



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO.135 OF 2009

SAPONYO OLE NDIALEI..... PLAINTIFF

VERSUS

MICHAEL ODONGO MIRERI.....1ST DEFENDANT

SIPROSA ACHOLA.....2ND DEFENDANT

NEREYA OUMA OCHOCHO.....3RD DEFENDANT

DISHON MAGELLI OMANGA.....4TH DEFENDANT

LEONARD AGUYO MIRERI.....5TH DEFENDANT

SILVIA ACHIENG.....6TH DEFENDANT

JUDGMENT

This suit concerns a dispute over the ownership of all that parcel of land known as **L.R No. Transmara/Oloontare/20** (hereinafter referred to as “**the suit property**”). The Plaintiff brought this suit on 15/7/2009 seeking; a permanent injunction to restrain the defendants from trespassing onto, ploughing, cultivating, using or interfering with the plaintiff’s quiet possession and enjoyment of the suit property, a mandatory injunction compelling the defendants to pull down and/or remove the structures that they have erected and crops that they have planted on the suit property, an order for the eviction of the defendants from the suit property, general damages and, mesne profits.

In his plaint dated 14/7/2009, the plaintiff averred that he is and was at all material times the registered proprietor of the suit property which measures 41 hectares. The plaintiff averred that the registration of the suit property in his name followed an adjudication process that was carried out under the provisions of the Adjudications Act Cap 284 Laws of Kenya. He averred that during that exercise, the defendants had raised objections against the registration of the suit property in his name which were dismissed. Appeals by the defendants to the Minister for Lands were similarly dismissed. The plaintiff averred that despite the dismissal of the defendants’ appeals as aforesaid, the defendants together with their families and relatives have forcibly entered onto the suit property without any lawful justification and proceeded to cultivate and put up houses thereon. The plaintiff averred that as a result the defendants’ wrongful acts aforesaid; he has been denied the use, benefit and enjoyment of the suit property and has thereby suffered loss and damage which is continuing. The plaintiff averred that prior to the filing of this suit, a demand was made upon the defendants to stop the said unlawful acts and compensate him for the loss that he has suffered but the same was not heeded.

The 1st, 2nd and 5th Defendants entered appearance and filed a joint statement of defence on 28/7/2009. The 4th defendant entered appearance through the firm of Mose, Murugu and Rigoro Advocates on 30/7/2009 but failed to file a statement of defence. The 3rd defendant on the other hand did not enter appearance. The 1st, 2nd and 5th defendants whom I will hereinafter refer to only as **“the defendants”** denied that the plaintiff is the lawful proprietor of the suit property and that they have trespassed thereon. The defendants contended that if at all the plaintiff is registered as the proprietor of the suit property then such registration was procured irregularly and effected prematurely. The defendants contended further that the plaintiffs’ claim is time barred and res-judicata.

When the suit came up for hearing, the Plaintiff gave evidence and did not call any witness. For the defendants, the 1st Defendant gave evidence on his own behalf and on behalf of the 2nd and 5th defendants. They also did not call any witness. In his testimony, the plaintiff reiterated the contents of the plaint. The plaintiff told the court that he is the registered proprietor of the suit property on which his homestead stands. He stated that the defendants with whom he has no relationship entered and occupied a portion of the suit property. He told the court that he has had several cases with the defendants since they entered the suit property. The initial cases arose during the adjudication process when the defendants objected to the suit property being recorded in his name. The defendants’ objection was dismissed and the defendants directed to vacate the suit property. The defendants were not satisfied with the decisions that were made in the objection proceedings and appealed against the same to the Minister for Lands. The defendants’ appeals were also dismissed. The Plaintiff told the court that since the filing of this suit, all the defendants have vacated the suit property save for the 1st and 2nd defendants. He urged the court to give an order for the eviction of the 1st and 2nd Defendants from the suit property. The plaintiff produced in evidence as exhibits; a copy of the title deed for the suit property dated 10/9/1997, a copy of the proceedings in objection Nos. 1/87, 20/88, 23/88, 24/88, 35/88, 45/88, 47/88 and 63/88, a copy of the proceedings in Appeal cases Nos. 159/98, 161/98, 162/98, 163/98, 249/98, 250/98 and 301/98, a copy of a decree that was issued in Migori SPMCC No. 28 of 1999, Saponyo Ole Ndiale Vs. Augustinus Mireri, a copy of the order that was issued on 20/9/2011 in Kilgoris SRMCC No. 9 of 2001, Saponyo Ole Ndiale Vs. Michael Odongo Mieri and proceedings in Kilgoris SRMCC No. 8/2008, Saponyo Ole Ndiale Vs. Michael Odongo Mireri and Siprosa Achola.

