



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 216 OF 2012

DAVID NGOGE ALFONS PLAINTIFF

VERSUS

JOSHUA MONYANCHA KIYONDI DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant on 5th July, 2012 seeking the following reliefs;
 - a. **A permanent injunction to restrain the defendant either by himself or through his agents, workmen and/or servants from trespassing on, occupying, settling on and/or alienating all that parcel of land known as LR No. Wanjare/Bomorenda/208 (hereinafter referred to as “the suit property”).**
 - b. **An order for the eviction of the defendant from the suit property.**
 - c. **Costs of this suit.**
 - d. **Interest on (c) above at court rates.**
 - e. **Any other relief that this court may deem fit to grant.**

In his plaint dated 26th June, 2012, the plaintiff averred that he is the registered owner of the suit property on which he has put up five (5) permanent rooms for rental. As of the date of filing suit each room was being rented out at kshs. 800/= per month. The plaintiff averred that he purchased the suit property from the defendant’s father in the year 1982 and that he has been in peaceful occupation of the property from the year 1982 until March, 2012 when the defendant without any lawful cause entered the suit property, chased away the tenants that were in occupation thereof and took possession thereby dispossessing the plaintiff completely of the suit property.

2. The defendant entered appearance in person on 30th August, 2012 but failed to file a statement of defence to the plaintiff’s claim herein. This suit was set down for formal proof on 4th February 2014. The defendant was served with a hearing notice but failed to attend court for the hearing. After I satisfied myself that the defendant was served, I allowed the plaintiff to proceed with the hearing the absence of the defendant notwithstanding. The plaintiff gave evidence and called no witness. The plaintiff told the court that the defendant is his nephew and that he (the plaintiff) is the owner of the suit property on which he has put up a residential building consisting of five (5) rooms which can accommodate 5 tenants. The plaintiff told the court that he acquired the suit property through exchange with his elder brother one, James Kiondi Alfons who also happens to be the father of the defendant. He gave his said elder brother another parcel of land known as LR No. Wanjare/Bomerenda/ 1546(“Plot No.1546”) in exchange with the suit property.
3. The plaintiff stated that following this exchange he transferred Plot No. 1546 to the defendant’s

father who in turn transferred the suit property to him. The plaintiff produced in evidence a copy of the title deed for the suit property in his name dated 20th August 1996 as P.exhibit 2. He also produced a copy of official search on the title of the suit property dated 29th November 2013 as P.exhibit 3. The plaintiff stated that all the rooms on the suit property had been rented out to tenants until, March, 2012 when the defendant came at night and demanded that the said tenants do vacate the suit property. All the tenants felt threatened and vacated the suit property.

4. The plaintiff stated further that the defendant is now occupying 1 room while he has given his son another 1 room. The remaining 3 rooms have been rented out by the defendant to tenants. The plaintiff produced copies of tenancy agreements he had entered into with some of the tenants who were forced to vacate the suit property by the defendant as P.exhibits 5 (a) (b) and (c). The plaintiff told the court that the defendant claims that the suit property belongs to his father and that he has attempted to reconcile with the defendant but nothing positive has materialized from his approach. He urged the court to issue the orders sought in his plaint together with the costs of the suit. After the close of the plaintiff's case, the plaintiff's advocate filed written closing submissions with leave of the court.
5. I have considered the plaint filed herein, the evidence tendered by the plaintiff and the closing submissions by the plaintiff's advocate. The plaintiff's claim against the defendant is based on the tort of trespass. Trespass has been defined as "any unjustifiable intrusion by one person upon land in possession of another". See, **Clerk & Lindsell on Torts, 18th Edition, page 923 paragraph 18-01**. The plaintiff has proved that he is indeed the registered owner of the suit property. The plaintiff's evidence regarding his ownership of the suit property was not rebutted. Section 26 (1) of the Land Registration Act, 2012 provides as follows:

"26(1) The certificate of title issued by the registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except:

- a. **On the grounds of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate or title has been acquired illegally, unprocedurally or through a corrupt abuse."**

6. Section 25(1) of the Land Registration Act, 2012 on the other hand provides as follows:

"25(1) The rights of a proprietor whether acquired on first registration or subsequent 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:-

1. **To leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**
2. **To such liabilities, rights and interests as affect the same and are declared by section 28 not to noting on the register unless the controversy is expressed in the register."**
7. The plaintiff as the registered proprietor of the suit property has absolute rights over the suit property which includes a right to exclusive possession and use thereof. The defendant did not defend this suit and as such did not adduce evidence to justify his occupation of the suit property. Once the plaintiff established that he is the registered owner of the suit property, the burden shifted to the defendant to justify his entry and continued occupation of the suit property. In the absence of any evidence by the defendant justifying his occupation of the suit property the only conclusion that the court can make is that the defendant's entry and occupation of the suit property is unjustifiable and as such the defendant is a trespasser on the suit property.
8. For the foregoing reasons, I am satisfied that the plaintiff has proved his case against the defendant

