



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MIGORI**

**ELC CASE NO. 97 OF 2017**

**(FORMERLY KISII ELCC NO 318 OF 2012)**

**MOSES OWINO ODONGO.....PLAINTIFF**

**VERSUS**

**ALBERT ONYANGO.....DEFENDANT**

**JUDGEMENT**

**A) INTRODUCTION**

1. The property at the heart of the instant dispute is land title number Kanyamwa/Kayambo/Kwamo/389 measuring approximately three decimal eight seven hectares (3.87 Ha) in area (Hereinafter referred to as the suit land). It is in Registry Map Sheet No. 3. The same is situated in Ndhiwa Sub County within Homa Bay County.
2. The plaintiff, Moses Owino Odongo is unrepresented. Further to his notice dated 29<sup>th</sup> January 2018 and filed in court on 30<sup>th</sup> January 2018 and duly served on his previous counsel, M/S Nyauke and Company Advocates, he was allowed to act in person with effect from 7<sup>th</sup> February 2018.
3. The defendant, Albert Onyango is represented by Odhiambo Kanyangi and Company Advocates. Previously, he was unrepresented.
4. On 2<sup>nd</sup> June 2016, the court (Mutungi J) sitting at Kisii ELC where the suit was initially lodged, observed that this is a case of trespass. That it was necessary to have the boundaries of the suit land and neighbouring land, LR No. Kanyamwa/Kayambo/Kwamo/390, established and fixed. Accordingly, the court directed and ordered the Land Registrar Homa Bay County and the County Surveyor, Homa Bay County to visit the two (2) land parcels to establish and fix the boundaries of the respective parcels of land in accordance with Section 18 and 19 of the Land Registration Act 2016 (2012).
5. By a report Ref. SN/LR/50 VOL V/48 dated 6<sup>th</sup> April 2018 and filed in court on 9<sup>th</sup> April 2018 and two (2) sketch plans annexed thereto, the court orders of 2<sup>nd</sup> June 2016, were complied with.
6. On 26<sup>th</sup> July 2018, this court encouraged the parties to attempt Alternative Dispute Resolution (ADR) method(s) herein as envisaged under Article 159 (2)(c) of the Constitution of Kenya, 2010. However, the attempt to resolve their dispute reportedly failed.

**B) THE GIST OF THE PLAINTIFF'S CASE**

7. The plaintiff originated this suit by way of a plaint dated 10<sup>th</sup> August 2012 and filed in court on 23<sup>rd</sup> August, 2016 seeking the following reliefs:
  - a) Orders of injunction to restrain the defendant from continuing trespassing unto the plaintiff's land parcel number Kanyamwa/Kayambo/Kwamo/389, (the suit land)
  - b) Orders of eviction to issue against the defendant to give vacant possession to the plaintiff respecting the suit land.
  - c) Costs of this suit and interest thereon at the rate of 16% p.a as from the date of filing this suit until payment in full.

8. The plaintiff claims that on diverse dates between the year 2010 and 2011, the defendant trespassed into a portion of (1) acre of the suit land and occupies and intends to continue in its occupation.. Thus, it precipitated the present suit.

9. In his testimony to the effect that the defendant trespassed into the suit land, the plaintiff (PW1) relied on his statement dated 10<sup>th</sup> August, 2012 as part of his evidence. He also relied on the following documents:

*a) Letters dated and received on 23<sup>rd</sup> August 2012 (PExhibit 1).*

*b) A letter dated 23<sup>rd</sup> August 2010 (PExhibit 2).*

*c) Upper Kayambo Location chief's letter dated 16<sup>th</sup> February 2012 (PExhibit 3).*

*d) Homa Bay Land Registrar's letter dated 6<sup>th</sup> April 2018 (PExhibit 4a), preliminary sketch (PExhibit 4b), final sketch (PExhibit 4c).*

*e) Title deed to the suit land (PExhibit 5).*

*f) A letter dated 9<sup>th</sup> October 2012 addressed to PW1 by the Land Registrar (PExhibit 6).*

*g) A letter dated 13<sup>th</sup> August 2012 by District Forests Officer, Ndhiwa (PExhibit 7a).*

*h) A receipt No. 13 dated 30<sup>th</sup> July 2012 issued to PW1 by Kenya Forest Service upon payment of Ksh 500/= on account of destruction fee and assessment of land boundary (PExhibit 7b).*

*i) A birth certificate No. 122503 issued on 29<sup>th</sup> March 2000 for PW1 (PExhibit 8).*

10. To reinforce his case, PW1 called five (5) witnesses namely Alfas Okoth Oginga (PW2), Homa Bay Land Registrar, Lamu Violet (PW3), Homa Bay County Surveyor, Felix Odhiambo (PW4), Kenya Forest Service Officer, Vitalis Odhiambo Kowidi (PW5) and Jane Auma Oginga (PW6). In that regard, PW1 produced PExhibits 1, 2, 3, 5 and 6 in evidence while PW3 produced PExhibits 4(a)(b) and (c) as PW5 produced PExhibits 7(a) and (b) accordingly.

11. In his reply to amended defence and defence to counterclaim dated 4<sup>th</sup> April 2019 and filed on 8<sup>th</sup> April 2019, PW1 stated that the defendant only opted to pay PW1 a sum of Ksh 28,000/= being compensation for trespass to the suit land after PW1 lodged a complaint before the area chief and the Land Registrar. That the defendant refused to pay the compensation.

12. Moreover, PW1 stated that he is the son of David Odongo Akech and not Raphael Omuga. That any purported sale of land agreement between the defendant and Raphael Omuga is not legally binding as the latter did not own the suit land. PW1 sought dismissal of the defendant's amended statement of defence and counterclaim.

13. In his six (6) paged submissions dated 12<sup>th</sup> March 2020 and filed in court on 13<sup>th</sup> March 2020, PW1 did brief reference to the pleadings, evidence and distinguished between an agreement and a contract. He submitted that he is the registered proprietor of the suit land since the year 2012. That he became the administrator of the estate of the late Akech Misuru Oginga on 13<sup>th</sup> May, 2011 and later confirmed accordingly on 15<sup>th</sup> February, 2012.

14. To buttress his submissions, PW1 relied on Section 102 of the Evidence Act (Chapter 80 Laws of Kenya) on the burden of proof in a suit or proceeding. He further relied on *Jesuloo Murerwa Mwarania –vs- Richard M Mwangi and 2 others (2020)eKLR*, *Ahmed Abdirahman Hassan -vs- Abdishukri Haji Abdi (2020)eKLR*, *Rosemary Wanjiku Mungai -vs- Annunciata Waithira Kibue (2020)eKLR*, in support of his submissions. He thus, submitted that judgement be entered in favour of the plaintiff and that the defendant's amended defence and counterclaim be dismissed with costs.

### **C) THE GIST OF THE DEFENDANT'S CASE**

15. By an amended statement of defence and counterclaim dated 11<sup>th</sup> March 2019 and filed on even date further to an application by way of Notice of Motion dated and filed on the same date and order of this court granted on 9<sup>th</sup> April 2018, the defendant (DW1) stated that PW1 is hell-bent to frustrate an agreement between him and PW1 for 10 feet by 60 feet of the suit land at Ksh 28,000/=, being purchase price. That there was an original agreement between DW1 and Raphael Omuga, the father of PW1. That PW1 rescinded the original sale of land agreement between the Raphael Omuga and himself (DW1).

16. DW1 further stated that PW1 has refused to accept the purchase price of Ksh 28,000/= in respect of 10 feet by 60 feet of the suit land. That PW1 has trespassed into the defendant's land parcel Kanyamwa/Kayambo/Kwamo/390.

17. Thus, DW1 has counterclaimed against PW1 for:

*a) There be an Order for Specific Performance of the agreement for the defendant to pay the plaintiff Kshs 28,000/= purchase price and the plaintiff to transfer the 10 feet by 60 feet portion of Land Parcel No. Kanyamwa/Kayambo Kwamo/389.*

**b) The Deputy Registrar to sign the transfer documents on behalf of the plaintiff, if need be.**

**c) Perpetual injunction restraining the plaintiff/his agents from trespassing, cultivating, ploughing the defendant's Land Parcel No. Kanyamwa/Kayambo Kwamo/390.**

**d) Eviction of the plaintiff from the defendant's Land Parcel No. Kanyamwa/Kayambo Kwamo/390.**

**e) Costs.**

18. In his testimony, DW1 relied on his statement dated and filed in court on 11<sup>th</sup> March 2019 and list of documents dated 29<sup>th</sup> January 2020 filed on even date (DEXhibits 1 and 2). That PW2 was present and a witness in DEXhibit 1 as shown in DEXhibit 2. He denied the allegations by PW1 and sought dismissal of the suit with costs and that judgement be entered in his favour in the counterclaim with costs.

19. Learned counsel for DW1 filed 8-paged submissions dated 21<sup>st</sup> May 2020 whereby he referred to the pleadings and urged this court to dismiss the plaintiff's suit with costs and that the counterclaim be allowed with costs. Counsel submitted that between 2010 and 2011 as alleged in the plaint, PW1 was not the registered owner of the suit land. That PW1 became its owner on 17<sup>th</sup> February, 2012 hence he lacks the locus standi to commence this suit for and on behalf of the estate of the late grandfather of PW1. Counsel relied on the decision of A.C. Mrima J in **Julian Adoyo Ongunga and another v Francis Kiberenge Bondeva (suing as the administrator of the estate of Fanuel Evan Amudavi (Deceased))(2016)eKLR** on locus standi in a suit.

20. Counsel submitted inter alia, that special damages claimed by PW1 ought to have been specifically pleaded in the plaint and proved at the trial. That PEXhibit 7(a) shows damages at Ksh 94,384/= but PEXhibit 7 which does not even bear a stamp duty as required under Section 19(1) of the Stamp Duty Act Chapter 480 Laws of Kenya, reveals a sum of Ksh 500/= only. That PEXhibit 4(b) and (c) were not reconciling hence of no probative value and that PW2 witnessed DEXhibit 1 and its translation (DEXhibit 2).

#### **D) ISSUES FOR DETERMINATION**

21. I have thoroughly considered the parties' respective pleadings, evidence and submissions including authorities cited therein. So, what are the issues for determination in this suit?

22. It is well established that issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see the Court of Appeal decision in **Galaxy Paints Ltd –Vs- Falcon Grounds Ltd (2000)2EA 385** restated in **Great Lakes Transport Company (V) Ltd v Kenya Revenue Authority (2009)KLR 720**.

23. Additionally, in the case of **Odd Jobs –vs- Mubia (1970) EA 476**, Duffus P held that:

***“A court may base its decision on unpleaded issue if it appears from the course followed at the trial that the issue has been referred to the court for decision...” (Emphasis laid)***

24. The Court further held thus:

***“In this respect a true court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties.” (Emphasis added)***

25. The foregone observation was echoed in **Vyas Industries Ltd v Diocese of Meru (1982)KLR 114**, among other cases. I note the same accordingly.

26. In view of the foregone, the issues for determination boil down to whether:

**a. The plaintiff has the locus standi to mount this suit.**

**b. Is the plaintiff the lawful proprietor of the suit land?**

**c. Who between on the plaintiff and the defendant trespassed into the suit land?**

**d. Have the plaintiff and the defendant established their respective claims to the requisite standards to entitle them to the reliefs inclusive of the orders sought in their respective pleadings?**

27. On the first issue, the entire pleadings are loudly silent and it is left to this court for a decision. Nonetheless, the issue arises from the submissions of the parties as per **Odd Jobs Case (supra)** and the decision in **Transworld Safaris (K) Ltd –vs- Ratemo (2008) KLR 339 at 346**.

28. The **Black's Law Dictionary 10<sup>th</sup> Edition** at page 1084 defines the term “locus standi” thus-

***“ The right to bring an action or to be heard in a given forum”***

29. The defendant's counsel submitted that the plaintiff was not the registered proprietor of the suit land between 2010 and 2011 as alleged in the plaint. That he only became its proprietor on 17<sup>th</sup> February 2012 and that he does not have grant of letters of administration in respect of the estate of his late grandfather. That the plaintiff ought to have filed the suit in his representative capacity of the estate.

30. **Order 24 Rule 5 of the Civil Procedure Rules, 2010** makes provision for determination of question as to the legal representative. The pleadings on their face herein tell it all.

31. It is trite law that the estate of the deceased person is vested in the legal representative; see the Court of Appeal decision in **Trouistik International Ltd –vs- Jane Mbeyu and another (1993)eKLR**.

32. Section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya provides:

**“ Legal representative means person who in law represent the estate of a deceased person, and where a party sues or it sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.**

33. In **Omari Kaburu –vs- ICDC (2007)eKLR**, Wanjiru Karanja J (now JA) held;

**The law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased...”**

34. Similarly, in **Republic v Attorney General and another ex-parte John Mugo (2013)eKLR**, H Ongundi J observed the following regarding the role of legal representative:-

**“And a legal representative is a person who has been issued letters of grant. This is provided under Section 82 (a) of the Law of Succession Act...”**

35. The foregone authorities including **Julian Adoyo Ongunga case (supra)** are all quite instructive. However, in view of the pleadings and nature of this suit as envisaged on Articles 22, 258,23 and 40 (1) of the Constitution of Kenya,2010, PW1 is mandated by law to mount the instant suit hence the authorities are distinguishable in the circumstances.

36. As regards the issue of proprietorship of the suit land, the testimonies of PW1, PW2, PW3 and PW4 reveal that PW1 is the proprietor of the suit land. In his statement, PW1 stated that the suit belongs to him. He stated:-

**“The suit land is mine and it is LR NO. KANYAMWA/KAYAMBO/KWAMO/389 approximately 3.87 hectares”**

37. Notably, part A- Property Section of PExhibit 5 (title deed) shows that the suit land register was opened on 27<sup>th</sup> July 2008. PExhibit 5 was issued in favour of PW1 upon registration on 17<sup>th</sup> December 2012.

