



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 784 OF 2017

(Formerly Kisii Elc case No. 204 of 2015)

DAMIAN MITIMBO AROKA.....PLAINTIFF

VERSUS

HELLEN ADHIAMBO NGORE.....1ST DEFENDANT

CAROLINE OWADE.....2ND DEFENDANT

JOSEPH OLAGO OGUTU.....3RD DEFENDANT

KENNEDY OBUYA OGUTU.....4TH DEFENDANT

JUDGMENT

A) INTRODUCTION

1. The present suit concerns the whole of land Reference Number Kanyamwa/Kayambo/Kwamo/437 measuring approximately twelve decimal seven five hectares (12.75Ha) in area (Hereinafter referred to as the suit land). The same is contained in Registry Map Sheet Number 8 and located in Ndhiwa sub county within Migori county.
2. The plaintiff is represented by the firm of Oguttu, Ochwangi, Ochwal and Company Advocates formerly, Oguttu-Mboya and Company Advocates.
3. The 1st and 4th defendants appear in person. The 2nd and 3rd defendants are not represented herein.
4. Notably, the defendants were duly served with the plaintiff's application dated 27th June 2016. There was no response thereto. On 18th July 2016, the court noted that the defendants had acted in contempt of court and were liable to punishment. They were directed to purge the contempt by having the body of **the deceased Sylvia Odhiambo olago** exhumed from the suit land within ten (10) days from the date of service of the order upon them. On 19th September 2016. The court was informed that the 1st defendant did continue to disobey court orders hence the committal order against 1st defendant was stayed pending the receipt of the Land Registrar's report.

A) THE GIST OF THE PLAINTIFF'S CASE

5. By a plaint dated 3rd June 2015 and filed in court on 9th June 2015, the plaintiff is seeking the following reliefs:

- i. Declaration that he plaintiff is the registered and/or lawful owner of LR. NO. KANYAMWA/K/KWAMO/437.***
- ii. An order of eviction against the defendants, their agents and/or servants from LR. NO. KANYAMWA/K/KWAMO/437.***
- iii. Permanent injunction restraining the defendants either by themselves, agents, servants and/or anyone claiming under the defendants from entering upon, re-entering, trespassing onto, building on, cultivating, interfering with and/or in any other manner dealing with the suit property, that is LR. NO. KANYAMWA/K/KWAMO/437 and/or any portion thereof.***
- iv. General damages for trespass.***

v. Interest on (iv) hereof at court rates.

vi. Costs of this suit be borne by the defendant.

vii. Such further and/or other relief as the Honourable court may deem fit and expedient so to grant.

6. It is the lamentation of the plaintiff as per the plaint, inter alia, that he is the sole and absolute registered proprietor of the suit land with effect from 29th July 2008 following the completion of the adjudication and demarcation process of Kwamo Adjudication Section. That in the year 2011, the 1st defendant trespassed into the suit land and erected a homestead thereon without the consent of the plaintiff.

7. The plaintiff further laments that in the year 2012/2013, the 2nd, 3rd and 4th defendants also trespassed into the suit land and erected structures thereon and cultivated various substantial portions of the suit land without the plaintiff's authority. That the actions of the defendants dispossessed the plaintiff of the suit land.

8. The plaintiff also states that owing to the actions of the defendants, he was prompted to file a land dispute with the Land Disputes Tribunal, Ndhiwa (defunct) which rendered its determination dated 22nd July 2011 whereby the dispute was referred to the Land Registrar and surveyor, Ndhiwa District, Homa-Bay for a report. That the Tribunal's award was lodged with the Principal Magistrate's Court Homa-Bay in Land Case No. 98 of 2011 whereupon the same was adopted accordingly. That the report by Land Registrar and Surveyor has not been implemented or enforced rendering the filing of this suit necessary.

