



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 149 OF 2014

PETER ANGOLO OWAGA PLAINTIFF

VERSUS

JULIUS ODERO OWAGA DEFENDANT

JUDGMENT

1. The plaintiff by a plaint dated 11th April 2014 filed the present suit against the defendant on the same date and seeks judgment against the defendant for:-
 - a. **An order of permanent injunction restraining the defendant from entering into, trespassing into, alienating, selling, cultivating on, tilling on, or otherwise interfering and/or dealing with all that piece and/or parcel of land known as title number North Sakwa/Kamresi/1127.**
 - b. **Eviction order be issued against the defendant from all that piece and/or parcel of land known as title number North Sakwa/Kamresi/1127.**
 - c. **Costs and interest of the suit.**

The plaintiff in the plaint states that he was at all material times the registered owner of all that parcel of land known as title number **North Sakwa/Kamresi/1127** (hereinafter referred to as “the suit property”). The plaintiff further states that the defendant on or about the month of February, 2014 without any color of right, and/or consent from the plaintiff trespassed onto the suit land owned and registered in the plaintiff’s name and started laying claim and asserting proprietary interest over the suit property. The plaintiff further avers that the defendant commenced construction of permanent houses in the suit property which is not only prejudicial to the plaintiff’s interests but also denies the plaintiff use of his property. In the premises the plaintiff seeks an order of restraint and eviction of the defendant.

2. The defendant was as per the affidavit of service sworn by one **Edward Owuor Nyaila** and filed in court on 9th September 2014 served with summons to enter appearance on 12th May 2014. The defendant did not enter appearance and/or file any defence and the suit was fixed for formal proof hearing on 30th September 2015. On the date fixed for hearing the plaintiff and his brother, **Joseph Njega Owaga** testified in support of the plaintiffs suit.
3. The plaintiff testified as PW1 and his brother as PW2. Their evidence was consistent. The gist of the evidence was that their late father had 4 wives and that before he died he subdivided his land **North Sakwa/Kamresi/500** which measured 16.5 hectares to all his 4 wives and set aside a portion for a church. The witnesses stated that the portion intended for the 3 wives apart from their mother was **North Sakwa/Kamresi/1124** measuring 11.82 hectares, the church was allocated the portion **North Sakwa/ Kamresi/1125** and the portion intended for the plaintiff’s mother was further subdivided into 2 portions namely **North Sakwa/ Kamresi/1126** and **1127**

measuring 2.08 hectares and 1.94 hectares respectively. The plaintiff and his brother stated each wife was shown her portion and demarcation done on the ground and the children of each wife were supposed to share their respective mother's portions. The plaintiff and PW2 shared their mother's portion and processed titles for their respective parcels. The plaintiff was registered as owner of title number **North Sakwa/Kamresi/1127** and was issued with a title deed on 16th May 2002. A certificate of official search dated 10th April 2014 confirms the plaintiff is the registered owner of the suit property as from 13th May 2002. The copy of title deed, certificate of official search and mutation form as per the plaintiff's list of documents dated 11th April 2014 were tendered and admitted in evidence.

4. The plaintiff and PW2 testified that the defendant in February 2014 defiantly refused to move to the plot allocated to his mother and started to construct a permanent house on the plaintiff's parcel of land which prompted the plaintiff to report the matter to the Assistant chief and the chief. The office of the assistant chief and the chief deputed elders to visit the plaintiff's land to verify the complaint by the plaintiff. The elders upon verification of the facts made findings that:

- i. **The late Owaga (the plaintiff's father) divide his land into four portions for his four wives.**
- ii. **That every son was to benefit directly from his own mother's house.**
- iii. **That the defendant had built his house on Plot No. 1127 which belongs to the plaintiff**

These findings are contained in the letter by the assistant chief dated 12th May 2014 and letter by the chief dated 5th May 2014 also confirms this position. The letter by the chief dated 5th May 2014 and from the assistant chief dated 12th May 2014 were tendered as evidence and admitted as PEx. 4 (a) and 4 (b).

5. On the evidence tendered by the plaintiff which is not controverted it is evident that the plaintiff is the registered owner of the suit property and has been so registered since 2002. There is further evidence that the plaintiff's father had made provision for all his four wives and that each child was supposed to get land from the portion allocated to their respective mother. The letters from the assistant chief and the chief tendered in evidence confirm the defendant had trespassed and was constructing his house on the plaintiff's parcel of land and that he had defied requests to move to his plot.
6. The plaintiff as the registered owner of the suit property has absolute rights of ownership as conferred under sections 24, 25 and 26 of the Land Registration Act, 2012 and is entitled to its use without any interference from any quarter. The defendant has no right to the parcel of land and therefore cannot have any reason to construct a house on the plaintiff's land and more so as he has land through his mother where he ought to build his house/home. The defendant did not enter any appearance in the suit and neither did he file any defence. The evidence by the plaintiff is not challenged. I accept the evidence tendered on behalf of the plaintiff in support of the claim and on the basis of the evidence I am satisfied the plaintiff has proved his case on a balance of probability.
7. I accordingly enter judgment in favour of the plaintiff in terms of prayer (a) in the plaint. I further order and direct the defendant to vacate and deliver vacant possession of the portion of **Title No. North Sakwa/Kamresi/1127** that he occupies to the plaintiff within sixty (60) days from the date of service of the decree herein upon him failing which an eviction order to issue on application. The costs of the suit are awarded to the plaintiff.

Judgment dated, signed and delivered at Kisii this 20th day of November, 2015.

J. M MUTUNGI

JUDGE

In the presence of:

Plaintiff present in person

N/A for the defendant

J. M MUTUNGI

JUDGE