



No. 256

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LANDCIVIL CASE NO. 112 OF 2004

ELIZAPHAN NYAMWEYA OBARE1ST PLAINTIFF

JOSEPHINE MORAA NYAMWEYA2ND PLAINTIFF

VERSUS

HARUN KING'OINA BOGITADEFENDANT

JUDGMENT

1. The plaintiffs brought this suit against the defendant on 14th July 2004 through a plaint of the same date. The plaintiffs sought as against the defendant, an order of eviction of the defendant from all that parcel of land known as **LR No. Central Kitutu/Daraja Mbili/2603** (hereinafter referred to as the “**suit property**”), an injunction restraining the defendant from in any way interfering with the suit property, costs of the suit and any other relief the court may deem fit to grant. The plaintiffs’ claim against the defendant as set out in the said plaint is that, the plaintiffs are the registered proprietors of the suit property and that on or about 30th June 2004 the defendant without any reasonable cause trespassed on to the suit property and demolished the plaintiffs semi-permanent buildings erected thereon, cleared a portion of the suit property and started assembling building materials with a view to start construction of a permanent structure on the suit property. It is on account of the said act of trespass that the plaintiffs were forced to institute this suit against the defendant.
2. The defendant entered appearance and filed a statement of defence on 24th August 2004. In his defence to the plaintiffs’ claim, the defendant denied that the plaintiffs are the registered proprietors of the suit property. The defendant claimed that the suit property was fraudulently acquired by the plaintiffs from a parcel of land known as **LR No. Central Kitutu/Daraja Mbili/1233** (hereinafter referred to as “**Plot No. 1233**”). The defendant denied the plaintiffs’ claim that the defendant has trespassed on the suit property and averred that the suit property was sold to him by one, Charles Gekonde Otara on 3rd June 2003 after which sale he took possession thereof and has remained in occupation to date. The defendant claimed that the plaintiffs have come to court with unclean hands contending that the plaintiffs’ were aware that the suit property had been sold to the defendant and that the defendant was in possession thereof. The defendant contended that Plot No. 1233 was fraudulently subdivided to give rise to the suit property. The defendant averred further that he has been in actual physical possession of the suit property since 3rd June 2003 when the same was sold to him. In conclusion the defendant urged the court to dismiss the plaintiffs’ suit with costs.

