



IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 41 OF 2013

ELKANA MOGIRE MARUCHA PLAINTIFF

VERSUS

RICHARD ONCHARI MARUCHA 1ST DEFENDANT

ALFRED MARUCHA NYAMARI 2ND DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendants on 4th February 2013 seeking an order for the eviction of the defendants from all that parcel of land known as **LR No. Nyaribari Chache/B/B/Boburia/1707** together with the cost of the suit. In his plaint dated 4th February 2013, the plaintiff averred that at all material times, the plaintiff was and still is the registered proprietor of all that parcel of land known as **LR No. Nyaribari Chache/B/B/Boburia/1707** (hereinafter referred to as the “**suit property**”) which measures 0.24 hectares. The plaintiff averred that he acquired the suit property from his late father, Marucha Obare who had six sons namely, Onchari Marucha, deceased, Mogaka Marucha, deceased, Elkana Mogire Marucha (plaintiff), Nyamari Marucha (alive), Nyamari Marucha, deceased and Onserio Marucha, deceased. The plaintiff averred that his late father allocated land to each of his said sons as follows; Ochari Marucha (deceased) was allocated LR No. Nyaribari Chache/B/B/Boburia/1704 (Plot No. 1704), Mogaka Marucha (deceased) was allocated LR No. Nyaribari Chache/B/B/Boburia/ 1705 (Plot No. 1705), Elkana Mogire Marucha (plaintiff) and Nyamari Marucha were jointly allocated LR No. Nyaribari Chache/B/B/Boburia/ 1707 (“the suit property”), Nyamari Marucha (deceased) was allocated LR No. Nyaribari Chache/B/B/Boburia/1706 (Plot No. 1706) and Onserio Marucha (deceased) was allocated LR No. Nyaribari Chache/B/B/Boburia/1708 (Plot No. 1708).
2. The plaintiff averred that as at the time when his late father divided land among his sons as aforesaid, the defendants were occupying the suit property which is registered in the name of the plaintiff. The plaintiff averred that even after the defendants were allocated their own parcels of land, the defendants have continued to occupy and cultivate portions of the suit property and have refused to vacate and move to their own parcels of land. The plaintiff averred further that the defendants’ continued occupation and use of the suit property is wrongful and that the same has subjected the plaintiff to irreparable loss and damage.
3. It is on account of the foregoing that the plaintiff has sought an order for the eviction of the defendants from the suit property. The defendants were served with summons to enter appearance but failed to do so as a consequence of which the plaintiff applied for interlocutory judgment against the defendants which was entered by the deputy registrar on 10th September 2013. This suit was thereafter set down for formal proof on 15th May 2014. Although it was not necessary to serve the defendants with a hearing notice interlocutory judgment having been entered against them as aforesaid, the plaintiff caused a hearing notice to be served upon the defendants for hearing that was scheduled for 15th May 2014. On 15th May 2014 only the plaintiff appeared in

court. The defendants failed to turn up for the hearing. The plaintiff gave evidence and called no witness. In his evidence, the plaintiff testified that the defendants are his nephews. The 1st defendant is the son of the plaintiff's deceased brother, Nyamari Marucha while the 2nd defendant is the son of the plaintiff's other deceased brother, Onchari Marucha. The plaintiff testified that the plaintiff is the registered proprietor of the suit property and that the defendants' deceased parents own separate parcels of land which were allocated to them by the plaintiff's late father. The 1st defendant's father owns Plot No. 1704 while the 2nd defendant's father owns Plot No. 1706. The plaintiff testified that instead of the defendants residing on and cultivating their said parents' parcels of land only, the defendants have resorted to carrying out cultivation on their said parents' parcels of land and also on the portions of the suit property. The plaintiff testified that the suit property belongs to the plaintiff and his brother one, Michael Nyamari Marucha and that the defendants have no lawful justification for their continued cultivation and occupation of portions thereof.

4. The plaintiff testified that the defendants should be evicted from the suit property so that the plaintiff and his said brother may divide the suit property between them. The plaintiff testified that whereas the 1st defendant is only carrying out cultivation on the suit property and has no structure thereon, the 2nd defendant has a homestead on the suit property which he has been occupying with his family for the last 15 years. The plaintiff urged the court to issue an order for the eviction of the defendants from the suit property so that they may move to their parents' parcels of land aforesaid. The plaintiff produced as exhibits; a copy of a certificate of official search dated 1st February 2013 for the suit property which shows that the same was registered in the name of the plaintiff on 7th January 1971, a copy of the register for the suit property which contains the same information, a copy of a certificate of official search for Plot No. 1706 dated 5th February 2013 which shows that the same is registered in the name of Alfred Marucha Nyamari and lastly, a copy of official search for Plot No. 1704 dated 5th February 2013 which shows that the said parcel of land is registered in the name of Onchari Marucha.
5. I have considered the plaintiff's case as pleaded, the evidence tendered by the plaintiff and the exhibits produced. The plaintiff's claim against the defendants is based on the tort of trespass. Although the suit was not defended, the plaintiff still had the burden of proving that indeed the defendants have trespassed on the suit property. Trespass has been defined as any unjustifiable intrusion by one person upon the land in the possession of another. The plaintiff was duty bound to prove that the suit property is owned by the plaintiff and that the defendants have no lawful or any justifiable cause for entering and remaining on the suit property. The plaintiff has placed evidence before the court in proof of his ownership of the suit property. This fact was proved by a certificate of official search and a copy of the register in respect of the suit property. Both documents show that the plaintiff is the registered proprietor of the suit property and that he was so registered on 7th January 1971. The plaintiff has also proved that the defendants' parents who are deceased have separate and distinct parcels of land registered in their names and that the defendants are using both the suit property and their said deceased parents' parcels of land. The plaintiff having proved that he is the registered proprietor of the suit property and that the defendants have entered and have remained in occupation thereof without the permission or authority from the plaintiff, the burden shifted to the defendants to show any justifiable cause for their continued occupation of the suit property.
6. As I have stated earlier in this judgment, the defendants did not file a defence to the plaintiff's claim. They therefore did not tender any evidence to justify their entry, occupation and use of the portions of the suit property. It follows therefore that the plaintiff's evidence was not controverted and as such the only conclusion that this court can arrive at is that the defendants are occupying the suit property unlawfully. The plaintiff having proved that the defendants are occupying the suit property unlawfully, the defendants are in law, trespassers on the suit property with no rights to remain and continue in occupation of the same. Due to the foregoing, it is my finding that the plaintiff has proved his case against the defendants on a balance of probability.
7. I therefore enter judgment for the plaintiff against the defendants jointly and severally as prayed in the plaint dated 4th February 2013. The 1st defendant shall vacate and hand over possession of the suit property to the plaintiff within sixty (60) days from the date hereof while the 2nd

defendant shall vacate and hand over possession of the suit property to the plaintiff within one hundred and eighty (180) days from the date hereof. In the event that the defendants or any one of them fails to hand over vacant possession of the suit property to the plaintiff as above prescribed, the plaintiff shall be at liberty to apply for warrants for the eviction of the defendants from the suit property. The plaintiff shall have the cost of the suit.

Delivered, signed and dated at KISII this 11th day of July, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Present in person for the plaintiff

N/A for the 1st defendant

N/A for the 2nd defendant

Mr. Ombasa Court Clerk.

S. OKONG'O

JUDGE