



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO.60 OF 2012**

**MARGARET OFWENYA NYAMBOYA.....PLAINTIFF**

**VERSUS**

**JOHN W. AKACH.....DEFENDANT**

**JUDGMENT**

1. Margaret Ofwenya Nyamboya, the Plaintiff, commenced this proceedings through the plaint dated 27<sup>th</sup> September 2012 seeking for an order of eviction from, and or vacant possession of land parcel **West Asembo/Siger/6**, permanent injunction, costs and interest against **John W. Akach**, the Defendant. She avers that she is the registered proprietor of land parcel **West Asembo/Siger/6**, while the Defendant is the registered proprietor of **West Asembo/Siger/7**. That since sometimes in 2005 the Defendant encroached and trespassed onto her land and constructed a house/home and continues to use the land despite being asked to stop.

2. The Defendant opposes the plaintiff's claim through his written statement of defence and amended counterclaim dated 25<sup>th</sup> July 2014. He avers that he is in lawful possession of the suit land since 1997, when he built a pit latrine on it after buying it from the Plaintiff's late husband. That he completed paying the purchase price in 2001 and in the same year built his family homestead on it. That by the time the Plaintiff started claiming the land in 2012, he had been on it uninterrupted for about 16 years. The Defendant prays for the Plaintiff's suit to be dismissed with costs and he be declared the legal owner of the land. He also prays for injunction order against the plaintiff, an order directing the Land Registrar to register him as the proprietor of the land and costs.

3. Mr. Odhiambo and Kopot advocates represented the Plaintiff and Defendant respectively during the hearing. The Plaintiff testified as PW1, and called Gedion Mwuinzi Malinda, the land Registrar Bondo/Rarienda, who testified as PW2. The Defendant testified as DW1. The court gave directions on filing and exchanging of written submissions at the close of the oral evidence. The counsel for the Plaintiff filed their written submissions on 20<sup>th</sup> July 2017 but none was filed for the Defendant.

4. The following are the issues for the court's determination;

- a) Whether the Plaintiff is the legally registered proprietor of land parcel West Asembo/Siger/6, the suit land.
- b) Whether the Defendant's use and possession of the suit land is lawful or amounts to trespass.
- c) Whether the Defendant has been in adverse possession of the suit land, and if so, from when.
- d) What orders to issue.
- e) Who pays the costs for the Plaintiff's suit and Defendant's counterclaim.

5. The court has carefully considered the pleadings filed by the parties, oral and documentary evidences presented, submissions by counsel for the Plaintiff and come to the following conclusions;

- a) That the Plaintiff is the legally registered proprietor of land parcel West Asembo/Siger/6, having acquired the registration on 8<sup>th</sup> May 2012 through transmission from the estate of her late husband, named Enock Ofwenya Nyaboya, who died in 2008.
- b) That the Defendant is the legally registered proprietor of land parcel, West Asembo/Siger/7 having acquired registration on 26<sup>th</sup> March 2004 upon purchasing it from one Lawi Achola Nyamboya, who died in 2004. That the said Lawi Achola Nyamboya was a brother to Enock Ofwenya Nyamboya, and therefore a brother in law to the Plaintiff.

c) That contrary to the Defendant's averment at paragraph 2 of his counterclaim that he bought the suit land from the "Plaintiff's husband," the evidence adduced by both the Plaintiff and Defendant and the documentary evidence availed by the parties and confirmed by PW2, shows that the Land the Defendant bought West Asembo/siger/7, that belonged to Lawi Achola Nyaboga, which borders the suit land, West Asembo/Siger/6. That evidence further confirms that the Plaintiff's husband was Enock Ofwenya Nyamboya and not Lawi Achola Nyamboya.

d) That after the Defendant bought land parcel West Asembo/Siger/7, he took possession of the land he was shown which was later in 2011 to 2012 found to have been partly in West Asembo/ Siger/7 and 6, upon the Plaintiff engaging a surveyor's services. That the Plaintiff did a demand notice dated 30<sup>th</sup> April 2012 to the Defendant to vacate from the suit land before filing this suit but he did not.

e) That until the Defendant got to know that the land he occupied was partly West Asembo/Siger/6, he had before then taken it to be his land, West Asembo/Seiger/7. That therefore he cannot have been in adverse possession of that part of West Asembo/Siger/6 until after the discovery that it was not his land, as he believed he was occupying his own land. That one cannot be in adverse possession of his own land.

f) That from the time the Defendant discovered that he was occupying a part of West Asembo/siger/6, to the time this suit was filed, only a period of less than one year had lapsed and the Defendant's claim over that land based on adverse possession is premature and therefore must fail.

6. That flowing from the foregoing the court finds that the Plaintiff has on a balance of probabilities proved her case against the Defendant. The court further finds that the Defendant has failed to prove his counterclaim against the Plaintiff to the standard required of balance of probabilities and his counterclaim fails. The court therefore enters judgment for the Plaintiff against the Defendant as follows;

a) That the Defendant is found to be a trespasser on land parcel West Asembo/siger/6, which is legally and procedurally registered in the name of the Plaintiff.

b) That the Defendant is hereby ordered to vacate from, and give vacant possession of, land parcel West Asembo/Siger/6 to the Plaintiff in ninety (90) days and in default eviction order to issue.

c) That a permanent injunction be and is hereby issued restraining the Defendant, either by himself, his servants or agents from re-entering, moving in or in any other manner whatsoever interfering with the Plaintiff's use and possession of land parcel West Asembo/Siger/6, after giving vacant possession either voluntarily or through eviction.

d) The Defendant will pay the Plaintiff's costs of this suit.

e) The Defendant's counterclaim is hereby dismissed with costs to the Plaintiff

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF FEBRUARY 2018**

**In presence of;**

**Plaintiff Present**

**Defendant Present**

**Counsel Mr. Odhiambo for Plaintiff**

**MR. Ouma for Kopot for Defendant**

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**7/2/2018**

7/2/2018

S.M. Kibunja Judge

Oyugi/Joane court assistant

Plaintiff present

Defendant present

Mr Odhiambo for the Plaintiff

Mr. Ouma for Kopot for the Defendant

Court: The judgment dated and delivered in open court in presence of both parties, Mr. Odhiambo for the Plaintiff and Mr. Ouma for Kopot for Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**7/2/2018**