



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE 147 OF 2017

JIMMY ODEKE.....PLAINTIFF

= VERSUS =

CHARLES ORODI AMUNYIN.....DEFENDANT

J U D G M E N T

1. Vide a plaint dated 16th August 2017 and amended on 25th Sept 2017 & 5th July 2018, the Plaintiff sought for the judgement against the defendant in the following terms;

a. Permanent injunction restraining the defendant personally and or through his agents, workers, servants, assignees from in whatsoever manner interfering with land parcel no. SOUTH TESO/AMUKURA/1076.

b. Costs of the suit.

c. Any other award that this Honourable Court deems fit to grant.

2. The plaintiff pleaded that he purchased 1¼ portion of the suit land from Stephen Inagai Omonyin in the year 2001 and paid the agreed purchase price in full. That the seller also honoured his part by putting the plaintiff into vacant possession.

3. The plaintiff continued that the defendant who is a brother to the seller without any colour of right or justifiable cause trespassed on to the plaintiff's portion and started digging and or cultivating it. That this action by the defendant has caused him damage and suffering as he is unable to quietly possess and peacefully occupy.

4. The defendant filed his defence on 14th November 2017 where he pleaded that the purported agreement that the plaintiff entered into with his brother is null and void and he should sue his brother for a refund of the consideration. The defendant admitted that the plaintiff has been in actual occupation all through his life hence paragraph 9 of the plaint cannot apply. He further claimed that the plaintiff's suit is time barred. He prayed that the suit be struck out with costs.

5. The matter proceeded for hearing on 21/1/2020 with the plaintiff testifying as PW1. He stated that he purchased the land measuring 1 ¼ acres from Stephen Omonyin who is the brother to the defendant. He was comfortably ploughing the land from 2001-2015. That the land became fallow in the year 2105 when he went to work in Kericho. Later, PW1 was called and informed that the defendant who was his neighbour had uprooted the boundary marks and planted cassava on his land.

6. PW1 said he returned home and reported the incident to the village elder who was also a witness to the sale agreement. The defendant was summoned by the village elder, chief and DO but he did not honour any of those summons. He reported the matter to the police vide OB No. 9/30/5/2016. The defendant went underground when he heard he was about to be arrested. The plaintiff stated that he was getting an average of Kshs.80,000-100,000 per year. He also prayed that he be refunded Kshs.4,000 per sitting. The defendant did not put any questions to the plaintiff.

7. PW2, Celestine Emachar, gave his evidence on 16/11/2020 by adopting his statement filed in court on 22/11/2019. PW2 stated that he was one of the witnesses during the sale transaction between the plaintiff and Stephen Omonyin. That Stephen had put the plaintiff in possession and the plaintiff continued using the land until the interference by the defendant.

8. On cross-examination, the witness stated that he was a witness to the sale agreement and was the clerk who prepared it. That the defendant and his brother came to his home looking for a buyer. PW2 states that the defendant got on the plaintiff's portion by force.

9. The defendant, DW1, testified on 16/12/2020 where he adopted his witness statement filed in court on 28/2/2020. He stated that his father Patrobas Singa Omonyin was the owner of six (6) acres of land comprised in title South Teso/Amukura/2665 which land is still under succession process. Dw1 said that his father had not apportioned them the land but they were cultivating it.

10. According to Dw1, although he witnessed the sale between his brother and the plaintiff, his brother Stephen had no land to sell on account of lack of letters of administration. He stated further that the sale was between the plaintiff and his brother who has since moved to Mount Elgon and rarely visits the ancestral home in Kokare. The witness concluded that initially the plaintiff used to cultivate the land but todate he (DW1) occupies it and the land is in the name of DW2 who is the administrator of their father's estate. DW2 said the plaintiff should pursue his brother for redress and compensation.

11. On cross-examination, DW1 stated that his brother sold his portion to the plaintiff in the year 2001. That the plaintiff was farming on the land from 2001-2015 because he was away. He stated that he signed the agreement in respect to his brother's share and not his. He stopped the plaintiff from using his share in 2016. He denied destroying any boundaries marks between his plot and the suit plot.

12. DW2, Simeon Emong'ori Enagai, also adopted his statement dated 28/2/2020. He said he is the administrator of the estate of Ekeya Omonyin Ebale who died intestate in Kokare village. DW2 said he had not known about plaintiff's issue until when the defendant was sued. DW2 said that the defendant has been sued yet it is Stephen who had sold land to the plaintiff. He continued that although there is land to be inherited, none of the beneficiaries have obtained titles due to the objection proceedings pending in Court. That the sale between the plaintiff and Stephen was null and void since the seller did not own any land. That the present suit is misconceived and total abuse of the court process.

13. On cross-examination, he stated that he is the administrator of the estate of the late Ekeya Omonyin Ebale in a P&A 236 of 2008 is pending because of an objection the plaintiff filed. He stated that he did not know how many purchasers were on the suit land. The suit land is 6 acres.

14. None of the parties filed any submissions. From the evidence adduced in court, it is not in dispute that the plaintiff bought land from the defendant's brother in 2001 for a consideration of Kshs.36,250/=. It is also not in dispute that the plaintiff took possession and peacefully utilized the land from 2001-2015. The plaintiff stated that he left the land fallow in the year 2016 when he went to work in Kericho. It is during his absence that the defendant allegedly trespassed without any colour of right started cultivating on it. The defendant on one part denied that he had trespassed on the suit portion and at the same time stated that the plaintiff should seek redress from the seller.

15. The issues I raise to be determined by this court are;

- a. **Whether or not the plaintiff is entitled to possession and user of 11/4 acre of the suit land.**
- b. **Whether or not the plaintiff is entitled to the orders of injunction against the defendant.**
- c. **Who should pay costs of the suit.**

16. The plaintiff has relied on a sale agreement which put him into possession of the sold portion. He has used that portion openly and without interruption for a period in excess of twelve (12) years. His peaceful occupation was corroborated by PW2 and DW1. The defendant pleaded thus in paragraph 7 of his defence, "**contents of paragraph 9 cannot suffice because the plaintiff has been in actual peaceful occupation of the land in contention all through his livelihood.**"

17. Although the defendant in his testimony now raised the issue of capacity of Stephen Ingai Omonyin to sell a portion of the suit land which belonged to the estate of his deceased father without letters of administration. DW1 & 2 stated that they were currently doing succession on the said estate with DW2 being the administrator in Cause No. P&A 236 of 2008. The defendant further stated that none of the beneficiaries has obtained title to their land portions as the plaintiff had filed objection proceedings.

18. The issue before the court for determination is possession and occupation of the land. The plaintiff has not demanded that the defendant transfer to him title of the sold portion so that the issue of legal capacity would arise. Since the defendant was aware of the sale since he was a witness; he knew the plaintiff was put in possession and had been using the land. The plaintiff has thus satisfied me that he is entitled to possession of the 1¼ acre of land he has been cultivating and occupying since the year 2001.

19. The defendant admitted that he is not the administrator of his father's estate. Therefore, he did not render any explanation why he decided to cultivate the suit portion. The plaintiff is seeking an order of permanent injunction against the defendant for trespass. Although the estate has not been distributed, the defendant's claim that his brother had intermeddled with the estate of the deceased is not a ground for himself to disturb the status quo. I am convinced from the evidence adduced that the plaintiff continuous stay and use of the suit land has conferred upon him rights capable of being protected. Unless the orders of injunction are given, the plaintiff stands to suffer irreparable loss.

20. The plaintiff prayed for payment of damages which he estimated at between Kshs.80,000-100,000 per year. He has also not presented evidence that his crops used to earn him Kshs.80,000-100,000/= per year. However, on account that his cultivation of the land was not denied. Secondly, that the actions of the defendant has prevented him from continuing with his cultivation. I find that he is entitled to compensation for the duration the defendant denied him user of the land. Consequently, I award him Kshs.100,000 as general damages.

21. Since costs does follow the event and the plaintiff's suit has succeeded, the plaintiff is awarded costs of the suit.

22. Accordingly, I enter judgement for the plaintiff against the defendant as follows;

a. An order of permanent injunction is hereby issued restraining the defendant personally and or through his agents, workers, servants, assignees from in whatsoever manner interfering with the plaintiffs portion measuring 11/4 comprised in land parcel No. SOUTH TESO/AMUKURA/1076.

b. General damages of Kshs One Hundred Thousand

(Kshs.100,000) payable within sixty days of delivery

of this judgement in default execution to issue.

d. Costs of the suit and interest.

DATED, SIGNED & DELIVERED AT BUSIA THIS 8TH OF APRIL 2021

A. OMOLLO

JUDGE