



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC 126 OF 2016

WALTER ANUMO ABIDHA.....PLAINTIFF

VERSUS

TURPHOSA ATIENO OLAGO.....DEFENDANT

JUDGEMENT

Walter Anumo Abidha, (hereinafter referred to as the plaintiff) has sued Truphosa Atieno Olago claiming that the Plaintiff is the current registered owner and proprietor of all that parcel of land known as SIAYA/MAHAYA/600 (falling under and within Mahaya Registration Section, Diagram 17) while the Defendant is the current registered owner and proprietor of all that parcel of land known as SIAYA/MAHAYA/251 (falling under and within Mahaya Registration Section, Diagram 13).

The said parcels of land i.e. SIAYA/MAHAYA/600 and SIYA/MAHAYA/251 share a common boundary, a road running in the direction of north-West of South-East of the said parcels of land.

With effect from May 2009, without any colour of right, without any basis for claim, entitlement and or title, the Defendant crossed the said boundary, encroached into and is currently working on, is in occupation and possession of a portion measuring 1.7 hectares (1.7ha) of the plaintiff's parcel of land (SIAYA/MAHAYA/600) and is claiming ownership and or entitlement/title to the said portion.

The Plaintiff's portion of land currently occupied by the defendant is fertile agricultural land which is used for cultivation of subsistence crops such as cassava, maize, millet, sweet potatoes and traditional vegetables.

The Defendant has been tilling, cultivating, and planting, and harvesting subsistence crops in and from the said portion of land and thereby disentiing the Plaintiff the right to use, occupy, possess and benefit from is parcel of land.

By virtue of the said illegal and unlawful occupation of the said portion of the Plaintiff's land by the Defendant, the Plaintiff has been denied access and use of his proprietary rights over the said portion as a result of which he has suffered and continues to suffer both general and special damages which he claims and seeks to recover from the defendant.

The particulars of special damages are Mense profits at the rate of Kshs. 1,000.00 per month from June 2009 until the date the Defendant surrenders possession/occupation of the said portion of land or until she is evicted and Damages for forcible detainer.

The Plaintiff has raised this matter with the Defendant and required her to cease the said illegal and unlawful encroachment, occupation and possession to no avail.

The plaintiff made a formal complaint to the police resulting in the Defendant being charged with the offence of criminal trespass vide Bondo SRM Court Criminal Case No. 995 of 2010 which trial did not determine the issue of ownership/proprietorship rights over the portion of land in question.

The plaintiff prays that a declaration that the Plaintiff is the rightful and legal owner of all that parcel of land known as SIAYA/MAHAYA/600 including the portion measuring 1.7ha. which the Defendant claims to be hers.

The plaintiff further prays for an order of permanent injunction restraining the Defendant by herself, her agents, servants, employees, and any person (s) claiming her authority from encroaching into, ingression, entering, cultivating, working on/in, tilling, or any way carrying on with

any activities within the boundaries of all that parcel of land known as SIAYA/MAHAYA/600 and a mandatory injunction ordering the Defendant to with immediate effect and forthwith move out, surrender, cede, relinquish, give up, and yield in favour of and hand over to the plaintiff the portion of land currently occupied by and in possession of the Defendant and in default, the Defendant be forcefully/forcibly be evicted from the same.

Mesne profits at the rate of Kshs. 1000.00 per month from June 2009 until the date the Defendant surrenders possession/occupation of the said portion of land or until she is evicted. Costs of this suit.

The Defendant on her part states that Siaya/Mahaya/600 and Siaya/Mahaya/251 share a common boundary but deny that the same is the road running northwest the South East. The Defendant denies being in occupation of the plaintiff's land.

In conclusion, the defendant states that the plaintiff's suit is an attempt to grab the defendant's land. The defendant denies trespassing on the plaintiff's land.

When the matter came up for hearing, the plaintiff testified that he is the registered proprietor of S/M/600. He produced the title deed and the green card. He produced the certificate of official search. He states that the defendant has trespassed into his property. The court ordered the County Surveyor to visit the disputed parcels of land and make a report. He produced the report. On cross examination by Mr. Nyamweya, he states that the road of access passes between the boundaries of the two parcels of land. The road is six metres. He states that the defendant has trespassed on S/M/600. The defendant did not call any evidence.

I have considered the pleadings, evidence and submissions on record and do find that the issue before court is a boundary dispute in respect of parcels number 600 and 251.

The District Surveyor Bondo found that the two parcels of land fall in a different Diagraphs. S/M/251 falls in Diagram No. 13 while Siaya/Mahaya/600 falls in Diagram no. 17. They fall in different maps and are separated by a twelve metre wide road. I do find that the plaintiff has proved his case on a balance of probabilities that the defendant has trespassed into the plaintiff's land.

I do grant orders that a declaration that the Plaintiff is the rightful and legal owner of all that parcel of land known as SIAYA/MAHAYA/600 including the portion measuring 1.7ha. which the Defendant claims to be hers.

Further I do grant a permanent injunction restraining the Defendant by herself, her agents, servants, employees, and any person (s) claiming her authority from encroaching into, ingression, entering, cultivating, working on/in, tilling, or any way carrying on with any activities within the boundaries of all that parcel of land known as SIAYA/MAHAYA/600.

An of mandatory injunction ordering the Defendant to with immediate effect and forthwith move out, surrender, cede, relinquish, give up, and yield in favour of and hand over to the plaintiff the portion of land currently occupied by and in possession of the Defendant and in default, the Defendant be forcefully/forcibly be evicted from the same. I decline to grant Mesne profits as they were not proved. Costs to the plaintiff. Orders accordingly.

DATED , DELIVERED and SIGNED THIS 22nd DAY OF MAY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE