



**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND CASE NO. 95 OF 2007**

**JOYCE NYANSIABOKA**

**ONCHOMBA.....PLAINTIFF**

**VERSUS**

**1. JOSEPH  
KENYANYA**

**2. ROSA KENYANYA**

**3. MARIA KENYANYA.....  
.....DEFENDANTS**

**JUDGMENT**

1. The Plaintiff is the registered proprietor of all that parcel of land known as **LR No. South Mugirango/ Bosinange/2855** (hereinafter referred to as “**the suit property**”). The suit property was purchased by the Plaintiff from one, **Mary Bitengo**. The Plaintiff brought this suit against the defendants by way of a Plaint dated 20<sup>th</sup> August, 2007 in which the Plaintiff sought; an order of a permanent injunction to restrain the defendants from trespassing into, interfering with and/or in any other manner whatsoever dealing with the suit property, an order of eviction of the defendants from the suit property and general damages for trespass. The Plaintiff’s suit was brought on the grounds that; on or about the month of October, 2004, the defendants entered the suit property without the Plaintiff’s permission or authority and commenced cultivation on a substantial portion thereof. In the month of June, 2007, the defendants started putting up structures and/or buildings on the suit property thereby dispossessing and depriving the Plaintiff of a substantial portion of the suit property. The Plaintiff claimed that the defendants failed and/or refused to desist from trespassing on and/or interfering with the suit property despite a demand made upon them to do so thereby rendering the filing of this suit inevitable.
2. The defendants entered appearance and filed a joint statement of defence on 11<sup>th</sup> September, 2007 to the Plaintiff’s claim. In their defence, the defendants attacked the legality of the Plaintiff’s title over the suit property. The defendants contended that, one, **Mary Bitengo** (hereinafter referred to only as “**Mary**”) who sold to the Plaintiff the suit property acquired the title of the suit property fraudulently and as such she had no valid title that she could pass to the Plaintiff. The defendants claimed that Mary did not obtain letters of administration with respect to the estate of the previous owner of the suit property, one, **Nyambeki Makori** (hereinafter referred to only as “**Makori**”) before she caused the suit property to be transferred to her name and thereafter to the Plaintiff. The defendants claimed that they are the true heirs of Makori who was the previous owner of the suit property and that they had occupied the suit property for over 30 years. The 1<sup>st</sup> and 2<sup>nd</sup> defendants claimed that they had contracted Woman to Woman marriage with Makori and as

Makori's wives; they had a right to occupy the suit property as beneficiaries of the estate of Makori. The defendants denied that they have trespassed on the suit property and committed the acts complained of herein by the Plaintiff.

