



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 1134 OF 2016

(FORMERLY HCC NO. 30 OF 2010)

YUVINALIS MANGIRA RWENYO.....PLAINTIFF

VERSUS

BONIFACE ISAAC.....1ST DEFENDANT

OBONYO ISAAC.....2ND DEFENDANT

BENARD ISAAC.....3RD DEFENDANT

NYASINGA ISAAC.....4TH DEFENDANT

J U D G M E N T

1. The plaintiff initiated the present suit vide a plaint dated 8th February 2010 filed in court on 9th February 2010. The plaintiff states he is the registered owner of land parcel **No. Central Nyaribari/Nyanturago/ 1004** (“the suit property”) which he purchased from the defendant’s father (deceased) in the 1970s. The plaintiff avers that the defendants unlawfully invaded the suit property on 24th and 25th January 2010 and unlawfully commenced the construction of a structure thereon and denied the plaintiff access to and the right of use of the suit property.

The plaintiff prays for judgment against the defendant for:-

- a. An order for eviction against the defendants either by themselves, their agents, their servants and or any other person from land parcel No. Central Nyaribari/Nyanturago/1004.**
- b. General damages.**
- c. Costs and interest.**
- d. Any other relief.**

2. The defendants were served with summons to enter appearance together with plaint on 25th February 2010 as per the affidavit of service sworn by one Peter Nyanusi Moenga, process server filed in court on 21st May 2010. The defendants did not enter an appearance and or file any defence. The matter was listed for formal proof hearing on diverse dates when the hearing did not proceed. On 9th May 2017 the matter was listed for hearing before me and since the plaintiff had not complied with Order 11 of the Civil Procedure Rules, I adjourned the matter to enable the plaintiff to file his witness statement and his bundle of documents. I refiled the suit for hearing on 28th September 2017 and directed that the defendants be served with a hearing notice. Though the defendants had been served there was no attendance on their part but owing to the court’s workload on the date the suit was adjourned and hearing refiled on 16th November 2017 again with a direction that the defendants be served with a hearing notice.

3. On the 16th November 2017, the defendants did not attend court although they had been served. I allowed the plaintiff to proceed with the hearing ex parte. The plaintiff testified as the sole witness in support of his case. It was the plaintiff’s evidence that he purchased the suit property **LR No. Nyaribari Chache/Nyanturago/1004** from the defendants deceased father one, Isaac Ombaso and that the land was transferred to him after due process. The plaintiff stated that he was duly registered as the owner of the suit property on 7th May 1976 as evidenced by the abstract of title. The plaintiff relied on the witness statement he had recorded on 12th July 2017 filed in court on 28th

September 2017. He also relied on the bundle of documents he had filed as the plaintiff's list of documents dated 12th July 2017 on 28th September 2017. The documents included:-

1. **Copy of Title deed of LR No. Nyaribari/Cache/Nyanturago/ 1004.**
2. **Copies of sale agreements dated 16th November, 1974, 14th March, 1975 and 2nd April, 1975.**
3. **Copy of official search dated 5th November 2015.**

The documents were admitted as evidence as "PEX.1-3" as listed in the bundle.

4. In the witness statement the defendant stated that the defendants encroached onto his land and constructed a structure thereon and that in spite of efforts through the Assistant Chief to get the defendants to cease the trespass, the defendants have failed and/or refused to yield. The plaintiff averred that the defendants have obstructed and denied him access to his property and seeks a declaration that he is the rightful owner of the suit land and for the eviction of the defendants.

5. The plaintiff's claim and evidence remains unrefuted and/or challenged. The defendants failed to appear or file a defence in spite of being served with summons to enter appearance and severally with hearing notices whenever the suit was scheduled for hearing. On the basis of the evidence tendered by the plaintiff, it is evident that the plaintiff is the registered owner of land parcel **Nyaribari Cache/Nyanturago/1004**. The plaintiff has produced in evidence a copy of the title dated 23rd June 2011 which was re-issued. Looking at the proprietorship section it is evident that the suit property was a subdivision of Plot No. 613 and that the title in respect of the suit property was first issued in favour of the plaintiff on 7th May 1976. A copy of the certificate of search in regard to the suit property dated 5th November 2015 confirms the plaintiff is the registered owner of the suit property.

6. Under Section 26(1) of the Land Registration Act, 2012 a certificate of title constitutes conclusive evidence of proprietorship of land. The plaintiff holds title to the suit land and a certificate of official search does confirm that he is indeed the registered owner. Section 26(2) provides as follows:-

26(2) A certified copy of any registered instrument signed by the Registrar and sealed with the seal of the Registrar, shall be received in evidence in the same manner as the original.

7. On the evidence presented by the plaintiff, I am satisfied that he is lawfully registered as the owner of the suit property. As such registered owner the plaintiff is by virtue of Section 24(a) vested with absolute rights of ownership and is entitled to unrestricted access to and use of his land without any hinderance from the defendants or any other person. Section 24 provides as follows:-

24. Subject to this Act-

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

b.

8. The plaintiff has stated that the defendants unlawfully encroached onto his land and have prevented him from accessing and/or using his land. The defendants have no right to enter and/or occupy the plaintiff's land without his authority or consent. The defendants did not appear and hence the plaintiff's evidence that they have trespassed onto his land was not challenged. In the absence of any challenge, I accept the plaintiff's evidence and hold the defendants' occupation of the plaintiff's land is unlawful and amounts to trespass.

9. Although the plaintiff made a prayer for damages his evidence was sketchy in that regard. I hold that no proper basis was laid by the plaintiff to justify an award for damages. I will decline to make an award of damages.

10. In the result, I am satisfied that the plaintiff has proved his case on a balance of probabilities and I accordingly enter judgment in favour of the plaintiff against the defendants jointly and severally and make the following orders:

1. The defendants are hereby ordered to vacate the plaintiff's land parcel Nyaribari Cache/Nyanturago/1004 within 30 days of being served with the decree herein.

2. That in the event the defendants fail to vacate as under (1) above an eviction order to issue against the defendants, their agents and servants for their forcible removal from land parcel Nyaribari Cache/Nyanturago/1004 on application by the plaintiff.

3. Costs of the suit are awarded to the plaintiff.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 9TH DAY of FEBRUARY, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Moguche for Ochoki for the plaintiff

N/A for the 1st, 2nd, 3rd and 4th defendants

Ruth court assistant

J. M. MUTUNGI

JUDGE