In his evidence, the 1st defendant stated as follows. He used to live at a place known as Oloontare on the suit property. He entered onto the suit property in the year 1975. As at the time of his testimony, he was staying at a place called Angaga Centre. The other people with whom they had lived on the suit property were the 2nd, 3rd, 5th and 6th defendants. He was invited to reside on the suit property by one, Matanda Ole Magero. The same applies to the 2nd and 5th defendants. When they entered onto the suit property, the plaintiff was not in occupation thereof. The plaintiff moved to the suit property in the year 2007. He admitted that prior to this suit, they had several cases with the plaintiff at Migori and Kilgoris concerning the suit property. He contended that the plaintiff acquired the suit property illegally through political influence. He stated that the plaintiff acquired a title deed for the suit property on 10/9/1997 before their appeals to the Minister for Lands against the decisions of the objection court were determined. He stated that in Kilgori SRMCC No. 8 of 2008, the court made a finding that the plaintiff had acquired title deed for the suit property illegally. He contended that the suit property should have been registered in the name of his deceased mother, Selina Obiero Mireris the proprietor thereof instead of the plaintiff. He narrated to the court at length the developments that they had carried out on the suit property. He stated that prior to their eviction from the suit property, they had occupied the same for several years. He urged the court to dismiss the plaintiff’s suit. He produced as exhibits; a copy of the proceedings in Kilgoris SRMCC No. 8 of 2008, Saponyo Ole Ndiale Vs. Michael Odongo Mireri and Siprosa Achola, a copy of certificate of official search on the register of the suit property dated 13/4/99, a copy of a letter dated 12/2/99 from the District Land Adjudication and Settlement Officer to Osoro and Ayacko Advocates, a copy of a letter by Hon. Ochilo Ayacko dated 8/1/99 to the Permanent Secretary, Office of the President, a copy of a letter dated 27/8/1998 from the Director of Land Adjudication and Settlement to the District Commissioner, Transmara District, a copy of a letter dated 8/3/1999 by the District Land Registrar, Transmara District to Osoro and Ayacko Advocates, a copy of a court order issued on 13/9/1999 in Migori SPM CC No. 28 of 1999, a copy of a letter dated 8/9/2008 by Ko’Winoh and Company Advocates to the Chief Land Registrar, a copy of a sketch map for Oloontare Adjudication Section and copies of several photographs

said to have been taken on the suit property.

After the close of the defendant's case, the parties agreed to make closing submissions in writing. The plaintiff filed his submissions on 18/12/2014 while the defendants did so on 19/2/2015. I have considered the pleadings and the evidence that was tendered by the parties in proof of their respective cases. I have also considered the parties' submissions and the authorities that were cited in support thereof. The parties did not agree on the issues for determination by the court. Each came up with its own issues. The plaintiff framed a total of nine (9) issues while the defendants came up with five (5) issues. After considering the pleadings, the evidence on record and the two sets of issues that were filed herein by the parties, the following in my view are the issues that arise for determination in this suit;

- i. Whether the plaintiff is the registered and lawful proprietor of all that parcel of land known as LR No. Transmara/Oloontare/20 ("the suit property")?
- ii. Whether the defendants are trespassers on the suit property?
- iii. Whether the plaintiff's claim is time barred?
- iv. Whether the plaintiff is entitled to the reliefs sought in the plaint?

