



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT ART KISII**

**ELC CASE NO. 1099 OF 2016**

**JOHN MONYANCHA NGOGE.....PLAINTIFF**

**VERSUS**

**MARCELA KERUBO KEBABE.....1<sup>ST</sup> DEFENDANT**

**ROBERT NYANDUSI KEBABE.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. By a Plaint dated 1<sup>st</sup> December October, 2016 the plaintiff filed suit against the Defendant seeking the following reliefs:

- a) A declaration that the Plaintiff is the legally registered owner of L.R No. WANAJRE/BOMARENDA/4755.
- b) An order of permanent injunction to restrain the defendants by themselves, their agents, servants and anybody claiming through them from entering, encroaching and doing anything on L.R No. WANJARE/BOMARENDA/4755.
- c) An order of eviction do issue against the defendants evicting them from L.R No. WANJARE/BOMARENDA/4755.

2. Despite being served with summons to enter appearance, the defendants neither entered appearance nor filed a defence. The suit therefore proceeded ex-parte.

3. It was the plaintiff's uncontroverted evidence that his late father Gabriel NgogeKereu purchased a portion of the suit property from the late Sylvester Kebaba Nyabaro. He produced the sale agreement dated 7<sup>th</sup> September, 1993. As an exhibit. He later obtained a title deed in his name on 4<sup>th</sup> December, 2014. After his father's demise, he took possession of the suit property and he has been in occupation thereof since 2008 together with his younger brothers who have been residing on and utilizing the said parcel of land. Sometime in the month of September, 2016, the defendants together with their agents descended on the suit property and started building a mud-walled house next to the plaintiff's house after chasing away the plaintiff's younger brothers.

4. Sometime in the year 2008, the plaintiff's mother Mary Nyasani filed a land dispute with the South Kisii Land Dispute Tribunal vide case no. 49 of 2008 seeking to have the portion purchased by her late husband transferred to her and the tribunal ruled in her favour. The award of the Tribunal was subsequently adopted as a judgment of the court vide Kisii Chief Magistrate Miscellaneous case No. 44 of 2008. The plaintiff produced a copy of the judgment and proceedings as well as photographs of the suit property as exhibits.

5. Mr. Ogari learned Counsel for the Plaintiff filed his submissions in which he stated that the plaintiff had proved his case on a balance of probabilities as his evidence was uncontroverted. He urged the court to enter judgment for the plaintiff as prayed in the plaint.

**ISSUES FOR DETERMINATION.**

6. Having considered the plaint, evidence and submissions on record, the following issues fall for determination:

- i. Whether the plaintiff is the registered owner of L.R No. WANJARE/BOMARENDA/4755.
- ii. Whether the defendants have trespassed on the suit property.
- iii. Whether the plaintiff is entitled to the reliefs sought.

iv. Who should bear the costs of the suit.

## ANALYSIS AND DETERMINATION

7. With regard to the first issue, Section 24 of the Land Registration Act No 3 of 2012 provides as follows:

***“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”***

Section 25 (1) of the said Act further provides that:

***“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”***

Section 26 of the same Act provides that:

***“the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except***

***a) on grounds of fraud, or misrepresentation to which the person is proved to be a party; or***

***b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.***

8. The plaintiff testified that he is the registered owner of land parcel L.R NO.WANJARE/BOMARENDA/4755 as demonstrated by Plaintiff's Exhibit 1a and 1b.

9. Since the plaintiff's evidence was not challenged at the hearing, it is my finding that the plaintiff is the absolute proprietor of the suit property. He is therefore entitled to protection of the said title as provided for under the Land Registration Act No. 3 of 2012.

10. Additionally, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that:

***“no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.”***

11. The second issue is whether the plaintiff has proved that the defendants trespassed onto his land. The Plaintiff testified that the defendants entered the plaintiff's land without his consent, chased away his younger brothers and constructed a mud-walled house thereon. In the case of **Nyangeri Obiye Thomas V Yunuke Sakagwa Nyoiza ELC Case No.277 of 2018** Okong'o J observed as follows:

Clerk & Lindsell on Torts 18<sup>th</sup> Edition at paragraph 18-01 defines trespass as follows:

***“Any unjustifiable intrusion by one person upon land in possession of another.” ....Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”***

12. From the evidence on record, it is my finding that the defendants are unlawfully occupying the suit property. This amounts to trespass to land.

13. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks three remedies; a declaratory order that he is the lawful owner of the suit property; a permanent injunction restraining the defendants from interfering with the plaintiff's land and in default thereof an order of eviction against them.

13.The principles that guide the court in granting an order of injunction are set out in the celebrated case of **Giella V Cassman Brown & Company Limited 1973. E.A 358** as follows:

***“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”***

14. From the evidence on record it is my finding that the plaintiff has proved his case on a balance of probabilities and he is thus entitled to all the reliefs stated in the plaint. I therefore enter judgment for the plaintiff and make the following final orders:

- a) A declaration is hereby issued that the plaintiff is the registered owner of land parcel L.R NO.WANJARE/BOMORENDA/4755.
- b) An order of permanent injunction is hereby issued restraining the defendants by themselves, their agents, servants and anybody claiming through them from entering, encroaching and doing anything on L.R No. WANJARE/BOMARENDA/4755.
- c) The defendants shall vacate and deliver vacant possession of the suit property to the plaintiff within 30 days failing which an order of eviction shall issue against them upon application by the plaintiff.
- d) The costs of this suit are awarded to the plaintiff.

Dated, signed and delivered at Kisii this 29<sup>th</sup> day of November, 2019.

**J.M ONYANGO**

**JUDGE**