



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 91 OF 2013**

**GABRIEL MUINDI SIMIYU.....PLAINTIFF**

**= VERSUS =**

**DESTERIO BARASA ONDWASI.....DEFENDANT**

**J U D G M E N T**

1. The Plaintiff – **GABRIEL MUINDI SIMIYU** – filed this case here against the Defendant – **DESTERIO BARASA ODWASI** – on 7/11/2013 vide a plaint dated 5/7/2013. He pleaded and later testified that he is the registered owner of land parcel No. BUKHAYO/LUPIDA/2491 (“suit land” hereafter) which he acquired through purchase from the deceased father of PW2. The Defendant is said to have trespassed onto the land and engaged in the exercise of excavating stones. He is also said to have threatened to use the whole land.

2. The Plaintiff wants the Defendant enjoined. More specifically, he has prayed for the following orders:

(a) A permanent injunction restraining the Defendant either by himself, his agents, servants or anyone acting under him from excavating stones, farming, planting, tilling, using and/or in any other way interfering with the Plaintiff’s L.R. No. BUKHAYO/LUPIDA/2491.

(b) Costs of the suit.

(c) Any other relief deemed fit to grant.

3. It is clear that the Defendant was served and on 5/12/2013 he entered appearance. He however failed to follow that up with filing of defence. Infact, the Defendant did not participate in the case in any meaningful way after that.

4. The hearing of the case took place on 2/7/2015, with the Plaintiff testifying as PW1 while his witness – JACOB ETYANG EKASIBA – testified as PW2. The evidence of these two witnesses was generally in agreement. It became clear that the Plaintiff bought the land from PW2’s deceased’s father. The Defendant was said to own the neighbouring parcel of land but there is a road separating that land from the Plaintiff’s land. The Defendant has however crossed over into the Plaintiff’s land and started excavating stones. The Plaintiff feels aggrieved because his rights of ownership have been interfered with.

5. After hearing, the Plaintiff filed submissions on 21/5/2018. The submissions captured well the substance of pleadings and evidence. There was also articulation of the applicable law.

6. I have considered the pleadings, evidence, and submissions. The case is not controverted. It is clear the Plaintiff owns the suit land. In the court file, there are various documents showing the process of acquisition and eventual ownership of the land by the Plaintiff.

7. It is improper and illegal for the Defendant to enter the suit land to excavate stones. I agree with the Plaintiff that that is violation of ownership rights. It was incumbent upon the Defendant to explain why he is doing that or whether he is doing it at all. But the Defendant refused or failed to participate in the case.

8. As submitted by counsel for the Plaintiff, the Plaintiff, as registered owner, is vested with absolute proprietorship of the land together with all the rights and privileges that go with such ownership. And his rights cannot be defeated by or through unwarranted and/or illegal acts by unauthorised persons. Such rights can only be defeated through due process.

9. In the circumstances of this case, there is really nothing standing in the way of what the Plaintiff is seeking. And it is reasonably clear that if the Defendant is not enjoined, his activities on the suit land will obviously result in serious damage that will affect the land's productivity. The Defendant is said to have threatened to continue his activities. There is therefore real likelihood of future infringement of the Plaintiff's rights.

10. Without much ado, I make a finding that the Plaintiff has proved his case on a balance of probability. I therefore grant him injunctive relief as prayed for in prayer (a) in the plaint. The Plaintiff is also entitled to costs (prayer b). I therefore award him costs of the suit.

**Dated, signed and delivered at Busia this 30<sup>th</sup> day of January, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: Absent

Defendant: Present

Counsel for Plaintiff: Absent

Counsel for Defendant: Absent

Court Assistant: Nelson Odame