



No. 339

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 226 OF 2010

DOMINIC MAANGU NYABWENGIPLAINTIFF

VERSUS

JUDY MOKEIRA NYAANGADEFENDANT

JUDGMENT

1. The plaintiff is the registered proprietor of all that parcel of land known as land parcel No. **West Kitutu/Bogeka/4009** (hereinafter referred to as “**the suit property**”). The plaintiff brought this suit against the defendant on 13th August 2010 seeking;
 - i. **An order of mandatory injunction directing the eviction of the defendant from the suit property.**
 - ii. **A permanent injunction to restrain the defendant from trespassing or in any way whatsoever interfering with the plaintiff’s use, occupation and possession of the suit property.**
 - iii. **Costs of the suit with interest thereon.**
 - iv. **Any other relief that the court may deem fit to grant.**

In his plaint dated 11th August 2010, the plaintiff averred that he is the registered proprietor of the suit property which property was transferred to him as a gift by his deceased father one, Peter Nyabwengi. The plaintiff averred that, sometimes in the month of June 2009, the defendant entered the suit property with the assistance of the assistant chief of Mogusii sub-location and settled on a portion thereof without the plaintiff’s consent or authority. The plaintiff averred that the defendant who on entering the suit property occupied a house that belonged to the plaintiff’s deceased’s brother John Bosco Nyabwengi has no right, interest or claim over any portion of the suit property and as such her entry and occupation of the suit property amounts to an act of trespass.

2. The plaintiff’s claim against the defendant was defended. In her statement of defence filed in court on 29th September 2010, the defendant while admitting that the plaintiff is the registered proprietor of the suit property, contended that such registration was acquired erroneously and/or through fraud. The defendant denied that the suit property was transferred to the plaintiff by Peter Nyabwengi deceased voluntarily as a gift. The defendant contended that at all material times, she was married to the plaintiff’s brother one, John Bosco Nyabwengi, deceased with whom they

- settled and lived together on the suit property from 1999 until 5th January 2003 when the plaintiff's said brother died and left the defendant still in occupation of the property. The defendant contended that she is in occupation of the suit property as of right and as such the plaintiff is not entitled to the orders sought against her.
3. When the plaintiff's suit came up for hearing, the plaintiff gave evidence and did not call any witness. On her part, the defendant gave evidence and called two (2) witnesses. In his evidence, the plaintiff told the court that the defendant was a girlfriend to his brother John Bosco Nyabwengi deceased who died in January 2003. The plaintiff testified further that he is the owner of the suit property. In proof of this fact, the plaintiff produced in evidence, a copy of his title deed for the suit property (Pexh.1) and a certificate of official search dated 5th August 2010 (Pexh.2). The plaintiff testified that the suit property was transferred to him by his late father, Peter Nyabwengi. He stated that they were two (2) sons. He had an elder brother John Bosco Nyabwengi, deceased ("hereinafter referred to only as "John Bosco").
 4. John Bosco died without a wife. He also had no child. The suit property was transferred to the plaintiff by his deceased father after the death of John Bosco. The suit property was his late father's personal property. It was not ancestral land. The defendant entered the suit property in the year 2009 with the assistance of the area assistant chief and was made to settle in the house that belonged to his (plaintiff's) deceased brother, John Bosco. The defendant thereafter commenced cultivation on a portion of the suit property. John Bosco only lived with the defendant as a husband and wife for a period of six (6) months only and that the defendant left and only came back in the year 2009. The defendant's status was discussed at family level and it was unanimously agreed that the defendant was not John Bosco's wife and as such was not entitled to occupy the suit property.
 5. In cross examination, the plaintiff stated that the suit property was a subdivision of land parcel No. West Kitutu/Bogeka/2948 ("Plot No. 2948") which was initially registered in the name of his deceased father, Peter Nyabwengi. He stated that Plot No. 2948 was subdivided into three (3) portions namely, land parcel numbers West Kitutu/ Bogeka/4009 ("the suit property"), 4010 and 4011. The plaintiff admitted that his father had been sick for a long time but denied that his father did not sign the mutation forms for the sub-division of Plot No. 2948. The plaintiff denied further that Plot No. 2948 had two (2) registers one of which indicated that Plot No. 2948 had not been sub-divided while the other indicated otherwise and had a restriction registered restricting any dealing. The plaintiff denied that he acquired the suit property fraudulently.
 6. The plaintiff stated that he came to know the defendant in the year 2002 when the defendant lived with the plaintiff's deceased brother John Bosco as a husband and wife for seven (7) months. He stated that the defendant did not participate in John Bosco's burial rites and that John Bosco was buried as unmarried person. The plaintiff stated that John Bosco's house which is occupied by the defendant was put up on a portion of land that their deceased father Peter Nyabwengi had shown John Bosco as his share of the family land. He confirmed that his deceased brother John Bosco and him were born and brought up on Plot No. 2948 and that they had at no time resided on their deceased father's ancestral home or land. He stated that his deceased father had shown each of them a portion of land to cultivate and that the portion of land which is being cultivated by the defendant was given to his deceased brother John Bosco to cultivate.
 7. In her evidence, the defendant testified that the plaintiff is her brother in law. The defendant stated that she was married to the plaintiff's deceased brother John Bosco Nyabwengi ("John Bosco") who died on 5th January 2003. She was married in 1999 under Kisii Customary Law and lived with the deceased on Plot No. 2948 which was then registered in the name of her father in law, Peter Nyabwengi Maangu. The defendant produced a copy of the register for the suit property certified by the land registrar on 20th July 2011 as Dexh.1. When her husband died, he was buried on Plot No. 2948 where she lived with him until his death. The defendant testified that they had a matrimonial house on Plot No. 2948 where they lived with the deceased and that they used to cultivate a portion of Plot No. 2948. The defendant stated that before the death of her husband, her father in law had divided Plot No. 2948 between his two (2) sons and that each had an identifiable portion for cultivation. She stated that her father in law died in March 2011 after a very long illness and that she was not aware that Plot No. 2948 had been subdivided. She came to know of the sub-division of Plot No. 2948 when she carried out a search at the land's office when some people came to Plot No. 2948 claiming that they had purchased portions thereof.

8. At the lands office, she was issued with a copy of another register for Plot No. 2948 which indicated that the said parcel of land had not been sub-divided. She produced this copy of the register for Plot No. 2948 as Dexh.2. The defendant maintained that she is occupying her own parcel of land that she was given by her father in law. The defendant stated that her father in law could not have transferred the suit property to the plaintiff because he was very sick at the material time. The defendant stated that she had two children with John Bosco and that she was duly recognized as John Bosco's wife. The defendant denied that she entered the suit property in the year 2009. The defendant stated that she has all along been staying on the suit property since she was married in 1999. The defendant testified that the plaintiff acquired the title to the suit property in the year 2010 long after Peter Nyabwengi her father in law had already given to them the portion of land in dispute and she was in occupation thereof. The defendant denied that she is a trespasser on the suit property. In cross-examination, the defendant stated that Plot No. 2948 was purchased for Peter Nyabwengi deceased by his own (Peter Nyabwengi) father who did not give him any land in his ancestral home at Bonchari.
9. The defendant maintained that Peter Nyabwengi had given her a portion of Plot No. 2948 and that the sub-division of that parcel of land was carried out fraudulently by plaintiff. The defendant denied that she was a mere girlfriend of John Bosco, deceased. The defendant's first witness was David Dunya Amol (DW2), the Land Registrar, Kisii County. He testified that the register for Plot No. 2948 was opened on 11th June 2002 and that the same was registered in the name of Peter Nyabwengi. He stated that on 29th July 2010, Plot No. 2948 was subdivided into three (3) portions namely, Plot No. 4009 (the suit property), Plot No. 4010 and Plot No. 4011. The defendant's second witness was Charles Mauta Maango (DW3). DW3 was a brother to Peter Nyabwengi, deceased and an uncle to the plaintiff. DW3 testified that the defendant was known to him as the widow of Peter Nyabwengi's son John Bosco deceased. He stated that his father purchased a parcel of land at Bogeka which he gave to Peter Nyabwengi and as such Peter Nyabwengi did not get any land at Bonchari which was their ancestral home. DW3 told the court that John Bosco lived with the defendant as husband and wife at Bogeka before he died and that the defendant participated in his funeral. He stated that John Bosco and the defendant had a house at Bogeka which is still in existence. He stated that before he died, Peter Nyabwengi had divided his land to his two sons, the plaintiff and John Bosco deceased. He stated that after the burial of John Bosco, the defendant continued to live in the house on which they had resided with John Bosco. He denied that the defendant entered the suit property in the year 2009 as claimed by the plaintiff. He stated that Peter Nyabwengi had sold the upper part of Plot No. 2948 and divided the remainder between his two sons. In cross-examination, DW3 expressed surprise that the plaintiff had denied that the defendant was John Bosco's wife. After the close of the defendant's case, the parties agreed to make closing submissions in writing. The plaintiff filed his submissions in court on 18th March 2014 while the defendant did the same on 23rd January, 2014.
10. The parties did not agree on issues for determination by the court. The plaintiff came up with five (5) issues while the defendant had four (4) issues. Having looked at the two sets of issues one drawn by the plaintiff's advocates and the other by the defendant's advocates, I am of the view that the following are the issues that arise from the parties pleadings and the evidence adduced in court;
 - i. Whether the plaintiff is the registered proprietor of the suit property?
 - ii. Whether the defendant has any right over the suit property?
 - iii. Whether the defendant is a trespasser on the suit property?
 - iv. Whether the plaintiff is entitled to the reliefs sought in the plaint?
 - v. Who should pay the costs of the suit?

