



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 161 of 2008

MUSA ANGIRA ANGIRA.....PLAINTIFF

VERSUS

1. SILFANUS NGOJE OCHIENG

2. ABICH NGOJE.....DEFENDANTS

JUDGMENT

This suit was brought by the plaintiff against the defendants jointly and severally vide a plaint dated 19th November, 2008 and filed in court on the following day. By the said plaint, the plaintiff sought against the defendants declaratory orders of this court to the effect that the plaintiff was the registered owner of land parcel **Suba West/Wasweta 11/216**, hereinafter referred to as "**the suit premises**". The plaintiff also prayed for further orders of eviction, permanent injunction, General damages for trespass and costs of the suit. The defendants were duly served with the summons to enter appearance together with copies of the plaint going by the affidavit of service on record. The process server, one, **David Okumu Ojil**, depones that on 23rd November, 2008 at about 11.30 a.m. accompanied by the plaintiff at the homestead of the defendants, he served them with the summons to enter appearance together with the plaint.

The defendants however failed to enter appearance and or file defence(s). Accordingly on 26th July, 2009 the plaintiff filed a request for interlocutory judgement in default of appearance and or defence(s). On the same day the request was granted. The case was thereafter set down for hearing by way of formal proof.

During the formal proof before me on the 9th March, 2010, only the plaintiff testified. His evidence was that at all material times he was the registered proprietor of the suit premises measuring approximately 29.0 hectares which suit premises were registered in his name on or about 24th April, 1973. The suit premises though, shares a common boundary with land parcel **Suba West/Wasweta 11/229** belonging to the defendants. On or about September, 2008, the defendants unlawfully descended upon and trespassed upon the suit premises, damaged and destroyed the common boundary made of sisal between the two

parcels of land and annexed a portion thereof. As a result of the aforesaid actions by the defendants, the plaintiff lodged a complaint with the District Land Registrar, Migori District. The District Land Registrar visited the suit premises and established that indeed the defendants had occupied a substantial portion of the suit premises and erected structures thereon which structures the 2nd defendant was ordered to remove but in vain. As a result of the defendants' illegal actions aforesaid, the plaintiff had suffered loss and hence the suit.

It was further, the case of the plaintiff that the portion occupied by the defendants as aforesaid belongs to him. He tendered in evidence a copy of official search dated 21st August, 2008. The plaintiff testified that he did not have the original title deed of the suit premises as he had pledged the same to secure a loan from ICDC. He went on to testify that when the defendants invaded the portion of the suit premises as aforesaid, he reported the incident to the area chief who upon visiting the suit premises wrote a letter dated 23rd September, 2009 confirming that portion in question belonged to the plaintiff. The said letter was tendered in evidence. Following the trespass the defendants cut down his trees. The plaintiff again reported the matter to the District Forest Officer, Migori district. The forest officer inspected the damage and prepared a report dated 28th August, 2008. According to the report, the damage caused by the defendants as aforesaid was assessed at kshs.26,320/-. The said report was tendered in evidence. Following the report to the District Land Registrar, he visited the suit premises accompanied by the District Surveyor and prepared separate reports all dated 30th September, 2008 respectively. The gravamen of the District Land Registrar's recommendations were that the defendants be forced to vacate the plaintiff's parcel of land within 60 days or be evicted therefrom and that the defendants should stop further cultivation of the plaintiff's land. As for the District surveyor, he was categorical that **"...there is no doubt of alleged trespass on to parcel No. Suba West/Wasweta 11/216 by persons well known to the complainant"**. The two reports were tendered in evidence.

Apparently on 17th February, 2009 the plaintiff had filed an application under certificate of urgency seeking an order of interim injunction to restrain the defendants by themselves, their servants or agents and or anyone claiming under them from re-entering and trespassing onto the suit premises. The application was duly heard and an order to that effect made. However the defendants continued with their acts of trespass on the suit premises. The plaintiff was compelled to move against the defendants by way of contempt proceedings. The contempt proceedings were heard and the defendants were found guilty on 15th August, 2009 and were jailed for 2 months each. A copy of the ruling was tendered in evidence as well. According to the plaintiff therefore he was the undisputed registered proprietor of the suit premises. That being the case he asked the court to restate that position by way of a declaratory order. Consequent upon such declaration the defendants should be evicted from the portion of the suit premises that they occupy and pay damages for their destruction as well as a permanent injunction and costs. At the conclusion of his evidence, the plaintiff sought and was allowed to advance his case further by way of written submissions.

I have carefully read the pleadings, the evidence tendered and the written submissions filed. The issue for determination by this court is whether the plaintiff has established on balance of probabilities that he is the registered proprietor and thus entitled to the orders sought in the plaint. There is no doubt at all that the plaintiff has been able to establish beyond preadventure that indeed he is the registered proprietor of the suit premises and therefore entitled to the possession of the whole of it. The certificate of official search attests to this fact. The letter from the chief of Suna Nyabisawa dated 23rd

September, 2009 also confirms this fact as well. Finally there are the reports by both the District Land Registrar as well as District Suveryor, all pointing to the fact that the entire suit premises indeed belongs to the plaintiff and that the defendants had illegally and without any colour of right occupied a portion thereof.

It is also instructive that upon being served with the plaint, the defendant did not see the need to defend the plaintiff's action against them. Contempt proceedings were commenced against them successfully. Indeed they were arrested and incarcerated in jail for 2 months. Yet again they did not see the need to contest the plaintiff's claim. The defendant's failure to contest the suit even after being jailed for contempt of court can only mean one thing; it is a confirmation that they trespassed on the suit premises well aware that the suit premises or a portion thereof did not belong to them at all. That being the case I have no hesitation whatsoever in granting the first prayer in the plaint. This court therefore declares the plaintiff to be the owner of all that piece or parcel of land known as **Suba West/Wasweta 11/216**.

The plaintiff has further sought that the defendants, being persons who have trespassed on the said parcel of land be evicted therefrom. One of the hall marks of land proprietorship is occupation. The plaintiff has established to my satisfaction that he is the registered proprietor of the suit premises and therefore entitled to exclusive possession and occupation of the same. He is therefore entitled to enjoy all the proprietary rights that come with being a registered owner of a parcel of land as encapsulated by sections 27 and 28 of the registered land Act. In the circumstances of this case, there is no justifiable reason why the plaintiff should be denied by the defendants the use, enjoyment and occupation of the entire suit premises. The defendants have no right to occupy the suit premises or a portion thereof. The plaintiff is therefore entitled to an order of eviction.

The plaintiff too has sought an order for permanent injunction. Going by the conduct of the defendants so far I think that this order is deserved. If not permanently enjoined, then the defendants are more likely than not to descend on the suit premises and perpetrate further their acts of trespass in future.

As regards damages, I can only grant the plaintiff the sum of Kshs.26,320/- being the value of the tress on the suit premises that were destroyed by the defendants. Otherwise the plaintiff led no other evidence that would have assisted me to award any other form of damages. He did not indicate in material particulars the area unlawfully encroached upon by the defendants. He did not testify as to what he used to do with the said portion of land, for instance did he use it for farming or grazing. If so what was the monthly or annual income. In the absence of such evidence, it is impossible on my part to award any other damages. I cannot just pick a figure from the air and give it to the plaintiff as general damages.

In the premises therefore, final judgment is hereby entered for the plaintiff against the defendants jointly and severally as hereunder:-

- i) The plaintiff is declared the registered proprietor and or lawful owner of all that piece of parcel of land known as **Suba West/Wasweta II/216**.
- ii) The defendants are hereby ordered to give vacant possession of the said parcel of land to the plaintiff within **sixty(60) days** from the date upon which this order and or decree shall have been served on them, failing which they shall be forcefully or forcibly evicted therefrom.

- iii) A permanent injunction shall forthwith issue restraining the defendants by themselves, their servants or agents and or any one claiming under them from re-entering, trespassing onto, cultivating, interfering with and or in any other manner whatsoever dealing with suit premises aforesaid.
- iv) The defendants shall jointly and severally pay to the plaintiff the sum of kshs.26,320/- being the value of the trees that they destroyed.
- v) The plaintiff shall also have the costs of this suit.

JUDGMENT DATED, SIGNED and DELIVERED in court on the **23rd** day of **April, 2010**.

M.A. MAKHANDIA.

JUDGE.