

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 1725 OF 1972

SAMPSON WANDERA

PETER OKUNJO WANDERA.....PLAINTIFFS

VERSUS

ATTORNEY-GENERAL.....RESPONDENT

JUDGMENT

The plaintiffs claim damages for trespass to land at parcel 125, Hataki, Butabona, Samia Location, in the Busia district, and it is alleged in the plaint, *inter alia*, that they were at all material times the proprietors of this land. The alleged acts of trespass are said to have been committed by the chief and the administrative officers mentioned in paragraph 5 of the plaint, or by their agents, during 1969, 1970, 1971 and 1972.

However, the land in question was registered in the name of the Government of Kenya (which is said to be vicariously liable for the acts of trespass) on 27th June 1973, as endorsed on the extract from the register exhibited in evidence. Accordingly, Mr Odingo, who appears for the Attorney-General, who is named as the defendant, has taken the preliminary objection that, by virtue of section 28 of the Registered Land Act, no claim in trespass, negligence or any other willful act can lie against the proprietor of the land as now registered. He cited what has become the well-known decision of Bennett J in *Obiero v Opiyo* [1972] E A 227 in support of his argument.

In reply Mr Kivuitu, for the plaintiff, stated that section 28 only relates to claims in respect of interests and rights which, but for the section, would subsist. He objected in that *Obiero's* case was concerned with whether customary rights could prevail against the proprietor and submitted that, in any case, the Act could not operate retrospectively to defeat a claim accruing before registration. In further reply, Mr Odingo referred me to the relevant land adjudication order (Legal Notice No 15 of 1965) and, quite rightly, pointed out that the registration of land under Registered Land Act is the end-product of the process of land adjudication and demarcation as laid down in the Land Adjudication Act.

I am perfectly satisfied that Mr Kivuitu's first submission is correct. In my judgment the section only deals with claims and interests against the owners of the land once he has become the registered proprietor. It cannot possibly defeat *ipso facto* a claim in tort allegedly committed before the registered proprietor became so registered. I quite agree that if the plaintiffs were not the proprietors of the land at the material times, as is stated in paragraph 2 of the defence, then, very probably they could not maintain an action for trespass, more obviously so if the government was then the proprietor of it. But this has not been shown, one way or the other, as yet.

In this connection, it is interesting to note that it is not only legal proprietorship that can found an action for civil trespass to land, which is generally an action at common law. In *Thompson v Ward* [1953] 2 Q B 153, which was a case where a statutory tenant, who had left the property, unsuccessfully sought to sue his former mistress and licensee for trespass, Lord Evershed M R stated that an action for trespass was only maintainable at the suit of him who was in possession of the land, using "possession" in its strict sense and including a person entitled to immediate and exclusive possession. The tenant failed because he had failed to establish a sufficient right or interest in the property to maintain an action for trespass. As

the matter has been put in issue, therefore, it is upon the plaintiffs to establish such right or interest in the land which is the subject of the present case.

The decision of Bennett J to which I was referred was not concerned with a claim in tort, but with rights in the land itself. If anything that decision is in favour of the plaintiffs on this preliminary objection. For there reasons I rule that the preliminary objection taken by the defendant fails.

Orders accordingly.

Dated and Delivered at Nairobi this 10th Day of November 1976

A.R.W. HANCOX

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JUDGE