



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 456 OF 2017**

**(formerly Kisii Elc Case No. 343 of 2010)**

**SAMSON KUNGU GUDA.....PLAINTIFF**

**Versus**

**JOHN OMOLLO KUNGA.....DEFENDANT**

**JUDGMENT**

**(A) INTRODUCTION:**

1. The suit land is **LR NO. KAMAGAMBO/KABUORO/1091** measuring approximately two (2) hectares. It is a subdivision of the original land **LR. NO. KAMAGAMBO/KABUORO/446** which was approximately 8.2 hectares in area.
2. The plaintiff is represented by learned counsel Mr. Kerario Marwa of the firm of Kerario Marwa and Company Advocates. The defendant appears in person.

**(B) THE PLAINTIFF'S CASE:**

3. The plaintiff asserts that in the year 1979, he bought the suit land from Johnstone Kunga Agar (Deceased) who was the father of the defendant. That all the relevant procedures were followed in the sale and the deceased did transfer the suit land to the plaintiff who obtained its title deed issued on 27<sup>th</sup> January 2004 (PExhibit 1). Since the year 2006, the defendant has harassed the plaintiff on the land and after the demise of the deceased, the defendant interfered with the plaintiff's quiet possession and user of the land hence precipitating the instant suit.
4. In that regard, by an amended plaint filed on 7<sup>th</sup> November 2014 further to a notice of motion dated 4<sup>th</sup> November 2013 which was allowed on 29/10/2014, the plaintiff is seeking against the defendant the following orders:-

- i. A permanent injunction restraining the defendant whether by himself, agents, servants and/or employees from trespassing, wasting, alienating, leasing and/or in interfering with the plaintiff's peaceful occupation and enjoyment of his land parcel No. KAMAGAMBO/KABUORO/1091 (the suit land).**
- ii. Mesne profits at the rate of Kshs. 100,000/= per year since the year 2010.**
- iii. Any other relief that this honourable Court shall deem fit to grant**
- iv. Costs of this suit.**

**(C) THE DEFENDANT'S CASE:**

5. In his amended statement of defence dated 19<sup>th</sup> January, 2015 and filed on even date, the defendant has denied the plaintiff's claim and sought its dismissal with costs. He states that the plaintiff had unlawfully and fraudulently acquired the suit land as the family members of the defendant are totally unaware of it.
6. The defendant further states that the dispute has been finalized vide Kisii High Court Misc. case number 139 of 2006 wherein the plaintiff was ordered to pay costs to the defendant's deceased father. That the suit does not disclose any reasonable cause of action, it is incompetent, nonstarter, and bad in law. That the plaintiff does not state under what capacity the defendant has been sued and that the land belonged to the defendant's deceased father who died on 16<sup>th</sup> May 2013.

**(D) EVIDENCE OF THE PARTIES:**

7. During hearing of the suit, the plaintiff (PW1) relied on his statement dated 28<sup>th</sup> June 2017 and filed on 4<sup>th</sup> July, 2017 as his evidence in chief. He also relied on his list of documents dated and filed on even date. The documents include a copy of title deed to the suit land (PExhibit 1), copy of a green card for the suit land (PExhibit 2), copy of a mutation form for the original land (DExhibit 4), application for consent of land control board dated 9<sup>th</sup> January 1979 (PExhibit 5) and copy of pleadings in Kisii High Court Misc. Civil Application No. 139 of 2006 (PExhibit 8).

8. PW1 testified, inter alia, that since the year 2010, the defendant completely prevented him from accessing the suit land. That the defendant did chase him away from the land on which he cultivates maize crop earning him approximately kshs. 10,000/= per annum.

9. On his part, the defendant (DW1) testified that whereas his deceased father, Johnson Kunga Agar and PW1 were brothers, the suit land belongs to him (DW1) and not PW1. That PW1 bought the land from the deceased father of DW1 in 1979, but failed to settle Kshs. 500/= being balance of the purchase price thereof.

10. DW1 also stated that his deceased father sold only three (3) acres of the original land to PW1. He relied on his documents dated 24/6/2015 (DExhibit 1) and a copy of Rongo Senior Principal Magistrate's Court Misc. Application No. 31 of 2006 (PExhibit 7).

**(E) THE PLAINTIFF'S SUBMISSIONS:**

11. By submissions dated 12<sup>th</sup> November 2013, counsel for the plaintiff gave the background of the matter and referred to the evidence of the parties. He framed three (3) issues for determination namely:-

- i. Whether the plaintiff is the owner of the suit land.**
- ii. Whether the defendant has been interfering with plaintiff's occupation of suit land.**
- iii. Whether the plaintiff is entitled to the prayers sought.**

12. Counsel relied on the plaintiff's exhibits as per list of documents dated 25<sup>th</sup> June 2017 (PExhibits 1 to 10). He submitted that proceedings and orders in Kisii High Court Misc. Application case No. 139 of 2006 (DExhibit 1) are irrelevant to the ownership of the suit land. That the defendant confirmed in his evidence that he is cultivating and staying on the land hence prevented the plaintiff from using the land. That the plaintiff has proved his case on a balance of probability thus he is entitled to the orders sought in the plaint.

**(F) THE DEFENDANT'S SUBMISSIONS:**

13. The defendant made reference to the amended pleadings and orders sought therein in his submissions dated 11<sup>th</sup> December 2018. He also framed four (4) issues for determination as follows :-

- a) Whether or not the defendant is properly sued in this matter.**
- b) Whether or not the plaintiff has proved trespass as against the defendant.**
- c) Whether or not the defendant is entitled to mesne profits.**
- d) Who bears the costs of this suit?**

14. The defendant submitted that the plaintiff is not a proper party to the instant suit. He relied on **Order 24 Rule 4 (4) of the Civil Procedure Rules, 2010 and Section 2 of the Civil Procedure Act (Cap 21) as well as paragraph 14 of the 5<sup>th</sup> Schedule to the Law of Succession Act (Cap 160).**

15. The defendant further submitted that the plaintiff did not produce an expert report to prove trespass and that boundary dispute summons dated 23<sup>rd</sup> May, 2011 (PExhibit 9) show that the plaintiff is not sure whether the defendant trespassed on the suit land or on LR NO. KAMAGAMBO/KABUORO/1090. That mesne profits are especial damages which have not been specifically pleaded and proved by the plaintiff. He urged the court to dismiss the suit with costs for want of proof on a balance of convenience.

**(G) ISSUES FOR DETERMINATION AND ANALYSIS OF EVIDENCE:**

16. I have anxiously considered the entire pleadings, evidence of PW1 and DW1 together with submissions of the parties in this suit. I bear in mind the case of **Galaxy Paints Co. Ltd –v- Falcon Grounds Ltd (2000) 2EA 385** and the issues framed in the submissions. Therefore, I compress the issues for determination as follows:-

- a) Is the defendant (DW1) properly sued in this suit?
- b) Is the plaintiff (PW1) the registered owner or proprietor of the suit land?

c) Has the defendant trespassed into the suit land?

d) Is the suit res judicata?

e) Is the plaintiff (PW1) entitled to the reliefs sought in his amended plaint?

17. On the 1<sup>st</sup> issue, the plaintiff filed the amended plaint pursuant to a Notice of motion dated 14<sup>th</sup> November 2013 for substitution and additional of parties under **Order 1 Rule 10 of the Civil Procedure Rules 2010, (the Rules)**. The motion was brought under the said order as well as **Order 51 of Rule 1 of the Rules** and it was allowed on 29<sup>th</sup> October 2014. The court has the discretion to allow substitution and addition of parties in a suit.

18. The defendant contends that he is not the proper party to have been sued in this matter. He referred to Order 24 Rule 4 of the Rules on the procedure in case of death of defendant or defendants. I am conscious of the definition of the term **“Legal representative”** and determination of questions as to legal representatives under **Section 2 of the Civil Procedure Act (Cap 21) and Order 24 Rule 5** of the Rules respectively. I am also aware of powers and duties of personal representatives under **Section 79 of the Law of Succession Act (Cap 160)**. Nonetheless by the amended plaint, the defendant is not sued as a legal representative of the estate of his deceased father, but as a trespasser as alleged in the plaint.

19. The defendant (DW1) stated in his amended statement of defence that PW1 acquired the suit land unlawfully and fraudulently. He pleaded particulars of fraud therein. I take into account the term **“fraud”** as defined in **Chitty on contracts Volume 2, 22<sup>nd</sup> Edition at 844**. The plaintiff (PW1) has shown that he obtained PExhibit 1 for the suit land by way of PExhibits 4,5 as reflected on PExhibit 2 through legal, formal process and it is free from any encumbrances as recognized by the Court of Appeal in the case of **Munyu Maina –v- Hiram Gathiha Maina (2013) eKLR**.

20. On the 2<sup>nd</sup> issue, PW1 stated at paragraphs 2b of his plaint that he is the registered owner of the suit land. He confirmed so at paragraph 6 of his statement dated 28<sup>th</sup> June 2017 and by PExhibits 1,2,5 and 6. The defendant denied the plaintiff’s claim of ownership of the land at paragraphs 3 of his statement of defence.

21. At paragraph 4 of the plaintiff’s statement, it is plainly clear that title deed to the land was to issued to PW1. In examination in chief, PW1 stated, inter alia;-

*“I was given the suit land. I have its title deed issued on 27/1/2004 in my name.”*

22. During cross-examination, PW1 testified in part that :-

*“The register shows that the suit land is mine and Land record duly signed by the Land Registrar.”*

23. The defendant did state that the suit land is registered in the name of PW1. This court is conscious of the term **“Proprietor”** under **Section 2 of the Land Registration Act, 2012**. Interest conferred upon registration of land as well as rights of a proprietor and certificate of title to be held as conclusive evidence of proprietorship are stipulated under **Sections 24, 25, and 26 of the said Act**. Quite clearly, PW1 is the registered owner of the suit land which is registered under the **Registered Land Act (Cap 300 Laws of Kenya now repealed); see Wainaina –v- Murai and others (1976-80) 1KLR 283 at 289/90**.

24. Regarding the issue of trespass, PW1 stated that DW1 planted maize crop on the suit land since the year 2010. DW1 admitted that he planted maize thereon although in cross –examination he denied having disturbed PW1 on the land.

25. It was the evidence of PW1 that DW1 chased him from the suit land thus prevented him (PW1) from quiet possession of the land. In cross-examination, PW1 testified, inter alia;-

*“The defendant completely prevented me from accessing the land since the year 2010. He ordered me to leave the land for him. I then filed this suit at Kisii High Court. I obtained an order against him. I used to cultivate the suit land. I used to plant maize on the land and I have lost approximately, Kshs. 100,000/=maize crops earnings from the land per annum.*

*I wish to produce my list of documents dated 28<sup>th</sup> June 2017, as PExhibits 1 to 10 respectively. I seek a permanent injunction mesne profit and costs of this suit. The defendant owns LR NO. KAMAGAMBO/KABUORO/1090 and not the suit land.”*

26. **Clerk and Lindsell on Torts 17<sup>th</sup> Edition at paragraph 17 -01** defines the term **“Trespass”** thus :-

*“An unjustifiable entry by one person upon the land in possession of another. Removing any part of soil of land also constitutes trespass” (Emphasis added).*

27. Similarly, trespass has been defined as any unjustified intrusion of one person upon the land in the possession of another; see **Zachariah Onsongo Momanyi –v- Evans Omurwa Onchagwa (2014) eKLR**.

28. Moreover, unlawful occupation of land is prohibited by law. **Section 152 A of the Land Act 2016 (2012)** provides that :-

**“A person shall not unlawfully occupy private, community or public land”**

29. By Pexhibits 4 and 5, the suit land (2 hactares) was a subdivision of the original land (8.2 hactares) as at 29<sup>th</sup> January 1979. PW1 was then registered as the owner of the suit land on 19<sup>th</sup> April 1995 and title deed (PExhibit 1) was issued to him on 27<sup>th</sup> January 2004 as revealed in PExhibits 1 and 2. My view is that PW1 followed a lawful process of purchase, subdivision and transfer of the suit land to which he is validly registered as its owner; see **Munyu Maina case (Supra)**.

30. On res judicata, I am guided by the definition of the term under **Section 7 of the Civil Procedure Act (Cap 21)**. The doctrine of res-judicata bars the same parties from litigating a second time on the same claim.

31. **Black’s Law Dictionary 10<sup>th</sup> Edition** has fashioned the term “**Res Judicata**” as an issue that has been definitively settled by judicial decision. The three essential elements of this affirmative defence are :-

*a) An earlier decision on the issue.*

*b) A final Judgment on merits.*

*c) The involvement of the same parties or parties in privity with the original parties.*

32. In the present suit, by PExhibits 6 and 7, there were earlier decisions on the matter. Furthermore, the parties in the previous suits were PW1 and Johnstone Kunga Agar (Deceased). DExhibit 1 shows that a similar suit was withdrawn. Thus I am of the considered view that there was no final Judgment on merits and the doctrine of res judicata can not apply in the circumstances.

33. PW1 has proved that he is the sole proprietor of the suit land. DW1 is in unlawful occupation of the land. Therefore, PW1 is entitled to a permanent injunction which is an equitable and discretionary remedy as sought in his amended plaint.

34. In respect of mesne profits, PW1 claims at paragraph 8 of his statement (evidence) mesne profits of Kshs. 100,000/= per year against DW1 since 2010. I am conscious of the definition of the term “**mesne profit**” under **Section 2 of the Civil Procedure Act (Cap 21)** which provides:-

**“Mesne profits” in relation to property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received there from, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession. ”**

35. In his submissions, DW1 stated that the issue of mesne profits was not specifically pleaded and strictly proved. I uphold the submissions by the defendant and endorse the decision in **Nakuru Industries Ltd –v- S.S. Mehta and Sons (2016) eKLR** that mesne profits are a form of special damages which must be specifically pleaded and strictly proved. The plaintiff has failed to meet that requirement in the instant suit. To that extend, the prayer for mesne profits be and is hereby declined.

36. By dint of the proviso to **Section 27 (1) of the Civil Procedure Act (Cap 21)**, the plaintiff has succeeded in this dispute. He is entitled to costs of this suit as against the defendants.

**(H) DISPOSITION:**

37. In the premises, I find that the plaintiff has shown that he is the registered proprietor of the suit land into which the defendant has trespassed. He has proved his claim against the defendant on a balance of probability.

38. Wherefore, I enter Judgment for the plaintiff against the defendant in terms of a permanent injunction and costs of the suit as sought in his amended plaint filed on 7<sup>th</sup> November, 2014.

**DELIVERED, DATED and SIGNED at MIGORI this 05<sup>th</sup> day of February 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Mr. Kerario Marwa learned Counsel for the plaintiff.

The defendant in person.

Tom Maurice – Court Assistant