



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA
CIVIL APPEAL 50 OF 2010

RESILAH NYANGWESO MAKOKHA.....APPELLANT

VERSUS

FRANCIS SHISIA ESHITEMI.....DEFENDANT

JUDGEMENT

The plaintiff Resilah Nyangweso Makokha sues the defendant Francis Shisia Eshitemi for eviction orders from land parcel no. Bukhayo/Kisoko/3820 and 3821 and a permanent injunction restraining the defendant from entering, remaining or using the plaintiffs land. The plaintiff also seeks for general and exemplary damages for trespass. The defendant filed a memorandum of appearance through Wanyama Wanyonyi and Co. Advocates on the 11th November 2010. However, no defence was filed by the defendant leading to interlocutory judgement being entered in favour of the plaintiff on the 12th January 2011. A hearing notice was served on the defendants counsel on 26/1/2011 but there was no attendance.

The plaintiff in his evidence affidavit filed on court in 21/10/11 and sworn on 14th October 2011 gives the history of the suit premises. The land Bukhayo/Kisoko 3821 was registered in the name of the plaintiff from 15th January 1996. The plaintiff depones that he was later tricked by the defendant to execute transfer of the land in his name. Being illiterate, the plaintiff executed the documents not knowing that he was giving out his land. The defendant then used the land as security for a loan and cultivated sugarcane on it. Later, the plaintiff learnt of the defendants' fraudulent act and its consequences. He filed a dispute before Nambale Land Disputes Tribunal for who ordered that the land be returned to him. Through a vesting order by Busia Principal Magistrate the plaintiff was registered owner of L.R Bukhayo/3821. The defendant refused to vacate the land and continuous to use it to date. The charge on the title by the defendant from Agricultural Finance Corporation (AFC) may not be fully settled. In this regard the plaintiff prays for an order that all monies due to AFC should be paid by the defendant.

The plaintiff's counsel submitted that the defendant is a trespasser and that he ought to be evicted from the land and all other reliefs sought in the plaint be given in the plaintiff's favour.

The plaintiff has annexed a copy of title deed in proof of ownership of the land since the year 2007. The evidence of the defendant tricking the plaintiff to execute transfer in his (defendant's) favour are supported by a copy of register. The plaintiff was the registered proprietor of the land Bukhayo/Kisoko/3821 on 15th January 1996 the land was transferred to the defendant on the same day

which is quite unusual. The plaintiff said that the defendant sub-divided her fathers land into two parcels 3820 and 3821. The defendant had the parcels registered in the plaintiff name and immediately transferred to himself the suit premises L.R No. Bukhayo/Kisoko/3821 immediately. The documents for application for consent to sub-divide and to transfer were all signed by the defendant on his part and thumb printed by the plaintiff on her part. The act of thumbprinting is evidence that the plaintiff does not know how to read and write. This explains her evidence that she is illiterate and was tricked to execute documents whose implication she did not understand. As soon as she discovered that she had lost her land to the defendant, the plaintiff took legal action to recover her land. There is no evidence that that the defendant has filed any appeal or any other proceedings to challenge the decision which vested the suit premises into the hands of the plaintiff. When given the chance to defend this suit the defendant failed to do so. The defendant took a loan of ksh. 200,000/= with Agricultural Finance Corporation when the title of the suit premises was in his name. He used the title of the land as security. The plaintiff was not a party to the contract between the defendant and the corporation. It is therefore the duty of the defendant to meet his legal obligations.

The plaintiff has proved on the balance of probabilities that the defendant is a trespasser on her land parcel no 3821 and also no 3820 which parcels are adjacent to each other. As a result of the trespass the plaintiff has shown that she has suffered damage due to denial of use of her land. I find that she is entitled to damages.

I therefore enter judgement in favour of the plaintiff against the defendant terms of the prayers in the plaint. I award damages for trespass to the plaintiff of ksh. 100,000/=. The defendant to meet the costs of the suit.

F.N MUCHEMI
J U D G E

Judgement dated and delivered on the 28th day of May, 2012

In the presence of none attendance by parties though notified.

L. KIMARU
J U D G E