3. This suit came up for hearing before Makhandia J. on 20<sup>th</sup> September, 2010 when the Plaintiff gave evidence and closed her case. In her evidence, the Plaintiff told the court that; she is the registered proprietor of the suit property which measures 1.2 ha. She bought the suit property from one, Mary Bitengo Michieka ("**Mary**"). The suit property was a portion of the original parcel of land known as **LR.No.South Mugirango/Bosinange/2809** (hereinafter referred to as "**Plot No. 2809**"). When she bought the suit property, Plot No. 2809 was registered in the name of Mary. She bought the suit property at Kshs. 180,000/=. After she entered into an agreement for sale with Mary, Mary subdivided Plot No. 2809 into two portions. One of the portions, which is the suit property was transferred to her (the Plaintiff) while the other portion remained registered in the name of Mary. Before she entered into the said agreement for sale with Mary, Mary showed her a grant of letters of administration. She took possession of the suit property soon after it was sold to her. In October 2004, the defendants came to the suit property claiming that Mary could not sell to her the suit property because she was a married woman. They entered the suit property without her permission or consent. She reported the matter to the District Officer Nyamarambe and the defendants vacated the suit property briefly after the said District Officer wrote to them. She also filed a complaint against the defendants with Nyamarambe Land Disputes Tribunal through Tribunal Cause No. 10 of 2006. The Tribunal ordered the defendants to vacate the suit property but they declined to comply. At the time, the defendants were only cultivating the suit property. They had not put up houses on the same. The defendants started putting up structures on the suit property in June, 2007. The defendants claimed that the suit property belongs to them. When she asked Mary about the defendant's claim, Mary told her that the suit property belonged to her and that the defendants had previously trespassed on her land and that there was a case on the issue between Mary and the defendants namely, Kisii HCCC No. 114 of 2002 that had been heard and concluded. In that case, the court ruled that Mary obtained the suit property legally. She was not party to the succession proceedings relating to the estate of Makori that was instituted by Mary. When she bought the suit property, it was already registered in the name of Mary. She bought the suit property for farming. Before interference from the defendants commenced, she had planted maize and beans on the suit property and managed to get 18 bags of maize in one season. In the 2<sup>nd</sup> season she got 22 bags of maize. At that time, one bag of maize was being sold at Kshs. 1,800/=. In the area, she could plant two seasons per year. She spent Kshs. 30,000/= in farm inputs. On average, she could get 20bags of maize from each planting season from which she would realize up to Kshs. 72,000/=. The Plaintiff testified that due to interference from the defendants she has been unable to put the suit property to any gainful use for about 4 years as of the date when she was giving evidence. She urged the court to award her damages for trespass plus costs and interest. The Plaintiff produced in evidence as Plaintiff's exhibit 1, a bundle of documents comprising of among others, a copy of the title deed for the suit property and a copy of the register for the suit property. The Plaintiff also produced in evidence a copy of the judgment that was delivered on 23<sup>rd</sup> July, 2010 in Kisii HCCC No. 114 of 2002 as Plaintiff's exhibit 2 and a copy of the decree issued in the said case on 18<sup>th</sup> August, 2010 as Plaintiff's exhibit 3.
4. Following the transfer of Makhandia J. directions were given on 4<sup>th</sup> October, 2011 by Sitati J. that the proceedings be typed and the matter proceeds from where it was left by Makhandia J. The defence case was heard before me on 18<sup>th</sup> April, 2013 and 10<sup>th</sup> July, 2013. The defendants gave evidence and called two witnesses. The 1<sup>st</sup> defendant told the court that she is a son of the 3<sup>rd</sup> defendant and that Nyambeki Makori (deceased) ("**Makori**") was her grandmother. He claimed that the other defendants and he are living on a parcel of land known as **LR. No. South Mugirango/Businange/441**(hereinafter referred to as "**Plot No. 441**") and that Mary Bitengo ("**Mary**") was his aunt. He told the court that he was not aware that Mary had applied for letters of administration in respect of the estate of Makori, in Succession Cause No. 30 of 1998 and that she had sold the suit property. He claimed that the suit property is not identifiable on the ground as Plot No. 441 which he claimed to be under their occupation has been subdivided into three portions of which the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have a portion each and the last portion has been reserved for one, Josephine Osebe (hereinafter referred to as "**Josephine**") whom he referred to as

his younger step mother. He told the court that the 2<sup>nd</sup> defendant is also his step mother and that in their family they are two children, a boy and a girl while the 2<sup>nd</sup> defendant has three sons and three daughters. Josephine also has two children. He claimed that they are all occupying and using Plot No. 441 and that Mary has no land in the area where Plot No. 441 is situated as she is married and has land where she is married. He claimed that they went to the court registry and perused the court file for Succession Cause No. 30 of 1998 and that the only document they got from the file was a copy of the Kenya Gazette. He produced a copy of the said Kenya Gazette as Defendant's exhibit No. 2. He denied knowing the Plaintiff herein and claimed that the Plaintiff has never been to the suit property on which she has neither a home nor a farm. He denied that the defendants have trespassed on the suit property. Next to give evidence was the 2<sup>nd</sup> defendant. She testified that; she was born in the year 1956 and got married in 1975 to Nyambeki Makori ("**Makori**"). She has six (6) children, three boys and three girls. The girls are married and the boys are at home. She has been staying on Plot No. 441 since she was married. Her husband Makori died in 1983. Mary Bitengo ("**Mary**") is known to her as the daughter of Makori. She did not know that Mary had applied for a grant of letters of administration with respect to the estate of Makori. She does not know the Plaintiff. She only saw her in court. She is not aware that the Plaintiff has any parcel of land where she is staying with the other defendants. She corroborated the evidence of the 1<sup>st</sup> defendant that Plot No. 441 has been divided between herself, the 2<sup>nd</sup> defendant and Josephine. She claimed that the 2<sup>nd</sup> defendant, the said Josephine and herself were all married to Makori because Makori had no son. She urged the court to allow all the defendants to continue occupying the suit property.