The first issue:

The suit property was registered under the Registered Act, Cap 300 Laws of Kenya (now repealed). The plaintiff produced in evidence a copy of the title deed for the suit property that was issued to him on 10/9/1997 by the Land Registrar, Transmara District. The defendants also produced as exhibit, a copy of certificate of official search on the register of the suit property. The said certificate showed that the suit property was registered in the name of the plaintiff on 10/9/97. Sections 27 and 28 of the Registered Land Act provide that the registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with the rights and privileges belonging or appurtenant thereto and that such rights shall not be liable to be defeated except as provided in the said Act. The said provisions of the Registered Land Act are reproduced in sections 24 and 25 of the Land Registration Act 2012.

Section 143(1) of the Registered Land Act provides that the court may rectify the register of land other than land acquired on first registration by directing that any registration be cancelled or amended where it is satisfied that such registration was acquired by fraud or mistake. There is a similar provision in section 80(1) of the Land Registration Act, 2012 save that the Land Registration Act does not exclude the register of land acquired on first registration from rectification by the court. Section 26(1) of the Land Registration Act, 2012 provides that a certificate of title issued by the land registrar upon registration or to a purchaser of land upon transfer by the proprietor of land shall be taken, by all courts as prima facie evidence that the person named as the proprietor of such land is the absolute and indefeasible owner thereof save where the title for such land is obtained through fraud or misrepresentation to which the person is proved to have been a party or where the certificate has been acquired illegally, un-procedurally or through corrupt scheme.

There is no dispute from the evidence on record that the plaintiff is the registered proprietor of the suit property. It is also clear from the provisions of the law that I have cited above that the title of a registered proprietor of land can only be challenged on the ground of fraud, misrepresentation, mistake, illegality, procedural impropriety and corruption. Such title can also be challenged by the beneficiaries of a trust and those claiming to have an overriding interest on the land the subject hereof. From the evidence before me, the suit property was registered in the name of the plaintiff under the Registered Land Act on first registration. Under section 143(1) of the Registered Land Act aforesaid, the plaintiff's title to the suit property is immune from challenge on account of fraud or mistake.

The defendants have challenged the plaintiff title on a number of grounds. The defendants have contended that they were discriminated upon on account of their ethnicity during the land adjudication process at Oloontare Adjudication Section. The defendants have contended that because they belong to the Luo tribe and were occupying land that was dominated by the Maasai tribe, they were not treated fairly during the land adjudication process and in the objection proceedings that ensued. The

defendants have contended that the same injustice was extended to the appeal that they lodged with the Minister for Lands after their objections were dismissed. The defendants have contended that the Minister for Lands at that time was a Mr. Konchella who is a Maasai. The defendants have contended that the District Commissioner who heard their appeals, Mr. J. M. Mathenge did so on behalf of the said Minister and as such must have been instructed by the said Minister to dismiss the said appeals that pitted members of his Maasai community against the defendants who are Luos. The defendants have attributed the dismissal of their objections and appeals to the Minister to this ethnic factor. The Defendants have contended that the discrimination that they were subjected to violated their constitutional rights guaranteed under Articles 27, 28, 39 and 40 of the Constitution of Kenya 2010. The defendants contended that since the plaintiff's title to the suit property came about as a result of the said violations of the said provisions of the Constitution of Kenya, the same is tainted with illegalities and as such null and void.

The other attack that has been mounted by the defendants against the Plaintiff's title to the suit property is that the plaintiff after being registered as the owner of the suit property was issued with a title deed prematurely while the appeals that the defendants had lodged with the Minister against the decisions of the objection court were still pending. The irregularity in manner in which the said title deed was issued according to the defendant goes to the root of the said title and renders it a nullity.

I have considered the two objections that have been raised by the defendants against the plaintiff's title to the suit property. The adjudication process in which the defendants claim to have suffered injustices and violation of their constitutional rights was undertaken under the Land Adjudication Act, Cap 284 Laws of Kenya (hereinafter referred to only as **"the Act"**). The Act has an inbuilt dispute resolution mechanism. It provides for, the adjudication committee, the arbitration board, objection proceedings and an appeal to the Minister of Lands as the channels through which any person aggrieved with a decision made during the land adjudication process can seek redress. From the material on record, the suit property was demarcated and recorded in the name of the plaintiff during the adjudication process. The defendants and others who are not parties to this suit who claimed ownership of the suit property were aggrieved by that move. Their complaints to the adjudication committee and the arbitration board seem not to have borne any fruit. After the adjudication register was completed, the defendants lodged objections under Section 26 of the Land Adjudication Act against the demarcation and recording of the suit property in the name of the plaintiff. The said objections were heard by the adjudication officer and were all dismissed on 26/1/88. The defendants were not satisfied with the determination of their objections and appealed against the same to the Minister under section 29 of the Land Adjudication Act. Although the said appeals were supposed to be lodged within 60 days from the date of the determination of the objections aforesaid, the record shows that the defendants did not lodge their appeals to the Minister until 10 years later. See D. Exh.5(c). No objection was raised to the late filing of the said appeals and the hearing of the same proceeded before J. M. Mathenge who was then the District Commissioner, Transmara District who heard the appeals on behalf of the Minister of Lands. The defendants' appeals to the Minister were dismissed on 22/5/2003. Section 29(5) of the Act provides that the decision of the Minister is final. I am of the view that after the Minister had rendered its decisions on the defendants' appeals aforesaid, the only recourse that was open to the defendants if they were aggrieved was to seek judicial review of the said decisions. The issues raised before me by the defendants such as discrimination, bias and violation of their constitutional rights should have been raised in the said judicial review application since no further appeal is provided for in the Act against the decision of the Minister. This court has no jurisdiction to re-open the proceedings of the objection court and the Minister to interrogate whether the same were sound in substance and in procedural aspects. Since the defendants did not challenge the decision of the Minister as aforesaid, their fate as far as the ownership of the suit property is concerned was sealed. The challenge mounted herein by the defendants to the plaintiff's title over the suit property on account of what transpired during the adjudication process cannot therefore hold.

With regard to the defendant's objection that the plaintiff was issued with a title deed for the suit property prematurely, I am again not in agreement. Furthermore, even if that was to be the case, I don't think that such incident would vitiate the plaintiff's proprietary interest in the suit property that

was otherwise acquired lawfully. Section 27 (3) of the Act provides that after all objections have been determined and the time for appeal under section 29 has expired, the adjudication officer shall send the adjudication register to the Director of Land Adjudication who in turn shall forward the same to the Chief Land Registrar together with a list of the appeals which have been filed. Section 28 of the Act provides that upon receipt of the adjudication register, the Chief Land registrar shall cause registration to be effected in accordance with the adjudication register provided that for those parcels of land which are affected by appeal, a restriction shall be entered against their titles until the appeal is heard and determined. What comes out from the foregoing is that the land registrar was entitled to register the plaintiff as the owner of the suit property after the defendants' objections were dismissed. The registration of the plaintiff as the owner of the suit property was therefore done lawfully. The suit property was registered in the name of the plaintiff on 10/9/97 according to D. Exh. 2. As at that date, if the land registrar was aware that the defendants had appealed against the determination of their objections, the land registrar was under a duty to register a restriction against the title of the suit property pending the outcome of the said appeal. This means that the plaintiff was not supposed to be issued with a title deed until the appeal was heard and determined. The defendants did not tell the court as to the exact date when they filed their appeals against the decision that was made in the objection proceedings. D. exhs.5(c) and 5(d) and P. Exhs. 3 to 8 show that the defendants' appeals were filed in the year 1998. This means that the appeals could not have been pending as at 10/9/97 when the plaintiff was registered as the owner of the suit property and issued with a title deed in respect thereto. There was therefore no illegality or impropriety in the issuance to the plaintiff of the title deed for the suit property.

The second issue:

I am in agreement with the decision of Khamoni J. in the case of **Wamwea vs. Catholic Diocese of Muranga Registered Trustees (2003) KLR 389** in which he held that:

“Once a party acquires legal title over a parcel of land such party is entitled not only to possession but also to occupation of that land and that a party who refuses to give vacant possession becomes a trespasser.”

The suit property was demarcated and recorded in the name of the plaintiff during the land adjudication at Oloontare Adjudication Section. The defendants appealed against that demarcation to the adjudication committee all the way to the Minister of lands and lost. The decision of the Minister was made on 11/5/2004. I am of the view that after that date, the defendants had no further justification for continuing to occupy the suit property. The defendants continued occupation of the suit property after that date amounted to trespass. In the book **Clerk and Lindsell on Tort's 18th Edition, page 23 paragraph 18 – 01**, trespass is defined as consisting in **“any unjustifiable intrusion by one person upon the land in the possession of another.”** As I have stated above, I am not satisfied from the evidence before me that the defendants have any justification for their continued occupation of the suit property. It is my finding therefore that they are trespassers on the suit property.

The third issue:

Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya provides that;

“An action may not be brought by any person to recover land after the end of twelve years from date on which the right of action accrued to him or if it accrued to some person through whom he claims, to that person.”

The plaintiff was registered as the owner of the suit property on 10/9/97. This is when the plaintiff's right to recover the suit property from the defendants accrued. The present suit was filed on 15/6/2009 before the expiry of 12 years from the time the right of action accrued to the plaintiff. In the circumstances, I am in agreement with the submission by the plaintiff that this suit is not time barred as claimed by the defendants.

The fourth issue;

The main issue in contention between the parties to this suit is the ownership of the suit property. The plaintiff has claimed that he is the lawful proprietor of the suit property. The defendants have made a similar claim. The doctrine of *res judicata* is set out in Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”

The onus was on the defendants to demonstrate that the issue of ownership of the suit property had been heard and determined as between the plaintiff and the defendants by a court of competent jurisdiction. I have no such evidence before me. The issue of the ownership of the suit property was not determined finally in the cases that were filed at Kilgoris and Migori Resident Magistrate’s Courts by the plaintiff herein. I am not persuaded therefore, that this suit is *res judicata*.

The fifth issue:

The Plaintiff has proved that he is the registered owner of the suit property and that the defendants are trespassers thereon. The plaintiff is therefore entitled to the injunctive reliefs sought against the defendants. The plaintiff is also entitled to an order for vacant possession of the suit property. On the plaintiff’s claim for mesne profits, I have no material before me on which I can assess the amount payable. The suit property measures approximately 41 ha. The plaintiff testified that he was born and brought up on the suit property and that he is occupying the suit property to date with his family. The plaintiff did not tell the court when the defendants entered the suit property. He also did not state the measurements of the portions of the suit property which are occupied by each of the defendants. Furthermore, the plaintiff testified that the 3rd to 6th defendants have since vacated the suit property. No indication was however given as to when they vacated the suit property. On the facts before me, I would only award the plaintiff nominal damages for trespass.

In conclusion, I am satisfied that the plaintiff has proved his claim against the defendants on a balance of probabilities. I therefore enter judgment for the plaintiff against the defendants jointly and severally as prayed in paragraphs (a), (b) and (c) of the plaint dated 14/7/2009. I also award the plaintiff general damages in the sum of Kshs.1,000/= . The defendants who are still in occupation of the suit property shall vacate and hand over possession the same to the plaintiff on or before 30/12/2015 in default of which the plaintiff shall be entitled to apply to court for their forceful eviction. The Plaintiff shall have the cost of the suit to be paid by the 2nd defendant only. Interest shall accrue on general damages at court rates from the date of this judgment until payment in full.

Signed at Nairobi this.....day of November,2015

S. O. OKONG’O

JUDGE

Delivered and Dated at Kisii this 4th day of December 2015

J. M. MUTUNGI

JUDGE

In presence of

.....for Plaintiff

.....for Defendants