



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 7 OF 2013

CHARLES MUMA NYAMBERE PLAINTIFF

VERSUS

DANIEL OWICHDEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant on 8th January 2013 by way of a plaint dated 7th January 2013. The plaintiff sought an order for the eviction of the defendant from all that parcel of land known as **LR No. Kagan/Manyuanda/519** (hereinafter referred as “**the suit property**”). In his plaint, the plaintiff averred that at all material times, the plaintiff was and still is the registered proprietor of the suit property and that in the month of July, 2012, the defendant entered the suit property without the plaintiff’s consent or authority and put up a kiosk thereon. The plaintiff averred further that after learning of the defendant’s said act of trespass, the plaintiff asked the defendant to remove the said kiosk from the suit property but instead of doing so, the defendant commenced cultivation as well on the said portion of the suit property where he had put up the said kiosk. The plaintiff averred that as a result of the foregoing, the plaintiff was left with no alternative but to file this suit. The suit was defended by the defendant. The defendant filed a statement of defence dated 22nd January 2013. In his statement of defence, the defendant denied that he had trespassed on the suit property as claimed by the plaintiff. The defendant contended that the plaintiff had allowed him to occupy a portion of the suit property measuring 20 feet by 15 feet on 4th March 1999 and that it is on that portion of the suit property where he put up a kiosk 13 years later in July, 2012. The defendant contended further that the plaintiff had a change of mind over the said portion of the suit property that he had willingly given to the defendant after the plaintiff attempted to sell another portion of the suit property to a third party and the prospective purchaser insisted that he must have the portion of the suit property near the road where the defendant’s kiosk is situated. The defendant contended further that the plaintiff’s suit has been brought in bad faith and that the plaintiff is being driven by malice. The defendant contended further that the plaintiff’s suit is time barred since the defendant has occupied the disputed portion of the suit property for over 13 years.

2. When this suit came up for hearing, the plaintiff testified and called one witness. The defendant also testified but did not call any witness. In his evidence, the plaintiff testified that he is the registered owner of the suit property. The plaintiff testified further that in the year 2012, the defendant without his consent or authority entered the suit property and put up a kiosk on a portion thereof on which portion he also commenced cultivation. The plaintiff stated further that he had asked the defendant to vacate the portions of the suit property under his occupation but the defendant refused and/or neglected to do so. The plaintiff urged the court to make an order for the eviction of the defendant from the suit property. The plaintiff produced as exhibits, a copy of a letter dated 3rd September 2012 addressed to the defendant by the senior chief of West Kagan location through which the said chief asked the defendant to demolish the Kiosk that he has put up on the suit property and to stop cultivation thereon, a copy of the title deed for

the suit property in the name of the plaintiff, a copy of a certificate of official search dated 28th August 2012 in respect of the suit property which shows that the plaintiff is the registered proprietor of the suit property and, a letter of demand dated 5th September 2012 addressed to the defendant by the firm of S. O. Odingo & Co. Advocates who was then acting for the plaintiff demanding that the defendant do remove the kiosk that he has put up on the suit property and vacate the same within one (1) month. In cross-examination, the plaintiff denied that he had given the defendant any portion of the suit property. The plaintiff stated that whereas the defendant's homestead is put up on another parcel of land namely, **LR No. Kagan/Manyuanda/520("Plot No. 520")**, the defendant has put up the kiosk in dispute on the suit property and not on Plot No. 520. The plaintiff's witness was one, Fredrick Otieno Nyambere (**PW2**). He testified that the plaintiff and the defendant are known to him. The plaintiff is his step brother while the defendant is his nephew. He told the court that the plaintiff is the owner of the suit property and that he did not know how the defendant came to put up a kiosk on the suit property.

3. In his evidence in chief, the defendant told the court that the kiosk that the plaintiff is complaining about has been put up by him in his homestead which is situated partly on Plot No. 520 and partly on the suit property. He admitted that the kiosk stands on the suit property but contended that it is the plaintiff who had allowed him to put up his homestead on the portion of the suit property where the said kiosk stands. He stated that whereas his homestead was put up in the year 1999, the kiosk was put up in the year 2012. He stated that it would be very expensive for him to remove the said kiosk from the suit property. In cross-examination, he maintained that the plaintiff had allowed him to put up his homestead partly on the suit property. He stated further that it would take him 4 years to remove the said kiosk from the suit property because it is a semi permanent structure. He also mentioned that his family relies on the said kiosk for their subsistence because he is jobless and has school going children.

4. After the close of their respective cases, the parties who were both acting in person informed the court that they would wish to rely on the evidence on record. I have considered the plaintiff's case as pleaded and the evidence adduced in support thereof. I have also considered the defendant's statement of defence and the evidence that was tendered in support thereof. From the pleadings filed by the parties the issues that arise for determination in this suit are as follows:-

- i. Whether the plaintiff had allowed the defendant to occupy a portion of the suit property on which he has put up a kiosk and on which he is also carrying out cultivation?
- ii. Whether the defendant is entitled to remain in occupation of the said portion of the suit property?
- iii. Whether the plaintiff's suit against the defendant is time barred?
- iv. Whether the plaintiff is entitled to the reliefs sought?

5. Issue No. I

The defendant has not denied that the plaintiff is the owner of the suit property and that the defendant has put up a kiosk on a portion of the suit property. The defendant has also not denied that he is cultivating a portion of the suit property. The defendant's contention is that he is not a trespasser on the suit property. His contention is that he entered into the suit property with the plaintiff's consent, set up his homestead thereon and subsequently put up the contentious kiosk. The plaintiff denied giving the defendant permission to enter into the suit property. The plaintiff maintained that the suit property and Plot No. 520 on which the defendant has his homestead are separate and distinct and that the defendant has his homestead on Plot No. 520 and has put up the kiosk on the suit property which is Plot No. 519. The defendant testified that he put up his homestead in the year 1999 which was followed by the contentious kiosk in the year 2012. In cross-examination, he admitted that he put up the said kiosk while the plaintiff was away and that he hoped that there would be no problem. The plaintiff has not complained in this suit about the defendant's homestead. His complaint is about the kiosk and the cultivation that the defendant is said to be carrying out on the suit property. If the plaintiff had allowed the defendant to put up his homestead on the portion of the suit property where the kiosk is situated and where also the defendant claims to have part of his homestead, I can see no reason why the plaintiff would not have sought an order

also for the demolition of that part of the defendant's homestead which is on the suit property. There is no evidence that the plaintiff has had any dispute with the defendant over the suit property since he put up his homestead in the year 1999. The plaintiff only took issue with the defendant when he put up the contentious kiosk in the year 1999. This shows that the defendant's homestead and the defendant's kiosk are on different parcels of land and that the kiosk which is admittedly on the suit property was put up without the permission of the plaintiff.

6. The plaintiff's witness, PW2 who is closely related to both parties testified that he did not know under what circumstances the defendant came to put up the said kiosk on the suit property. PW2 who is the defendant's paternal uncle would have known if the plaintiff had permitted the defendant to occupy a portion of the suit property. The defendant did not give any indication at the trial that his relationship with PW2 is not cordial. In fact, the defendant did not ask the witness any question although the defendant had claimed that the entire family of Nyambere to which both parties and PW2 belong had agreed that the defendant sets up his homestead partly on the suit property and partly on Plot No. 520. Due to the foregoing, I am not persuaded that the defendant entered that portion of the suit property on which he has put up a kiosk and which is also under his cultivation with the permission of the plaintiff.

7. Issue No. II

Even if it is assumed for argument's sake that the defendant was permitted by the plaintiff to occupy a portion of the suit property, can that permission entitle the defendant to remain in occupation of the suit property after the license or permission has been withdrawn by the plaintiff? The answer to that question is no. The defendant did not purchase the suit property. The defendant did not therefore acquire any proprietary interest on the suit property that can defeat the plaintiff's title. If the defendant was permitted by the plaintiff to occupy a portion of the suit property, such permission could only give rise to a licence that could be revoked or withdrawn by the plaintiff. The plaintiff expressly demanded that the defendant vacates the subject portion of the suit property. The defendant had no alternative in the circumstances but to comply. It is my finding therefore that the defendant has no right to remain on the suit property whether he entered therein with the permission of the plaintiff or otherwise.

8. Issue No. III

The defendant has claimed that he entered the suit property in the year 1999 and as such the plaintiff's suit that was filed against him after a period of 13 years from the date he took possession is time barred. I am of the opinion that the defendant's plea of time bar cannot stand. The defendant has claimed that he entered into the suit property with the permission of the plaintiff. It follows therefore that he has been in occupation of the suit property with the consent of the plaintiff. The position in law as I know it is that for the purposes of limitation of actions, time started to run against the plaintiff only after he withdrew his consent to the defendant's continued occupation of the suit property. Time therefore started running against the plaintiff in the year 2012 when he demanded that the defendant vacates the suit property. In the case of, **Mutiso vs. Mutiso [1998] LLR 3268(CAK)**, the Court of Appeal stated as follows; "*.....the appellant in his own affidavit, referred to at the beginning of this judgment, had categorically stated that he had been put into possession and remained on the suit land for a period of about 18 years by the consent and with the knowledge of the respondent and his predecessor. His possession could not therefore be construed to be adverse. Consequently, time did not begin to run in his favour until the respondent withdrew his consent. The concrete evidence of the withdrawal of the consent was the demand by the respondent that the appellant should stop any further development on the suit land and instead vacate.*" I need not say more. This suit which was filed in the year 2013 barely a year after the plaintiff had served the defendant with a notice to vacate was filed within time assuming that the defendant had entered the suit property with the permission of the plaintiff.

9. Issue No. IV:

The only prayer sought by the plaintiff in the plaint apart from costs is an order for the eviction of the defendant from the suit property. I have already held above that the defendant entered the suit property without the consent of the plaintiff and even if he had such consent, the same was withdrawn. In the

circumstances, the defendant is a trespasser in the suit property. Even if it is assumed for argument's sake that the defendant entered the suit property with the consent of the plaintiff, the defendant became a trespasser in the suit property as soon as the plaintiff withdrew the said consent. The plaintiff having proved that the defendant is a trespasser in the suit property, the plaintiff is entitled to the order of eviction sought against the defendant.

10. In conclusion, it is my finding that the plaintiff has proved his case against the defendant to the required standard and is entitled to the relief sought in the plaint. I therefore enter judgment for the plaintiff as prayed in paragraph (a) of the plaint dated 7th January 2013 and order that the defendant do vacate and handover to the plaintiff that portion of **LR No. Kagan/Manyuanda/519** currently under his occupation within 90 days from the date hereof in default of which he shall be evicted there from. The plaintiff shall have the costs of this suit which shall be limited to court filing fees paid and direct out of pocket expenses incurred.

Delivered, dated and signed at Kisii this 14th day of March 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiff

N/A for the Defendant

Mobisa Court Clerk

S. OKONG'O

JUDGE