



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.67 OF 2012

LAMECH ONSONGO MARAGIA PLAINTIFF

VERSUS

1. ALEXINA KERUBO ACHACHI

2. JOSEPH OGWARO ACHACHI

3. PATRICK MOGIRE ACHACHI..... DEFENDANTS

JUDGMENT

1. The plaintiff brought this suit against the defendants on 23rd February, 2012 seeking the following reliefs;
 - a. **An order for the eviction of the defendants from all that parcel of land known as LR No. West Kitutu/Mwakibagendi/ 2196(hereinafter referred to only to as “the suit property”).**
 - b. **A permanent injunction to restrain the defendants from tilling and/or cultivating or in any way interfering with the suit property.**
 - c. **Costs of the suit.**
 - d. **Any other relief this court may deem fit to grant.**

In his plaint dated 21st February, 2012, the plaintiff averred that, he is the registered proprietor of the suit property which measures 0.36 hectares or thereabouts. He purchased the suit property from one, Juma Ochwangi and Justinus Achachi Nyakoe. The suit property is a portion of the original parcel of land known as LR No. West Kitutu/Mwakibagendi/ 972 (hereinafter referred to only as Plot No. 972). Plot No. 972 was registered in the names of the said Juma Ochwangi and Justinus Achachi Nyakoe. The plaintiff averred that he had exclusive and absolute possession of the suit property from the year 1998 when he purchased the same until the year 2010 when the defendants without the plaintiff’s consent or justifiable cause jointly and severally entered the suit property and started tilling and/or cultivating the same thereby interfering with his possession of the property. The plaintiff averred further that, the activities of the defendants on the suit property aforesaid have subjected the suit property to waste and interfered with the plaintiff’s rights over the same. The plaintiff averred that demand was made upon the defendants who were also served with a notice of intention to sue but they refused and/or neglected to desist from the aforesaid acts complained of by the plaintiff thereby rendering the institution of these proceedings necessary.

2. The defendants were served with the Summons to enter appearance but failed to do so within the prescribed time. The matter was set down for formal proof on 25th November, 2014 when the plaintiff gave evidence and called no witness. In his evidence, the plaintiff told the court that; the

1st defendant who is the mother of the 2nd and 3rd defendants is the wife of Justinus Achachi Nyakoe (hereinafter referred to as “**Achachi**”) from whom he purchased the suit property. The 2nd and 3rd defendants are the sons of Achachi. He told the court that after Achachi sold and transferred the suit property to him in the year 1998, he gave him possession of the suit property which he occupied until the year 2010 when the defendants forcefully entered therein and evicted him. The defendants have since prevented him from accessing the suit property which is now under the occupation and use of the defendants. The plaintiff produced as exhibits, a copy of the title deed for the suit property dated 21st November, 2001 in his name, a copy of a certificate of official search on the title of the suit property dated 11th January, 2012, a copy of the Mutation Form dated 8th September, 1999 that was used to sub-divided Plot No.972 and a copy of agreement for sale of land that he entered into with Joseph Juma Ochwangi and Justinus Achachi Nyakoe (Achachi) on 17th April, 1998 in respect of the suit property. On examination by the court, the plaintiff stated that the defendants own and are living on a different parcel of land and that they are only using the suit property for cultivation. He stated that the defendants have not put up any structure on the suit property.

3. After the close of the plaintiff’s case, the plaintiff’s advocate informed the court that he did not wish to make any closing submissions. I have considered the plaintiff’s case as pleaded and the evidence tendered by the plaintiff in proof thereof. The plaintiff’s claim against the defendants is based on the tort of trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, **Clerk & Lindsell on Torts, 18th Edition, page, 923, paragraph, 18-01**. What I need to determine in this suit is whether the plaintiff has proved his ownership of the suit property and the fact that the defendants have entered into and have been using the suit property without his permission or any justifiable cause. The plaintiff has demonstrated that the suit property is registered in his name. He produced in evidence a copy of the title deed for the suit property in his name and a certificate of official search on the title of the suit property which shows that the property was registered in his name on 21st November, 2001.
4. This suit was not defended by any of the defendants. The evidence that was tendered by the plaintiff was therefore not controverted by the defendants. The plaintiff’s title to the suit property is therefore not contested by the defendants. The plaintiff’s testimony that the defendants entered into and have been cultivating the suit property without his consent or authority since the year 2010 is also not challenged. The plaintiff having proved his ownership of the suit property and the defendants’ unauthorized entry and use thereof, the onus shifted to the defendants to justify their occupation of the suit property. In the absence of any evidence from the defendants, the only conclusion this court can make is that the defendants have no justifiable reason for their entry and continued use of the suit property. They are therefore trespassers on the suit property. For the foregoing reasons, I am satisfied that the plaintiff has proved his claim against the defendants on a balance of probability and as such he is entitled to the prayers sought in the plaint.
5. Consequently, I hereby enter judgment for the plaintiff against the defendants jointly and severally as prayed for in paragraphs (a), (b) and (c) of the plaint dated 21st February, 2012. The defendants shall vacate and handover possession of the suit property to the plaintiff within 45 days from the date hereof failure to which the plaintiff shall be at liberty to apply for warrants for their forceful eviction from the property. A copy of the decree extracted from this judgment shall be served upon the defendants forthwith by the plaintiff and an affidavit of service shall be filed in court. The filing of the said affidavit of service shall be a condition precedent to the taking of any further steps herein at the instance of the plaintiff.

Delivered, dated and signed at KISII this 6th day of February, 2015.

S. OKONG’O

JUDGE

In the presence of:-

Mr. Ojala h/b for Soire for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE