



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO.67 OF 2011**

MOSES OCHICH OCHICH ..... PLAINTIFF

VERSUS

1. DAMAR ODAK

2. J.ODINGO ODAK

3. JANE KICHE

4. ISAYAH OYUGI

5. TITUS OKAL

6. SIKUKU AGANYO

7. MRS.MINARI ONDABA

8. MRS. OGEMBO..... DEFENDANTS

**JUDGMENT**

1. The plaintiff brought this suit against the defendant on 15<sup>th</sup> April 2011 seeking the following reliefs;

**a. A declaration that the defendants are trespassers on the plaintiff's parcel of land known as Plot No. 108 Oyugis Town (hereinafter referred only to as "the suit property").**

**b. An order for the eviction of the defendants from the suit property.**

**c. Costs of the suit.**

In his plaint dated 15<sup>th</sup> April, 2011, the plaintiff averred that, he is the legal representative of the estate of one, Fanuel Ochich Were, deceased (hereinafter referred to as "**the deceased**"). The deceased is and was at all material times the owner of the suit property while the 1<sup>st</sup> defendant is and was at all material times the owner of Plot No. 38 Oyugis Town. The plaintiff averred that sometimes in the year 2000 or thereabouts, the defendants entered the suit property without his permission and put up temporary structures thereon which are being used by the defendants as kiosks. In addition to the structures that she has put up on the suit property with the other defendants, the 1<sup>st</sup> defendant has also put up an

underground petrol tank and a water tank on the suit property. The plaintiff averred that as a result of the defendants' said acts of trespass, the plaintiff has been deprived of the use and enjoyment of the portions of suit property under the defendants' occupation.

2. The defendants were served with the Summons to enter appearance but failed to do so within the prescribed time. The matter was set down for formal proof on 6<sup>th</sup> May, 2014 when the plaintiff gave evidence and called one witness. In his evidence, the plaintiff told the court that; he is the son of Fanuel Ochich Were (deceased). The deceased was the owner of the suit property while the 1<sup>st</sup> defendant owns Plot No. 38. Sometimes in the year 1988, the 1<sup>st</sup> defendant fenced off a portion of the suit property. This prompted the deceased to file a suit against the 1<sup>st</sup> defendant at the High Court at Kisii namely, Kisii HCCC No.227 of 1988. In that case, judgment was entered in favour of the deceased and the 1<sup>st</sup> defendant was ordered to remove his fence around the suit property. The plaintiff testified further that the deceased died on 2<sup>nd</sup> September, 1998 and he (the plaintiff) was appointed the legal administrator of the deceased's estate. The plaintiff told the court that the 1<sup>st</sup> defendant has re-entered the suit property without his permission or consent and installed an underground petrol tank on a portion thereof. The 2<sup>nd</sup> to 8<sup>th</sup> defendants have also entered into the suit property and put up kiosks on the other portion thereof. On examination by the court, the 1<sup>st</sup> defendant stated that he is certain that the 1<sup>st</sup> defendant's underground petrol tank is on a portion of the suit property because the officers of the Town Council of Oyugis had shown the plaintiff and the 1<sup>st</sup> defendant the boundary between the suit property and Plot No.38. The plaintiff's witness was his brother, Stephen Mark Ochich, PW2. PW2 corroborated the evidence of the plaintiff. He told the court that the 1<sup>st</sup> defendant entered the suit property after the death of the deceased and installed an underground petrol tank thereon. He urged the court to give an order for the eviction of the defendants from the suit property so that the plaintiff may develop the same.

3. The plaintiff produced in evidence among others; a copy of the judgment that was made in favour of the deceased against the 1<sup>st</sup> defendant in Kisii HCCC No. 227 of 1988, a copy of the Limited Grant of Letters of Administration in respect of the estate of the deceased, Fanuel Ochich Were, that was issued to the plaintiff and one, George Were Ochich and a copy of Plot Card for Plot No.108 Oyugis Town ("the suit property"). After the close of the plaintiff's case, the plaintiff's advocate made closing submissions in writing. I have considered the plaintiff's case as pleaded and the evidence tendered by the plaintiff in proof thereof. The plaintiff's claim against the defendants is based on the tort of trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, **Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page, 923, paragraph, 18-01.** What I need to determine is whether the plaintiff has proved that the deceased is the owner of the suit property and that the defendants have entered and occupied the same without any justifiable cause. The plaintiff has demonstrated that the suit property is owned by the deceased in respect of whose estate he is the legal administrator. He produced in evidence a copy of the Plot Card for the suit property in the name of the deceased, a copy of the extract of the minutes of the meeting of South Nyanza Town Planning, Markets and Housing Committee held on 22<sup>nd</sup> July, 1976 pursuant to which the suit property was allocated to the deceased and a copy of the judgment of this court in which the court had made a finding that the deceased was entitled to quiet and peaceful possession of the suit property.

4. This suit was not defended by any of the defendants. The evidence that was tendered by the plaintiff and his witness was therefore not controverted by the defendants. The deceased's title to the suit property is therefore not contested by the defendants. The plaintiff's testimony that the defendants have entered into and occupied portions of the suit property without his consent or authority is also not challenged. The plaintiff having proved the deceased's ownership of the suit property and the defendants' entry and occupation thereof, the onus was upon the defendants to justify their occupation of the suit property. In the absence of any evidence from the defendants, the only conclusion this court can make is that the defendants have no justifiable cause for their entry and occupation of the suit property and as such they are trespassers. For the foregoing reasons, I am satisfied that the plaintiff has proved his claim against the defendant on a balance of probability and as such he is entitled to the prayers sought in the plaint.

5. I therefore enter judgment for the plaintiff against the defendants jointly and severally as prayed in the

plaint dated 15<sup>th</sup> April, 2011. The defendants shall vacate and handover possession of the portions of the suit property in their occupation to the plaintiff within 60 days from the date hereof failure to which the plaintiff shall be at liberty to apply for warrants for their forceful eviction from the suit property. A copy of the decree extracted from this judgment shall be served upon the defendants forthwith by the plaintiff and an affidavit of service shall be filed in court. The filing of the said affidavit of service shall be a condition precedent to the taking of any further proceedings herein at the instance of the plaintiff.

**Delivered, signed and dated at KISII this 19<sup>th</sup> day of December, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

N/A for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**