11. Issue No. I;

I am satisfied from the material on record that the plaintiff is the registered proprietor of the suit property. This fact was proved by a copy of the title deed for the suit property and a certificate of official search that were produced in evidence by the plaintiff as P.exh.1 and P.exh.2 respectively. The evidence tendered by the plaintiff regarding his registration as the proprietor of the suit property was not controverted by the defendant. In fact the defendant also produced in evidence a

certificate of official search on the title of the suit property dated 30th August 2011 (D.exh.3) which confirmed the fact that the suit property is registered in the name of the plaintiff. Due to the foregoing, I would answer issue number one in the affirmative.

12. Issues Nos. II and III;

It is not in dispute that the defendant is in possession of a portion of the suit property. The plaintiff has in his pleadings and in his evidence tendered in court contended that the defendant's occupation of the suit property is illegal and as such the defendant should be evicted from the suit property. On her part, the defendant has contended that she is in occupation of the suit property as of right the portion thereof under her occupation having been given to her by the plaintiff's deceased father who was also her father in law. The defendant has contended that the entire parcel of land comprised in the suit property was erroneously and/or fraudulently registered in the name of the plaintiff who was entitled to a portion thereof only. The defendant has contended that the plaintiff is holding the title of the suit property in trust for the plaintiff and the defendant. The defendant has also contended that her interest in the suit property was an overriding interest on the title thereof and that the plaintiff acquired the suit property subject to her said interest.

13. The defendant led evidence that she was a wife to the plaintiff's elder brother one, John Bosco Nyabwengi, deceased (John Bosco) with whom she had two (2) children. The defendant contended that when she was married to John Bosco, she was settled on Plot No. 2948 which was then owned by the plaintiff and John Bosco's father, Peter Nyabwengi. The defendant and John Bosco had their matrimonial house on the said parcel of land which they occupied. The defendant testified that her father in law who is also the plaintiff's father, the late Peter Nyabwengi gave each of his sons who were only two namely, the plaintiff and John Bosco distinct and separate portions of Plot No. 2948 and that all at material times the plaintiff on the one hand and the defendant and John Bosco on the other hand occupied separate and distinct portions of Plot No. 2948 that were given to them by the late Peter Nyabwengi. The defendant testified that her husband John Bosco died and was buried on the said portion of Plot No. 2948 that he had been allocated by Peter Nyabwengi. The defendant contended that even after the death of her husband she continued to occupy the said portion of Plot No. 2948 that had been given to her and her husband by Peter Nyabwengi.
14. The defendant contended that she came to know that Plot No. 2948 had been sub-divided into three (3) portions when some people came inquiring about portions thereof which they claimed to have purchased. The defendant's search revealed that Plot No. 2948 had been sub-divided into three (3) portions and that the portion of Plot No. 2948 that was hitherto under occupation by the plaintiff and herself was now comprised on the title of the suit property. The defendant contended that her father in law could not have transferred the land under her occupation and which he had given to her and her deceased husband to the plaintiff. The defendant contended that her father in law was sick for a very long time prior to his death and as such could not have participated in the sub-division of Plot No. 2948 and the transfer of a portion thereof to the plaintiff. The defendant's evidence was corroborated by DW3. DW3 was the late Peter Nyabwengi's brother.
15. He confirmed that the defendant was John Bosco's wife and that Peter Nyabwengi had divided his land between his two (2) sons, the plaintiff and his elder brother John Bosco deceased and that the defendant and John Bosco occupied distinct portion of land now comprised in the suit property that was given to John Bosco by Peter Nyabwengi. DW3 testified that the defendant was recognized as John Bosco's wife and participated fully as such during the burial of John Bosco. DW3 testified that Peter Nyabwengi had no other parcel of land at Bonchari that he could allocate to any of his sons as his only parcel of land was at Bogeka which land was purchased for him by his father who was also the father of DW3. DW2 denied that Peter Nyabwengi had ancestral land at Bonchari as had been alleged by the plaintiff. In his plaint the plaintiff did not acknowledge that the defendant had any relationship with the plaintiff or the plaintiff's elder brother John Bosco.
16. The defendant is depicted in the plaint as some stranger who invaded the suit property with the assistance of the area assistant chief and settled on John Bosco's "hut". At the beginning of his evidence in chief, the plaintiff testified that John Bosco died without a wife or a child. In the

course of his evidence however, he stated that John Bosco lived with the defendant in the house now occupied by the defendant as a wife for 6 months before the defendant vacated the said house in 2003 and come back to re-occupy the same in the year 2009 with the assistance of the area assistant chief. In cross-examination, the plaintiff restated that the defendant lived with John Bosco as a husband and wife for 7 months. The plaintiff admitted also that his deceased father Peter Nyabwengi had allocated to each of them a portion of what was Plot No. 2948, and that John Bosco's house which is occupied by the defendant is situated on the portion of land that was allocated to John Bosco by Peter Nyabwengi. The plaintiff admitted further that the portion of the suit property being cultivated by the defendant is part of the land that Peter Nyabwengi had allocated to John Bosco. On being examined by the court, the plaintiff reiterated that John Bosco had been allocated a portion of Plot No. 2948 by Peter Nyabwengi and that when he died, he was buried on that portion of Plot No. 2948 which now forms part of the suit property. The plaintiff claimed however that when John Bosco died the parcel of land that had been allocated to him by Peter Nyabwengi reverted to Peter Nyabwengi who was still alive.

17. From the evidence on record, I am persuaded that the defendant is the widow of John Bosco who was the plaintiff's elder brother. I am also satisfied that the defendant and John Bosco resided on and cultivated a portion of what was formerly Plot No. 2948 which portion was given to John Bosco by his father Peter Nyabwengi as his share of Peter Nyabwengi's land when Peter Nyabwengi divided his land to his two (2) sons. I am persuaded further that the defendant continued to occupy the portion of land that was allocated to John Bosco after his death as his widow. In this regard, I find the evidence of the defendant and her witness DW3 more believable than that of the plaintiff. I am unable to believe the plaintiff's contention that the defendant lived with John Bosco for 6 months and left in the year 2003 only to come back in the year 2009 to occupy the house which they had lived in with John Bosco. I do not think that the said house which the plaintiff has referred to in the plaint as a "hut" could have survived unoccupied for a period of six (6) years. It is not clear from the evidence on record how the late Peter Nyabwengi transferred the suit property to the plaintiff. Although the validity of the transfer was contested, the plaintiff who admitted in cross-examination that Peter Nyabwengi was very sick for a long time did not place before the court a copy of the transfer that was executed by Peter Nyabwengi for perusal.

18. From the totality of the evidence before me, it is my finding that when the plaintiff acquired the suit property, the defendant was in occupation thereof and was using the same as of right the portion of the suit property under the defendant's occupation having been allocated by Peter Nyabwengi to the defendant's husband John Bosco, deceased. I am in agreement with the submission by the defendant's advocate that the plaintiff acquired the suit property subject to the defendant's right of occupation that was an overriding interest on the suit property under section 30 (g) of the Registered Land Act, Cap 300 Laws of Kenya (now repealed). That being my finding, it follows that the defendant has an interest in the suit property recognized in law and as such she is not a trespasser as claimed by the plaintiff. Trespass has been defined as any unjustified intrusion by one person on the land in the possession of another. While the plaintiff has proved that the suit property, a portion of which is occupied by the defendant is registered in his name, the plaintiff has failed to prove that the defendant's occupation of the suit property is unjustified. The act of trespass has therefore not been proved by the plaintiff.

19. Issue No. IV;

In view of the findings that I have reached above, this issue must be answered in the negative. The plaintiff's case against the defendant is based on trespass. As I have stated above, the plaintiff has failed to prove that the defendant is a trespasser on the suit property. This court cannot therefore issue an order for the eviction of the defendant from the suit property and a permanent injunction to restrain the defendant from entering the suit property.

20. Issue No. V;

The cost normally follow the evident. However in view of the relationship between the parties herein, I would order that each party do bear its own costs.

21. Conclusion

It is my finding that the plaintiff has failed to prove his claim against the defendant to the required standard. The plaintiff's case is accordingly dismissed. Each party shall bear its own costs.

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

S. OKONG'O

JUDGE

In the presence of:-

Mr. Soire for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE