



**No. 118**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE NO. 54 OF 2009**

**ROBERT OUKO.....APPELLANT**

**-VERSUS-**

**REBECCA MORAA KENGA.....RESPONDENT**

**JUDGMENT**

**Robert Otieno, “the plaintiff”** filed this suit vide a plaint dated 1<sup>st</sup> March, 2009 through **Messrs Maroro & Omariba Associates**. The suit was against, **Rebecca Moraa Kenga “the defendant”** and the prayers sought therein were:-

- “a) An injunction permanently restraining the defendant, her agents, employees and/or servants, or whosoever from trespassing, cultivating, working on or in any way interfering with the Plaintiff’s peaceful possession and enjoyment of land parcel No. Settlement Scheme/Ekerubo/33 or any portion thereof.***
- b) General damages for trespass and lost income.***
- c) Costs and interests from the date of filing till payment in full.***
- d) Other and better relief the honourable court may deem just to grant in the circumstances.....”***

The suit was informed by the fact that the plaintiff was at all material times the administrator of the estate of the late **Alfayo Otieno**, whose estate consisted of land parcel **Settlement Scheme/Ekerubo/33 “the Suit premises”**. Since the year 2006, however, the defendant had been trespassing on one acre of the suit premises thereby effectively blocking the plaintiff and other beneficiaries of the estate of the deceased from making any economic use of the same. Accordingly, the plaintiff had suffered both loss and damage since every time he attempts to plough the suit premises, the defendant trespasses into it and blocks or obstructs his workers, employees, servants and or agents from so doing. As a result of the defendants actions aforesaid, the estate of the deceased has suffered loss and damage too. Hence the suit.

The defendant was served with summons to enter appearance on 9<sup>th</sup> April, 2009 going by the affidavit of service of one, **Lawrence O. Nyasunda**, a court process server dated 7<sup>th</sup> July, 2009 and filed in court on

9<sup>th</sup> July, 2009. Though she acknowledged receipt of the summons to enter appearance by signing, she however failed to enter appearance nor file a defence to the claim within the prescribed or stipulated period. On 9<sup>th</sup> July 2009, the plaintiff requested for interlocutory judgment in default of appearance. The Deputy Registrar of this court duly entered the interlocutory judgment the following day. Thereafter the suit was set down for hearing by way of formal proof.

In support of the claim, the plaintiff testified before me on 18<sup>th</sup> May, 2010 that the defendant was a wife to his neighbour. The suit premises were registered in the name of his father, who passed on sometimes in October, 2005. He had since obtained a limited grant to enable him file this suit. He tendered in evidence a certified copy of the certificate of freehold title. Previously his deceased father had sued the defendant and obtained an order of eviction against the defendant in **Kisii CMCCC No. 887 of 2002**. Though she was subsequently evicted nonetheless she had not allowed the plaintiff or anybody else to that portion of the suit premises that she occupies. The plaintiff therefore prayed that he be granted the orders in terms of the plaint. That marked the close of the plaintiff's case.

Subsequent thereto, **Mr. Nyawencha**, learned counsel for the plaintiff requested that he be allowed to file written submissions. He's request was duly granted. I have carefully read and considered the written submissions as well as the oral evidence tendered.

It is not in dispute that the plaintiff is the administrator of the estate **Alfayo Otieno** deceased going by the limited grant issued to him and exhibited in court. The deceased was and is the registered proprietor of the suit premises again going by a copy of the title exhibited in court. It is also not in dispute that previously the plaintiff's father (deceased) had filed a civil suit against the defendant in **Kisii CMCCC No. 887 of 2002** if a copy of the decree exhibited in court is anything to go by. By that decree the defendant was ordered to vacate the suit premises and the officer commanding Manga Police Station was to supervise and oversee the compliance with the said order. The defendant, her agents, employees and or servants too were permanently enjoined and restrained from entering, cultivating and or in any way interfering with the suit premises.

The evidence of the plaintiff was neither challenged nor controverted. It must therefore be taken to be true. In the absence of any other evidence to the contrary, it must be taken that the plaintiff has proved his case on a balance of probabilities as required by law. Thus he is entitled to some of the prayers in the plaint. However before I conclude this judgment, I must point out that this suit was wholly unnecessary. Had it been defended or contested it would have foundered on the doctrine of *res judicata*. It is quite clear that the suit premises have been the subject of previous proceedings. A decree ensued from those earlier proceedings almost along the same lines as the prayers sought in this case. That decree has not been the subject of any appeal nor has it been set aside or reviewed. All that the plaintiff was required to do as the administrator of the estate of the deceased was to execute it. Without necessarily having to file a fresh suit. A multiplicity of suits does not advance the cause of justice. If anything they serve obsifucate issues and waste court's otherwise valuable judicial time. Had this suit been defended and the issue of *res judicata* raised, I would have had absolutely no qualms striking it out on that basis.

By that as it may, and for what it is worth, I would grant prayers (a) and (c) in the plaint only.

**Judgment dated, signed and delivered at Kisii on this 30<sup>th</sup> June 2010.**

**ASIKE-MAKHANDIA**

**JUDGE**