



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 4 OF 2018

CRISPIN J.K. OSEWE.....PLAINTIFF

VERSUS

JENNIFER ATIENO OCHUODHO.....DEFENDANT

JUDGMENT

A) INTRODUCTION

1. At the heart of the present dispute is property known as LR No. Kanyadier/171 measuring approximately one decimal zero one hectares (1.01 Ha) in area (the suit land). The same is contained in Registry Map Sheet No. 20 and is located within Homa Bay County.
2. The plaintiff, Crispin J.K Osewe is represented by learned counsel, Mr. Oyoo of Edward Kisia and Associates Advocates.
3. The defendant, Jennifer Atieno Ochuodho is unrepresented in this suit.
4. The suit was heard by way of viva voce evidence further to the court's directions given on 22nd October 2019.

B) THE GIST OF THE PLAINTIFF'S CASE

5. By an originating summons dated 10th January 2018 and duly filed in court on even date, the plaintiff claims that she is the sole registered proprietor of the suit land unto which the defendant has trespassed. Thus, he is seeking reliefs that:

- a) There be a declaration that the defendant has continued to trespass upon the suit land and an order to the defendant to vacate or be evicted from the same.
- b) Costs of this originating summons be borne by the defendant.
- c) Such further and/or other orders as the Honourable Court may deem fit and expedient to grant in the circumstances of this suit.

6. The originating summons is premised on grounds (a) to (g) set out on its face as well as the plaintiff's supporting affidavit of nine (9) paragraphs sworn on even date and list of documents marked as "JKO1" to "JKO3" annexed thereto. Briefly, the plaintiff laments that he is the sole registered proprietor of the suit land. That in the year 2010, the defendant approached him to let her temporarily occupy the same as she was looking for land to purchase and settle on. The plaintiff allowed her accordingly between April 2020 and February 2017. After the agreement elapsed, the plaintiff's plea to the defendant to vacate the suit land which he wanted to use, bore no fruits. It then provoked the present suit.

7. On 22nd October 2019, the plaintiff (PW1) testified that the suit is registered in his name. He relied on the originating summons, the supporting affidavit and copies of list of documents which include title deed marked as "JKO1" (PEXh1), certificate of official search marked as "JKO3" (PEXhibit 3), in support of his testimony.

8. The plaintiff's counsel failed to file and serve submissions as ordered and directed by this court on 22nd October 2020.

C) THE GIST OF THE DEFENDANT'S CASE

9. The defendant was duly served as per affidavit of service sworn on 22nd October 2019 filed on even date by Vitalis Onyango Akuku, an authorized court process server. It is also discernable from proceedings of 22nd October 2019.

10. The defendant was accorded his rights under Articles 48 and 50(1) of the Constitution of Kenya, 2010; see also the decision in the case of **Re Hebtulla Properties Ltd (1976-80) 1 KLR 1195** which is hereby endorsed accordingly.

11. Be that as it may, the defendant failed to file response to the originating summons or file and serve any submissions herein.

D) ISSUES FOR DETERMINATION

12. It is settled law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see **Galaxy Paints Co. Ltd v Falcon Grounds Ltd (2000)2EA 385**.

13. Having duly considered the originating summons in its entirety and the evidence of PW1 in the present suit, I am of the view that the following issues fall for determination;

- a) Is PW1 the sole registered proprietor of the suit land ?
- b) Has the defendant trespassed thereunto?
- c) Is PW1 entitled to the reliefs sought in the originating summons?

E) ANALYSIS AND DETERMINATION

14. As regards the first issue, at the outset, it is important to note that in its introduction, the originating summons reveals that the plaintiff is the sole registered proprietor of the suit land. The plaintiff's assertion is further shown under ground (g) of the originating summons and paragraph 3 of the supporting affidavit thereto.

15. The term **"Proprietor"** is defined under Section 2 of the Land Registration Act, 2016 (2012) (the LRA). Furthermore, the suit land is registered in the name of PW1 under Section 108 of the LRA as disclosed in title deed (PEXhibit 1). The rights and interests of a proprietor are provided for under Sections 24, 25 and 26 of the LRA. The title of proprietor shall not be subject to challenge except as stipulated at **Sections 26(1)(a) and (b) (Ibid)**.

16. Moreover, it is trite law that fraud and misrepresentation are grounds for impeaching a certificate of title; see **Kuria Kiarie and 2 others v Sammy Magera (2018) eKLR**.

17. Besides, PW1 testified inter alia;

"The suit land is LR No. East Kanyada/Kanyadier/171 approximately 0.01 hectares in my name."

18. Clearly, PEXh1, 2 and 3 show that PW1 is the proprietor of the suit land with effect from 19th January 2015. Title deed (PEXhibit 1) was issued to him on 15th April 2015 accordingly.

19. In the case of **Michael Githinji Kimotho v Nicholas Muratha Mugo Civil Appeal No. 53 of 1995** applied in the case of **Macharia Mwangi Maina and 87 others v Davidson Mwangi Kagiri (2014) eKLR**, the Court of Appeal held that:

"The protected rights of a proprietor under Section 28 of the Registered Land Act cannot be defeated except as provided in that Act and certainly not at the instance of a trespasser."

20. It is evident that PW1 is the proprietor of the suit land and his rights are protected under **Sections 24, 25 and 26 of the LRA (supra)**. The said legal provisions are aligned to **Article 40 (1) of the Constitution (supra)**.

21. On the issue of trespass, I take into account grounds (b), (c) and (d) of the originating summons. PW1 deposed at paragraph 6 of the supporting affidavit that the defendant has stubbornly refused to vacate the suit land after the agreed period elapsed.

22. According to Clerk and Lindsell on Torts 18th Edition paragraph 18-01, **"Trespass"** means:

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

23. The **Black's Law Dictionary 10th Edition at page 1733** defines the term **"Trespass"** as follows: -

"An unlawful act committed against the person or property of another especially wrongful entry on another's real property."

24. Similarly, in the Concise Oxford Dictionary 12th Edition at page 1539 the term “**Trespass**” is defined thus:-

“Enter someone’s land or property without permission.”

25. The pleadings and testimony of PW1 firmly reveal that the defendant is in unlawful occupation of the suit land. It is private land. Indeed, section 152 A of the Land Act, 2016 (2012) prohibits such occupation.

26. To that extent, is PW1 entitled to the reliefs sought? PW1 deposed at paragraph 8 of his affidavit in support of the originating summons that the defendant should vacate the suit land or be evicted therefrom. Since PW1 has secure protection of the suit land under the constitution and the law, he is entitled to the reliefs sought in this suit.

27. It is therefore, the finding of this court that the plaintiff has complied with Sections 107, 108 and 109 of the Evidence Act Chapter 80 Laws of Kenya. He has proved his claim against the defendant by way of formal proof on a balance of probabilities as held by the Court of Appeal in *Kirugi and another v Kabiya and 3 others (1987)KLR 347*.

28. Wherefore, judgment is hereby entered for the plaintiff against the defendants in terms of prayers (1) and (2) sought in the originating summons. The defendant shall vacate the suit land and hand over vacant possession to PW1 within the next ninety (90) days from this date in default the plaintiff (PW1) to evict him therefrom; see (*Muhiddin Mohammed Muhiddin v Jackson Muthama and 168 others (2014) eKLR*).

Orders accordingly.

DATED DELIVERED SIGNED in open court at **MIGORI** this **11th** day of **November 2020**.

G.M.A ONGONDO

JUDGE

In presence of ;

Both parties – Absent

Tom Maurice – Court Assistant