



No. 299

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 241 OF 2010**

EPHRAITH N. OKWOYO ..... PLAINTIFF

VERSUS

KENNEDY OKIOGA BWANA ..... DEFENDANT

**JUDGMENT**

1. The plaintiff herein, Ephraith N. Okwoyo brought this suit against the defendant on 7<sup>th</sup> September, 2010 through a plaint dated 3<sup>rd</sup> September 2010 seeking the following reliefs:-
  - a. **Declaration that the plaintiff is the registered and/or lawful owner of LR No. Nyaribari Chache/B/B/Boburia/8739 (hereinafter referred as “the suit land” where the context so admits).**
  - b. **An order of eviction against the defendant from LR No. Nyaribari Chache/B/B/Boburia/8739.**
  - c. **Permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the defendant from re-entering trespassing onto, cultivating, ploughing, building structures, interfering with and/or in any other manner, whatsoever dealing with the suit land that is LR No. NyaribariChache/B/B/Boburia/8739.**
  - d. **General damages for trespass.**
  - e. **Costs of this suit to be borne by the defendants.**
  - f. **Such further and/or other relief as the honourable court may deem fit and expedient so to grant**

In paragraphs 3, 4, 5 and 6 of the plaint the plaintiff averred as follows:-

- a. **At all material times relevant to this suit the plaintiff was and still is the registered proprietor of the suit land measuring approximately 0.12ha which parcel of land was sold and transferred to the plaintiff by one James Okioga Bwana on the 22<sup>nd</sup> day of March 2010.**
- b. **By virtue of being the registered proprietor of the suit land, the plaintiff is entitled to exclusive rights over same to the exclusion of all and sundry, the defendant not exempted.**
- c. **On or about the month of April and August 2010, respectively, the defendant herein without any lawful cause, basis and without any colour of rights whatsoever and/or howsoever, trespassed upon the suit land and while thereon commenced to erect temporary structures. Besides the defendant also commenced to cultivate a substantial portion of the suit land.**
- d. **As a result of the defendant’s acts of trespass, the plaintiff has been dispossessed and/or**

**deprived of the suit land. Consequently, the plaintiff has therefore suffered loss and claims damages for trespass as well as mesne profits.**

- b. Together with the plaint, the plaintiff filed an application by way of chamber summons dated 3<sup>rd</sup> September, 2010 in which the plaintiff sought among other prayers, a temporary mandatory injunction to compel the defendant to yield up, vacate and/or grant vacant possession of the suit land to the plaintiff. The plaintiff's application for a mandatory injunction was heard by Musinga J. (as he then was) who allowed the same on 16<sup>th</sup> September, 2010. In the meantime, the defendant had entered appearance on 13<sup>th</sup> September 2010. The defendant did not however file a defence to the plaintiff's claim within the prescribed time. Upon application by the plaintiff, the deputy registrar entered interlocutory judgment against the defendant in default of defence on 15<sup>th</sup> October, 2010.
- c. This suit was ultimately fixed for hearing on 13<sup>th</sup> March, 2014. On that day, Mr. Ochwangi, advocate appeared for the plaintiff while Mr. Momanyi Aunga, advocate appeared for the defendant. The plaintiff was present in court and was ready to proceed with the hearing while the defendant was absent. Mr. Momanyi for the defendant applied for the adjournment of the hearing on the ground that he no longer had instructions to act for the defendant in the matter. The application for adjournment was opposed by Mr. Ochwang'i. I disallowed the defendant's application for adjournment and ordered the hearing to proceed at 11.45 am. Neither Mr. Momanyi nor the defendant turned up in court when the hearing commenced at 12.35pm on the same day. The hearing proceeded nevertheless their absence notwithstanding.
- d. The plaintiff testified and called no witness. In her testimony, the plaintiff told the court that; she is the owner of the suit land which measures about 0.12ha. She purchased the suit land from one, James Okioga Bwana. Before purchasing the suit land, she carried out a search on the title of the suit land to confirm that indeed the said James Okioga was the registered owner. She produced a copy of the search certificate dated 19<sup>th</sup> October 2009 which was marked as P exh. 1. After confirming that the suit land was in the name of James Okioga Bwana, she proceeded to enter into a written agreement for sale dated 15<sup>th</sup> September, 2009 with James Okioga Bwana over the suit land. She produced the said agreement that was marked as Pexh. 2. Subsequently, they applied for consent of the Land Control Board first to sub-divide the original parcel of land (LR No. Nyaribari Chache/B/B/Boburia/3572) a portion of which had been sold to her and thereafter a consent to transfer the portion that was sold to her (the suit land) to her name. Both consents were granted. She produced consent letter dated 23<sup>rd</sup> October 2009 for the sub-division of the original parcel of land as P.exh 3 and consent letter dated 20<sup>th</sup> January 2010 for the transfer of the suit land to her name as P. exh. 4.
- e. After obtaining the requisite consent, the suit land was transferred to her name through an instrument of transfer dated 4<sup>th</sup> January 2010. She produced a copy of the said instrument of transfer as exhibit P.exh. 5. Thereafter, she was issued with a title deed for the suit land dated 22<sup>nd</sup> March 2010. A copy of the same was produced and marked as P.exh. 6. Thereafter she carried out another search on the title of the suit land, which search confirmed that she was the registered owner thereof. She produced this latest certificate of official search that was dated 6<sup>th</sup> September 2010 as P. exh. 7. The plaintiff testified further that; the defendant is the son of James Okioga Bwana from whom she purchased the suit land. The defendant was not the owner of the suit land. After she had purchased the suit land, the defendant decided to put up a house thereon without her (plaintiff's) consent.
- f. The plaintiff testified further that; before this suit was instituted, her advocates had written to the defendant demanding that he vacates the suit land which demand was ignored by the defendant. The demand letter dated 11<sup>th</sup> May, 2010 and a copy of the delivery book through which the same was delivered to the defendant were produced and marked as P.exh. 8 and P.exh.9 respectively. The plaintiff testified further that the defendant had also failed to comply with the temporary mandatory injunction that was issued by the court herein on 16<sup>th</sup> September, 2010 which required him to vacate the suit land pending the hearing and determination of this suit. A copy of the said court order was produced and marked as P. exh. 10. In conclusion, the plaintiff urged the court to grant the reliefs set out in her plaint dated 3<sup>rd</sup> September, 2010.
- g. After the close of the plaintiff's case, the plaintiff's advocate Mr. Ochwangi informed the court

that the plaintiff wished to rely entirely on the evidence on record. He urged the court to enter judgment for the plaintiff as prayed for in the plaint aforesaid. The only issue which, this court needs to determine is whether the plaintiff has proved her case against the defendant on a balance of probability to entitle her to the reliefs sought in the plaint filed herein. Section 26 (1) of the Land Registration Act, 2012 provides as follows:-

**“26(1) The certificate of title issued by the registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificates and the title of that proprietor shall not be subject to challenge, except:-**

1. **On the grounds of fraud or misrepresentation to which the person is proved to be a party, or**
  2. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.**
8. Section 28 of the Registered Land Act, Cap.300(now repealed) provides that:-

**“28. The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from other interests and claims whatsoever but subject:-**

- a. **to the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register; and**
- b. **unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register”.**

The plaintiff gave a detailed account in her evidence on how she acquired the title to the suit property. The plaintiff produced a certificate of official search that she conducted on the title of the suit property prior to entering into the agreement for sale in respect thereto. She produced a copy of the consent of the land control board that authorized the sale and transfer of the suit property to her name. She also produced a copy of her title deed for the suit property and a copy of a certificate of official search on the title of the suit property which also shows that she is the registered proprietor of the suit property. The defendant on the other hand did not adduce evidence to challenge the plaintiff's ownership of the suit property. As I have stated above, the plaintiff's title can only be challenged on account of fraud or misrepresentation or on account of the title thereof having been acquired unlawfully or unprocedurally or through corrupt scheme. The defendant did not place any evidence before this court to prove the existence of any of these circumstances that can defeat the plaintiff's title. On the material before me, I am satisfied that the plaintiff has proved that she is the owner of the suit property and that the defendant is a trespasser thereon. Trespass has been defined as any intrusion by a person into the land in the possession of another without any unjustifiable cause. In the case of **Robert Nyaguna Kamau & Another –vs- Kirika Kamungu [2014] eKLR**, my brother, Onyancha J. stated that:

**“.....to prove trespass, the plaintiff who alleged it had to prove ownership as well as the fact that possession by the defendant was unlawful and without reasonable excuse.”**

I am fully in agreement with this statement of the law. The plaintiff having proved that she is the registered owner of the suit property and that the defendant entered and occupied the same without her consent or authority, the burden shifted to the defendant to justify his entry and continuous occupation of the suit property. The defendant did not tender any evidence in his defence. He therefore failed to discharge this burden. The only conclusion the court can arrive at in the circumstances is that the

defendant is a trespasser on the suit property. The plaintiff has therefore proved her claim against the defendant on a balance of probability. The plaintiff did not place any material before me on the basis of which I can assess general damages claimed. I would therefore not award any general damages to the plaintiff.

9. In conclusion, I hereby enter judgment for the plaintiff against the defendant as prayed in paragraphs (i), (ii) and (iii) of the plaint. The defendant shall vacate and handover possession of LR. No. Nyaribari Chache/B/B/Boburia/8739 to the plaintiff within sixty (60) days from the date of this judgment failure to which the plaintiff shall be at liberty to apply for warrants for the defendant's forceful eviction. The plaintiff shall have the costs of this suit.

**Delivered, signed and dated at KISII this 31<sup>st</sup> day of July, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Ogari h/b for Mr. Oguttu for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk.

**S. OKONG'O**

**JUDGE**