



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 35 OF 2014**

VICTOR MOGA ..... PLAINTIFF

VERSUS

RICHARD KEBIRA MARIERA ..... DEFENDANT

**JUDGMENT**

1. This is a trespass claim. The plaintiff brought this suit against the defendant on 6<sup>th</sup> February 2012 seeking the following reliefs:
  - i. **A permanent injunction restraining the defendant by himself or through his agents, servants and/or anyone claiming under the defendant from trespassing onto, interfering with and/or in any other manner whatsoever, dealing with the suit land that is LR No. West Kitutu/Bogeka/5066 (hereinafter referred to as the suit property).**
  - ii. **An order of eviction against the defendant.**
  - iii. **General damages for trespass.**
  - iv. **Costs of the suit to be borne by the defendant.**
  - v. **Such further order/or other relief as the court may deem fit and expedient so to grant.**
2. In his plaint dated 5<sup>th</sup> February 2014 the plaintiff averred that; he is and was at all material times the registered proprietor of the suit property which measures 0.18hectares or thereabouts. On or about the month of November 2013, the defendant entered onto the suit property without his knowledge and/or consent, occupied the same and started cultivating the same. The defendant was ordered by the District Officer Mosoch Division to vacate the suit property and hand over possession of the same to the plaintiff but declined to do so. The plaintiff has averred that as a result of the actions aforesaid, he has been denying the use and occupation of the suit property and has thereby suffered loss and damage.
3. The defendant entered appearance and filed a statement of defence dated 7<sup>th</sup> April, 2014 on 11<sup>th</sup> April, 2014. In his statement of defence the defendant has admitted that the plaintiff is the registered proprietor of the suit property. He has claimed however that the said registration was carried out fraudulently without his knowledge or that of his family. The defendant has contended that the suit property all along belonged to him and that the plaintiff with full knowledge of his (the defendant) ownership rights over the suit property caused the same to be transferred to the plaintiff's name. The defendant has also averred that this suit is defective, malicious and vexatious and that the same falls short of the express requirements of the relevant statute and/or law and that he shall apply to have the same struck out.
4. When the suit came up for hearing on 3<sup>rd</sup> June, 2015, Mr. Kaburi held brief for Mr. Sagwe for the plaintiff while Mr. Omariba appeared for the defendant. Mr. Omariba applied for the adjournment of the suit on the ground that his firm wished to cease acting for the defendant in the matter and

such required time to make a formal application for that purpose. The defendant's application for adjournment was dismissed by the court for reasons which are on record. The matter was thereafter scheduled for hearing at 12.30pm on the same day. When the same was called out for hearing at 2.20pm, the plaintiff and his advocate were present and ready to proceed with the hearing. However, neither the defendant nor his advocate Mr. Omariba was present. Since the court had given an indication in the presence of the advocates for both parties that it shall proceed with the hearing of the matter, the plaintiff was allowed to prosecute his suit the absence of the defendant and his advocate notwithstanding.

5. The plaintiff gave evidence and called no witness. In his evidence the plaintiff stated as follows; he is the registered owner of the suit property. He purchased the suit property from one, Berina Nyangara Mochoge and Alloys Nyangisera Mochoge who were mother and son respectively on 28<sup>th</sup> March 2012 at a consideration of Kshs. 750,000. The agreement for sale was in writing and the same was witnessed by Job Obure, advocate. He produced as an exhibit a copy of the said agreement as P. Exhibit 1. He paid the purchase price in full. He produced copies of the acknowledgements of payment dated 30<sup>th</sup> March 2012 and 6<sup>th</sup> August 2012 as P. Exhibit 2 and P.Exhibit 3 respectively. Following receipt of the said payments, Berina Nyangara Mochoge aforesaid executed a transfer in his favour and he was registered as the owner of the suit property. He produced a copy of the register for the suit property as P.Exhibit 4. After the said registration, he was issued with a title deed for the suit property on 25<sup>th</sup> May 2012. He produced a copy of the said title deed together with a copy of official search on the register of the suit property as P.Exhibit 5 and P.Exhibit 6 respectively.
6. He stated further that Berina Nyangara Mochoge was the first registered owner of the suit property and that he had no problem with her concerning the transaction. He stated that the problem started when he went to fence the suit property. The defendant prevented him from doing so claiming that the suit property belonged to him. The plaintiff stated that the defendant is not a son to Berina Nyangara Mochoge although he has prevented him from using the suit property since he purchased the same. He stated that the defendant has put up a house on the suit property and he is also cultivating the same. The defendant has been asked to vacate the suit property and has failed to do so. On examination by the court the plaintiff stated that the defendant has put up two semi-permanent houses and a permanent toilet on the suit property. He stated that these structures were put up by the defendant after he had purchased the suit property. He stated that the suit property was vacant when he purchased the same.
7. After the close of the plaintiff's case, the plaintiff's advocate informed the court that he did not wish to make any closing submissions. I have considered the plaintiff's case as pleaded and the evidence that was tendered by the plaintiff in proof thereof. I have also considered the defendant's statement of defence. As I have stated at the beginning of this judgment, the plaintiff's claim against the defendant is based on the tort of trespass. Trespass has been defined as any intrusion by one person on the land in the possession of another without any justifiable cause. See, **Clerk and Lindell on Torts 18<sup>th</sup> Edition at page 923, paragraph 18-01**. What I need to determine is whether the plaintiff has established his occupation or ownership of the suit property and the fact that the defendant has entered onto and occupied the suit property without justifiable cause. The plaintiff has demonstrated that he is the registered proprietor of the suit property. He has produced in evidence a copy of the title deed for the suit property in his name and a certificate of official search on the register of the suit property which shows that the suit property was registered in his name on 23<sup>rd</sup> May 2012.
8. The defendant filed a statement of defence alleging that the plaintiff acquired the suit property fraudulently. The defendant did not tender any evidence in proof of the said allegations. Fraud must be pleaded and proved. I am in agreement with the decision of Mutungi J. in the case of **Bubaki Investment Company Ltd –vs- National Land Commission & 2 Others [20150 eKLR** where he stated that:-

**“...It is not enough for a party to allege fraud in any matters and leave it at that for the court to look for the evidence. Fraud is a serious matter which borders on criminality and must be specifically pleaded and proved. The burden of proof where fraud is alleged is on higher threshold than on a balance of probability and is on such scale as is normally required in criminal cases though the standard is not as high as**

**to be beyond any reasonable doubt but is close there.”**

9. In the case of **Kampala Bottlers Ltd. vs. Damanico (U) Ltd.**[1990-1994] EA 141, it was held that **“To impeach the title of a registered proprietor of land, fraud must be attributed to the transferee, either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act.”** It was held further that **“The burden of proof of fraud must be heavier than a balance of probabilities generally applied in civil matters”**. That was also the holding by the Court of Appeal in the case of **Virani t/a Kisumu Beach Resort vs. Phoenix of East Africa Assurance Co. Ltd.**[2004]2 KLR 269.
10. There is no evidence before me that the plaintiff acquired the suit property fraudulently. Fraud although pleaded has not been proved. That being the only defence that was raised by the defendant against the plaintiff’s claim, the claim as it stands of after the disposal of that defence is irresistible. The plaintiff’s title to the suit property stands uncontested by the defendants. The plaintiff’s evidence that the defendant has entered onto the suit property and put up structures thereon without his consent is also not challenged. The plaintiff having proved his ownership of the suit property and the defendant’s entry and occupation thereof without his consent, the onus shifted to the defendant to justify his entry and occupation of the said property.
11. In the absence of any evidence by the defendant in his defence, the only conclusion that I can make is that the defendant has no justifiable cause for his entry and occupation the suit property. The defendant is therefore a trespasser on the suit property. Consequently, I am satisfied that the plaintiff has proved his claim against the defendant on a balance of probabilities and as such he is entitled to the orders of injunction and eviction sought herein. The plaintiff has not proved that he has suffered damages and as such I am not inclined to award him any. General damages like any other head of damages is compensatory in nature. It is not awarded as a matter of course. The claimant must lay a basis for the same. No basis was laid for the general damages claimed herein and non can be awarded.
12. In conclusion, I hereby enter judgment for the plaintiff against the defendant as prayed for in paragraphs (i) and (ii) of the plaint dated 5<sup>th</sup> February, 2014. The defendant shall vacate and handover possession of the suit property to the plaintiff within one hundred and twenty (120) days from the date hereof failure to which the plaintiff shall be at liberty to apply for warrants for his forceful eviction from the property. A copy of this judgment shall be served upon the defendant forthwith by the plaintiff and an affidavit of service shall be filed in court. The filing of the said affidavit of service shall be a condition precedent to the taking of any further steps herein at the instance of the plaintiff. The plaintiff shall have the costs of the suit.

**Delivered, Dated and Signed at Kisii this 27<sup>th</sup> day of August, 2015.**

**S.OKONG’O**

**JUDGE**

**In the presence of:**

Mr. Kaburi                      for the plaintiff

N/A                                      for the defendant

Mr. Omwoyo                      court clerk

**S.OKONG’O**

**JUDGE**