



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KISII**

**CASE NO. 26 OF 2017**

**PETER RIANG'A MAKORI.....PLAINTIFF**

**VERSUS**

**RONALD OINO ANGWENYI.....DEFENDANT**

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

1. The plaintiff instituted the instant suit against the defendant vide a plaint dated 6<sup>th</sup> February 2017 filed in court on the same date. The plaintiff prays for judgment against the defendant for:

- (a) An eviction order as the plaintiff is the sole owner and/or bonafide owner of the said plot number Kisii/Wanjare/Bogiakumu/3266.**
- (b) A permanent injunction be issued against the defendant, her agents, servants, or otherwise howsoever from trespassing into or interfering with land parcel No. Kisii Wanjare/Bogiakumu/ 3266 in whatsoever manner.**
- (c) General damages.**
- (d) Any further relief that the honourable court may deem just to grant**
- (e) Costs of this suit.**

2. The plaintiff's claim was that he was at all material times the lawful registered owner of land parcel number **Wanjare/Bogiakumu/3266** ("the suit property") but stated that the defendant during the month of October 2016 wrongfully and unlawfully entered into the suit property and destroyed the plaintiff's fencing together with 5000 blue gum trees and commenced putting up structures thereon. The plaintiff averred the defendant's acts were without any authority and without any colour of right to the suit property. The plaintiff further averred that the defendant chased the plaintiff's agents/relatives who were utilizing the plaintiff's land from the land and prevented them from re-entering onto the land.

3. The plaintiff stated that he conducted a search on the suit property at the land registry in January 2017 which revealed the defendant had somehow been registered the owner of the suit property on 4<sup>th</sup> June 2016 by way of a transfer. The plaintiff contended the transfer must have been fraudulently effected to the defendant as the defendant failed to prove how he had acquired the property when the land registrar summoned both the plaintiff and the defendant to make inquiry as to the authenticity of the titles held by myself and the defendant. The land registrar proceeded to cancel the registration of the defendant as the owner of the suit property but the defendant despite being requested to desist from trespassing onto the plaintiff's land by the land registrar has refused to yield possession and occupation of the suit property and has denied the plaintiff entry into and use of the suit property.

4. The plaintiff prayed for judgment against the defendant for:

- (a) An eviction order and permanent injunction restraining the defendant, his agents or servants from trespassing into or interfering with land parcel No. Wanjare/Bogiakumu/3266.**
- (b) Damages.**
- (c) Costs of the suit.**

5. The defendant was served with summons to enter appearance together with the plaint on 5<sup>th</sup> February 2017 as per the affidavit of service sworn by one Isaac Nyangena Kimari dated 28<sup>th</sup> February 2017 and filed on the same date. Although Mr. Bigogo Advocate of Bigogo Onderi & Company Advocates appeared for the defendant on 23<sup>rd</sup> March 2017 and sought and was granted leave to file the defendant's response to the suit, the defendant did not file any defence to the suit. Mr. Bigogo filed an application to be allowed to cease to act for the defendant on the basis that he had failed to get any instructions from the defendant to enable him to continue representing the defendant. He was allowed to cease from acting for the defendant on 22<sup>nd</sup> October 2018 and as that was the date that the suit was fixed for hearing and Mr. Bigogo informed the court he had notified the defendant of the hearing and the plaintiff's advocate had as well served the defendant with a hearing notice directly, the court allowed the plaintiff to proceed with the hearing *ex parte* notwithstanding the absence of the defendant.

6. One, Thomas Ngwaro Makori testified as PW1 on behalf of the plaintiff by virtue of a power of attorney dated 21<sup>st</sup> November 2011 registered as P.A No. 2316 on 21<sup>st</sup> March 2012. The plaintiff is resident in the United States of America (USA) and PW1 is his brother to whom he donated the power of Attorney to act for and represent him and thus PW1 had proper *locus standi* to represent, act and testify on behalf of the plaintiff.

7. PW1 in his evidence relied on the witness statement made and filed by the plaintiff and on the bundle of documents filed by the plaintiff in support of the suit. It was the plaintiff's evidence that he purchased land parcel number **Wanjare/Bogiakumu/3266** from one Nyoera Ongori in the year 2001 at the price of kshs. 250,000/= which he paid in full and was issued with a title deed for the land the same year. A copy of the abstract of title (green card) for land parcel **Wanjare/Bogiakumu/3266** reveals that the suit property was a subdivision of land parcel number 2451 and its register was opened on 24<sup>th</sup> January 2001 when Nyoera Ongori was registered as the owner. the abstract of title *inter alia* shows the following transactions:-

**1. 24<sup>th</sup> January 2001: Nyoero Ongoro registered as owner**

**2. 13<sup>th</sup> June 2001: Peter Riang'a Makori registered as owner**

**3. 14<sup>th</sup> June 2001: Title deed issued to Peter Riang'a Makori**

**4. 3<sup>rd</sup> August 2012: Title reissued pursuant to a Gazette Notice No. 7993 of 15<sup>th</sup> June 2012**

**5. 4<sup>th</sup> April 2016: Ronald Oino Angwenyi registered as owner pursuant to a transfer**

**6. 6<sup>th</sup> April 2016: Title issued to Ronald Oino Angwenyi**

**7. 10<sup>th</sup> January 2017: Title issued to Ronald Angwenyi on 4<sup>th</sup> April 2016 cancelled by the land registrar**

8. The plaintiff stated that since purchasing the suit property he had never sold the same to any other person. The plaintiff in his witness statement stated that in October 2016 some persons associated with Mary Kemunto Orango who was a member of Nyoero Ongori's family invaded his land and started carrying out cultivation thereon. The plaintiff was prevented from entering onto the suit property and the gum trees that he had planted on the land were destroyed/uprooted. The plaintiff stated further that the people working on his land indicated that they had been hired by the owner of the land to work on the land.

9. This turn of events prompted the plaintiff to conduct an official search at the Kisii land registry as per the certificate of official search dated 6<sup>th</sup> January 2017 ("**PEX.2**") annexed to the plaintiff's bundle of documents. The search revealed that the defendant was registered as owner of land parcel number **Wanjare/Bogiakumu/3266** on 4<sup>th</sup> June 2016 by way of transfer which the plaintiff knew nothing about. The plaintiff stated there were no documents at the lands office to evidence the transfer by himself to the defendant and the land registrar expressed the view that there could only have been tampering of the green card to show the defendant to be the registered owner. The plaintiff stated that upon summons by the land registrar, the defendant failed to produce any documents to support the transaction in his favour and that prompted the land registrar to make an entry in the Green Card cancelling the transfer effected to the defendant.

10. The plaintiff has tendered evidence to demonstrate that he was registered as owner of land parcel **Wanjare/Bogiakumu/3266**. The copy of the abstract of title (green card) certified by the land registrar on 21<sup>st</sup> November 2011 annexed to the plaintiff's bundle of documents ("**PEX.3**") shows the plaintiff was registered as owner of the property on 13<sup>th</sup> June 2001 pursuant to a transfer for the consideration of kshs. 250,000/= and was issued a title deed on 14<sup>th</sup> June 2001. I am satisfied the plaintiff was lawfully registered as the owner of the property. The plaintiff has pleaded and maintained that he has never sold and/or transferred the property to any person. He denied effecting the transfer to Ronald Oino Agwenyi, the defendant on 4<sup>th</sup> April 2016. Apart from the entry in the green card, there is no other evidence to support the transfer to the defendant. The plaintiff as the registered owner of the property in 2016 was the only person who could have effected the transfer of the property to the defendant and he did not.

11. The defendant though having been served and though he engaged counsel, never filed any defence to the suit. The averments and evidence by the plaintiff remain unchallenged. I find no reason why I should not believe the evidence of the plaintiff and I accordingly accept his evidence that he was indeed the registered owner of the suit property and that he never transferred the same out to the defendant. I hold the purported transfer to the defendant to have been procured unlawfully and/or fraudulently. There was absolutely no evidence to support the transfer and it is no wonder the land registrar took the unusual step of cancelling the entry in the green card. It is usual for all documents supporting a transaction to be held and retained in the parcel file at the lands office where the transaction relates to land registered under the previous (repealed) Land Registered Act, Cap 300 Laws of Kenya and now the Land Registration Act, 2012. There were no documents held by the Lands office to support the transfer to the defendant and when called upon by the land registrar to avail any documents in support of the transaction, the defendant failed to do so.

12. The plaintiff in the suit has claimed damages and has specifically claimed the value of 5000 gum trees which he claims to have been destroyed by the defendant. This constitutes a special damages claim and would therefore require to be specifically pleaded and specifically proved. The plaintiff under paragraph 8 of the plaint pleaded that he has been deprived of the use and enjoyment of the land and that his 5000 gum trees were destroyed and has therefore suffered loss and damage. The plaintiff went on to state the value would be furnished at the hearing. During the hearing the plaintiff placed reliance on a report dated 9<sup>th</sup> February 2017 made by the Kenya Forest Service Bonchari Sub-County, Kisii which placed a value of kshs. 1,750,000/=.

13. It is not clear how the figure of 5000 gum trees was arrived at and/or when they were planted or if they were all of the same size. I am not satisfied that the special damages were sufficiently particularized in the pleadings as required and neither were they specifically proved at the trial. I therefore decline to award any special damages.

14. As I have found and held that the plaintiff was the lawful and valid registered owner of the suit property, the defendant's entry onto the land in 2016 constituted trespass. The unlawful entry of the defendant onto the suit property deprived the plaintiff of the use of his land. Trespass is actionable per se and once trespass is established no proof of damage is necessary. In the instant matter the defendant upon entering into possession/occupation of the suit property has prevented the plaintiff from entering onto his land and from making use of the same. The plaintiff is entitled to general damages and I award him kshs. 200,000/= for trespass.

15. In the premises, I find and hold that the plaintiff has proved his case on a balance of probabilities and enter judgment in the plaintiff's favour in the following terms:-

**(a) The defendant be and is hereby ordered to vacate and deliver to the plaintiff vacant possession of land parcel No. Wanjare/ Bogiakumu/3266 within 30 days from the date of service of the decree herein upon him.**

**(b) In default of compliance with (a) above the plaintiff be entitled to an order for the forcible eviction of the defendant from land parcel No. Wanjare/Bogiakumu/3266 upon application.**

**(c) General damages for trespass of kshs. 200,000/= awarded to the plaintiff together with interest at court rates from the date of judgment until payment in full.**

**(d) Costs of the suit to the plaintiff.**

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 20<sup>TH</sup> DAY of MARCH 2019.**

**J. M. MUTUNGI**

**JUDGE**

**In the Presence of:**

Ms. Ondeyo for the plaintiff

N/A for the defendant

Ruth Court Assistant

**J. M. MUTUNGI**

**JUDGE**