



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Civil Case 43 of 2009

KAROLI OOKO PLAINTIFF

-VERSUS-

MARTHA OKOWADEFENDANT

-

JUDGMENT

A plaint was filed on the 30th of April, 2009 by **KAROLI OOKO** the plaintiff against **MARTHA OKOWA** the defendant herein. In the suit the plaintiff prayed for judgment against the defendant for:-

- a) **General damages for trespass and detinue.**
- b) **An order that the defendant do vacate all portions of land parcel no. KISUMU/MUHORONI/1041 forthwith or be evicted therefrom forthwith.**
- c) **A permanent order of injunction restraining the defendant by herself or her agents or servants or proxies or any of them from entering, remaining on, occupying, cultivating, developing or in any other way using the plaintiff's said land parcel NO. KISUMU/MUHORONI/1041 or any portion thereof.**
- d) **Costs of this suit plus interest thereon.**

On the 9th of April, 2010 an interlocutory judgment was entered against the defendant for failure to enter an appearance and file a defence.

At the hearing of the formal proof, the plaintiff gave his evidence and produced exhibits in support.

I have considered the pleadings before court and the plaintiff's evidence. The main issue for determination is whether the defendant has encroached on the plaintiff's land and if so is the plaintiff entitled to general damages for trespass, and can the court make an order for the defendant to vacate the suit property.

In his plaint the plaintiff stated that he is the absolute proprietor of land parcel number **KISUMU/MUHORONI/1041** measuring 3.2 ha. He further stated that his property shares a common boundary with the defendant's land number **KISUMU/MUHORONI/914** and that on diverse dates and without any reasonable or justifiable reason, the defendant forcefully and illegally encroached, occupied and cultivated his piece of land thus denying him to exercise his right, enjoy and use his said parcel of land and as a result the plaintiff contends that he has suffered loss and damage.

The plaintiff further stated that the parties previously had two matters in court, the first one being **KISUMU HCCC NO. 67 OF 1993** between the defendant's husband, the plaintiff and the Chief Land Registrar (**Musa Okowa Apamo and Thomas Auma Kola VS The Settlement Fund Trustee, The Chief Land Registrar & Karoli Ooko**) which suit abated when both the plaintiffs' died. The second case being **TAMU RMCC NO. 61 OF 2007 (Martha Okowa (suing as the administrator of the estate of MOSES OKOWA APAMO) VS KAROLI OOKO** which case was dismissed. In evidence the plaintiff produced his title deed dated 1st December, 1989 for **KISUMU/MUHORONI/1041** where he is registered as the absolute proprietor. He also produced the area survey Map. He stated further that there is a stream passing through his land. It was also his evidence that title number **KISUMU/MUHORONI/914** is in the name of **MOSES OKOWA APAMO** (deceased) and the defendant who is the deceased wife is in occupation. She is also the

administrator of the estate of her late husband. He contended further that the defendant is in the habit of cultivating a portion of **KISUMU/MUHORONI/1041** despite request by the plaintiff to stop doing so. There have been two suits that did not bear any fruit, namely **KSM HCCC NO. 67 OF 2003** (supra) which abated and **TAMU RM CC NO. 61 OF 2007** (supra) which was withdrawn as the court lacked jurisdiction. The plaintiff further stated in evidence that he brought the District Registrar to determine the boundary. He produced the report of District Land Registrar as part of his exhibits. According to the plaintiff the defendant claims that the allocation was not properly done.

The plaintiff claims that the defendant's actions have caused him psychological torture and damage. That he had wanted to plant trees, he bought seedlings but the defendant denied him access as she continued to cultivate the land subject matter.

It is unfortunate to say the least, that the defendant chose not to defend the suit to enable the court adjudicate on this long outstanding dispute once and for all in the presence of both parties. That as it may, the evidence before court is that of the plaintiff.

There is no doubt and it remains undisputed that the plaintiff is the absolute proprietor from the Government of Kenya of title number, **KISUMU/MUHORONI/1041**. The plan survey sheet **4/117/1/20** of the Muhoroni Settlement Scheme clearly marks the boundaries. The plaintiff's land borders the railway line, on the West side, parcel number 914 on the Northern side and parcel number 915 on the Southern part. On the Eastern side it borders parcel numbers 859 and 860. There is a stream, running through the plaintiff's property.

In his ruling, the District Land Registrar was categorical that the disputed area marked as "**N-T-C-B**" on the map belonged to the plaintiff and whether he may cultivate or not is an environmental issue to be taken up by **NEEMA**. The decision was made on the 12th of July, 2007 and the parties were given 30 days within which to appeal. The court was not informed of any appeal by either of the parties.

From the evidence on record it is clear that the stream and the disputed area belong to the plaintiff as the registered proprietor of parcel number 1041. The court finds that the defendant has no claim in law over the disputed area whatsoever. The defendant cannot be heard to complain that the area is not to be cultivated and then proceed to do so herself. It is to be noted that there is no restriction against the plaintiff to cultivate the area so far and as the registered owner unless restricted by law, he is at liberty to do so.

In the circumstances of the case and based on the plaintiff's evidence and the exhibits placed before court, the court grants prayer b, c, & d of the plaint.

The plaintiff did not prove by way of evidence the loss and damage he incurred as alleged in the plaint and the court declines to make a finding in this regard and therefore prayer (a) is dismissed.

DATED AND DELIVERED THIS 1ST OF OCTOBER, 2010.

**ALI-ARONI
JUDGE**

In the presence of:

..... present for defendant/applicant

..... present for plaintiff/respondents