



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Akiwumi, Tunoi & Lakha JJ A)

CIVIL APPEAL NO 181 OF 1995

Between

CHARLES OGEJO OCHIENGAPPELLANT

AND

GEOFFREY OKUMU.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kisii (Mr Justice Mbaluto) dated 26th April, 1995 in HCCC No 464 OF 1991)

JUDGMENT

This appeal is from the judgment of the High Court of Kenya at Kisii (Mbaluto J) delivered on the 26th April, 1995. In that judgment the Court dismissed the suit by the appellant for orders of eviction of the respondent and a permanent injunction restraining him from interfering with the suit land parcel number Suna East/Wasweta 1/1682 of which the appellant is the registered proprietor.

The basis of the appellant's prayers was trespass. He averred that the respondent had trespassed on his land parcel. But the respondent provided evidence to the effect that he is not on the appellant's land but on his own land known as LR No 8534/130 to which he holds title having acquired it from the Government of Kenya. The learned judge found that there was an apparent confusion in the actual position of the two parcels of land which confusion sprang from the sub-division in or about 1975 of the head title of the original plot number 193 then registered in the name of Ochieng Orwa, the appellant's father. That sub-division resulted in the creation of several plots with new numbers two of which are now parcels numbers 1682 and 1582 or LR 8534/130 as the latter is now known. Before that sub-division parcel number 1582 had been reserved for or given by the original owner to the Government of Kenya for use as a depot for the Ministry of Works. Admittedly the appellant did not know how or under what circumstances the Government acquired title to the suit land.

The gravamen of the appellant's grounds of appeal is that the learned judge erred in not determining the issue before him which was whether or not the respondent has trespassed on the land registered in the name of the appellant.

Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. See *Halsbury's Laws of England* 3rd edition Volume 38 at pg 744. In the instant case the appellant has no right to sue in trespass since the respondent was lawfully in possession of the title to the suit land at the time of the alleged trespass.

Moreover, under section 23 (1) of the Registration of Titles Act the certificate of title in respect of LR 8530/130 and in possession of the respondent shall be taken by all Courts as conclusive evidence that the respondent is the proprietor of the said land as the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party. No particulars of fraud or misrepresentation were pleaded nor was any evidence led to prove them. In our view the findings of the learned judge that the title of the respondent was indefeasible was correct.

We observe that no evidence was led by the appellant to show a nexus between the respondent's title and any damages that the appellant might have suffered, trespass to land being a wrongful act done in disturbance of the possession of property of another.

This appeal is without merit and must fail. It is ordered dismissed with cost to the respondent.

Dated and delivered at Kisumu this 24th day of November 1995

P.K TUNOI

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR