



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. E005 OF 2020

JACOB ERNEST AMBALA ODONDI....PLAINTIFF

- VERSUS -

VIOLET SHIKUKUDEFENDANT

J U D G M E N T

1. The plaintiff filed this suit against the defendant via a plaint dated 16th September 2020 seeking for the following orders;

- a. **An order of permanent injunction restraining the defendant by herself, or by her agents, servants or otherwise howsoever from entering upon, remaining on or continuing in occupation of and/or otherwise dealing with or in any way whatsoever interfering with the plaintiff's access to, use of and quiet possession of the suit property.**
- b. **An order of mandatory injunction directing the defendant whether by herself or by her agents, servants or otherwise however to forthwith remove and demolish all the dwelling structures erected on part of the property failing which the same be removed by the Plaintiff at the defendant's costs and expense.**
- c. **The Officer Commanding Busia Police Station do assist in effecting and supervise enforcement of orders herein.**
- d. **The defendant be ordered to pay the plaintiff mense profits and damages for trespass.**
- e. **The defendant be ordered to pay the plaintiff costs of this suit.**

2. The plaintiff pleaded that he is the registered owner of all that parcel of land known as SOUTH TESO/ANGOROMO/1459 which he has had possession of since 1982. Sometime in 2012 while the plaintiff was doing a site visit of his property, he found the defendant had trespassed on part of the suit property by erecting a structure and on inquiry the defendant informed him that she lawfully bought the property from third parties who did not have proprietary rights over the suit property.

3. Despite being served with summons to enter appearance, the defendant neither filed her defence nor appeared in court for the hearing.

4. The matter was set down for hearing on 27/7/2021 with the plaintiff relying on his sole testimony. He adopted his witness statement dated 16th September 2020 as his evidence and stated that sometime in 1982 while he was working in Busia County he purchased the suit property known as South Teso/Angoromo/1459 from Fabian Ikapel which was subsequently transferred into his name and he was issued with a title deed on 26th January 1984. Upon having vacant possession, he fenced the parcel of land and carried out farming activities over the years on the suit land.

5. The plaintiff further stated that sometime in 2007 after retiring from civil service, he got contractual jobs that necessitated his travelling out of the country. When he returned to the country in 2012, he went to inspect the suit property with the intention of developing it and discovered that the suit property had been encroached into by the defendant. The defendant claimed that she lawfully bought the property from third parties who according to the plaintiff did not have proprietary rights over the suit property. The witness demanded that she vacates the suit property but the defendant refused to vacate the suit premises alleging that she is the bona fide owner of the area she had trespassed and vowed never to vacate. The plaintiff took action by reporting the matter to the area assistant chief who advised him to report the issue to the County Land Registrar and to that end he wrote a letter to the said County Land Registrar to assist him in determining what he thought was a boundary issue.

6. Pursuant to the request made by the chief's letter, a boundary dispute hearing was called on 22nd March 2013 and all the parties related to the dispute were called and were in attendance including the defendant, the district land registrar, district land surveyor and the area assistant

chief. After hearing the parties and looking at the various documents provided by the parties and the situation on the ground, the land registrar prepared a report and produced as Pex4. In the report, the Registrar found that the defendant was occupying more land than is contained in her title deed but the Land Registrar said that under the Land Registration Act he had no powers to deal with the said dispute and directed parties to come before this court for dispute resolution.

7. The office of the district surveyor on request from the district land registrar conducted a survey of the suit property and found that the defendant had encroached on the plaintiff's land by approximately ½ acre. The plaintiff avers further that despite the findings from the relevant authorities and his demands that the defendant vacate the suit premises, she has adamantly refused and has continued with the wrongful occupation and unauthorized construction on the suit property thus denying him access to and use of the suit property which have occasioned him loss. He prayed that the defendant be permanently restrained from trespassing on his property, ordered to remove the offending structures and be ordered to pay damages for the trespass. He relied on the documents in the list dated 16th September 2020 which were produced as Pex 1-5.

8. The suit is undefended and the plaintiff has proceeded to give both oral and documentary evidence in support of his claim. There is no doubt that the plaintiff is the registered proprietor of the land known as South Teso/Angoromo/1459 measuring 2.339Ha as is evidenced by the title deed produced as Pex 1. The Plaintiff's title to the suit property has not been challenged in any way by the Defendant on any of the grounds enumerated in Section 26 of the Land Registration Act. The district land registrar through a boundary dispute hearing on 23rd March 2013 (Pex 3) made a finding that the defendant is in physical occupation of an area measuring 0.58 Ha against her registered area of 0.40Ha. Similarly, the district surveyor's report dated 14th August 2018 (Pex 4) indicated that the registered land size of South Teso/Angoromo/3276 owned by the defendant's land measures 0.40Ha on title while the occupation on the ground was 0.58Ha which implied that she was occupying a larger area on the ground as compared to its registered area. The surveyor's report in Pex 4 stated as follows;

'The excess of 0.18Ha (approximately ½ acre) was hived off to compensate for the loss on parcel No. 1459. That was on a consensus basis otherwise establishing the boundary as it is mapped would mean going into the homestead of the owner of parcel No. 3276.'

From the above quoted section, it is clear that the disputed land belongs to the plaintiff as was explained by the surveyor.

9. Both the district land registrar and the land surveyor in their reports indicated that the defendant is occupying an excess of 0.18Ha which is approximately ½ acres. Since those reports were not disputed by the defendant, they corroborate the plaintiff's claim of trespass and this court finds that the defendant has encroached into the plaintiff's land known as South Teso/Angoromo/1459 by a portion measuring 0.18ha. The court finds that the plaintiff has proved his case on the required standard of balance of probabilities and is therefore entitled to prayer (a) and (b) of the plaint being a permanent and mandatory injunction against the defendant.

10. The plaintiff has also sought for mesne profits and damages for trespass from the defendant. The plaintiff has proved on a balance of probabilities that the defendant has trespassed on part of his parcel of land known as South Teso/Angoromo/1459. The court awards the plaintiff Kshs.50,000/= as the nominal award of general damages in this case taking into consideration the duration of the trespass. Mesne profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates. It must be pleaded and proved, however where a party claims for both mesne profits and damages for trespass the Court can only grant one. In this instant as the Court has already granted general damages for trespass, this prayer is therefore declined. See the case of Maina Kabuchwa -vs- Gachuma Gacheru (2018) eKLR, where the Court held that:-

"Where a party claims for both mesne profits and damages for trespass, the Court can only grant one."

11. The upshot is that judgment is entered for the plaintiff against the defendant that;

a. An order of permanent injunction is hereby issued against the defendant by herself, or by her agents, servants or otherwise howsoever from entering upon, remaining on or continuing in occupation of and/or otherwise dealing with or in any way whatsoever interfering with the plaintiff's access to, use of and quiet possession of the suit property.

b. An order of mandatory injunction is hereby issued directing the defendant whether by herself or by her agents, servants or otherwise however to forthwith remove and demolish all the dwelling structures erected on part of the suit property within 90 days of being served with the decree herein.

c. In default of complying with (b), the offending structures shall be removed by the plaintiff at the defendant's cost and expense.

d. The Officer Commanding Busia Police Station to provide security during the process of execution.

e. The defendant to pay the plaintiff Kshs.50,000/= as general damages for trespass.

f. The plaintiff's prayer for mesne profits is declined.

g. The plaintiff is awarded the costs of the suit.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 9TH DAY OF DECEMBER, 2021

A. OMOLLO

JUDGE