



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND CASE NO. 67 OF 2017

ESTHER KERUBO OSORO PLAINTIFF

VERSUS

WILFRED ONSOMU DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff claims that she is the registered owner of Land Parcel Number **South Mugirango/Bosinange/3299**. She filed the instant suit on 14th March 2017 seeking the following orders against the Defendant;

- a. An order of eviction be issued against the Defendant from land parcel number South Mugirango/Bosinange/3299;
- b. A permanent injunction be granted restraining the Defendant from trespassing onto or being or remaining in possession or using or in any manner from interfering with the Plaintiff's title South Mugirango/Bosinange/3299; and
- c. Costs of this suit be granted.

BACKGROUND

2. The Plaintiff contends that on diverse dates between 2016 and 2017, the Defendant deliberately and forcefully entered and occupied her late mother's houses situated on the suit land. She avers that the Defendant is a stranger. That her mother Marcella Binsari Aoro died on 10th June 2016 having sired only two daughters and had no sons at all.

3. The Defendant's counsel filed a notice of appointment but no statement of defence was filed despite sufficient time being given to do so. The Defendant also failed to give evidence when the matter came up for hearing.

4. For her part, the Plaintiff testified that she got to know the Defendant when her mother died in 2016. She stated that during her lifetime, her mother owned Land Parcel No. **South Mugirango/Bosinange/3299**. Since the land was still registered in her father's name, she applied for letters of administration in the estate her deceased father, Aoro Mogusu vide High Court Succession Cause No. 19 of 2005 and had the title to the suit land transferred to her on 12th April, 2016 after the death of her mother.

5. She accused the Defendant of demolishing her late mother's house and cutting down the trees her mother had planted. She also testified that the Defendant had been tilling the land and harvesting their napier grass and bananas and had also sunk a borehole and was excavating stones from the land without their consent. The Plaintiff produced documents to support her claim that she was the registered owner of the land. She also stated that she had filed a supplementary list of documents containing her mother's obituary which showed that the Defendant was not her relative.

6. The Plaintiff's nephew, Gideon Ornyi Otondi (PW 2), confirmed that the Defendant had trespassed onto the land after his grandmother's death and had carried out some developments without the Plaintiff's consent.

ISSUES FOR DETERMINATION

7. The main issue arising in this matter is whether the Plaintiff has proved that the Defendant has illegally trespassed into her land parcel no. South Mugirango/Bosinange/3299 and if so what remedies should issue.

ANALYSIS AND DETERMINATION

8. In the case of *Karugi & another v Kabiya & 3 others Civil Appeal No. 80 of 1982 [1983] eKLR* the Court of Appeal held that a Plaintiff's burden of proof is not in any way lessened because the case is heard by way of formal proof. The court held that the burden on the Plaintiff to prove his case remains the same, though where the matter is not defended, that burden may become easier to discharge.

9. The Plaintiff produced a grant of letters of administration issued in Succession Cause No. 19 of 2005 where she was named a co-administrator with her mother in the estate of her father who died on 15th December 1984. She also produced a copy of her mother's death certificate showing that she died on 10th June 2016. To prove ownership, the Plaintiff produced a copy of the title deed showing that she was registered as the proprietor of the suit land on 12th April 2016. A certificate of official search also proved that she was the registered proprietor of the land.

10. After the matter had been certified ready for hearing, the Defendant filed an application on 5th October 2017 claiming that he was a legal heir of the Plaintiff's mother, Marcela Binsari Aoro, for the reason that she had married his mother Lispar Magomo Aoro in a woman to woman marriage according to Gusii Customary Law. He stated that the Plaintiff disregarded the law of inheritance and had the land registered in her name without involving the other siblings.

11. The Defendant was given an opportunity to file a statement of defence but failed to do so. He also failed to give evidence in support of his claim. The Plaintiff proceeded to have the matter heard in accordance with **Order 10 Rule (9)** which provides that where the defendant fails to file a defence, the Plaintiff is entitled to set the matter down for hearing.

12. The **Land Act at Section 26** provides that the certificate of title issued by the Registrar upon registration is to be taken as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner. The Plaintiff produced a copy of the title deed and official search which affirmed that she was registered as the proprietor of the suit land on 12th April, 2016. Since no evidence of fraud, misrepresentation or proof of illegal acquisition of the land was tendered before court, I find that the Plaintiff is the indefeasible owner of Land Parcel Number South Mugirango/Bosinange/3299.

13. The Plaintiff's uncontroverted evidence during the hearing of the matter, proved that the Defendant had trespassed onto her land and was tilling and dealing with the land in a manner that was inconsistent with her rights as the registered owner. I am thus satisfied that the Plaintiff has proved her case on a balance of probabilities.

14. In the premises, I enter Judgement for the Plaintiff against the Defendant and make the following orders:

- a. The Defendant shall give vacant possession of land parcel No. South Mugirango/Bosinange/3299 within 30 days failing which an eviction order shall issue upon application
- b. A permanent injunction is hereby issued restraining the Defendant from trespassing onto or being or remaining in possession or using or in any manner from interfering with the Plaintiff's title South Mugirango/Bosinange/3299.
- c. The costs of this application shall be borne by the Defendant.

Dated, signed and delivered at Kisii this 13th day of March, 2020.

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J.M. ONYANGO

JUDGE