



No. 325

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 257 OF 2011

WILSON OYOO OWUOTH.....PLAINTIFF

VERSUS

ISAIAH OMOLLO.....DEFENDANT

JUDGMENT

1. The plaintiff is the duly appointed attorney of one, Richard Nyakidi MC Akech (hereinafter referred to only as “Richard”). Richard resides in Houston Texas United States of America. The plaintiff brought this suit against the defendant on 9th November 2011 seeking; a permanent injunction to restrain the defendant from trespassing into or remaining in possession of or using or in any manner interfering with all that parcel of land known as Kanyamwa/K/K/Kadwet/1619 (hereinafter referred to as “the suit property”) and an order for the eviction of the defendant from the suit property. In his plaint dated 7th November 2011, the plaintiff averred that Richard is and was at all material times the registered proprietor of the suit property which measures 2.82 ha or thereabouts. The plaintiff averred that sometimes in the year 2011 the defendant forcefully entered and occupied a portion of the suit property claiming that the said portion belongs to him.

2. The plaintiff averred that following this incident the plaintiff lodged a complaint against the defendant with the District Land Registrar, Homa Bay who came and arbitrated the dispute over the boundary of the suit property and the defendant’s parcel of land known as LR No. Kanyamwa/K/K/Kadwet/1410 (hereinafter referred to as “Plot No. 1410”). The land registrar found that the defendant had established his homestead on the upper part of the suit property. He reinstated the boundary of the suit property on the upper part and urged the defendant to vacate and handover the portion thereof under his occupation to the plaintiff an exercise which the defendant is said to have agreed to undertake by 31st August, 2011. The defendant however failed to do so prompting the filing of this suit.

3. The defendant was served with summons to enter appearance and he did enter appearance on 28th November 2011 through the firm of Sam Onyango & Co. Advocates. The defendant did not however file a statement of defence to the plaintiff’s claim. When this matter came up for pre-trial conference on 24th January 2013, the defendant appeared in court without his advocates. On that day, the plaintiff’s advocate drew the attention of the court to the fact that the defendant had not filed a statement of defence. In view of the reliefs sought herein against the defendant, I ordered the defendant to file his statement of defence, bundle of documents and witness statements within 21 days from the date of the order. I thereafter set down the matter for mention on 19th March 2013 for directions. When the matter came up for mention on

19th March 2014 there was no appearance on behalf of the defendant. The defendant had not also complied with the order that required him to file defence, bundle of documents and witness statements.

4. The court gave the plaintiff the liberty to list this suit for hearing at the registry. The suit was thereafter listed for hearing on 15th May 2013 when it did not proceed because the defendant's advocate was not served with a hearing notice. The hearing notice had been served upon the defendant directly and he appeared in court. The matter was adjourned to 11th February 2013 for hearing in the presence of the defendant. On 11th February 2013, neither the defendant nor his advocate appeared in court. After satisfying myself that the defendant's advocates were duly served with a hearing notice, I allowed the plaintiff's advocate to proceed with the hearing of the suit the absence of the defendant's advocate notwithstanding. The plaintiff gave evidence and called one witness. In his evidence, the plaintiff testified that he is the attorney of Richard who is his son-in-law and that Richard had given him a power of attorney to protect Richard's interest in the suit property.

5. The plaintiff stated that the defendant entered the suit property and put up structures thereon and has since refused to vacate even after being asked by the land registrar, Homa Bay District to do so. The land registrar Homa Bay District had arbitrated on the dispute and had found that the defendant had trespassed on the suit property. The plaintiff stated that the defendant has put up his homestead on a portion of the suit property on which he is also carrying out cultivation. He stated that before the defendant moved to the suit property he was occupying his own parcel of land. The plaintiff produced in evidence among others, a power of attorney dated 24th October 2011 donated to him by Richard (Pexh. 1), proceedings of the land registrar Homa Bay dated 10th May 2011 on the determination of the boundary of the suit property and Plot No. 1410 (Pexh. 2), a copy of the title deed for the suit property (Pexh. 3) and a certificate of official search in respect of the suit property (Pexh. 4). The plaintiff's witness was Narkiso Oyugi Akech (PW2). He is an elder brother to Richard. He corroborated the plaintiff's evidence that Richard owns the suit property and that the defendant has trespassed thereon and has refused to vacate after being asked to do so.

6. After the close of the plaintiff's case, the plaintiff's advocate filed written submissions. I have considered the plaintiff's claim as pleaded, the evidence tendered and the plaintiff's advocates closing submissions. I am satisfied on the evidence before me that the plaintiff has proved his claim against the defendant to the required standard. The plaintiff has proved that Richard is the registered proprietor of the suit property. The plaintiff has also proved that the defendant has entered and occupied the suit property without the consent of the plaintiff or Richard. The plaintiff having proved that the suit property is registered in the name of Richard and that the defendant has entered and occupied a portion thereof without the consent or permission of the plaintiff or Richard the burden shifted to the defendant to justify his occupation of the said portion of the suit property. The defendant was served with the summons to enter appearance. He entered appearance but failed to file a defence to the plaintiff's claim. The defendant did not therefore place any evidence before the court to justify his occupation of the suit property.

7. The only conclusion this court can draw from the foregoing is that the defendant is a trespasser on the suit property. Richard's rights over the suit property are protected under Article 40 of the Constitution of Kenya 2010 and sections 24, 25 and 26 of the Land Registration Act, 2012. The law vests upon Richard the absolute ownership of the suit property together with all rights and privileges associated with such ownership. Richard is therefore entitled to occupy the suit property to the exclusion of all the defendant not exempted. The plaintiff having proved that the defendant is a trespasser on the suit property, this court has no option but to grant the reliefs sought in the plaint filed herein.

8. In conclusion therefore, it is my finding that the plaintiff has proved his case against the defendant on a balance of probability. I therefore enter judgment for the plaintiff against the defendant as prayed in paragraph (a) of the plaint dated 7th November 2011. The defendant shall vacate and handover vacant possession of the suit property to the plaintiff within one hundred and eighty (180) days from the date of this judgment failure to which the plaintiff shall be at liberty to apply for the defendant's eviction there from. A copy of this judgment together with a decree extracted there from shall be served upon the

defendant personally within thirty (30) days from the date hereof and an affidavit of service shall be filed in court. The filing of the said affidavit of service shall be a condition precedent to taking any further proceedings on this matter at the instance of the plaintiff. The plaintiff shall have the costs of the suit.

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

S. OKONG'O

JUDGE

In the presence of:-

Mr. Sagwe for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE