



No. 320

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 295 OF 2012

DAVID OGUTU ONDA PLAINTIFF

VERSUS

WALTER NDEDE OWINO DEFENDANT

JUDGMENT

1. In his plaint filed herein on 30th July 2012 the plaintiff claimed that on or about January 2012 the defendant without his consent or permission entered the plaintiff's parcel of land known as **LR No. East Karachwonyo/Kobuya/1494** (hereinafter referred to as "**the suit property**") and commenced cultivation thereon. The plaintiff averred that as a result of the defendant's said act of trespass, the plaintiff has been denied and/or deprived of the use and/or enjoyment of the suit property thereby occasioning him loss and damage. The plaintiff sought as against the defendant; a declaration that the plaintiff is the registered and/or lawful owner of the suit property, a permanent injunction to restrain the defendant from entering upon, re-entering, trespassing onto, cultivating, planting assorted crops, building structures, interfering with and/or in any other manner dealing with the suit property or any portion thereof and general damages for trespass.
2. The plaintiff's claim against the defendant was defended by the defendant. In his defence filed on 4th September 2012, the defendant denied the plaintiff's claim in its entirety and contended that the plaintiff had acquired the title to the suit property illegally and fraudulently and as such the plaintiff does not have a valid title over the suit property capable of conferring any right over the suit property upon the plaintiff. The defendant contended that he has been in occupation of the portion of the suit property which he has been accused to have trespassed on for more than 12 years and that the suit property ought to have been sub-divided into two (2) portions so that the defendant would remain with the portion under his occupation while the plaintiff would have the other portion. The defendant contended that instead of the plaintiff sub-dividing the land comprised in the suit property into two portions and only having a portion thereof registered in his name the plaintiff caused the entire parcel to be registered into his name including the portion thereof that belonged to the defendant. The defendant contended that when the plaintiff caused the entire parcel of land comprised in the suit property to be transferred to the plaintiff, the plaintiff was well aware that the portion of that land had been acquired earlier by the defendant and that the same was in the defendant's possession. The defendant contended that the plaintiff is not entitled to any of the reliefs sought in the plaint.
3. When the suit was set down for hearing the plaintiff gave evidence and called no witness. The defendant on his part gave evidence and called two (2) witnesses. In his evidence, the plaintiff testified that; he is the registered proprietor of the suit property. He purchased the suit property from one, Timothy Obuya Anyiego. The suit property measures 0.35ha. He produced in evidence

a copy of the title deed for the suit property dated 22nd June 2011 in his name and a certificate of official search on the title of the suit property dated 26th July 2012 which also confirmed that the suit property is registered in his name the same having been so registered on 21st June 2011. The plaintiff also produced in evidence a copy of an agreement for sale dated 16th March 2002 said to have been made between the plaintiff and the said Timon Obuya Anyiego in respect of the suit property.

4. The plaintiff told the court that on 15th January 2012, he found the defendant and another person planting sisal plants on the suit property and when he confronted them the defendant claimed that he was marking a boundary. Prior to that date the plaintiff had found Cassava planted on the suit property by the defendant. The plaintiff stated that he did not allow the defendant to plant sisal plants and cassava on the suit property. The plaintiff stated that he is the one who used to cultivate the suit property. In cross examination, the plaintiff stated that he purchased the suit property in the year 2002 and that when he entered into an agreement for sale with Timothy Obuya Anyiego the measurement of the land that he was purchasing was not indicated in the said agreement for sale. The plaintiff stated further that he was not aware and was not informed by Timothy Obuya Anyiego that the defendant had earlier on purchased a portion of the parcel of land that was being sold to him.
5. In his testimony, the defendant stated that on 13th June 2000 he purchased a portion of all that parcel of land formerly known as LR No. East Karachwonyo/Kobuya/542 ("Plot No. 542") from Timon Obuya Anyiego. Timon Obuya marked the boundaries of the portion of Plot No. 542 that he sold to him with sisal plants. The remaining portion of Plot No. 542 belonged to Timon Obuya Anyiego. The defendant produced in evidence a copy of the agreement for sale dated 13th June 2000 said to have been made between the defendant and Timon Obuya Anyiego. The defendant stated that soon after purchasing the said portion of Plot No. 542, he took possession thereof and has been using the same since then. The defendant testified that at a later date the plaintiff purchased a portion of Plot No. 542 that remained after the sale of a portion thereof by Timon Obuya to him.
6. The defendant stated further that in March 2012 he sent some workers to the said portion of Plot No. 542 that he had purchased from Timon Obuya and they were chased away by the plaintiff. The defendant reported the incident to the provincial administration and had the boundary between the portions of Plot No. 542 that were purchased by the defendant and the plaintiff at different times which had been destroyed by the plaintiff restored. It was also agreed that the plaintiff would have the suit property which had included the defendant's portion of the original Plot No. 542 subdivided so that the defendant's portion of the said parcel of land is transferred to the defendant. Following this agreement, the defendant applied to the area land control board for consent to sub-divide the suit property which consent was duly granted. The defendant produced a copy of the said consent in evidence as an exhibit.
7. The defendant stated that the sub-division of the suit property was never carried out after the consent was obtained as aforesaid. The defendant contended that the plaintiff included in the suit property during the sub-division of Plot No. 542 the portion of Plot No. 542 that had been sold by Timon Obuya to the defendant. In cross-examination, the defendant stated that the portion of Plot No. 542 that he purchased from Timon Obuya is now comprised in the suit property. The defendant stated that when the plaintiff had Plot No. 542 subdivided so that he can get a portion thereof which he purchased from Timon Obuya, he included in his portion the portion of Plot No. 542 that had been purchased by the defendant from the same vendor. The defendant's first witness was the defendant's father Enos Ayal (DW2). DW2 testified that he is the one who purchased the portion of land in dispute from Timon Obuya on behalf of and for the defendant. He confirmed that the purchase price was kshs. 8,500/= and that Timon Obuya marked the boundary of the said portion using sisal plants. DW2 also confirmed that the defendant has been using the said portion of land that was purchased from Timon Obuya since the year 2000 for maize and cassava cultivation. DW2 stated that the plaintiff and the defendant were sold distinct portions of Plot No. 542 by Timon Obuya. DW2 confirmed that he witnessed the agreement for sale between the defendant and Timon Obuya.
8. In cross examination, DW2 did not come out clearly as to whether he is the one who purchased the portion of land in dispute from Timon Obuya or the defendant. The defendant's second witness

was Timon Obuya (DW3). In his evidence in chief, DW3 told the court that he owned a parcel of land situated at Kobuya portions of which he sold to three (3) people two of whom were the plaintiff and the defendant herein. The defendant was the first to purchase land from him followed by the plaintiff. He placed boundary marks using sisal plants on the portions of land that he sold to each of the purchasers. The plaintiff uprooted the sisal plant boundaries he had placed between the land that was sold to the plaintiff and that which he had sold to the defendant and started to claim the land that was sold to the defendant as part of his land. On examination by the court, DW3 stated that the plaintiff and the defendant are in occupation of their respective portions of land that he had sold to each of them. DW3 stated further that when he sold a portion of the original parcel of land to the plaintiff the defendant was already in occupation of the portion that he had sold to him earlier.

9. After the close of the defendant's case, the advocates for the parties agreed to make closing submissions in writing. The defendant filed his closing submissions on 9th April 2014 while the plaintiff filed his submissions on 5th May 2014. I have considered the pleadings filed by the parties herein, the evidence on record and the parties' respective closing submissions. I have also considered the cases cited by both parties in support of their submissions. The parties agreed on a total of thirteen (13) issues for determination by the court. Some of the issues overlap and for clarity I would merge some of them. The issues agreed upon by the parties are summarized as follows:-

- i. Whether the plaintiff is the registered proprietor of LR No. East Karachuonyo/Kobuya/1494 ("the suit property")?
- ii. Whether the defendant ever brought and/or purchased a portion of LR No. 542 and if so whether the said portion forms part or is comprised in the suit property?
- iii. Whether the defendant has been in occupation of a portion of the suit property and if so, whether he has been in such occupation for a period of 12 years?
- iv. Whether the plaintiff acquired the title to the suit property illegally or fraudulently?
- v. Whether the defendant has any rights and/or interest over the suit property?
- vi. Whether the defendant is a trespasser on the suit property?
- vii. Whether the plaintiff's title to the suit property is liable to be revoked on account of the defendant's alleged interest therein?
- viii. Whether the plaintiff is entitled to the orders sought?

10. Issue No. I;

The evidence adduced by the plaintiff in proof of his registration as the owner of the suit property was not challenged in any material respect by the defendant. The plaintiff testified that he is the registered proprietor of the suit property. In proof of this fact, the plaintiff produced a copy of the title deed for the suit property in his name and a certificate of official search on the title of the suit property. The two (2) documents show that the plaintiff was registered as the proprietor of the suit property on 21st June 2011. The defendant also produced a certificate of official search dated 17th April 2014 which confirmed that the plaintiff is the registered proprietor of the suit property. On the evidence before me, I am satisfied that the plaintiff is registered as the proprietor of the suit property. I therefore answer the 1st issue in the affirmative.

11. Issue No. II;

The defendant's defence to the plaintiff's claim herein is that the defendant and the plaintiff had purchased separate and distinct portions of Plot No. 542 from Timothy Obuya Anyiego a.k.a Timon Obuya Anyiego and that when the plaintiff caused Plot No. 542 to be sub-divided so that he can have a separate title for the portion of the said plot that he had purchased as aforesaid, the plaintiff merged his portion of Plot No. 542 with the defendant's to form a single parcel of land for which a single title was issued in the name of the plaintiff. This parcel of land is now comprised in the title of the suit property. In proof of his purchased of the said portion of Plot No. 542, the defendant produced in evidence a copy of an agreement for sale dated 13th June 2000 that he claimed to have entered into with Timon Obuya

Anyiego with respect to the said portion of Plot No. 542. According to the said agreement that was produced in court as D.exh. 1, the defendant purchased unspecified portion of Plot No. 542 at a consideration of kshs. 8,500/= of which the defendant paid a sum of kshs. 1,800/= on the execution of the agreement and the balance of kshs. 6,700/= in three instalments. It is indicated in the said agreement that the execution thereof was witnessed by four (4) witnesses, two for the seller Timon Obuya Anyiego and two for the defendant.

12. The agreement shows on the face of it that it was also intended to be signed by the area chief as a witness. The agreement was executed by Timon Obuya Anyiego as vendor and the defendant as purchaser. Timon Obuya executed the agreement using a thumb print while the defendant signed the same. Of the four (4) witnesses, only Enos Ayal (DW2) appended his signature to the same. The remaining three witnesses did not do so. The chief for the area did not also sign the agreement. In his submission the plaintiff contended that this agreement for sale is invalid for lack of necessary ingredients of a valid agreement for sale. The plaintiff pointed out as I have stated above that some of the witnesses who are purported to have been present when the agreement for sale was executed between the defendant and Timon Obuya Anyiego did not sign the agreement. The plaintiff also contended that the particulars of the identity cards of some of the witnesses are not indicated in the said agreement. The plaintiff also contended that the chief of Kobuya location did not also sign the agreement. The plaintiff contended that the foregoing shortcomings in the form of the agreement for sale that the defendant entered into with Timon Obuya Anyiego casts doubt on the authenticity of the said agreement. In do not think that it was a requirement of law as at 13th June 2000 that an agreement for sale of land be witnessed either by a chief or any other person. There was also no requirement that the particulars of identity cards of the parties and witnesses to an agreement for sale of land be furnished.
13. I am of the view that it was sufficient that the agreement was in writing and that it was executed by both the seller and the purchaser. The agreement dated 13th June 2000 between the defendant and Timon Obuya meets that requirement. If I was to hold otherwise, even the agreement for sale that was entered between the plaintiff and Timon Obuya Anyiego would not meet the requirements that have been advanced by the plaintiff. The said agreement is deficient in several material particulars. That agreement was neither signed by the seller nor the purchaser. The name of the purchaser who was the plaintiff is not even mentioned. The particulars of the parcel of land that was the subject of the agreement is also not mentioned and of the four (4) witnesses whose names are set out in the said agreement only, one namely, George Odhiambo Ogwara executed the agreement. The particulars of the identity cards for the plaintiff, Timon Obuya Anyiego and two of the witnesses are also not provided. The agreement that was entered into between the plaintiff and the defendant does not meet even the basic threshold for a valid agreement for sale of land.
14. I am satisfied on the material and evidence before me that the defendant bought a portion of Plot No. 542 from Timon Obuya Anyiego. The defendant testified to that effect and produced an agreement for sale between the defendant and Timon Obuya Anyiego in that regard which agreement I have held above to be valid. The defendant's testimony was corroborated by the evidence of Timon Obuya Anyiego (DW3) and the defendant's father Enos Ayal (DW2). The defendant and DW3 struck me as truthful witnesses. Their testimonies were not shaken on cross-examination. On this issue, I am inclined to believe the evidence of the defendant and DW3 rather than that of the plaintiff. It is not in dispute that the suit property is a portion of Plot No. 542. It is also not in dispute that Plot No. 542 was owned by Timon Obuya Anyiego. The plaintiff did not come out clearly as to the measurement of Plot No. 542 that he purchased. The agreement for sale that was produced by the plaintiff in evidence did not refer to Plot No. 542 neither did it have any indication as to the measurement of the portion thereof that was purchased by the plaintiff.
15. On the evidence before me, the plaintiff is the one who carried out the sub-division of Plot No. 542 and caused the suit property to be transferred to his name. the plaintiff did not place before the court; a copy of the instrument of transfer that was executed in his favour by Timon Obuya Anyiego, a copy of the mutation form for the sub-division of Plot No. 542, copies of consent letters from the land control board that authorized the sub-division of Plot No. 542 and transfer of the suit property to the plaintiff. These documents could have shed some light as to the measurement of the portion of Plot No. 542 that was purchased by the plaintiff. Since these documents were been in the possession of the plaintiff and the plaintiff failed to produce the same

in evidence it can only be concluded that the information contained therein could have been adverse to the plaintiff. I am persuaded by the evidence on record that both the plaintiff and the defendant purchased portions of Plot No. 542. The extent of the portions that were purchased by each of them is however not clear from the evidence on record.

16. The defendant testified that when Plot No. 542 was sub-divided by the plaintiff for the purposes of securing a title for the portion that he had purchased, the plaintiff included the portion of Plot No. 542 that had been sold by Timon Obuya Anyiego to the defendant earlier as part of the portion of Plot No. 542 that he had purchased. The portion of Plot No. 542 that was purchased by the defendant was therefore merged with the plaintiff's portion to form one title that was registered in the name of the plaintiff. The defendant's case was that the plaintiff acquired a title over a portion of land that did not belong to him. The defendant contended that the plaintiff should have processed a title only for the portion of Plot No. 542 that was sold to him by Timon Obuya Anyiego and that he had no right to annex the portion of the said property that had been sold to the defendant and which was in the defendant's possession. The defendant's evidence was corroborated by DW2 and DW3. DW3 was categorical that he sold to the plaintiff and the defendant distinct portions of Plot No. 542, the boundaries of which portions he clearly marked out using sisal plants. DW3 testified that, the plaintiff and the defendant still occupy distinct and separate portions of the former Plot No. 542 and that the problem arose when the plaintiff laid a claim to the portion of land that he had sold to the defendant after the plaintiff proceeded to acquire a title deed for the entire parcel of land including the portion that had been sold to the defendant. The defendant and DW2 testified that the defendant took possession of the disputed land in the year 2000 soon after he purchased the same from Timon Obuya Anyiego (DW3) and that he has over the years been cultivating cassava and maize thereon. DW3 testified that when he sold a portion of Plot No. 542 to the plaintiff, the defendant was in possession of the portion of the said plot that he had sold to him earlier and that the defendant was still occupying the said portion of land as at the time of his (DW3) testimony. The plaintiff's contention and testimony was that the defendant is in occupation of the suit property but as a trespasser. Whether or not the defendant is a trespasser on the suit property is an issue that I will determine later in this judgment. For now I am satisfied on the material before me that the portion of Plot No. 542 that was purchased by the defendant from Timon Obuya Anyiego is now part of or is comprised in the suit property.

17. Issue No. III;

In view of what I have stated above, this issue would be answered in the affirmative. There is overwhelming evidence that the defendant has been in occupation of the suit property. The defendant, DW2 and DW3 were unanimous in their testimonies that the defendant has been and is still in occupation of a portion of the suit property. The plaintiff has not contested this fact. What is contested is the period in which the defendant has been in occupation of the disputed portion of the suit property. Whereas the defendant and his witnesses contended that the defendant has been in occupation of the suit property since the year 2000, the plaintiff has contended that the defendant trespassed on the suit property on or about 15th January, 2012. In my view, the defendant cannot be said strictly speaking to have been in occupation of the suit property since the year 2000. From the evidence on record the suit property came into being on 4th May 2011 upon the sub-division of Plot No. 542. The defendant could not therefore have occupied a nonexistent property.