9. The plaintiff who is currently incapacitated gave to Paul Orato Mitiambo (PW1), a power of attorney dated/registered on 30th August 2018 (PEXhibit 1). Therefore, PW1 relied on the plaintiff's statement dated 3rd May 2015 and filed in court on 9th June 2015 and the plaintiff's bundle of documents dated 3rd June 2015 Nos. 1 to 7 (PEXhibits 2 to 8 respectively). He also relied on Land Registrar's report dated 24th November 2016, filed in court as per plaintiff's supplementary bundle of documents dated 29th September 2018 (PEXhibit 9).

10. On 19th August 2020, learned counsel for the plaintiff filed submissions dated 13th August 2020 providing the background of the case, framed three (3) issues for determination including whether the plaintiff has proved his case on a balance of probabilities and whether the plaintiff is entitled to the reliefs sought in the plaint. Counsel analysed the issues in favour of the plaintiff and cited authorities, namely *D.T Dobie and Company (K) Ltd -vs- Wanyonyi Chebukati (2014)eKLR*, *James Muniu Mucheru-vs-National Bank of Kenya Ltd (2019)eKLR*, and *Morgan Air Cargo Ltd -vs- Everest Enterprises Ltd(2014)eKLR*, in support thereof.

B) **THE GIST OF THE DEFENDANTS' CASE**

11. The 1st defendant filed her statement of defence dated 30th June 2015 whereby she denied the plaintiff's claim. She claims that she is a legal occupant of LR No. Kanyamwa/Kayambo/436 and not the suit land. That the Tribunal's award was quashed by an immediate order in Homa Bay Law Courts Misc Civil Case No. 98 of 2011.

12. The 1st defendant also states that the plaintiff withdrew his case before Ndhiwa Law Courts as the plaintiff is adjudged to be of unsound mind. She urged this court to dismiss the plaintiff's case with costs.

13. In his statement of defence dated 12th November 2019, the 4th defendant denied the plaintiff's claim, termed it untrue, mischievous and misconceived. He stated that this suit is res judicata as the same facts conversed herein had been exhaustively determined in Ndhiwa Law Courts. He sought dismissal of the suit with costs to the defendants.

14. The 1st defendant(DW1) testified, inter alia, that the suit land belonged to Ogotu Agot (Deceased) who was her father in law. That she lives thereon and cultivates the same. She further stated that she lives on LR No. Kanyamwa/Kayambo/Kwamo/436 and not on the suit land. She relied on her statement of defence and list of documents dated 30th June 2015 (DEXhibits 1 to 3).

15. The 4th defendant (DW2) stated that he is a son of the deceased who owned LR No. Kanyamwa/Kayambo/Kwamo/436. That the suit land belongs to DW1 in this suit.

16. DW3, Dalmas Gor Agot, aged 88 years relied on his statement dated 17th May 2018 as part of his evidence. He stated that he does not know the parcel land in dispute herein.

17. DW4, Elijah Nyakengo testified that the suit land belongs to the deceased whose children including DW1, occupy it. He relied on his statement dated 17th May 2018 as part of his testimony.

18. The 2nd and 3rd defendants were duly served. They failed to file and serve either a statement of defence or submissions. Thus, they did not challenge the plaintiff's claim.

19. On 18th September 2020, the 1st and 4th defendants filed a 3-paged submissions dated 15th September 2020 giving the background of the case and identified two (2) issues for determination namely whether the defendants trespassed into the suit land and whether the defendant has proved his case on a balance of probabilities. In analyzing the issues in their favour, they cited **The Black's Law Dictionary at page 23, Sections 107, 109 and 112 of the Evidence Act Chapter 80 Laws of Kenya and James Muniu Mucheru-vs-National Bank of Kenya Ltd (2019) eKLR**, concerning the meaning of "Trespass", that he who alleges must prove and the standard of proof in civil cases respectively.

20. The 1st and 4th defendants submitted that the existing problem regarding the ownership of the suit land was generated by the Land's office as demonstrated by the two (2) expert reports which absolve them of any wrong doing herein. That the blame squarely falls on the Land's office. That a lasting solution including equitable remedies be found for all parties including the 1st and 4th defendants.

