



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 152 OF 2013**

PHILIP OMAYO MINYEGA ..... PLAINTIFF

VERSUS

CECILLIA MOKEIRA ..... DEFENDANT

**JUDGMENT**

1. The plaintiff brought this suit against the defendant on 4<sup>th</sup> April 2013 seeking the following reliefs;

- a. **Possession of all that parcel of land comprised in title No. West Kitutu/Bogeka/1125 (hereinafter referred only to as “the suit land”).**
- b. **Costs of the suit.**

In paragraphs 3, 4 and 5 of the plaint dated 3<sup>rd</sup> April, 2013 the plaintiff averred that:-

**(i) At all material times the plaintiff was and still is the registered proprietor of all that parcel of Land Title Number West Kitutu/Bogeka/1125 (“the suit land”) measuring 2.4 hectares.**

**(ii) On or about 1<sup>st</sup> day of December 2011 the defendant wrongfully entered part of the said land and premises and has wrongfully taken possession of the same, and has thereby trespassed and is still trespassing thereon.**

**(iii) By reason of the matters aforesaid, the plaintiff has been deprived of the use and enjoyment of the said land and premises and has thereby suffered loss and damages.**

The defendant was served with the summons and she neither entered appearance nor filed a statement of defence.

2. The matter was set down for formal proof on 6<sup>th</sup> February 2014 when the plaintiff gave evidence and closed his case. In his evidence, the plaintiff told the court that; he works in Mombasa although his home is in Nyakoe in West Kitutu. He owns the suit land together with one, Merceline Gesare (“Merceline”) who is a cousin to him. His father and Merceline’s father who are both deceased were brothers and as such were entitled to share the suit land equally. Although the suit land is registered in his name, he holds half share thereof in trust for Merceline who is a minor. Merceline’s father died several years ago while her mother died on 1<sup>st</sup> December 2011. In the year 2012, Merceline called him in Mombasa and informed him that the defendant had entered the suit land, occupied the same and was carrying out cultivation thereon.

3. On receipt of this information, he instructed his advocates on record to write to the defendant demanding that she vacates the suit land. Despite the said demand, the defendant continued with her occupation and cultivation on the suit land. He produced in evidence a copy of the demand letter dated 13<sup>th</sup> March 2013 that was written to the defendant as P.exb.1. He also produced a copy of the title deed of the suit property as P.exb.2. He stated further that the defendant is not related to Merceline in any way and as such he did not know on what basis she was occupying the suit land. He urged the court to grant an order for the eviction of defendant from the suit land. On examination by the court, he reiterated that the defendant entered the suit property in the year 2012. The plaintiff told the court further that the defendant is occupying a semi-permanent house on the suit property that was put up by Merceline's parents and that the defendant is living in the said house with her children.
4. I have considered the plaintiff's claim as pleaded and the evidence tendered by the plaintiff in proof thereof. The plaintiff's claim against the defendant is based on the tort of trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. What I need to determine therefore is whether the plaintiff has proved that he is the owner of the suit land and that the defendant has entered and occupied the same without any justifiable cause. The plaintiff has demonstrated that he is the registered owner of the suit land by producing in evidence a copy of the title deed for the suit property in his name.
5. Section 24 of the Land Registration Act, 2012, the registration of the plaintiff as the proprietor of the suit land has vested upon the plaintiff absolute ownership of the suit land together with all rights and privileges associated with such ownership. Under section 25 of the said Act, the plaintiff's rights over the suit land are indefeasible except as provided under the Act. Section 25 (1) of the Land Registration Act, 2012 provides as follows:-

**The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of 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 all 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. **To such liabilities rights and interests as affect the same and are declared by section 28 not to riding on the register unless the controversy is expressed in the register.**

This suit was not defended by the defendant. The plaintiff's testimony and evidence was therefore not controverted by the defendant. The plaintiff's title to the suit land is therefore not contested. The plaintiff's testimony that the defendant has entered into and occupied the suit land without his consent or authority is also not challenged.

6. The plaintiff having proved his ownership of the suit land and the defendant's entry and occupation thereof the onus was upon the defendant to justify her occupation. In the absence of any evidence from the defendant, the only conclusion this court can arrive at is that the defendant has no justifiable cause for her entry and occupation of the suit land and as such she is a trespasser. For the foregoing reasons, I am satisfied that the plaintiff has proved his claim against the defendant and as such he is entitled to the prayers sought in the plaint.
7. I therefore enter judgment for the plaintiff against the defendant as prayed in the plaint dated 3<sup>rd</sup> April 2013. The defendant shall vacate and handover possession of the suit property to the plaintiff within 90 days from the date hereof failure to which the plaintiff shall be at liberty to apply for warrant's for her forceful eviction. A copy of this judgment shall be served upon the defendant forthwith by the plaintiff and an affidavit of service shall be filed in court. The filing of the said affidavit of service shall be a condition precedent to any further proceedings herein.

**Delivered, signed and dated at KISII this 7<sup>th</sup> day of August, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Ombachi

for the plaintiff

N/A

for the defendant

Mr. Mobisa

Court Clerk.

**S. OKONG'O**

**JUDGE**