



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND COURT CASE NO. 395 OF 2013**

**HENRY MBOGA .....PLAINTIFF**

**VERSUS**

**HENRY MACHANA .....DEFENDANT**

**JUDGMENT**

1. The plaintiff by a plaint dated 24<sup>th</sup> September 2013 seeks judgment against the defendant for:-
  - a. **Declaration that the plaintiff is the registered and/or lawful owner of LR No. West Kitutu/Bogusero/5190.**
  - b. **Permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the defendant from entering, reentering, trespassing onto, cultivating, building structures, interfering with, and/or in any manner dealing with the suit land that is LR No. West Kitutu/Bogusero/5190 and/or any portion thereof.**
  - c. **Costs of the suit.**
2. The plaintiff by the plaint claims that he is the registered proprietor of land parcel **LR No. West Kitutu/Bogusero/5150** (hereinafter referred to as “**the suit land**”) and has been so registered since the 12<sup>th</sup> April 2010. The plaintiff avers that on or about August 2013 the defendant without the consent and authority of the plaintiff unlawfully entered onto the plaintiff’s said parcel of land and thereon dug a pit latrine and commenced the erection of a permanent structure in the suit land which prompted the plaintiff to simultaneously with the plaint file an application for a temporary injunction to restrain the defendant from carrying on with the illegal and unlawful activities on the suit property.
3. The defendant was served with summons to enter appearance together with the plaint and the application seeking a temporary injunction as per the affidavit of service by one **William Ogwara**, a process server dated 24<sup>th</sup> January 2014 filed on the same date. The court granted a temporary injunction on 27<sup>th</sup> January 2014 in default of the defendant’s response or opposition to the application. As the defendant never entered any appearance and/or filed any defence the court directed that the matter be fixed for formal proof hearing and the same was listed for hearing before me on 16<sup>th</sup> November 2015 when the plaintiff attended court and testified in support of his claim.
4. The plaintiff testified that he was the registered proprietor of the suit land and produced and showed to the court the original title in respect of the suit property which corresponded with the copy of the title annexed to the plaintiff’s bundle of documents produced in court as exhibits. The title showed the plaintiff was registered as owner of the suit property on 12<sup>th</sup> April 2010 a fact confirmed by the official search in respect of the suit property dated 23<sup>rd</sup> September 2013 also produced in court as an exhibit. The plaintiff stated that the defendant unlawfully entered onto the

suit property and that inspite of the plaintiff advising the defendant that the land he had entered belonged to the plaintiff, the defendant ignored the plaintiff and proceeded to build two rental houses (single rooms) which he rents out to tenants. The plaintiff testified that the defendant continued to build on the plot even after the plaintiff's advocate had written a demand letter to him to cease the acts of trespass. The plaintiff seeks orders that he is the lawful owner of the suit property and a permanent injunction barring the defendant from acts of trespass onto the suit property.

5. The averments and the evidence tendered by the plaintiff in this matter has not been controverted. The defendant neither appeared nor filed any defence. The plaintiff has demonstrated that he is the registered proprietor of land parcel number **West Kitutu/Bogusero/5190** as per the copy of title produced and the certificate of official search dated 23<sup>rd</sup> September 2013 also produced in evidence. In the circumstances I make a finding and holding that the plaintiff is the registered absolute proprietor of the suit property and in terms of **sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012** the plaintiff is vested with absolute rights of ownership which are indefeasible and are not liable to challenge save as provided under section **26 (1) (a) and (b)** of the **Land Registration Act**. The defendant has not shown he had any right to enter onto the plaintiff's parcel of land and I hold his entry thereto constituted trespass.
6. Having regard to the evidence and the documents tendered by the plaintiff in support of his claim I am satisfied the plaintiff has proved his case on balance of probabilities and I accordingly enter judgment in favour of the plaintiff for:-
  - a. **A declaration that the plaintiff is the registered absolute proprietor of land parcel West Kitutu/Bogusero/5190.**
  - b. **The defendant is hereby ordered to vacate land parcel West Kitutu/Bogusero/5190 within 30 days of being served with the decree herein failing which an eviction order to issue on application.**
  - c. **Costs of the suit awarded to the plaintiff.**

**Judgment dated, signed and delivered at Kisii this 4<sup>th</sup> day of December, 2015.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the defendant

**J. M. MUTUNGI**

**JUDGE**