18. The evidence on record points to the fact that the defendant was in occupation of a portion of Plot No. 542 before its sub-division and when the sub-division was effected, the portion of Plot No. 542 that was hitherto occupied by the defendant fell within the suit property and the defendant continued in occupation. As evidence of his occupation, the defendant and DW2 testified that the defendant has been cultivating cassava on the disputed portion of the suit property since the year 2000. The plaintiff did not deny the fact that the defendant has grown cassava on the disputed portion of the suit property. The plaintiff's contention is that the cultivation of cassava on the suit property commenced in January, 2012 and that prior to that it was the plaintiff who was cultivating the disputed parcel of land. The plaintiff did not however state the nature of the crops that he used to grow on the disputed portion of the suit property neither did he furnish evidence of such cultivation. Weighing the evidence of the plaintiff as against that of the defendant and his

witnesses, I am inclined to believe the evidence of the defendant and his witnesses that the defendant has been in occupation of the disputed portion of the suit property from the year 2000 and as such has had such occupation for more than 12 years.

19.Issue No. IV;

I have already held hereinabove that both the defendant and the plaintiff purchased distinct portions of Plot No. 542. On the sub-division of Plot No. 542 both the plaintiff and the defendant were supposed to obtain titles for their respective portions of Plot No. 542. This did not happen. The evidence before me shows that during the sub-division, the defendant's portion of Plot No.542 was amalgamated with that of the plaintiff and a title issued in the name of the plaintiff as the owner of the hitherto distinct portions of land. There is evidence on record which I have accepted that when Timon Obuya Anyiego (DW3) sold to the plaintiff a portion of Plot No. 542 he had already sold a portion of the said plot to the defendant and the defendant was in possession hereof. It follows therefore that when the plaintiff acquired a title to the suit property the defendant was in possession hereof. The plaintiff's title was therefore subject to the defendant's right of possession thereof which, was an overriding interest on the title of that was acquired by the plaintiff under the provisions of section 30 (g) of the Registered Land Act, Cap 300 Laws of Kenya (now repealed). I have no evidence before me that the plaintiff acquired the suit property fraudulently. The standard of proof of fraud is above a balance of probability. Fraud must not only be pleaded and particularized but must also be proved to the standard stated above. The defendant pleaded fraud but neither particularized it nor tendered evidence in proof thereof. The mere fact that a portion of Plot No. 542 that had been sold to the defendant was on sub-division of Plot No. 542 registered in the name of plaintiff is not per se evidence of fraud. I am however in agreement with the defendant's contention that the plaintiff's title to the suit property was acquired illegally to the extent that the parcel of land that had been purchased by the defendant and that was in the defendant's possession was included in the plaintiff's title.

20.Issue No. V;

The defendant has no title to the portion of the suit property in dispute. This does not mean however that the defendant has no right over the portion of the suit property. As I have stated above the plaintiff acquired the suit property while the defendant was in possession. The defendant's possession of the suit property was lawfully acquired. As I have stated above, the defendant has an overriding interest in the suit property arising from his possession of a portion of the suit property as of the date when the plaintiff acquired title thereto.

21.Issue No. VI;

Trespass has been defined as any unjustified intrusion by one person upon the land in the possession of another. See, **Zacharia Onsongo Momanyi vs. Evans Omurwa Onchagwa [2014] eKLR**. To be able to establish the tort of trespass the plaintiff had to establish his ownership of the suit property and the fact that the defendant's occupation of the property is unjustified. The plaintiff has proved that he is registered as the proprietor of the suit property. The plaintiff has however failed to prove that the defendant's occupation of the suit property is unjustified. The defendant entered and occupied the suit property lawfully. The plaintiff acquired the title to the suit property while the defendant was in lawful possession. The defendant's occupation of the suit property cannot therefore be said to be unjustified. The defendant is therefore not a trespasser on the suit property.

22.Issue No. VII;

The defendant has not lodged a counter-claim against the plaintiff. There is therefore no prayer before me for the revocation or cancellation of the plaintiff's title over the suit property. In the circumstances, it is not necessary to consider whether the plaintiff's title over the suit property should be revoked or cancelled.

23.Issue No. VIII;

The plaintiff's claim against the defendant is based on trespass. I have already held above that the defendant is not a trespasser on the suit property. It follows that the Plaintiff is not entitled to the reliefs sought herein.

24. Conclusion;

In conclusion, it is my finding that the plaintiff has failed to prove his claim against the defendant to the required standard. The plaintiff's suit is accordingly dismissed. Each party shall bear its own costs of the suit.

Delivered, signed and dated at KISII this 31ST of October, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Oguttu-Mboya for the plaintiff

Mr. Sagwe h/b for Omwoyo for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE