



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 199 OF 2011**

**MAGERE MOSAISI CHACHA .....PLAINTIFF**

**VERSUS**

**1. NYASOKO MWITA MASUNA**

**2. BOKE NYASUNA**

**3. MOGOSI GATI MWITA**

**4. SUSANA CHACHA..... DEFENDANTS**

**JUDGMENT**

1. The plaintiff brought this suit against the defendantson 22<sup>nd</sup> September, 2011 seeking the following reliefs;

- a. An order for the eviction of the defendants from the parcel of land known as LR. No. Bukira/Buhiringera/201 (hereinafter referred only to as “the suit property”).**
- b. A permanent injunction to restrain the defendants from entering, remaining on or interfering in any manner whatsoever with the suit property.**
- c. Cost of the suit .**

In his plaint dated 12<sup>th</sup> September, 2011, the plaintiff averred that he is the registered proprietor of the suit property and that the defendants have jointly and severally entered the suit property unlawfully and put up homesteads thereon thereby interfering with his (the plaintiff's) quiet enjoyment of the property. The plaintiff averred that all attempts made to remove the defendants from the suit property bore no fruit leaving him with no alternative but to institute this suit. The defendants entered appearance and filed a joint statement of defence on 24<sup>th</sup> November, 2011. In their defence, the defendants contended that the suit property was ancestral land that the 1<sup>st</sup> defendant had left under the care of the plaintiff for some time. The defendants contended that upon his return, the 1<sup>st</sup> defendant found that the plaintiff had caused himself to be registered as the proprietor the suit property. The defendants denied that they are trespassers on the suit property. They contended that they have been in occupation of the suit property for over 50 years and as such have acquired prescriptive rights over the same. The defendants averred further that the plaintiff had filed another suit before this court over the same subject matter namely, Kisii HCCC No. 205 of 1989 which suit is still pending hearing and determination. The defendants termed the plaintiff's claim herein an abuse of the process of the court.

2. The matter was set down for hearing 6<sup>th</sup> May, 2014 when the plaintiff gave evidence and closed his case. The defendants did not appear at the trial. Mr. Otara, advocate who held brief for Mr. Abisai, advocate for the defendants left the court room after his application for adjournment of the matter was dismissed. In his evidence, the plaintiff testified that, he is the registered proprietor of the suit property and that the defendants have put up home steads on the said property and are also cultivating portions thereof. The plaintiff stated that defendants' father came from Tanzania and settled on a portion of the suit property without his permission and that the defendants have no right to occupy the suit property. He told the court that he had sued the defendants' father in Kisii HCCC No. 205 of 1989 but he (the defendant's father) died before that suit was heard and determined. Before coming to court, he had raised the issue of the defendants' invasion of his land with the local chief and District Officer. He had also lodged a complaint against the defendants' father with South Nyanza District Land Registrar and the District Magistrates Court at Migori. The defendant's father who he had sued was known as Mwita Mwaisaka. On being examined by the court, the plaintiff stated that he could not remember when the defendants entered the suit property.

3. The plaintiff told the court that he is occupying a portion of the suit property while the defendants and their families are occupying the other portion. The plaintiff produced as exhibits; copies of the pleadings filed in Kisii HCCC No. 205 of 1989, a copy of a letter dated 20<sup>th</sup> December, 1983 addressed to the plaintiff by the District Magistrate, Migori, a copy of a letter dated 7<sup>th</sup> February, 1984 addressed to one, Mwita Masuna through, the Chief Bukira West Location by the District Officer, Kehancha Division, a copy of a letter dated 27<sup>th</sup> February, 1984 addressed to the Officer in charge, Kehancha Police Station by the Land Registrar, South Nyanza District, a certificate of official search on the title of the suit property dated 2<sup>nd</sup> August, 2011 and a copy of Land Certificate for the suit property dated 8<sup>th</sup> December, 1983.

4. 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. He told the court that he wished to rely entirely on the evidence on record and urged the court to enter judgment for the plaintiff against the defendants as prayed in the plaint. 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. What I need to determine therefore is whether the plaintiff has proved that he is the owner of the suit property and that the defendants have entered and occupied the same without any justifiable cause. The plaintiff has demonstrated that he is the registered owner of the suit property by producing in evidence a copy of the land certificate for the suit property in his name and a copy of certificate of Official Search on the title of the suit property which shows that the property registered in his name.

5. Under section 24 of the Land Registration Act, 2012, the registration of the plaintiff as the proprietor of the suit property vests upon him absolute ownership thereof together with all rights and privileges associated with such ownership. Under section 25 of the said Act, the plaintiff's rights over the suit property are indefeasible except as provided under the said Act. Section 25 (1) of the Land Registration Act, 2012 provides as follows:-

**1) The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject:**

**a) To the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register; and**

**b) To such liabilities rights and interests as affect the same and are declared by section 28 not to require noting on the register unless the contrary is expressed in the register.**

This suit was defended by the defendants. The defendants however failed to appear in court to tender evidence in their defence. The defendants had contended in their statement of defence that they are in

