



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

ENVIRONMENT & LAND CASE NO. 338 OF 2013

ENREST KODIA SHITSILI.....PLAINTIFF

VERSUS

LEONIDAH ACHITSA WANGULA.....DEFENDANT

JUDGMENT

1. **ERNEST KODIA SHITSILI**, (the plaintiff), sued **LEONIDAH ACHITSA WANGULA**, (the defendant), seeking a Permanent Injunction against the defendant restraining the defendant from trespassing, accessing or in any other way whatsoever interfering with the Plaintiff's user over LR NO. KAKAMEGA/ MUGOMARI/ 1878 and 1879. He also prayed for costs of the suit.
2. In his Complaint dated 13/11/2013 and filed in court on 21/11/2013, the Plaintiff averred that he is the registered proprietor of the parcels of land, namely KAKAMEGA/ MUGOMARI/1878 and KAKAMEGA/MUGOMARI/1879, which were the result of the subdivision of parcel No. KAKAMEGA/MUGOMARI/1299. According to the plaintiff's complaint, the defendant has persistently trespassed onto the two parcels of land and undertaken thereon farming activities, and has even gone ahead and erected a house, all without the plaintiff's permission.
3. Although served, the defendant never entered appearance nor filed her defence. The matter proceeded without the benefit of the Defendant's participation.
4. In his evidence, the plaintiff testified that he resides at Kakamega Town and he is a farmer. He said the defendant is his neighbour, and that the defendant's parcel of land borders those of the plaintiff, namely KAKAMEGA/MUGOMARI/1878 and 1879.
5. The plaintiff complained that the defendant has entered his parcels of land without his permission, and asked the court to grant his wish. The plaintiff produced in evidence Title Deeds for the two parcels of land, which he produced as P.Exh.1 (parcel No. 1878) and P.Exh.2 (parcel 1879). The plaintiff also adopted his statement annexed to the Complaint, which is in material particular, similar to what he had told the court. He therefore concluded by praying that the court allows his suit as prayed in the Complaint.
6. I have considered the plaintiff's evidence before the court and the exhibits produced. From the evidence and those exhibits, the plaintiff is the registered proprietor of Parcel Nos. Kakamega/Mugomari/1878 and 1879. The defendant chose to ignore the summons and therefore did not come forward and explain why she was trespassing onto the plaintiff's parcel of land, or if she had any competing claim to that of the plaintiff.

7. On the face of the evidence and exhibits, the plaintiff is the registered owner of the suit property. Section 24 (a) of Land Registration (Act No.3 of 2012) provides as follows;

S.24 (a) “The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

8. The registration of the plaintiff as proprietor of the two parcels of land, gives the plaintiff absolute proprietorship for those parcels. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

S.25 (i) “The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by 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, subject;

(a) to 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 require noting on the register, unless the contrary is expressed in the register.

9. The defendant has not come forward to say what her claim on the suit land is. The plaintiff complains that the defendant is cultivating on his parcel of land. That is in violation of the plaintiff’s right and privileges over the parcels of land as contained in Section 24 of the Act. The plaintiff has produced Title Deeds as evidence of ownership and in terms of Section 26 (1) of the Act;

“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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 and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or miss-representation to which the person is proved to be a party to;

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

10. The plaintiff as the registered owner of the suit land has an indefeasible right over those properties. The plaintiff’s rights as proprietor of the lands is clearly protected in law and the defendant has no reason to trespass thereon and cultivate at her own whims. The law allows the Defendant to challenge the plaintiff’s ownership on grounds of illegality, unprocedural acquisition or corrupt scheme. She did not do that in this suit.

11. I am satisfied that the plaintiff has proved his case on a balance of probability. Consequently, I enter judgment for the plaintiff against the Defendant for a Permanent Injunction restraining the defendant from trespassing, accessing or in any other way whatsoever interfering with the plaintiff’s use over LR. No. KAKAMEGA/MUGOMARI/1878 and KAKAMEGA/ MUGOMARI/ 1879. Costs of the suit to the plaintiff.

DATED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF OCTOBER, 2014

E. C. MWITA

J U D G E