, the 1st Defendant(DW1) also reiterated the contents of the Defendants joint statement of defence. DW1 stated that the disputed plots were on Plot No. 597 owned by Oyugis Town Council which had allocated the same to them. DW1 stated further that the boundary between the suit property and Plot No. 597 had been determined by the Land Registrar who had made a finding that the Plaintiff had encroached on land belonging to Oyugis Town Council contrary to the Plaintiff's contention that it was Oyugis Town Council which had encroached on the suit property. The Defendants witness, JOSEPH ADINDA ONYANGO (DW2) corroborated the evidence of DW1. I have considered the Plaintiff's claim against the Defendants as pleaded and the evidence that was adduced by the Plaintiff in proof thereof. I have also considered the Defendants' statement of defence and evidence that was adduced by the Defendants.

The parties did not agree on the issues for determination by the court. From the pleadings and the evidence on record the following in my view are the issues that arise for determination in this suit.

- i. Whether plot numbers 1, 2, 3A and 3B are within LR. No. West Kasipul/Konyango/Kokal/597 (Plot No. 597) or within LR No. west Kasipul /Konyango Kokal /2236(the suit property)?
- ii. Whether the Defendants have trespassed on the suit property?
- iii. Whether the Plaintiff is entitled to the reliefs sought.
- iv. Who is liable to pay the costs of the suit

The first issue:

It was not disputed that Plot No. 597 was at all material times trust land and that the same was set aside through Gazette Notice No. 1682 dated 9/5/1966 which was published in the Kenya Gazette on 17/5/1966 for the purposes of a market known as Ruga. Plot No. 597 measured approximately 2.33 acres according to the said Kenya Gazette Notice. It was also common ground that Plot No. 597 was at all material times registered in the name of South Nyanza County Council the predecessor in title to Oyugis Town Council. It was also not disputed that the suit property was registered in the name of the Plaintiff. From the evidence on record, the suit property traces its origin to LR.No. West Kasipul/Konyango Kokal/585 ("Plot No. 585") which was registered in the name of the Plaintiff on first registration. Plot No. 585 shared a common boundary with Plot No.597 which was also registered in the name of South Nyanza Town Council on first registration. Whereas the Plaintiff sub-divided Plot No. 585 on several occasions, Plot No. 597 was never sub-divided. The suit property measures 1.37 hectares (approximately 3.4 acres). It is one of the sub-divisions of Plot No. 585 which still shared a common boundary with Plot No. 597. The Town Council of Oyugis (now defunct), the successor in title to South Nyanza County Council in respect of Plot No. 597 sub-divided Plot No. 597 informally to create sub-plots which it allocated to members of the public. Among the sub-plots which were created by Oyugis Town Council from Plot No.597 were plot numbers 1,2,3A, and 3B(the disputed plots). The 1st Defendant was allocated plot No. 3A by Oyugis Town council. The 2nd Defendant was allocated plot No. 1 and 2 while the 3rd Defendant was allocated Plot No. 3B. As mentioned earlier, the Defendants contended that the four (4) plots are situated at Ruga Market within plot No. 597 owned by Oyugis Town Council while the Plaintiff maintained that the same are situated on the suit property.

The Defendants placed in evidence, plot cards showing that the disputed plots were allocated to them by Oyugis Town Council which owned plot No. 597. The Defendants also led evidence that after the disputed plots were allocated to them, they developed the same with permanent structures. I am in agreement with the Defendants' advocates that the issue as to whether or not the disputed plots are situated on Plot No. 597 or on the suit property cannot be determined without first establishing the boundary between plot No. 597 and the suit property. The Plaintiff produced in evidence Registry Index Map for West Kasipul/Kanyango Kokal registration section (Diagram No. 23) (Pexh. 4). Pexh. 4 showed the locations of the suit property and plot No. 597 on the ground. For lack of a better way to express the extent of the Defendants' alleged encroachment on the suit property, the Plaintiff made a mark consisting of letter "A" using a highlighter on Pexh. 4 to show the area which he claimed the Defendants were occupying inside the suit property.

When Pexh. 4 was put to the DWI, he denied that the disputed plots are on the area the Plaintiff had marked with letter "A" on that exhibit. I agree with the Plaintiff's submission that when DW 1 was asked by the court whether or not their developments were on the place marked "A" in Pexh. 4, he answered in the affirmative. This affirmation must however be considered in light of the entire evidence on record. It cannot be considered in isolation. DW 1 had stated in his evidence in chief and in cross examination that the Defendant's developments were not on the suit property or on the area that had been marked with letter "A" on Pexh. 4. DW1's answer to the contrary following the question that had been put to him by the court alone without more cannot therefore be taken as conclusive proof that the disputed plots are on the suit property.

The Defendants led evidence that the dispute over the disputed plots started as soon as the disputed plots were allocated to them by the Town Council of Oyugis. They contended that at that time, the dispute was referred to the Land Registrar, Rachuonyo District under section 21(2) and 22(1) of the Registered Land Act, chapter 300 laws of Kenya (now repealed) for adjudication. The Land Registrar was asked to determine the boundary between Plot No. 597 and a parcel of land known as West Kasipul/Konyango Kokal/1379 ("Plot No. 1379") then owned by the Plaintiff. From the Proceedings of the said Land Registrar, the Plaintiff had wanted the boundary between his parcel of land and Ruga Market to be established. The said Land Registrar with the assistance of the District Surveyor traced the origin of the Plaintiff's Plot No. 1379 to Plot No. 585 and using the Registry Index Map for West Kasipul /Konyango Kokal (Sheet Map No. 23) established and fixed the boundary between Plot No. 597 and Plot No. 1379. The Defendants have contended that that decision by the Land Registrar which was made on 19/6/2008 settled the boundary dispute between Plot No. 597 on which the disputed plots are situated and Plot No. 1379.

The Defendants have contended that the Plaintiff did not appeal the said decision of the Land Registrar. The Defendants have submitted that the suit property originated from Plot No. 1379 whose boundary *vis a vis* plot No. 597 had been fixed by the Land Registrar as aforesaid. The Defendants have submitted that since the District Land Registrar did not find any encroachment onto Plot No. 1379 from Plot No. 597, the same position should obtain with regard to the alleged encroachment on the suit property. The Defendants produced the proceedings of the said Land Registrar as Dexh. 3.

I have perused Dexh. 3. The heading of the proceedings reads as follows; "**Boundary identification between Ruga Market and Parcel No. 1, 2 and 3 and K/Kokal/1379.....**". The plots referred to as Parcel No. 1 and 2 are among the disputed plots which are the subject of this suit. In the circumstances, the Defendants' contention that the dispute over the boundary of Ruga Market situated on Plot No. 597 and the Plaintiff's parcel of land had been determined was not far-fetched. The Plaintiff did not mention these proceedings that took place before the District Land Registrar in his pleadings. The Plaintiff did not also comment on the decision of the said District Land Registrar when it was produced by the Defendants in evidence.

I am in agreement with the Defendants that when the District Land Registrar identified the boundaries of Ruga Market on Plot No. 597 and the Plaintiff's Plot No. 1379, there was no finding of encroachment on Plot No. 1379. If there had been any encroachment, there would have been no reason why the District Land Registrar would not have said so expressly in his decision. The said decision of the Land Registrar

(Dexh.3) would have been sufficient to lay this suit to rest if I had found some connection between Plot No. 1379 and the suit property. Although both the Plaintiff and the Defendants contended that the suit property originated from Plot No. 1379 whose boundary was in dispute before the Land Registrar aforesaid, I don't think that that is the case. The hearing of the boundary dispute before the Land Registrar took place on 19/6/2008. I have noted from Pexh.2A that the suit property is a sub-division of plot No. West Kasipul/Konyango Kokal/1924 ("Plot No. 1924") and not Plot No. 1379.

I have also noted that the suit property was registered on 17/2/2005 before the date of the boundary dispute that was determined by the District Land Registrar. This means that the suit property was in existence as at 19/6/2008 when the Land Registrar was hearing the boundary dispute and if at all its boundary was also in issue, the same would have been dealt with at the time. It is therefore not correct as was contended by the parties that the suit property originated from the sub-division of Plot No. 1379. There is no evidence before me connecting Plot No. 1379 and the suit property, more particularly their location. That said, the onus was upon the Plaintiff to prove that the disputed plots are within the suit property. From what I have set out above there is no evidence that the disputed plots and the developments thereon are on the suit property. I am of the view that the Plaintiff should have placed before the court some more reliable evidence regarding the alleged encroachment on the suit property by the Defendants. I am of the opinion that a survey report would have sufficed for that purpose. I am of the view that Pexh. 4 fell short of the proof required. It is my finding therefore that the Plaintiff has failed to prove that the disputed plots are on the suit property and not on Plot No. 597 as contended by the Defendants.

The second issue:

Trespass is defined as any unjustified intrusion by one person upon the land in possession of another. See, **Zacharia Onsongo Momanyi vs. Evans Omurwa Onchagwa [2014] eKLR**. The Plaintiff having failed to prove intrusion or encroachment upon the suit property by the Defendants, the important element of trespass is missing. Trespass has therefore not been proved.

The third issue:

The Plaintiff's claim against the Defendants was based on trespass. The Plaintiff having failed to prove trespass, there is no basis upon which the orders of eviction and injunctions sought can issue in his favour. On the issue of costs, costs normally follow the event. No reason has been advanced in this case that would cause me depart from that well established legal position.

Conclusion:

In the final analysis and for the reasons given above, it is my finding that the Plaintiff has failed to prove his claim against the Defendants on a balance of probabilities and as such he is not entitled to the reliefs sought herein. The Plaintiffs suit is dismissed accordingly.

In the interest of justice and fairness and with a view to bring to an end the dispute between the parties which has been raging on since the year 2008 and which has attracted both criminal and civil proceedings, I hereby order the District Land Registrar, Rachuonyo District to visit LR. No. West Kasipul/Konyango Kokal/2236 and LR.No. West Kasipul/Konyango Kokal/597 within 30 days from the date hereof after giving notice to the Plaintiff, the Defendants and the Country Government of Homa Bay to identify, establish and fix the boundary between the two parcels of land. The Plaintiff shall be at liberty to take whatever action as he may be advised by his advocatesshould it turn out that there is an encroachment on the suit property by the County Government of Homa Bay, the successor in title to Oyugis Town Council in respect of the suit property. The Plaintiff shall meet the costs for fixing the said boundary and the costs of this suit.

Signed in Nairobi thisday of2016.

S. OKONGO

JUDGE

Delivered, Dated and Signed at Kisii this 15th day of April 2016.

J. M. MUTUNGI

JUDGE

In the presence of

.....for the Plaintiff

.....for the Defendants