5. The 3<sup>rd</sup> defendant was the last to give evidence among the defendants. She testified that; she was married to Nyambeki Makori ("**Makori**") in 1970. She was Makori's first wife. The 1<sup>st</sup> plaintiff is her son. She is and has been staying in the homestead of Makori which is situated on Plot No. 441 since 1970. She corroborated the evidence of the 1<sup>st</sup> and 2<sup>nd</sup> defendant that they have divided the said Plot No. 441 into three portions two of which portions belong to the 2<sup>nd</sup> defendant and herself while the third portion belongs to Josephine. She knows Mary and that she (Mary) has no land where they are staying. She urged the court to allow the defendants stay where they are staying in peace. The defendant's first witness was, **Mariko Nyamosi Kenyaga** ("**DW4**"). He testified that; Nyambeki Makori ("**Makori**") was his grandmother. Makori was the wife of his grandfather. His mother was Klemensia Bisare while his grandmother was Nyangarisia Nyamosi. Makori did not have a son. Makori asked Kenyanya (DW5) to get children for her. Makori married Rosa Kenyanya and Maria Kenyanya, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. There was also a lady by the name Josephine who was brought by Mary Bitengo ("**Mary**"). Josephine is deceased and was buried on the suit property. He corroborated the evidence of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants that the parcel of land occupied by the defendants has been divided into three portions for the 1<sup>st</sup> defendant, 2<sup>nd</sup> defendant and Josephine. He claimed that the plaintiff has no share in the parcel of land occupied by the defendants. He stated that he was not aware that Mary Bitengo ("**Mary**") had applied for a grant of letters of administration with respect to the estate of Makori. The defendant's last witness was **Kenyanya Makori** (DW5). He testified that; the defendants are all known to him. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were inherited by him while the 1<sup>st</sup> defendant is his son. He has his homestead on his own parcel of land while the defendants are residing in the homestead of Nyambeki Makori ("**Makori**") on the land that belongs to Makori. He testified that Makori's land which is next to his (DW5) land has not been sold and that Mary Bitengo ("**Mary**") is his step sister. Mary was the daughter of Makori and she is married. He corroborated the evidence of the earlier witnesses for the defendants that the defendants are residing on the land that belongs to Makori. He maintained that Makori married the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and that the Plaintiff is not known to him and he has never seen her. He corroborated the evidence of the previous witnesses that the land that belonged to Makori has been divided into three portions for the 2<sup>nd</sup> defendant, the 3<sup>rd</sup> defendant and Josephine who was brought into the property by Mary. He claimed that although the 1<sup>st</sup> defendant was his son, he was supposed to inherit land from Makori and not from him because he only sired him on behalf of Makori who married his mother, the 3<sup>rd</sup> defendant as Makori had no son. He contended that the Plaintiff owns no land in the area.

6. After the close of the defence case, the parties agreed to put in written submissions. The Plaintiff filed her written submissions on 19<sup>th</sup> August, 2013 while the defendants filed their submissions in reply on 24<sup>th</sup> September, 2013. I have considered the Plaintiff's case as pleaded and the evidence tendered by the Plaintiff in proof thereof. I have also considered the defendants' joint statement of defence and the evidence tendered by the defendants and their witnesses. Finally, I have considered the written submissions by the advocates for both parties and the case law cited. The parties did not agree on issues for determination by the court. I am in agreement with the submission by the Plaintiff that the issues that arise for determination in this case are as follows;
- i. **Whether the Plaintiff is the registered owner of the suit property and if so, whether the Plaintiff acquired title to the suit property through an irregular and fraudulent process?**
  - ii. **Whether the Plaintiff has lawful rights and/or interests over the suit property?**
  - iii. **Whether the defendants have any lawful rights and/or interests on the suit property and, if not, whether the defendants are trespassers on the suit property?**
  - iv. **Whether the Plaintiff is entitled to the reliefs sought?**
7. It is clear from the evidence on record that the suit property is a portion of all that parcel of land previously known as **LR. No. South Mugirango/Bosinange/2809(Plot No. 2809)**. Plot No. 2809 was hitherto registered in the name of Nyambeki Makori (deceased) ("**Makori**"). After the death of Makori, Mary Bitengo Michieka ("**Mary**") who was the daughter of Makori applied for letters of administration in respect of the estate of Makori in, **Kisii High Court Succession No. 30 of 1998**. The grant of letters of administration of the said estate was duly issued to Mary and she became the sole administrator of the estate of Makori. After Mary was appointed as the administrator of the estate of Makori as aforesaid, she caused Plot No. 2809 to be transferred to her name by transmission. Mary thereafter proceeded to sell a portion of Plot No. 2809 to the Plaintiff herein at a consideration of Kshs. 180,000.00. Plot No. 2809 was sub-divided into two portions following this sale into LR. No. South Mugirango/Bosinange/ 2855 ("**the suit property**") which was transferred to the Plaintiff by Mary and Plot No. LR. No. South Mugirango/Bosinange/ 2856 (hereinafter referred to as "**Plot No. 2856**") which remained in the name of Mary. The Plaintiff produced a copy of the register and a copy of the title deed for the suit property which showed and demonstrated beyond doubt that the suit property is registered in the name of the Plaintiff the same having been registered as such on 18<sup>th</sup> April, 2002. The said register and title deed shows further that the suit property is a sub-division of Plot No. 2809. Following the registration of Plot No. 2809 in the name of Mary, the 1<sup>st</sup> and 2<sup>nd</sup> defendants' herein mounted a civil suit in the High Court against Mary, namely, **Kisii HCCC No. 114 of 2002** (hereinafter referred to as "**the High Court Case**"). In the said case, the 1<sup>st</sup> and 2<sup>nd</sup> defendants contended that Mary had acquired letters of administration of the estate of Makori irregularly and fraudulently and as such, the transfer of Plot No. 2809 into the name of Mary was similarly irregular and fraudulent. The 1<sup>st</sup> and 2<sup>nd</sup> defendant's case in the High Court was mounted on similar grounds put forward herein by the defendants in defence of this suit and the evidence that was tendered by the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein in the said case is the same evidence that has been adduced by the defendants in this case. I would wish to add also that most of the witnesses who gave evidence on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the High Court Case also gave evidence before me in this case. The 1<sup>st</sup> and 2<sup>nd</sup> defendants had contended in the High Court as they have maintained in this suit that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein had entered into Woman to Woman marriage with Makori, a woman who had no son, under the Abagusii Customs and as such they were lawful wives and heirs of the estate of Makori. They claimed that Makori had nominated DW5 herein to sire children on her behalf with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and that the 1<sup>st</sup> defendant was a product of that arrangement. In a judgment and subsequent decree that were produced in evidence as Plaintiff's exhibits 2 and 3 respectively, the High Court, Musinga J. dismissed the 1<sup>st</sup> and 2<sup>nd</sup> defendants' claim against Mary. The High Court made a finding that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein were not married to Makori through Woman to Woman marriage under Abagusii Customary Law as the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein had contended. The court held that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein were the wives of DW5 herein and accordingly, the 1<sup>st</sup> defendant was

also held to be the son of DW5. The High Court held further that Mary had no obligation to involve the defendants herein in the administration of the estate of Makori as they were not beneficiaries of that estate. The High Court concluded that Plot No. 2809 was lawfully registered in the name of Mary who subsequently sub-divided the same, retained Plot No. 2856 in her name and sold the other portion (the suit property). There is no evidence before me and it was never contended that the said decision of the High Court was appealed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein. Due to the foregoing, I am in agreement with the Plaintiff's submission that the legality of Mary's title over Plot No. 2809 was conclusively determined in the High Court Case and cannot be revisited in this suit. I am satisfied therefore that the Plaintiff is lawfully registered as the owner of the suit property and that the Plaintiff acquired the suit property lawfully from Mary who had a valid title to the same.