C) ISSUES FOR DETERMINATION

21. It is trite law that the issues for determination in a suit generally flow from either the pleadings or as framed for the court's determination; see the case of **Great Lakes Company (U) Ltd v Kenya Revenue Authority (2009)KLR 720**.

22. On 26th October 2015, the plaintiff filed a statement of agreed issues (plaintiff's version) dated 24th October 2015. The issues include; whether PW1 is the registered proprietor of the suit land and whether the defendants trespassed onto it and is the plaintiff entitled to the orders sought in the instant suit?

23. Having examined the parties' respective pleadings, the testimonies of PW1, DW1, DW2, DW3 and DW4 and the version of the plaintiff's issues for determination, I endorse the said issues which are compressed infra;

a) Is the instant suit res Judicata?

b) Depending on the outcome in issue number (a) hereinabove, is the plaintiff the registered proprietor of the suit land?

c) Did the defendants trespass onto the suit land as alleged in the instant suit?

d) Is the plaintiff entitled to the reliefs sought in the plaint?

D) DISCUSSION AND DETERMINATION

24. As regards res judicata, DW2 stated at paragraph 6 of his statement of defence that this suit is res judicata. That the basis thereof is that the same facts of the case were exhaustively determined before Ndhiwa court.

25. DW2 stated at paragraph 9 of her statement of defence that there was Ndhiwa SRMCC No. 12 of 2012. That the said suit was withdrawn.

26. On his part, PW1 did not refer to the Ndhiwa court's case in his plaint. However, he made reference to Homa-Bay PMCC No. 98 of 2011 which was determined but the decision of the Tribunal subsequently confirmed by the court as judgment, could not be enforced as the court ceased to possess jurisdiction over the matter.

27. Section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya defines the term "res Judicata". The legal provision is noted accordingly.

28. Similarly, in the **Black's Law Dictionary 10th Edition at page 1504**, the term "**res judicata**" means:

"An issue that has been definitively settled by Judicial decision"

29. The said Dictionary gives elements of the aforesaid term thus:-

a) An earlier decision on the issue

b) A final Judgment on merits

c) The involvement of the same parties or parties in privy with the original parties.

30. The parties' respective pleadings in their entirety indicate that there had been earlier proceedings in Ndhiwa and Homa-Bay Law Courts. However, since the suits were withdrawn and court ceased to seize jurisdiction respectively, all the ingredients of "res judicata" doctrine have not been attained in the present suit.

31. On that score, can the suit be struck out or dismissed? The straight answer is, not in the affirmative.

32. Regarding proprietorship of the suit land, the plaintiff stated at paragraphs 4 and 5 of the plaint that he is the registered proprietor of the suit land with effect from 29th July 2008 upon the completion of the Adjudication and Demarcation process of Kwamo Adjudication section (now registration section). That he has exclusive rights over the suit land.

33. Paragraph 2 of the plaintiff's statement dated 3rd June 2015 reveals that he is the registered proprietor of the suit land. PEXhibits 2 and 3 discern that he is registered as such with effect from 29th July 2008 and title deed (PEXhibit 2) was issued to him on 8th June 2011 accordingly.

34. According to PEXh9, the suit land is registered in the name of the plaintiff and it's introduction reads;

“The land parcel Kanyamwa/Kayambo/Kwamo/437 is registered in the name of Damian Mitimbo Aroka. It measures approximately twelve decimal seven (12.7Ha) hectares...”

35. DW1 stated that the suit land belonged to the deceased. In cross examination, she maintained that:

“I live on LR No. Kanyamwa/Kayambo/Kwamo/436 and not on LR No. 437. It was owned by the deceased, Ogutu Agot. My immediate neighbour in Gor Agot. I do not know the suit land LR No. 437 herein as claimed by the plaintiff (PW1).”

36. On his part, DW2 denied the plaintiff’s claim but told the court that the suit land belongs to the plaintiff. In examination in chief, he stated in part:

“...I deny the claim mounted by PW1 in respect of the suit land, LR No. Kanyamwa/K/Kwamo/437. I have no interest thereon. It belongs to PW1 herein.”

