



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU

E & L CASE NO. 13 OF 2012

FESTO SEWE OBIERO.....PLAINTIFF

VERSUS

CALEB OMONDI OPIYO.....1ST DEFENDANT

ISAIAH ODHIAMBO JAOKO.....2ND DEFENDANT

TOM MBOYA ORON.....3RD DEFENDANT

JUDGMENT

1. Festo Sewe Obiero, the Plaintiff, sued Caleb Omondi Opiyo, Isaiah Odhiambo Jaoko, Tom Mbuya Oron and John Ouma Oron, the Defendants through the Plaint dated the 16th June 2012, seeking for an order of permanent injunction restraining them from trespassing and interfering with his rights and privileges as the adjudicated owner of **Plot No. 2088 Kochogo Adjudication Section** [the suit land], general damages for trespass and costs of the suit. He avers that he is the adjudicated owner of the said land and that on or about the 28th July 2011, the Defendants trespassed onto the said parcel without his consent and commenced cultivating it. That on the following day, he reported to the Nyando Land Adjudication and Settlement Officer, who after hearing the parties and ascertaining the survey work confirmed that the Plot belonged to the Plaintiff. That the Defendants however, declined to vacate from the land despite demand being made. That the Plaintiff sought and obtained the Land Adjudication and Settlement Officer's consent to institute this suit. That the Defendants' action has denied the Plaintiff's access to the land and has occasioned him loss and damage.

2. The Defendants opposed the Plaintiff's claim through their statement of defence dated the 27th July, 2012. The Defendants averred that if the suit land was registered with the Plaintiff, then the registration was irregular and illegal as the process is at objection stage. They denied being involved in the hearing before the Land Adjudication and Settlement Officer. The Defendants alleged that it is the Plaintiff who is trying to acquire parcels of land that fall outside that of his clan. They denied sharing a boundary with the Plaintiff or denying him access to his land. They pray for the suit to be dismissed with costs.

3. The Plaintiff filed a reply to the defence dated 16th August, 2012 denying that his registration with the suit land was irregular and illegal. He also denied that the adjudication exercise in the area is to be done afresh and that he is trying to acquire land that is outside that of his clan.

4. The hearing of the case commenced on the 3rd October, 2012 when the Plaintiff testified as **PW1**. He produced a letter dated 26th January, 2010 from the District Land Adjudication and Settlement Officer, Nyando confirming that Plot No. 2088 – Kochogo Adjudication Section is registered in his name, and that title deeds have not been issued as the lands in that Section are still under adjudication. He also produced letter dated 15th November, 2011 by the same office granting him consent under **Section 30 of the Land Adjudication Act** to file these proceedings. The Plaintiff testified that on the 28th July 2011, the Defendants entered onto the suit land and started digging thereon with a tractor without his permission or consent. That after failing to get a solution to the matter through the Assistant Chief and Adjudication Officer, he instructed his advocate to file this suit. That on the 8th August 2010, he received information from PW2 that he had seen the four Defendants working on the suit land. PW1 reported to the police and the 2nd Defendant was arrested and charged with trespass in **Nyando Principal Magistrate's Criminal Case No. 594 of 2011**. That the Defendants are still using the land and he prays for their eviction, damages for trespass and costs. During cross examination, PW1 informed the Court that the 2nd Defendant was acquitted in the criminal case. That he had not been stopped by the District Commissioner from using the land. He also denied that the District commissioner is the one who allowed the Defendants to use the suit land. PW2, a nephew to PW1, testified that the Defendants are cultivating the suit land that belongs to the Plaintiff. He disclosed that the 4th Defendant passed on when the suit was pending in court. **PW3** also confirmed that the 4th Defendant has since passed on. He also testified that the suit land belonged to the Plaintiff, and that he had used a portion of it in 1989 with his permission. The last witness for the Plaintiff was **Benjamin Otieno Oduge**, the Assistant Director Land Adjudication and Settlement who testified as **PW4**. He confirmed that he was based at Nyando in 2012. He confirmed receiving a letter from the Plaintiff's advocate dated 8th September, 2012 among others seeking for confirmation whether the adjudication and demarcation work at Ongado area had been done. He responded through his letter dated 17th September, 2012 among others confirming that **"the work at Ongado area of Kochogo "A"**

Adjudication Section was not nullified by any government officer. The Land Owners were just stopped from cultivating their parcels of land in this area by the District Commissioner, Nyando after consulting the District Security Committee on security grounds.” The witness testified that parcel No. 2088 Kochogo Adjudication Section is registered with the Plaintiff. That the parcel’s title and those of about 1000 other plots are yet to be issued for reportedly being outside the declared and gazetted adjudication section. That the adjudication of the said 1000 parcels, whose titles have not been issued, has not been nullified.

5. That the Plaintiff through his Counsel on record filed, the Notice of Withdrawal of suit against the 4th Defendant dated the 18th October, 2014, on the 21st November, 2014 and the same was entered as an order of the Court by the Deputy Registrar on the 5th November, 2014. The Defendants failed to call any evidence despite being given the opportunity to do so, and their case was closed on the 10th February, 2020. That the Environment and Land Court, Kisumu fixed the judgment for the 14th May, 2020 but on the 21st May, 2020 directed that the file be forwarded to this Court for writing of the judgment.

6. The following are the issues for the Court’s determinations;

(a) Who between the Plaintiff and the Defendants has been registered as the owner of the land described as Parcel No. 2088 – Kochogo Adjudication Section?

(b) Who between the Plaintiff and Defendants is, or are entitled to use the said land?

(c) Whether the Plaintiff is entitled to damages.

(d) Who pays the costs of the suit?

7. The Court has carefully considered the pleadings by both sides, the oral and documentary evidence tendered by PW1 to PW4 and come to the following determinations;

(a) That from the oral and documentary evidence tendered by **PW1 and PW4, Parcel No. 2088 – Kochogo Adjudication Section**, the suit land, was upon adjudication and objection process created from the parent parcel that belonged to the Plaintiff’s late father and registered with the Plaintiff. That the Land Adjudication and Settlement Officer’s letters dated 26th January 2010, 31st January, 2012 and 29th December 2011 produced by PW1 as **exhibits 1, 6 and 7** respectively, and whose content have not been challenged, and or rebutted confirms that the suit land is registered with the Plaintiff.

(b) That though the Defendants had in their pleadings denied the Plaintiff’s claim, alleging among others that the Plaintiff is not the one registered with the land, and or that his registration was irregular and illegal, and was not entitled to own land in that section, they did not adduce evidence to support their averments. Their claim therefore, remains mere allegation for failure to discharge their duty under **Section 107 of the Evidence Act Chapter 80 of Laws of Kenya**.

(c) That further, as the testimony of PW4 has not been challenged and or rebutted that the adjudication results of Kochogo Adjudication Section has not been cancelled, and or nullified and that the Plaintiff was the one registered with Parcel No. 2088 – Kochogo Adjudication Section, the Court finds the person entitled to legally and equitably use and possess the suit land is the Plaintiff or one with his permission or consent.

(d) That the Plaintiff’s evidence that the Defendants entered onto the suit land on the 28th July 2011, and have since remained thereon without the Plaintiff’s consent was supported by PW2 and PW3. That the Land Adjudication Officer’s letter dated 31st January 2012 produced as exhibit 6, where it reported at Clause 5 that **“the parcel of land upon a survey conducted by my office it is confirmed had been trespassed upon and cultivated by third parties”**, amounts to evidence of trespass onto the suit land. That the Defendants’ action of entering onto the said land and remaining thereon without the Plaintiff’s consent or permission amounts to trespass. That accordingly, the Defendants should therefore vacate, and be enjoined from interfering with the Plaintiff’s rights and privileges as the adjudicated owner of the suit land.

(e) That though the Plaintiff has sought for general damages against the Defendants, the testimony of PW4 that the adjudicated owners of the suit land had been directed by the District Commissioner not to use their parcels leaves reasonable doubts as to whether the Plaintiff would have put the parcel to any use, even if the Defendants had not trespassed thereon. That as the District Commissioner was not enjoined into the suit through the Attorney General, and in the absence of evidence to guide the Court on the nature and quantum of loss the Plaintiff may have suffered, the prayer for damages is not proved and will not be granted.

(f) That the act of the Defendants trespassing onto the suit land and remaining thereon without the Plaintiff’s consent is the one that necessitated the filing of this suit. The Plaintiff is therefore entitled to costs of the suit in terms of **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

8. That in view of the foregoing, the Court finds that the Plaintiff has proved his case against the 1st, 2nd and 3rd Defendants on a balance of probabilities. That the Court therefore, enters judgment for the Plaintiff and against the said Defendants, and orders as follows;

(a) That the 1st to 3rd Defendants are declared trespassers on parcel 2088 – Kochogo Adjudication Section and are hereby directed to give the Plaintiff vacant possession in ninety (90) days, and in default, eviction orders to issue.

(b) That upon the 1st to 3rd Defendants vacating the suit land, or being evicted from the said land, they remain permanently

injunction from interfering with the Plaintiff's rights and privileges as the adjudicated owner of parcel No. 2088 – Kochogo Adjudication Section.

(c) That the 1st to 3rd Defendants do pay the Plaintiff's costs in the suit.

Orders accordingly.

Dated and signed at Eldoret this 23rd day of July, 2020.

S. M. KIBUNJA

JUDGE

Delivered and signed this 9th day of October, 2020.

A. OMBWAYO

JUDGE

Judgment read and be transmitted by the Deputy Registrar digitally through the e-mail addresses provided by Counsel in the presence of:

Plaintiff: Absent.

Defendants: Absent.

Counsel: Absent.

Court Assistant: Christine