8. The plaintiff has demonstrated on the material placed me that she is the registered proprietor of the suit property. Under **Section 24(a)** of the **Land Registration Act, 2012**, the registration of a person as a proprietor of land vests upon that person the absolute ownership of that land together with all the rights and privileges belonging and appurtenant thereto. Under **Section 25 (1)** of the **Land Registration Act, 2012**, the rights of a proprietor of land acquired for valuable consideration is indefeasible except as provided under the said Act. The defendants have not placed any evidence before this court of any irregularity in the acquisition of the Plaintiff's title that can negate the Plaintiff's rights over the same. The issues that they have raised had already been determined against them in a previous suit. It is therefore my finding that the Plaintiff is entitled in relation to the suit property to enjoy the rights conferred upon her by section 24 of the Land Registration Act, 2012 and that the defendants have no lawful claim over the suit property. The defendants claim over the suit property is based on their relationship with the Makori. As I have already stated above, the defendants' claim over Plot No. 2809 from which the suit property a rose was laid to rest in the High Court case. The defendants' claim that Makori's succession was conducted fraudulently by Mary cannot be re-litigated again a court of competent jurisdiction having made a finding on the same in the negative.
9. Having made a finding that the defendants have no lawful claim over the suit property, it follows that the defendants' occupation of the suit property is unlawful. A person who enters land in the possession of another without that person's consent or authorization is a trespasser. In the book, **Clerk & Lindsell on Torts, 18<sup>th</sup> Edition at paragraph 18-01**, trespass to land is defined as consisting of **"any unjustifiable intrusion by one person upon land in the possession of another."** In the same book, it is stated that trespass is actionable at the suit of the person in possession of the land (paragraph 18-10) and that proof of ownership is a prima facie proof of possession (paragraph 18-110). In this case the Plaintiff has proved that she is the owner of the suit property. The defendants are therefore trespassers on the suit property. The Plaintiff having satisfied the court that the defendants are trespassers on the suit property, the Plaintiff is entitled to an order to evict the defendants from the suit property. The Plaintiff is also entitled to an injunction to restrain the defendants once evicted from trespassing once again into the suit property. In addition to the two reliefs that I have mentioned, the Plaintiff had also sought general damages for trespass. In her submission, the Plaintiff submitted that an award of Kshs. 252,000.00 would be a reasonable compensation to the Plaintiff for the loss suffered as a result of being kept out of the suit property. The Plaintiff had testified that she had purchased the suit property for farming and that in a year, the suit property could yield up to 40 bags of maize which was retailing at Kshs. 1,800.00 per bag as at the time the defendants entered the suit property in the year 2004. The Plaintiff testified that she would use up to Kshs. 30,000.00 per year in farm inputs. The Plaintiff submitted that she has been kept away from the suit property for 6 years and having regard to the above stated annual yield of maize from the suit property and the amount that would have been spent during the period in farm inputs, the sum of Kshs. 252,000.00 which has been given as an assessment of the Plaintiff's loss arising from the defendant's acts of trespass is reasonable. The Plaintiff did not place any material before the court to support her assessment of general damages. Her claim that she could realize 40 bags from the suit property was a mere assertion that was not backed by any tangible proof. The same applies to her retail price of maize of Kshs. 1800.00 per bag and the cost of farm inputs. Due to the foregoing, as much as I agree that the Plaintiff is entitled to general damages for trespass, the Plaintiff having failed to place before the court any material on the basis of which the court can make a reasonable assessment of the

Plaintiff's loss, the court would only award the Plaintiff nominal damages in recognition of the fact that her rights had been infringed.

10. In conclusion, I am satisfied that the Plaintiff has proved her claim against the defendants on a balance of probability. I therefore enter judgment for the Plaintiff against the defendants jointly and severally as follows;

**(a) The defendants jointly and/or severally shall quit vacate and hand over to the Plaintiff possession of all that parcel of land known as LR. No. South Mugirango/ Bosinange/ 2855 within six (6) months from the date hereof;**

**(b) An order of permanent injunction is issued restraining the defendants by themselves or through their agents, servants and/or any one claiming under the defendants from trespassing into, interfering with and/or in any manner whatsoever dealing with LR. No. South Mugirango/ Bosinange/ 2855 once they vacate the property pursuant to order (a) above;**

**(c) The defendants shall pay to the Plaintiff a sum of Kenya Shillings Thirty Thousand (Ksh. 30,000.00) as general damages for trespass together with interest at court rates from the date hereof until payment in full;**

**(d) The defendants shall pay to the Plaintiff the costs of this suit.**

**Delivered, dated and signed at KISII this 7<sup>th</sup> day of February 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Kerongo h/b for Oguttu for the Plaintiff

Mr. Sagwe for the Defendants

Mobisa Court clerk

**S. OKONG'O**

**JUDGE**