37. DW3 stated that the suit land is not known to him. However, DW4 stated that the suit land is LR No. Kanyamwa/Kabonyo/Kwamo/436.

38. In her evidence, DW1 relied on documents including Homa Bay County Land Registrar’s report dated 3rd October 2013 (DEXh3 which is also PEXh6). The same reads, inter alia;

“The parcel Kanyamwa/K/Kwamo/436 belongs to Ogutu Agot while 437 belongs to Damian Mitiambo Aroka...”(Emphasis added)

39. The revelation in PEXhibit 2 is that the suit land is registered pursuant to the provisions of the Registered Land Act Chapter 300 Laws of Kenya (The Repealed Act). In that regard, I approve the decision of Simpson J (as he then was) in ***Wainaina v Murai and others (1976-80)KLR 289*** that:-

“The land in question is registered under the Registered Land Act...”

40. By PEXhibit 2 (Title) and it’s meaning at page 1712 of the Black’s Law Dictionary 10th Edition, the plaintiff is the proprietor of the suit land. As such, the second issue is resolved.

41. In respect of issue of trespass, the plaintiff asserted at paragraphs 6 to 12 of the plaint that the defendants trespassed into the suit land. The assertion is reinforced by PEXhibits 5 and 6 as well as the findings and implementation of the orders 3 and 4 in PEXhibit 9 alongside DEXhibit 3.

42. This court is conscious of the definition of the term “Trespass” in the **Black’s Law Dictionary and the Trespass Act** (supra). In ***Clerk and Lindsell on Torts (18th Edition) paragraphs 18-01***, “Trespass” means:

“An unjustifiable entry by one person upon the land in possession of another.”

43. The 1st and 4th defendants merely denied the plaintiff’s claim and failed to thwart it while the 2nd and 3rd defendants failed to challenge the same. So, the plaintiff has proved by way of PEXhibits 5, 6, 9 and DEXhibit3 that the 1st, 2nd, 3rd and 4th defendants trespassed into the suit land to the requisite standards as provided for under Sections 107,108,109 and 112 of the Evidence Act and the decision in **James Mucheru case (supra)**.

44. **Article 40(1) of the Constitution of Kenya, 2010** concerns the protection of right to property. I bear in mind the settled law in ***National Bank of Kenya Ltd-vs-Shimmers Plaza Ltd (2009)KLR 278 at 283, Nguruman Ltd- vs- Jan Bonde Nielsen and 2 others (2014)eKLR***, which applied ***Giella-vs-Cassman Brown and Company Ltd (1973)EA 358, Eric Edome and another-vs-Pauline Kasumba Osebe and another (2014)eKLR***, and Section 13(7)(a) and (c) of the Environment and Land Court Act, 2015(2011) on injunctive reliefs and the award of general damages. In the obtaining scenario, I think an amount of **Ksh. 100,000/=** being general damages for trespass in favour of the plaintiff, would be appropriate and reasonable. I proceed to award the same.

45. In the result, it is the finding of this court that the plaintiff has proved his case against the 1st, 2nd, 3rd and 4th defendants jointly and severally on a balance of probabilities. Judgment be and is hereby rendered in terms of orders (i), (ii), (iii), (iv), (v) and (vi) as sought in the plaint dated 3rd June 2015 and duly lodged in court on 7th June 2015. General damages for trespass is assessed at Kenya Shillings One Hundred Thousand only. (Ksh 100,000/=) in favour of the plaintiff against the defendants.

46. Given that the defendants may be in possession and occupation of the suit land, it is ordered and directed that the defendants vacate the suit land within a period of forty-five (45) days from the date hereof failing which eviction order to issue accordingly.

47. It is so ordered.

Delivered, Signed and Dated at Migori in open Court pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge, this 27TH day of OCTOBER, 2020.

G.M.A ONGONDO

JUDGE

In presence of:-

Mr. P. Ochwangi learned for the plaintiff

1st and 4th defendant

Tom Maurice- Court Assistant