



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

E & L CASE NO. 736 OF 2015

[FORMERLY KISUMU HCCC NO. 70 OF 2010]

JOSEPH ABONGO MUGA.....PLAINTIFF

VERSUS

MOSES ODOYO NYAOKE.....1ST DEFENDANT

DICKENS AYUB ODHIAMBO.....2ND DEFENDANT

JUDGMENT

1. **Joseph Abongo Muga**, substituted by Argwings Kodhek Abongo vide Order of 28th October 2013, the Plaintiff, filed this suit against **Moses Odoyo Nyaoke**, the Defendant, through the Plaint dated the 5th May, 2010 and filed on the 12th May, 2010 seeking for the following;

- (a) *Declaration that the Defendant has trespassed upon land parcel Kisumu/Koguta/170, suit land.*
- (b) *Order directing the Defendant to vacate the suit land and in default he be evicted.*
- (c) *Permanent injunction restraining the Defendant from trespassing upon the suit land or otherwise interfering with the Plaintiff's use and possession of the same.*
- (d) *Costs and interest at Court's rates from date of Judgment until payment in full.*

The Plaintiff avers that he is the registered proprietor of the suit land having obtained it from **Lewnida Ajwang** by way of Succession Cause No. 395 of 2005. That the Defendant has without authority or justification entered onto the suit land and began developments thereon without his consent.

2. The Plaintiff's claim is opposed by the Defendant through the statement of defence dated the 3rd June, 2010 and filed on the 4th June, 2010. The Amended Statement of Defence dated the 10th July, 2012 was later filed enjoining **Dickens Ayub Odhiambo** as the 2nd Defendant after the Ruling of 11th November, 2011. The Defendant among others avers that he was born and brought up, and has lived on the suit land that on the ground encompasses Kisumu/Koguta/165. That if the Plaintiff is the registered proprietor of the suit land, then the Succession Cause and the removal of the Caution against the title were fraudulently done.

3. The hearing of the Plaintiff's case commenced on the 28th May, 2015 when **Argwings Kodhek Abongo** testified as **PW1**. He was recalled for cross examination on the 29th November, 2016. The Plaintiff then called Paul Kibet Rugut, the District Surveyor, Nyando, Nyakach and Muhoroni sub-counties who testified as **PW2** on the 28th September, 2017. The 1st Defendant, Moses Odoyo Nyaoke, testified on 1st October, 2018 as **DW1** and the 2nd Defendant, Ayub Odhiambo Nyaoke, testified as **DW2**. That it is the Plaintiff's case that the 1st Defendant has trespassed onto a part of his land without permission and should be evicted. PW2 confirmed that the official record held by the office shows that the Plaintiff's land parcel Kisumu/Koguta East/170 is separated from Kisumu/Koguta East/166 by an access road. That the Defendant's case is that they were born and brought up on land parcel Kisumu/Koguta East/166. That all the nine siblings, apart from the 1st Defendant, have settled on the part of the land below the public access road. That the 1st Defendant is settled on part of the land above the public access road which is the portion in dispute. That though the 1st Defendant had insisted that he has lived where he is since birth, the 2nd Defendant indicated that he only moved to that portion above the public access road in 2002.

4. The learned Counsel for the parties agreed on the 6th December, 2018 to file and exchange written submissions in 14 days. The Counsel

for the Plaintiff filed theirs dated 20th June, 2019 on the 21st June, 2019 while Counsel for the Defendant filed theirs on the 21st January, 2020.

5. The following are the issues for the Court's determinations;

(a) Whether the Plaintiff is the registered proprietor of the suit at the material times.

(b) Whether the 1st Defendant has trespassed onto the suit land, and if so, the orders to issue.

(c) Who pays the costs of the suit.

6. The Court has after considering the pleadings by the parties, oral and documentary evidence by PW1, PW2, DW1 and DW2, the written submissions by both Counsel come to the following conclusions;

(a) That from the copy of the green card availed by the Plaintiff for Koguta East/170, the land was first registered on the 14th May, 1974 in the name of Lewnidah Ajwang. That the land appears in Registry Map Sheet Number 9 and measures 1.5 hectares. That parcel was transmitted to the original Plaintiff, Joseph Abongo Muga now deceased, vide Nairobi High Court Succession Cause No. 395 of 2005 through the Certificate of Confirmation of Grant issued on the 14th December, 2006 that was also availed as exhibit. That transmission is captured as entry numbers 3 and 4 on the green card. That the green card was issued on the 18th March, 2010 and there is no evidence tendered to suggest that the said entries have been altered thereafter or were fraudulently made. That accordingly, the Court finds and holds that from the time this suit was filed up to-date, the said Joseph Abongo Muga (deceased) was and still is the registered proprietor of the suit land.

(b) That the evidence tendered by PW1, especially the Limited Grant of Letters of Administration Ad Litem issued on 2nd September, 2013 in *Kisumu High Court [P & A] Cause No. 497 of 2013* confirms that he had the capacity to seek to substitute the late Joseph Abongo Muga as the Plaintiff following his death. That the participation of PW1 in the proceedings is therefore as a legal representative of the Estate of the late Joseph Abongo Muga and not in his personal or individual capacity.

(c) That the uncontroverted evidence by PW2, the Surveyor in the area the suit land is situated and therefore an expert witness, is that land parcel Kisumu/Koguta East/170, the suit land, is separated from Kisumu/Koguta East/166 by a public access road. That position supports the Plaintiff's case and is then confirmed by the Registry Map Sheet Number 9 by the survey of Kenya of June 1971 that was last amended on the 24th March, 2016 and produced as exhibit 13. That as the evidence by PW2 and the said Registry Map Sheet Number 9 shows clearly that land parcel Kisumu/Koguta East/166, which the Defendants indicated is their family land do not go beyond the public access road, the act of the 1st Defendant moving onto and taking possession of a portion of Kisumu/Koguta East/170 that is across the road in 2002, and claiming it as part of their family land was unjustified, unlawful and without permission of the registered proprietor. That the 1st Defendant is therefore a trespasser onto that portion of the suit land and should give vacant possession or be evicted and thereafter be permanently enjoined from interfering with the Plaintiff's use and possession of the said land.

(d) That as the Plaintiff has succeeded in all prayers, then he is entitled to costs of the suit and interests at Court's rates in accordance with **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya.**

6. That from the foregoing, the Court finds that the Plaintiff has proved his case against the Defendant's to the standard required of balance of probabilities. That judgment is therefore entered against the Defendant's in the following terms:

(a) That the 1st Defendant has trespassed onto a part of Kisumu/Koguta East/170, and is therefore declared a trespasser.

(b) That the 1st Defendant do give vacant possession of that portion of Kisumu/Koguta East/170 in his possession within ninety (90) days, and in default, eviction order to issue. That thereafter, the 1st Defendant to remain permanently restrained from trespassing onto that portion of the suit land or otherwise interfering with the Plaintiff's use and possession of the same.

(c) The Defendants do pay the Plaintiff's costs and interests at Court's rates.

Orders accordingly.

Signed and dated at Eldoret this 9th day of April, 2020.

S. M. KIBUNJA

JUDGE

Delivered and signed this 8th day of May, 2020.

A. O. OMBWAYO

JUDGE