



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C SUIT NO 450 OF 2013

RICHARD BARONGO OPANGA.....PLAINTIFF

VERSUS

SABINA KERUBO OGORI.....1ST DEFENDANT

FRANCIS MARIERA OGORI.....2ND DEFENDANT

ANDREW GICHANA OGORI.....3RD DEFENDANT

SAMUEL ORANDO OGORI.....4TH DEFENDANT

JUDGMENT

1. The Plaintiff avers that he is the registered owner of the land parcel known as L.R WEST KITUTU/BOGEKA/1408 ('suit property'). His case is that on diverse dates in 2013 the Defendants forcefully trespassed and entered the suit property. The Defendants uprooted tea bushes and the boundary that was on the parcel of land. The Plaintiff thereafter requested the Defendants to vacate the suit land but the Defendants failed to do so and continue to illegally occupy the suit property. The Plaintiff thus seeks the following orders;

a) A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation and user of all that piece of land known as LR NO. WEST KITUTU/1408

b) A declaration that the Defendants whether by themselves or their servants agents assigns or otherwise howsoever, are unlawfully and wrongfully in occupation possession and user of the suit property and are accordingly trespassers (sic) on the same.

c) A permanent injunction restraining forever (sic) the Defendant whether by themselves or their servants agents assignees or otherwise howsoever from remaining on or continuing in occupation possession or user of the suit property.

d) Eviction from and/or surrender of vacant possession of the suit property and be condemned to pay damage caused on the crops and property.

e) Costs of the suit together with interests thereon at court rates.

f) Any other or further relief(s) as this Honorable Court may deem appropriate to grant in the circumstances of this suit.

2. The 1st Defendant in her Defence denies the Plaintiff's allegations and avers that she is not in illegal occupation of the suit property. The 2nd, 3rd and 4th Defendants similarly filed their statement of Defence denying the allegations contained in the plaint. The Defendants in their statement of Defence at paragraph 2 stated that they are;

"...strangers to land parcel No. West Kitut/Bogeka/1408 and its contents thereto which the plaintiff is put to strict proof thereof."

3. Before the matter was set down for hearing, the court directed the Kisii Land Registrar and County Surveyor to visit the suit property and land parcel L.R. No. WEST KITUTU/BOGEKA/1115 to ascertain whether the Defendants encroached on the Plaintiff's land. They both filed a joint report and indicated that the Plaintiff's land was wholly occupied by the Defendants.

4. The 1st and 2nd Defendants contested the findings of the Land Registrar and the Surveyor and the court further ordered that it would visit

the site together with the Land Registrar and the Surveyor for the boundary to be ascertained.

5. The matter came up for hearing when Richard Barongo testified as PW1. He adopted his witness statement filed in court on 12th November 2013. He testified that he is the registered proprietor of the suit property. He also testified that he is not interested in L.R. No. WEST KITUTU/BOGEKA/1115 and asked for eviction orders against the Defendants.

6. Despite being served with a Hearing Notice, the Defendants did not attend court on the hearing date.

7. The Plaintiff submitted that the suit property is registered in his name as per the title deed and the confirmation by the Land Registrar and the Surveyor which leads to the conclusion that the suit land is wholly occupied by the Defendants. He therefore argues that the Plaintiff is entitled to the orders sought. He further submitted that the Defendants' acts of continued illegal trespass and occupation of the Plaintiff's land violates the Plaintiff's right to enjoyment of his property. Further **Section 24 of the Land Registration Act** stipulates as follows;

"...subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto....."

8. Counsel cited the case of **Willy Kipsongok Morogo v Albert K. Mororo (2017) eKLR** where the court held that since the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff, he is therefore entitled to the protection under Sections 24, 25 and 26. He argued that trespass to land is actionable *per se* and cited the case of **Park Towers Ltd v John Mithamo Njika & 7 Others (2014) eKLR**.

9. Counsel finally submitted that the Plaintiff has suffered loss and damage and urged the court to grant him the prayers sought in the Plaintiff.

ISSUES FOR DETERMINATION

- i. Whether the Plaintiff is the registered owner of the suit property.
- ii. Whether the Defendants have trespassed onto the suit property.
- iii. Who should bear the costs of this suit?

ANAYSIS AND DETERMINATION

10. The fact that the Defendants are in occupation of L.R WEST KITUTU/BOGEKA/1408 was confirmed by the Kisii Land Registrar and the County Surveyor. The Certificate of official search and title deed reveal that the Plaintiff is the registered proprietor of the suit land.

11. **Section 26 (1) of the Land Registration Act** provides that:

"The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner..." The Plaintiff is therefore protected under **Article 40 of the Constitution of Kenya** which provides as follows:

"40. Protection of right to property

1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

a) of any description; and

b) in any part of Kenya

2) Parliament shall not enact a law that permits the state or any person-

a) to arbitrarily deprive a person of property of any description of any interest in, or right over, any property of any description; or

b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4)."

12. Since the Defendants did not participate in the hearing of the suit despite being served with the hearing notice, the Plaintiff's testimony remains unchallenged. In **Karuru Munyororo vs Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988**, the court held that:

"The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaintiff and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

13. The only issue that now remains for determination is whether the Plaintiff is entitled to the orders sought. Having considered the certificate of search and title deed tendered by the Plaintiff before this court, I find that the Plaintiff is the registered proprietor of the suit land. I also note that the court visited the disputed land and confirmed the findings of the Kisii Land Registrar and the County Surveyor. It is therefore my finding that the Defendant's occupation of the suit land is illegal. In the case of **Nyangeri Obiye Thomas V Yunuke Sakagwa Nyoiza ELC Case No.277 of 2018** Okong'o J observed as follows:

"Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows:

"Any unjustifiable intrusion by one person upon land in possession of another."...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession"

14. The Defendants' actions of remaining on the suit land therefore amounts to trespass which entitles the Plaintiff to nominal damages.

15. The Plaintiff has also sought injunctive orders and I have considered the Court of Appeal decision in **Nguruman Limited v Jan Bonde Nielsen & 2 others, [2014] eKLR**, where the court reiterated the conditions to be met by a litigant who seeks injunctive relief:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

a) establish his case only at a prima facie level,

b) demonstrate irreparable injury if a temporary injunction is not granted, and

c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

16. The Plaintiff has demonstrated through evidence that he is the registered owner of the suit property and has thus established a prima facie case. The Defendants have wholly occupied the Plaintiff's land thus if the injunctive orders are not granted the Plaintiff would suffer irreparable injury.

17. In the end, I find that the Plaintiff has proved his case on a balance of probabilities and I therefore enter judgment in his favour and grant the following orders;

a) A permanent injunction is hereby issued restraining the Defendants from trespassing upon or cultivating or doing any other acts which are prejudicial to the Plaintiff's proprietary interest in land parcel number L.R WEST KITUTU/BOGEKA/1408.

b) The Defendants are hereby ordered to vacate the suit property within 30 days from the date of service of the decree herein upon them failing which the Plaintiff may apply for an eviction order.

c) The Plaintiff is awarded nominal damages for trespass in the amount of Kshs 100,000/-.

d) The costs of this suit shall be borne by the Defendants.

Dated, signed and delivered at KISII this 17th of February, 2021.

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J.M ONYANGO

JUDGE