38. DW1 stated in exam in chief, inter alia;

**“...while PW1 owns the suit land.”**

39. It was the assertion of DW1 that he bought the portion of the suit land as per DEXhibits 1 and 2 which are allegedly thumbprinted by PW1. However, it is pretty clear from the plaint, statement of PW1 and his submissions that he affixed his signature thereto. On that score, the allegations of DW1 are far from the truth. On that score, PW1 is the proprietor of the suit land as stipulated under Sections 2, 24, 25 and 26 of the Land Registration Act, 2016 (2012).

40. In respect of trespass, PW1 alleged that DW1 trespassed into his land. The same allegations are contained in the counterclaim against PW1. I am aware of **Black's Law Dictionary 10<sup>th</sup> Edition at page 1733** whereby **“Trespass means ;-**

**“An unlawful act against the person or a party of another”**

41. **Clerk and Lindsell on Torts 18<sup>th</sup> Edition paragraph 18-01** defines the term “trespass” as follows:

**“An unjustifiable entry by one person upon the land in possession of another.”**

42. The testimonies of PW1, PW2, PW3 and PW4 show that DW1 unlawfully entered the suit land of PW1. Quite clearly, PExhibit 4(a) at paragraphs 5 and 7(ii) of the ruling of PW3 reveals that DW1 trespassed into the suit land. PExhibits 4 (a), (b) and (c) illustrate the extent of trespass into the suit land. As already noted at paragraph 39 hereinabove, the defendant's counter allegations thereof prevail not.

43. It is noted that PExhibits 4 (a), (b) and (c) were prepared pursuant to Sections 18 and 19 of the Land Registration Act, 2016 (2012). I find PExhibits4 (a), (b) and (c) sound, relevant hereto and endorse the same accordingly as held in **Andrew Marigwa v Kebati Ondieki (2017)eKLR** and this court's decision in **Registered Trustees, Legio Maria Africa Church Mission –v- Simeon Nyamweya Obwocha (2018) eKLR**.

44. Concerning reliefs available to the parties, since PW1 has shown that DW1 trespassed onto the suit land, PW1 is entitled to permanent injunction and eviction as provided under Section 13(7) (a) of the Environment and Land Court Act 2015 (2011) and Section 152A of the Land Act 2016 (2012) respectively; see also *Giella –vs- Cassman Brown and Co Ltd (1973)EA 358* and *Nguruman Ltd –vs- Jan Bonde Nielsen and 2 others (2014)eKLR*.

45. The plaintiff claimed a sum of Ksh 94,884/= as special damages as shown in PEXhibits 7(a) and (b) against the defendant. In that regard, I approve the decision of Odero J in *Nakuru Industries Ltd –vs- S.S Mehta and sons (2016)eKLR* that special damages must be specifically pleaded and proved.

46. Be that as it may, I bear in mind the decisions including **Odd Jobs, Vyas and Tranworld cases (supra)**, on issues for the court's determination. Herein, special damages arose from the facts stated at the trial hence it is necessary to determine the same. By PEXhibits 7(a) and (b), PW1 has proved special damages for trespass at Ksh 94,884/= against the defendant (DW1).

47. In the premises, I find that the plaintiff has locus standi to originate this suit and that he is the lawful proprietor of the suit land onto which the defendant trespassed. The action has caused the plaintiff Ksh 94,884/= special damages thereof. The plaintiff has proved his case against the defendant on a balance of probabilities while the defendant has failed to prove his counterclaim against the plaintiff on a balance of probabilities.

48. Afortiori, this suit is determined as follows:

*a) The defendant's suit by way of a counterclaim dated 11<sup>th</sup> March 2019 as per amended statement of defence and counterclaim filed on 11<sup>th</sup> March 2019, is hereby dismissed with costs to the plaintiff.*

*b) Judgement be and is hereby entered for the plaintiff against the defendant for a permanent injunction, eviction orders and costs of the suit as sought in the plaint dated 10<sup>th</sup> August 2012 and filed on 23<sup>rd</sup> August 2012 and special damages for trespass proved at Ksh 94, 884.*

*c) The defendants shall move out of a portion of land measuring 0.17 hectares of the suit land, LR NO. KANYAMWA/KAYAMBO/KWAMO/389 as revealed in PEXhibits 4 (a) (b) and (c) within the next sixty (60) days from this date in default the plaintiff shall forcefully evict him therefrom.*

*d) Orders accordingly.*

**Delivered, Signed and Dated at Migori through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 11<sup>th</sup> day of JUNE , 2020.**

**G.M.A. ONGONDO**

**JUDGE**

**In presence of :-**

Plaintiff present in person

Defendant – Absent – Non appearance for him.

Court Assistant – Tom Maurice