



No. 257

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
ENVIRONMENT AND LAND CIVIL CASE NO. 102 OF 2009
CLEMENCIA NYANCHOKA KINARO.....PLAINTIFF
VERSUS
JOYCE NYANSIABOKA ONCHOMBA.....DEFENDANT
IN THE MAIN SUIT
AND
1. FLORENCE KEMUNTO RATEMO
2. JOYCE NYANSIBOKA KINARO.....PLANTIFFS
VERSUS
CLEMENSIA NYANCHOKA KINARO.....DEFENDANT
BY WAY OF COUNTER-CLAIM

JUDGMENT

1. The plaintiff brought this suit against the defendant on 11th June, 2009 seeking; a mandatory injunction against the defendant to vacate and demolish all structures erected by the defendant on all that parcel of land known as **LR. No. Wanjare/Bogiakomu/4063** (hereinafter referred to only as “**the suit property**”) and in default an order for her eviction. The plaintiff also claimed a permanent injunction to restrain the defendant from trespassing into the suit property and the costs of the suit. The plaintiff’s claim against the defendant as set out in her plaint dated 10th June 2009 is that the plaintiff is the registered proprietor of the suit property and that sometimes in the year 2008 the defendant without any reasonable cause or consent from the plaintiff entered the suit property and started constructing thereon a residential house.

2. The plaintiff claimed further that following the said act of trespass into the suit property the defendant has constructed the said house to completion and now resides therein, without any consent or license from the plaintiff and that the defendant is also carrying out farming activities on a portion of the suit property. The plaintiff has contended that despite demand made upon the defendant to vacate and hand over possession of the suit property in her possession, the defendant has persisted in her acts of trespass and

has continued to stay on the suit property. It is on account of the foregoing that the plaintiff brought this claim against the defendant to seek the reliefs that I have already set out hereinabove. The defendant entered appearance and filed a statement of defence and counter-claim against the plaintiff on 28th July 2009. In her statement of defence, the defendant contended that the suit property was curved out of a parcel of land known as **LR No. Wanjare/Bogiakomu/1922** (hereinafter referred only as “**Plot No. 1922**”) which was then registered in the name of one, Kinaro Tongi, deceased (hereinafter referred to only as “Kinaro”). The defendant denied trespassing into the suit property and contended that the house that she has constructed is on her own parcel of land and not on the suit property.

3. The defendant contended further that the cultivation complained of by the plaintiff is being carried out on a portion of land that one, Florence Kemunto Ratemo who is a beneficiary of the estate of Kinaro is entitled to and that the said cultivation is being carried out with the consent of the said Florence Kemunto Ratemo. The defendant contended further that the plaintiff had agreed on 18th July 2008 to transfer to her the said portion of the suit property under her cultivation. In her counter-claim against the plaintiff which she brought together with Florence Kemunto Ratemo (hereinafter only referred to as “**the 1st plaintiff in the counter-claim**” or “**Florence**”), Florence contended that she was a beneficiary of the estate of Kinaro with respect to which the plaintiff herein is the administrator. Florence contended further that it was agreed in Kisii High Court Succession Cause No. 395 of 1994 that the plaintiff would distribute the estate of Kinaro to all beneficiaries. Florence contended that Plot No. 1922 was one of the assets of the estate of Kinaro and that the same was supposed to be divided between the plaintiff and herself. Florence has accused the plaintiff of failing to distribute Kinaro’s estate after the confirmation of grant in Kisii High Court Succession Cause No. 395 of 1994. Florence contended that the portion of the suit property which is being cultivated by the defendant herein is her (Florence’s) share of Plot No. 1922 which she was entitled to as a beneficiary as of Kinaro. Florence contended that the plaintiff herein is under a duty and obligation to distribute and transfer the said portion of land under cultivation by the defendant herein to her (Florence).

4. In their counter-claim against the plaintiff, Florence and the defendant herein have jointly sought judgment against the plaintiff herein for an order directing the plaintiff to transfer to Florence a portion of the suit property which was originally part of Plot No. 1922 which Florence is entitled to as a beneficiary of the estate of Kinaro and a permanent injunction to restrain the plaintiff herein from interfering with Florence and the defendant’s occupation of the portion of the suit property which was curved from Plot No. 1922 which Florence is entitled to as a foresaid. In his reply to defence and defence to the defendant’s counter-claim, the plaintiff contended that Florence had no interest in the estate of Kinaro and that her claim to that estate was considered in Kisii High Court Succession Cause No. 395 of 1994 and was dismissed. The plaintiff contended that the counter-claim raised herein by the defendant and Florence is *res judicata*.

5. This suit was fixed for hearing by consent on 19th September 2013. On 19th September 2013, Mr. Maroro advocate appeared for the defendant and applied for adjournment of the matter. The defendant’s application for adjournment was opposed by the plaintiff’s advocate. The court dismissed the defendant’s application for adjournment and ordered the matter to proceed. When the court resumed at 12.30pm on that day for the hearing of the matter, there was no appearance for the defendant. Only the plaintiff and her advocate were present in court and the court allowed the plaintiff to proceed with the hearing. In her evidence, the plaintiff testified that she is the registered proprietor of the suit property. She produced in evidence as exhibits, three (3) certificates of official search dated 16th September 2009, 22nd November 2011 and 29th May 2012 respectively carried out on the title of the suit property which searches showed that the plaintiff is the registered proprietor of the suit property having been registered as such on 15th August 2008. The plaintiff also produced as an exhibit, a copy of the title deed dated 20th August 2008 for the suit property in her name.

6. The plaintiff testified further that the suit property is a sub-division of LR No. Wanjare/Bogiakomu/1922 (**Plot No. 1922**) which was initially registered in the name of her late husband, Kinaro, deceased. She testified that upon the death of her said husband, she filed a Succession Cause No. 395 of 1994 and obtained Grant of letters of administration in respect of his estate. She produced as an exhibit, a

copy Grant of letters of administration dated 7th February 1997 in respect of the estate of her deceased husband, Kinaro Tongi who died on 4th November 1990. The plaintiff testified further that the said Grant of letters of administration was confirmed on 3rd December 2003. She produced as an exhibit a copy of Certificate of Confirmation of the said Grant of the same date. The plaintiff testified further that the suit property is her share of Plot No. 1922 which belonged to her late husband and that she has brought these proceedings against the defendant because she is cultivating the suit property. She stated that the defendant has planted Napier grass and maize on the suit property and that she has also put up a cow shed on the property. The plaintiff testified that the defendant has her own parcel of land but she has decided to cultivate the suit property and to put up a cow shed on the same.

7. The plaintiff stated that the defendant has been in occupation of the suit property for over 5 years and that if the defendant had not occupied the same she would have put the suit property in occupation of the defendant to cultivation. She stated that the defendant has prevented her from making use of the portion of the suit property under the defendant's occupation. The plaintiff stated that the defendant was not a beneficiary of the estate of Kinaro and that Kinaro was succeeded by her (the plaintiff) and her children as the only beneficiaries of his estate. The plaintiff testified that she is not related in any way to the defendant who was also not related to her deceased husband Kinaro and that the defendant has taken a larger portion of the suit property and left her with a very small portion where she has put up her home. The plaintiff urged the court to dismiss the defendant's counter-claim and to issue an order for the eviction of the defendant from the portion of the suit property under her occupation. The plaintiff testified further that the claim raised by the defendant and Florence in their counter-claim was raised as an objection in the succession cause mentioned above which objection was dismissed. The plaintiff did not call any witness and after the close of her case, her advocate filed with leave of the court written submissions on 30th October 2013.

8. I have considered the pleadings filed herein by the parties, the evidence tendered by the plaintiff and the plaintiff's written submissions. The plaintiff's claim against the defendant is based on trespass. Trespass is unauthorized entry into the land that is in the possession of another. In this suit, the onus was upon the plaintiff to prove that she is the owner of the suit property and that the defendant has entered therein without her permission. From the evidence on record, I am satisfied that the plaintiff has proved on a balance of probability that she is the registered proprietor of the suit property. The plaintiff has also proved and it has not been denied by the defendant that the defendant is in occupation of a portion of the suit property without the plaintiff's consent or permission. Once the plaintiff has established that she is the registered proprietor of the suit property, the onus shifted on the defendant to justify her entry and continued occupation of the suit property. As I have stated herein above at the beginning of this judgment, the defendant did not appear at the trial and as such did not adduce any evidence in her defence and in support of the counter-claim that she has preferred together with Florence against the plaintiff. The defendant has therefore not placed any material before the court in justification of her continued occupation of a portion of the suit property. In the circumstances, it is my finding that the defendant is a trespasser on the suit property with no valid claim over the suit property. I am therefore persuaded that the plaintiff is entitled to the reliefs sought in this suit. The defendant and Florence had lodged a counter-claim against the plaintiff contending that the said Florence has an interest in the suit property. Since the defendant and Florence did not give any evidence in proof of their counter-claim against the plaintiff, the contents of the said counter-claim constitute mere allegations without any basis.

9. In conclusion, I hereby enter judgment for the plaintiff against the defendant as prayed in the plaint dated 10th June 2009. The defendant, Joyce Nyansiaboka Onchomba shall vacate and hand over possession to the plaintiff of the portion of the suit property in her occupation within thirty (30) days from the date hereof failure to which the plaintiff shall be at liberty to apply for her eviction. The counter-claim by the defendant and Florence Kemunto Ratemo is dismissed. The plaintiff shall have the costs of this suit and the counter-claim.

Delivered, dated and signed at Kisii this 29th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiff

N/A for the Defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE