



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO.45 OF 2013**

ZACHARIA ONSONGO MOMANYI..... PLAINTIFF

VERSUS

EVANS OMURWA ONCHAGWA ..... DEFENDANT

**JUDGMENT**

1. The Plaintiff brought this suit against the defendant on 6<sup>th</sup> February, 2013 seeking an order for the eviction of the defendant from all that parcel of land known as **LR. No. Central Kitutu/Mwabundusi/638** (hereinafter referred to as **“the suit property”**). In his plaint dated 6<sup>th</sup> February, 2013, the Plaintiff averred that he is the registered proprietor of the suit property and that on diverse dates in the month of December, 2012, the defendant deliberately and forcefully entered the suit property and commenced construction of a permanent building thereon. The Plaintiff averred further that a demand was made upon the defendant to stop trespassing on the suit property but the defendant refused and/or declined to comply thereby leaving the Plaintiff with no alternative but to institute this suit. The defendant was served with the Summons to enter appearance but failed to do so within the prescribed time. The Plaintiff requested for interlocutory judgment on 19<sup>th</sup> March, 2013 which was entered by the Deputy Registrar on 17<sup>th</sup> April, 2013. The matter was thereafter listed for formal proof on 2<sup>nd</sup> July, 2013.
2. During the formal proof, the Plaintiff gave evidence and did not call any witness. The Plaintiff testified that the suit property is registered in his name as the proprietor thereof. He produced as exhibits, certificate of official search dated 29<sup>th</sup> May, 2013 and a copy of a title deed for the suit property in proof of this fact. The Plaintiff stated further that he does not know the defendant and that he has never met him. He stated that the defendant entered the suit property and started putting up a permanent structure thereon and that his attempts to discuss the matter with the defendant did not succeed. He stated that the defendant is said to be working at Homa Bay District Hospital and that only his workers are on the ground. He stated that he wants the defendant to be evicted from the suit property so that he may put the property to his own use. He urged the court to order the defendant to remove the structure he has put up on the suit property and to hand over vacant possession. He stated that he had sued the defendant and others in an earlier case over the suit property which case he won. He produced a copy of the decree that was issued in the said earlier case as an exhibit. At the conclusion of the Plaintiff's evidence, the Plaintiff's advocate, Mr. Sagwe requested to be allowed to put in written submissions which request was allowed by the court.
3. In his written submissions dated 30<sup>th</sup> July, 2013 which was filed in court on the same date, the Plaintiff's said advocate submitted that the Plaintiff has proved his case against the defendant. He submitted that the Plaintiff has proved that the Plaintiff is the registered proprietor of the suit property. He submitted further that the evidence adduced by the Plaintiff was not controverted since the defendant chose not to defend the suit. He submitted that the defendant having failed to

- justify his continued occupation of the suit property, the eviction orders sought should issue.
4. I have considered the Plaintiff's case as pleaded and the evidence tendered in support thereof. The Plaintiffs' claim against the defendant is based on the tort of trespass. Trespass to land has been defined as consisting of **"any unjustifiable intrusion by one person upon land in the possession of another"**, (see, **Clerk & Lindsell on Torts, 18<sup>th</sup> Edition at paragraph 18-01**). Trespass is actionable at the suit of the person in possession of land and proof of ownership is a prima facie proof of possession. In this case therefore, the Plaintiff was under a duty to prove that the defendant had unjustifiably entered the suit property which was in his possession. I am satisfied from the Plaintiff's testimony and the documents produced by the Plaintiff in evidence that the Plaintiff has proved on a balance of probability that the defendant has committed acts of trespass on the suit property. The Plaintiff has proved that the suit property is registered in the name of the Plaintiff. The Plaintiff produced in evidence a copy of a title deed for the suit property in the name of the Plaintiff which confirmed the Plaintiff's ownership of the suit property and that the same was registered in his name on 14<sup>th</sup> December, 2012. The Plaintiff was registered as proprietor of the suit property pursuant to a court judgment that was made in favour of the Plaintiff against the defendant in Kisii HCCC No. 86 of 2010, Zacharia Onsongo Momanyi vs. Erasto Nanga Manase & 2 others on 14<sup>th</sup> October, 2011. The defendant did not enter appearance and as such failed to tender any evidence at the trial to challenge the Plaintiff's claim. The Plaintiff's testimony was therefore not controverted. It is my finding therefore that the Plaintiff has proved that he is the registered proprietor of the suit property and that the defendant has trespassed thereon by putting up a permanent building thereon without the Plaintiff's permission or any lawful excuse.
  5. In conclusion therefore, it is my finding that the Plaintiff has proved his case against the defendant on a balance of probability. I therefore enter judgment for the Plaintiff against the defendant as follows;
    - a. **The defendant shall vacate and hand over vacant possession of all that parcel of land known as LR. No. Central Kitutu/Mwabundusi/ 638 within 90 days from the date of service of a copy of this judgment upon the defendant in person;**
    - b. **A copy of this judgment shall also be served upon the defendant's agents and/or employees on the suit property in addition to the said service upon the defendant and an affidavit of service upon the defendant and the said agents and/or employees shall be filed in court;**
    - c. **The cost of this suit shall be paid by the defendant to the Plaintiff.**

**Delivered, dated and signed at KISII this 24<sup>th</sup> day of January 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Odhiambo h/b for Sagwe for the Plaintiff

N/A for the Defendant

Mr. Mobisa Court clerk

**S. OKONG'O**

**JUDGE**