



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

Civil Case 28 of 2006

KENNEDY OCHIENG ORWA PLAINTIFF

VERSUS

DANIEL OMONDI OMOLLO & OTHERS DEFENDANTS

RULING

The plaintiff filed a suit against the defendants and averred that he is the legal administrator of the estate of **Orwa Owich, deceased**. The deceased was the registered proprietor of **L.R. No. SOUTH SAKWA/KOGELO/777**, hereinafter referred to as “**the suit land.**” The plaintiff stated that on or about February 2006 the defendants trespassed upon the suit land and erected structures thereon. They also commenced construction on the suit land. The plaintiff prayed for an eviction order against the defendants and a permanent injunction to restrain them from trespassing thereon. He also prayed for general damages for trespass and mesne profits.

The defendants filed a joint statement of defence and denied that they had trespassed on the suit land. They alleged that the suit land traced its existence to parcel of land known as **L.R. SOUTH SAKWA/KOGELO/98** which, upon first registration, was registered in the names of three people namely: **James Omollo, Mwango Nyagilo** and **Musa Otina**, all deceased. The defendants said they are sons and beneficiaries of the aforesaid deceased persons. As a result of various land disputes parcels Numbers **L.R.NO. SOUTH SAKWA/KOGELO/759** and **L.R. NO. SOUTH SAKWA/KOGELO/760** were created as subdivisions of the original parcel No. 98.

While there was pending before the High Court of Kenya at Kisii Civil Suit No. 59 of 1981 relating to the original parcel of land **L.R. NO. SOUTH SAKWA/KOGELO/759** was sub-divided into two thus creating the suit land and **L.R. NO. SOUTH SAKWA/KOGELO/776**. The defendants therefore averred that they were in lawful occupation of the suit land.

On 11th May 2007 the plaintiff filed an application by way of a notice of motion seeking summary judgment against the defendants. The application was premised on the following grounds:

- (a) **that the suit land is still registered in the name of the plaintiff’s deceased father, Orwa Owich.**
- (b) **The title in respect of the suit land was issued in favour of the deceased on 5th November 1981.**
- (c) **That the suit land was a sub-division of L.R. SOUTH SAKWA/KOGELO/759, hitherto**

registered in the name of Petro Oteyo, now deceased.

- (d) That the defendants have not challenged the deceased's title to the suit land.
- (e) That the deceased's title in respect of the suit land is indefeasible.
- (f) That the plaintiff, as the legal administrator of the deceased's estate, has absolute and exclusive rights over the suit land by dint of Sections 27 and 28 of the Registered Land Act.
- (g) That the statement of defence filed by the defendants is a sham and does not raise any *bona fide* triable issues.
- (h) That the defendants have no rights over the suit land.

The plaintiff filed an affidavit wherein he amplified the aforesaid grounds. He also annexed to his affidavit photocopies of grant of letters of administration intestate in respect of the estate of the deceased, land certificate for the suit land and certificates of official search for the same and the Green Cards in respect of L.R. South Sakwa/Kogelo/759 and the suit land.

On 17th November 2008 the defendants' advocates, M/s Odero Osiemo & Company, were served with a hearing notice in respect of the application aforesaid. They did not file an affidavit in reply and neither did they attend court on the hearing date. The plaintiff's application was therefore unopposed.

I have considered the pleadings filed by the parties. It is not in dispute that the plaintiff is the legal administrator of the deceased's estate. The deceased was the registered proprietor of the suit land. The land certificate was issued to him on 5th November 1981. The suit land was a subdivision of L.R. NO. SOUTH SAKWA/KOGELO/759. If at all the defendants had any lawful claim over the suit land they did not pursue the same since 1981. The plaintiff states that they trespassed to the suit land in February 2006. Even if the defendants had any lawful claim over the suit land the same is now time barred and cannot be sustained in law. In the circumstances their defence is a sham. In **INDUSTRIAL AND DEVELOPMENT CORPORATION –VS- DABER ENTERPRISES LIMITED**, [2000] 1 EA 75, it was held that summary procedure is applied to enable a plaintiff to obtain quick judgment where there is plainly no defence. **“Where the defence is a point of law and the court can see at once that the point is misconceived or, if arguable, plainly unsustainable, summary judgment would be given.”**

In the circumstances of this case, the plaintiff is entitled to summary judgment as prayed in the plaint, and I so find and hold. A permanent injunction is also issued restraining the defendants by themselves, agents, servants, and/or such other persons acting on their behalf from trespassing and/or further trespassing on the suit land in any manner adverse to the interests of the estate of the deceased. The defendants shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF JULY, 2009.

D. MUSINGA

JUDGE.

28/7/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Oguttu for the plaintiff

Court: Judgment delivered in open court.

D. MUSINGA

JUDGE.