3. On 23rd May 2013, this suit was listed for hearing by consent on 18th December 2013. When the suit came up for hearing on 18th December 2013, only the 2nd plaintiff and her advocate appeared in court. The defendant did not appear together with his advocate. Since the date for hearing was taken by consent, I allowed the plaintiffs' advocate to proceed with the hearing. In her evidence, the 2nd plaintiff testified that she is the wife of the 1st plaintiff who is deceased. Before the death of the 1st plaintiff, the 1st plaintiff and she had purchased a parcel of land from one, Charles Gekonde Otara in January 2004. The sale was reduced into writing in the form of an agreement which was executed between the deceased, 1st plaintiff and the said Charles Gekonde Otara. After the execution of the said agreement for sale, the parties sought the consent of the land control board for the transfer of the said property to the plaintiffs which consent was granted. The property which they purchased was later on transferred to their joint names. The parcel of land that was purchased by them was the suit property and following the transfer of the same to their joint names as aforesaid they were issued with a title deed on 10th June 2014.
4. The 2nd plaintiff testified further that they purchased the suit property together with the developments thereon which comprised of a house and that the purchase price was kshs. 950,000/= which was for the land and the development thereon. The 2nd plaintiff testified that they have never taken possession of the suit property since they purchased the same because the same has been under the occupation of the defendant who has refused to vacate and hand over the same to them. The 2nd plaintiff testified further that when the defendant heard that they had purchased the suit property, the defendant filed a civil suit against them at the Chief Magistrate's court at Kisii in , Kisii CMCC No. 141 of 2004. In that case, the defendant and another person sued the 1st plaintiff herein and Charles Gekonde which case was later on withdrawn on 23rd September 2010. The 2nd plaintiff testified that the defendant is still in occupation of the suit property and that her prayer to court is for the court to issue an order for the eviction of the defendant. The 2nd plaintiff produced in evidence; a copy of the certificate of death for the 1st plaintiff issued on 25th June 2012, a copy of sale of land agreement between Charles Gekonde Otara and Elizaphan Nyamweya Obare (the 1st plaintiff) dated 5th January 2004, an application for consent of land control board for the sub-division of Plot No. 1233 into 3 portions, a letter of consent of the land control board dated 12th May 2004 for the subdivision of Plot No. 1233, a copy of the register for the suit property, a copy of the title deed for the suit property dated 10th June 2004 and a copy of the decree issued in, **Kisii Chief Magistrate's Court Civil Suit No. 141 of 2004, Dennis Isoe Marubi and Harun Kingoina Bogita –vs- Charles Gekonde Otara and Elizaphan Nyamweya**. The 2nd plaintiff did not call any witness.
5. After the close of the plaintiff's case, the plaintiffs advocate Mr. Masese made brief oral submissions. I have considered the pleadings filed herein by the parties and the evidence tendered by the 2nd plaintiff. The plaintiffs' claim against the defendant is based on trespass. Trespass to land has been defined as any unjustifiable intrusion by one person upon the land in the possession of another. See the book, **Clerk and Lindsell on tort, 18th Edition, Page 923, paragraph 18-01**. In order to prove an act of trespass, the 2nd plaintiff was under duty to prove that the plaintiffs are the registered proprietors of the suit property and that the defendants have entered therein and occupied the same without their permission. I am satisfied from the material placed before me that the 2nd plaintiff has proved her claim against the defendant on a balance of probability. The 2nd plaintiff has tendered in evidence a copy of an agreement for sale between one, Charles Gekonde Otara and the 1st Plaintiff with respect to a portion of Plot No. 1233. According to the said agreement for sale, the 1st plaintiff purchased from the said Charles Gekonde Otara a portion of the said Plot No. 1233 together with the house standing thereon at a consideration of kshs. 950,000/=. Under the said agreement, the 1st Plaintiff was supposed to take possession of the purchased portion of Plot No. 1233 immediately on the execution of the said agreement that was dated 5th January 2004. The 2nd plaintiff also tendered in evidence, an application for consent of the land control board made by the said Charles Gekonde Otara for the subdivision of Plot No. 1233 into 3 portions and consent of the land control board that was issued on 12th May 2004 for that purpose. The 2nd plaintiff tendered in evidence a copy of the register for the suit property

which indicates that it is a subdivision of Plot No. 1233 and that the same was registered in the name of Charles Gekonde Otara on 10th June 2004 before it was transferred on the same day to the names of the plaintiffs who were subsequently issued with the title deed for the same also on the same day.

6. The 2nd plaintiff also tendered in evidence a copy of a title deed for the suit property dated 10th June 2004 in the names of the plaintiffs. Finally, the plaintiffs tendered in evidence a decree issued in, **Kisii CMCC No. 141 of 2004, Dennis Isoe Mururi and Another –vs- Charles Gekonde Otara & Another** in which case the defendant herein had challenged the sale of the suit property to the plaintiffs herein, which suit was subsequently withdrawn by the defendant on 23rd September 2010. The 2nd plaintiff has therefore proved that they acquired the suit property lawfully and that the property is now registered in their names. The 2nd plaintiff has also proved further and it is not denied by the defendant that although the suit property is registered in the names of the plaintiffs the same is in the occupation of the defendant. Once the 2nd plaintiff established that they are the registered owners of the suit property, the onus shifted to the defendant in occupation of the suit property to justify his occupation thereof. As I have stated hereinabove, the defendant did not tender any evidence at the trial of this suit and as such the allegations contained in his statement of defence are not backed by any evidence.
7. The defendant has therefore failed to show any justifiable cause for his continued occupation of the suit property. In the absence of any such cause, it is my finding that the defendant is a trespasser in the suit property and as such the 2nd plaintiff is entitled to the orders sought.
8. In conclusion, I hereby enter judgment for the 2nd plaintiff against the defendant as prayed in the plaint dated 14th July 2004. The defendant shall vacate and handover the suit property to the 2nd plaintiff within Forty Five (45) days from the date hereof, failure to which the 2nd plaintiff shall be at liberty to apply for the defendant's eviction from the premises. The plaintiff shall have the costs of this suit.

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

S. OKONG'O

JUDGE

In the presence of:-

Mr. G. J M. Masese for the Plaintiffs

Mr. Momanyi for the Defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE