



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 210 OF 2009

OKAL ONGARO..... PLAINTIFF

VERSUS

JAMES OWIYO ODIPO DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant on 21st October, 2009 seeking the following reliefs;
 - a. **Declaration that the plaintiff is the registered and/or lawful owner of all that parcel of land known as LR. No. Kamagambo/ Kanyajuok/1331 (hereinafter referred to only to as “the suit property”) and a permanent injunction restraining the defendant by himself or through his agents, servants and /or anyone claiming under the defendant from re-entering, trespassing onto, cultivating, interfering with and/or in any other manner whatsoever dealing with the suit property;**
 - b. **Costs of the suit;**
 - c. **Such further and/or other relief as the court may deem fit and expedient to grant.**

In paragraphs 3, 4, 5 and 6 of the plaint dated 21st October, 2009 the plaintiff averred that:-

- i. **At all material times the plaintiff was and still is the registered proprietor of all that parcel of land known as LR No. Kamagambo/ Kanyajouk/1331 (“the suit property”) measuring 2.14 hectares which parcel of land was registered in his name on 19th May, 2009.**
- ii. **On or about 29th April, 2009, the defendant without any lawful cause or basis entered the suit property and commenced cultivation on a substantial portion thereof an act which has and/or is likely to dispossess the plaintiff of the said portion of the suit property thereby exposing him to loss and damage.**

The defendant entered appearance and filed a statement of defence on 17th November, 2009. In his defence to the plaintiff’s claim, the defendant contended that the plaintiff acquired the suit property fraudulently. The defendant contended that the suit property originated from a parcel of land known as LR. No. Kamagambo/Kanyajuok/148 that was owned by his father. The defendant denied that he has trespassed on the suit property. He contended that his family has occupied a portion of the suit property for over a century.

2. When the suit came up for hearing on 26th January, 2015, only the plaintiff and his advocate

attended court. The defendant and his advocate did not turn up. After satisfying myself from the affidavit of service of Isaiah Miruka sworn on 3rd December, 2014 that the defendant's advocates, J.N.Awetch & Company Advocates were duly served with a hearing notice, I allowed the hearing of the case to proceed in the absence of the defendant and his advocates notwithstanding. The plaintiff gave evidence and did not call any witness. In his evidence, the plaintiff told the court that he is the owner of the suit property which measures 2.14ha. The suit property was registered in his name on 28th February, 1985. The defendant on the other hand is the registered owner of LR. No. Kamagambo/Kanyajuok/ 1332 (hereinafter referred to as "**Plot No.1332**"). The suit property and Plot No. 1332 have an established boundary between them. The defendant destroyed the said boundary that was marked by sisal plants, entered the suit property and put up houses on a portion thereof which he has leased out to third parties. The said houses were put up by the defendant in the year 2013 while this suit was pending. The portion of the suit property on which the defendant has encroached measures 150 feet by 250 feet.

3. The plaintiff produced in evidence a copy of the title deed for the suit property dated 19th May, 2009 and a copy of a certificate of official search on the title of the suit property dated 18th May, 2009. In examination by the court, the plaintiff stated that the dispute between him and the defendant started in the year 2009. He urged the court to grant the prayers sought in the plaint. After the close of the plaintiff's case, the plaintiff's advocates made closing submissions in writing. I have considered the pleadings on record and the evidence that was tendered by the plaintiff in proof of his case against the defendant. I have also considered the plaintiff's advocates closing submissions. The plaintiff's claim against the defendant is based on trespass. Trespass has been defined as any intrusion by one person upon the land in the possession of another without any justifiable cause. See, **Clerk & Lindell on Torts, 18th Edition, page, 923**. The issues that I need to determine are; whether the plaintiff is the owner and/or occupier of the suit property and whether the defendant has entered on and occupied the suit property without any justifiable cause. The plaintiff produced in evidence a copy of the title deed for the suit property and a certificate of official search on the register of the property. The two documents show that the suit property was registered in the name of the plaintiff on 28th February, 1985.
4. Under section 24 of the Land Registration Act, 2012 ("the Act"), the registration of the plaintiff as the proprietor of the suit property vested upon him absolute ownership of the said property together with all rights and privileges associated with such ownership. Under sections 25 and 26 of the Act, the plaintiff's rights over the suit property are indefeasible save as provided otherwise in the said Act. Section 25 of the Act, 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:**
2. **To the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register; and**
3. **To such liabilities rights and interests as affect the same and are declared by section 28 not to require noting in the register unless the contrary is expressed in the register.**

Section 26(1) of the Land Registration Act, 2012 provides that;

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all courts as *prima facie* evidence that the person named as proprietor of land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be liable to challenge, except;

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or

through corrupt scheme.

5. As I have stated earlier in this judgment, the defendant filed a statement of defence but failed to turn up for the hearing of the case. The evidence that was tendered by the plaintiff in support of his claim against the defendant was not controverted. The defendant had in his statement of defence contested the plaintiff's title to the suit property which he claimed to have been acquired fraudulently. He had also challenged the plaintiff's contention that he entered onto and occupied the suit property without the plaintiff's consent or authority. The defendant placed no evidence before the court in proof of his allegation of fraud against the plaintiff. No evidence of whatsoever nature was also placed before the court in proof of the defendant's allegation that he has occupied the suit property for several years. I am satisfied on the material before me that the plaintiff has established his ownership of the suit property. As the owner of the said property, the plaintiff is entitled to enjoy all rights and privileges associated with such ownership which includes exclusive possession of the property. The plaintiff having established his ownership of the suit property and the fact that the defendant has entered and occupied the same without his permission, the burden shifted to the defendant to justify his occupation of the property. In the absence of any evidence from the defendant, the only conclusion this court can arrive at is that the defendant has no justifiable cause for his entry and occupation of the suit property and as such he is a trespasser thereon. For the foregoing reasons, I am satisfied that the plaintiff has proved his claim against the defendant on a balance of probabilities and as such he is entitled to the prayers sought in the plaint.
6. I therefore enter judgment for the plaintiff against the defendant in terms of prayers (i) and (ii) of the plaint dated 21st October, 2009.

Delivered, Dated and Signed at Kisii this 5th day of June, 2015.

S.OKONG'O

JUDGE

In the presence of:

Mr. Gitonga for the plaintiff

N/A for the defendant

Millicent Maore Court Assistant

S.OKONG'O

JUDGE