



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 416 OF 2015

EZEKIEL ODUK PLAINTIFF

VERSUS

CHARLES ODHIAMBO DEFENDANT

JUDGMENT

1. The plaintiff vide a plaint dated 14th September 2014 filed in court on the same date states that he is the registered proprietor of land parcel number **Kamagambo/Kanyimach/838**. The defendant is an occupier of the adjacent land parcel number **Kamagambo/Kanyimach/837**. The plaintiff avers that on or about May 2012 he had the boundaries of his parcel of land verified and established by a land surveyor when it was established the defendant had encroached onto the plaintiff's parcel number 838 and had put a structure thereon and that he was occupying and utilizing a portion of the plaintiff's said land without the permission or consent of the plaintiff.

2. The defendant was duly notified by the plaintiff that he was in encroachment of the plaintiff's land and he (the defendant) requested the plaintiff to allow him to stay on upto the end of the season being the month of August 2012 to enable him to harvest his maize crop and vacate from the plaintiff's portion of land. The defendant after the end of the season and after harvesting his crop neglected and refused to vacate the plaintiff's parcel of land he had encroached upon necessitating the instant suit where the plaintiff seeks judgment against the defendant interalia for orders that:-

- (i) That the defendant has unlawfully encroached onto the plaintiff's land parcel number 838 Kanyimach;**
- (ii) An order of eviction against the defendant his servants and agents from the plaintiff's parcel of land;**
- (iii) An injunction restraining the defendant, his agents and servants from encroaching onto the plaintiff's parcel of land.**
- (iv) General damages for trespassing;**
- (v) Costs of the suit.**

3. The defendant was served with summons to enter appearance together with the plaint on 28th September 2015 as per the affidavit of service sworn by one Benjamin H. O Were and filed in court on 6th January 2016. The suit was fixed for hearing on 21st march 2016 and although the defendant was served with a hearing notice of the suit on 11th March 2016 as per the affidavit of service sworn on 18th

March 2016, the defendant did not attend court on the hearing date and the court permitted the plaintiff to proceed with formal proof hearing ex parte.

4. The plaintiff, Ezekiel Oduk testified as PW1 and was the sole witness who testified in support of the plaintiff's case. It was his evidence that he is the registered owner of land parcel number **Kamagambo/Kanyimach/838** and produced a copy of the title deed in his name issued on 25th April 2012 to support his ownership (PEX.1). He testified that he purchased the land from one Monicah Onyango Anyonga who had charged the land to Agricultural Finance Corporation but had been unable to redeem the loan. At the time of purchase the plaintiff stated the land was vacant. After purchase of the property the plaintiff commissioned a private surveyor to establish the boundaries of the suit land for him. The surveyor found that the defendant who was supposed to be in occupation of parcel number 837 which is adjacent to the plaintiff's plot had encroached into a portion of the plaintiff's land. It was then that the defendant requested the plaintiff to allow him to stay on upto the end of the season so that he could harvest his crop and vacate.

5. After the close of the season the defendant refused to vacate insisting that the government surveyor be called to fix and establish the boundaries as the owner of parcel number 837 had objected to the surveyor brought by the plaintiff. The plaintiff testified that they called a government surveyor in July 2014 as evidenced by the summons from the land registrar dated 23rd May 2014 (PEX2) and he came and established and verified the boundaries. The plaintiff stated that the government surveyor confirmed the boundaries of his parcel of land as established by the earlier surveyor. A copy of the Registry Index Map (RIM) used to confirm the boundaries was tendered in evidence (PEX3). The plaintiff stated inspite of the surveyor confirming the defendant was encroaching onto his plot the defendant has refused to vacate inspite of demand made to him as per demand notice dated 12th August and 26th September 2014 respectively included in the bundle of documents (See PEX. 4, 5 and 6). In the premises the plaintiff seeks the orders prayed for in the plaint.

6. I have reviewed the plaint filed by the plaintiff and the evidence adduced at the hearing by the plaintiff. The evidence establishes that the plaintiff is the registered owner of **land parcel No. Kamagambo/Kanyamach/838**. As the registered proprietor of the land the plaintiff is the absolute owner of the land and is vested with all the rights and privileges which go with ownership in terms of Sections 24 and 25 of the Land Registration Act, 2012. He is entitled to exclusive access, possession, occupation and right to use the land as he pleases. I accept the evidence of the plaintiff that the defendant is in unlawful encroachment of his land. The plaintiff gave evidence that the government surveyor verified the parcel boundaries of parcels 838 and 837 and affirmed that the defendant as determined by the private surveyor had encroached onto the plaintiff's land. By reason of the defendant's unlawful occupation of the plaintiff's portion of land, the plaintiff has been denied the use of the portion and he is entitled to damages for trespass. The evidence by the plaintiff has not been controverted and I am satisfied that he has proved his case against the defendant on a balance of probability.

7. I accordingly enter judgment in favour of the plaintiff against the defendant and make the following order:-

(i) That the defendant is in unlawful encroachment of a portion of the plaintiff's parcel of land number Kamagambo/Kanyimach/838 and is hereby ordered to vacate therefrom within 30 days of being served with the decree herein;

(ii) That in the event the defendant fails to vacate and deliver vacant possession of the portion of the plaintiff's land he is unlawfully occupying as per (i) above an eviction order shall issue on application;

(iii) A permanent injunction is hereby issued against the defendant whether by himself, his agents and/or servants restraining them from entering, trespassing or in any manner interfering with the plaintiff's land parcel Kamagambo/Kanyimach/838 or any portion thereof;

(iv) Damages of kshs. 25,000/= are awarded to the plaintiff for trespass against the defendant;

(v) Costs of the suit to the plaintiff.

Judgment dated, signed and delivered at Kisii this 6th day of May, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

..... Court assistant

J. M. MUTUNGI

JUDGE