



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ENVIRONMENT & LAND CASE NO. 331 OF 2014

ISADIA WASANGALE PLAINTIFF

VERSUS

HELLENAH MUHIGA DEFENDANT

JUDGMENT

1. **ISADIA WA SANGALE**, (The Plaintiff), filed this suit against **HELLENAH MUHIGA**, (The Defendant), seeking a declaration that he is the rightful owner of parcel of land known as **TIRIKI/SHAMAKHOKHO/952**, an order that the Defendant and her agents be evicted from the suit land, that structures erected thereon be demolished and a permanent injunction restraining the Defendant and her agents from alienating, laying claim to, utilizing and trespassing on to the suit land.

2. The Plaintiff pleaded in his Complaint that he is the registered owner of parcel of land known as **Tiriki/Shamakhokho/952** and that he had enjoyed peaceful and quiet possession and use of his land until the Defendant illegally and wrongfully trespassed and or encroached on to part of his land and erected a pit latrine and urinal pit thereon. The plaintiff further pleaded that when the Defendant refused to heed his demand to vacate his land, he resolved to file this suit.

3. Although served, the Defendant did not enter appearance or file a defence. The Plaintiff then applied for an interlocutory judgment which was entered on 29/7/2012. On 20/3/2013, the firm of Musiega & Co. Advocates filed a Notice of Appointment of Advocates on behalf of the Defendant, and on the same day, a consent was recorded in court setting aside the interlocutory judgment and the Defendant given fourteen (14) days to file her Defence with the matter set down for mention on 15/5/2013.

4. When the matter came up for mention on 15/5/2013, the Defendant had not filed her Defence and the court ordered that a Hearing date be fixed at the Registry. A date was taken and the matter was listed for hearing on 23/7/2014 when once again counsel for the Defendant informed the court that they had lost contact with the Defendant and requested for time to file an application seeking leave to cease acting. Counsel was given thirty (30) days to do so and the matter was once again set for mention on 27/10/2014. On that day, parties did not appear and the matter was stood over generally.

5. When the matter finally came up for hearing on 16/2/2015, only the Plaintiff attended and upon being satisfied that the Defendant's counsel had been served, the matter proceeded ex-parte.

6. The Plaintiff, (PW1), testified that he is the proprietor of parcel of land No. **TIRIKI/SHAMAKHOKHO/952** and that the Defendant is his neighbour and owns parcel No. **TIRIKI/SHAMAKHOKHO/453**. The Plaintiff told the court that a road separates his parcel of land and

that of the Defendant. The Plaintiff adopted his statement which he had signed and filed in court together with his plaint. The Plaintiff said that the Defendant had unlawfully entered his land and erected thereon a pit latrine and urinal pit despite his protests. This according to the Plaintiff, has prevented him from developing his land.

7. The Plaintiff produced in evidence a title Deed for the suit land as P.Exh.1 and a Search for the same parcel of land as P.Exh.2. He also produced a sketch map showing the layout of the parcels of land as P.Exh.3. The Plaintiff prayed that his suit be allowed with costs.

8. PW2, the Assistant Chief of the area, told the court that he knows both the Plaintiff and the Defendant both of whom come from his Sub-location and that they are neighbours. The witness told the court that the two have had a boundary dispute after the Defendant encroached onto the Plaintiff's parcel of land. The witness testified that he tried to intervene but the Defendant refused and put up structures on the Plaintiff's parcel of land. The witness adopted his statement which contained what he had already told the court. The witness told the court that the Defendant has developed her parcel of land No. TIRIKI/SHAMAKHOKHO/452 having constructed thereon rental houses. The witness said that after the Defendant declined to heed his advice to vacate the Plaintiff's parcel of land, he advised the Plaintiff to seek the services of a surveyor and District Land Registrar and thereafter seek help from the court.

9. I have considered the Plaintiff's evidence and that of his witness and also perused the exhibits produced before court. The issue I have to determine is whether the Plaintiff has proved his case as required.

10. The Plaintiff is the registered proprietor of parcel of land No. TIRIKI/SHAMAKHOKHO/952 which according to him is neighbouring parcel No. TIRIKI/SHAMAKHOKHO/453 belonging to the Defendant. According to the Plaintiff, the Defendant has trespassed onto his parcel of land and erected thereon a pit latrine and a urinal pit, all done in total disregard of the Plaintiff's right of ownership to the suit land.

11. The Title Deed (P.Exh.1) shows that the Plaintiff acquired proprietary interest over the suit land on 28/7/1987 and the Title Deed was issued on 16/12/1998. The Search (P.Exh.2) which was issued on 10/4/2012 confirms that the Plaintiff still remains the proprietor of the suit land. The sketch map (P.Exh.3) also shows that there is a road separating the two parcels of land TIRIKI/SHAMAKHOKHO/952 and 453 belonging to the Plaintiff and Defendant respectively. There is no doubt therefore that on the evidence, the plaintiff is the owner of the suit land.

12. PW2 has also confirmed that indeed the Defendant has erected structures on the Plaintiff's parcel of land and that his effort to resolve the dispute as the Area Assistant Chief came to nought after the Defendant refused to heed his advice. The Defendant has developed her parcel of land and erected thereon rental houses and is now using the Plaintiff's parcel of land on which she has put up a pit latrine and urinal pit. This confirms that indeed the Defendant has trespassed onto the Plaintiff's parcel of land.

13. The Defendant's actions are not only unlawful but also illegal. They fly against the Plaintiff's Constitutional right to property ownership. As long as the plaintiff is the legitimate owner of parcel No. TIRIKI/SHAMAKHOKHO/952, his right is protected in law and the Defendant has no right whatsoever to trespass thereon and carry out activities that are inconsistent with the Plaintiff's Constitutional right of ownership and enjoyment of his property.

14. Article 40 (1) of the Constitution provides as follows;

1) "Subject to Article 65, every person has the right either individually or in association with others, to acquire and own property;

a) Of any description and

b) In any part of Kenya."

The Constitution thus protects everyone's right of property ownership, including the Plaintiff, regardless of the type of property and where it is situated. According to P.Exh.1, the title Deed, the Plaintiff acquired the interest in the suit land in 1987 and from that time the plaintiff has held the inalienable right to that land and his proprietary interest can only be interfered with or defeated in a manner that is acceptable in law.

15. Moreover, Section 27 of the Registered Land Act (Cap. 300 – now repealed) provided as follows;

S. 27 “Subject to this Act –

a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. “

16. The Section emphasized indefeasibility of the Plaintiff's right as proprietor of the suit land to enjoy his ownership and privileges over the suit land without any other person's interference. This is a right that is protected by law and cannot be defeated by competing claims that are unknown to law. Such claims are not only illegal but also unlawful. The Defendant's actions of encroachment and use of the Plaintiff's land without his permission are illegal and untenable. That is why Section 28 of the retired Registered Land Act was in the following words;

S.28 “The right of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided for 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 leases, charges and other encumbrances and to the conditions and restrictions, if any, shown on the register; and

b) unless the contrary is expressed in the register, to such liabilities, rights, and interests as affect the same and are declared by Section 30 not to require noting on the register.....”

17. The Defendant did not put forward a defence and has not raised any claim known to law against the Plaintiff's right of ownership to this land. The law is clear that the Defendant's claim, if any should be one that is known and appreciated in law. She was given an opportunity to state why she is trespassing onto the Plaintiff's land but failed to do so. It can only be taken that she has no lawful reason or excuse to do so, and therefore her actions are in violation of the law. This court will not countenance such actions.

18. I am satisfied that the Plaintiff has, from the evidence on record and exhibits produced, proved his case on a balance of probabilities and must succeed.

19. The plaintiff has prayed that the court orders or declares that he is the lawful owner of the parcel of land TIRIKI/SHAMAKHOKHO/952. The court cannot make a declaration where the law is clear as to who the lawful owner of the land is. The Title Deed was issued in accordance with the law and to the lawful proprietor to that land. The court cannot add more.

20. Consequently, I enter judgment for the Plaintiff against the Defendant and make the following orders;

1) An order is hereby issued directing the Defendant, her relatives, employees, servants, agents and/or any other person claiming through her to vacate from the Plaintiff's parcel of land known as TIRIKI/SHAMAKHOKHO/ 952 and remove with them all structures including the pit latrine and urinal pit erected on the suit land within three (3) months from the date of this judgment, and in default, they be forcibly evicted and the structures demolished.

2) A Permanent Injunction is hereby issued perpetually restraining the defendant either by herself or through her relatives, employees, servants or agents or any other person claiming under her from alienating, laying claim to, trespassing onto, utilizing, developing, carrying out any works, constructing and or in any other manner dealing with land parcel Number TIRIKI.SHAMAKHOKHO/952 and or interfering with the Plaintiff's peaceful and exclusive ownership, possession and or use thereof.

3) The Plaintiff shall also have costs of the suit.

Dated and delivered at Kakamega this 17th day of March, 2015

E. C. MWITA

J U D G E