



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 755 OF 2017

(Formerly Kisii ELCC No. 276 of 2012)

CALEB ODONDI OMOLLO PLAINTIFF

VERSUS

JACOB CALEB OKAL DEFENDANT

JUDGMENT

1. By a Plaint dated 13th July, 2012 and filed in Court on 16/7/2012, the Plaintiff namely **CALEB ODONDI OMOLLO** through Ogutu Mboya and Co Advocates sued the Defendant, **JACOB CALEB OKAL** for the following orders:-

- a) *Declaration that the Plaintiff is the registered, legitimate and lawful owner / Allottee of Plot No. 024BLOCK 'C'.*
- b) *An Order of Eviction against the Defendant from Plot No. 024 BLOCK 'C' (hereinafter referred to as the suit land)*
- c) *Permanent Injunction restraining the Defendant either by himself, agents, servants and/or anyone claiming under the Defendant, from re-entering, trespassing onto, remaining in possession of, interfering with and /or in any other manner, whatsoever, dealing with the suit land.*
- d) *General Damages for trespass/mesne profits*
- e) *Costs of this suit be borne by the Defendant.*

2. Briefly the Plaintiff's claim is that one Justus Ngole Omollo (Deceased) and the plaintiff were joint registered proprietors and / or allottees of the suit land, at all material times relevant to this suit. On 29th December, 1990, the deceased passed on leaving the plaintiff as the sole proprietor and/or allottee of the suit land.

3. The Plaintiff further claims that on or about the year 2006, while he was in the United States of America (USA), the defendant unlawfully entered onto and trespassed upon the suit land. Subsequently, the defendant took occupation of the suit land and has remained on the land to-date. As a result of the defendant's acts of trespass, the Plaintiff has been dispossessed and/ or deprived of the suit land prompting the filing of this suit.

4. The defendant who is unrepresented filed his statement of defence dated 16th August 2012. He stated that he has no interest and he has never had interest in the suit land. He denied the plaintiff's claim.

5. The defendant termed the Plaintiff's claim utterly misplaced since he occupies plot No. T042 within Rongo Town and not the suit land. He stated that there are two cases namely Rongo SRMCC NOS. 99 of 2010 and 100 of 2010 involving the parties herein hence the instant suit is a duplication.

6. In his Reply to defence dated 29th August 2012, the plaintiff reiterated the contents of his plaint. He stated that Plot No. T042 in Rongo Town is strange and non-existent. He further stated that Rongo SRM CC Nos. 99 and 100 of 2010 relate to a dispute between the defendant herein and one, FLORA KORE, now deceased and termed the allegation by the defendant, incorrect, misconceived and misleading. He urged the Court to strike out and/or dismiss the defendant's statement of defence and enter judgment as sought in the plaint.

7. On 30/1/2018, the Court directed the parties to file and serve submissions. Consequently, by submissions dated 2nd March, 2018, counsel

for the plaintiff gave the background of the case and identified issues for determination as follows:-

- (i) **Whether the Plaintiff was the registered owner of the suit plot**
- (ii) **Whether the Plaintiff has proved his case on balance of probabilities**
- (iii) **Whether the Plaintiff is entitled to relief sought**
- (iv) **Whether the Plaintiff is entitled to costs**

8. Counsel further relied on authorities namely:-

- a) **Elijah Wachira Nduru-vs-Timothy Githaiga Mwangi (2016) eKLR** where the court observed that the plaintiff was the proprietor of the plot in dispute since there has been no cancellation by the company of his name.
- b) **Waas enterprises Limited-vs-City Council of Nairobi & another (2014) eKLR** whereby it was noted that only the plaintiff is entitled to enjoy proprietary rights over the suit land
- c) **Zakayo Wanzala Makomere-vs-West Kenya Sugar Co. Ltd (2013) eKLR** that the plaintiff is required to prove his claim against the defendant on the balance of probabilities
- d) **D.T. Dobie & Company (K) Ltd-vs-Wanyonyi Wafula Chebukati (2014) eKLR** in respect of the burden of proof in civil cases on a balance of probability.
- e) **Phelista Mukami Makau-vs-Elizabeth Kanini Mulumbi (2015) eKLR** where the court held that in the absence of evidence in rebuttal from the respondent, it follows that the appellant proved his case on a balance of probability.
- f) **Linus Nganga Kiongo & 3 others-VS-Town Council of Kikuyu (2012) eKLR** with regard to uncontroverted and unchallenged evidence.

9. I have considered the pleadings, the evidence of PW1 and the submissions by the Plaintiff's counsel. In **Great Lakes Transport Co (K) Ltd vs Kenya Revenue Authority (2009) LKR 720 and Nkalubo vs Kibirige (1973) EA 102**, issues for determination are those pleaded or as framed by the parties arising from facts or evidence in a suit. I note that the Plaintiff's counsel filed a statement of agreed issues dated 29th August, 2012 pursuant to Order 15 Rules 1 and 2 Civil Procedure Rules, 2010. The issues boil down to the plaintiff's proprietorship of the suit land, proof of the instant claim and entitlement of the plaintiff to the reliefs sought in the plaint as identified in the submissions.

10. On proprietorship of the suit land, the Plaintiff (PW1) testified that in 1986, his late brother Justus Ngoje Omollo and himself were allocated the suit land in Rongo Town Council within the then Homa Bay County. He stated. inter alia:-

"This is Plot Card in respect of the suit land and it is serial Number 199 (PEXH 1). The allottees thereon are my late brother Justus Ngoje Omollo and myself. Authority for allocation of the suit land was given in 1992 as per PEXH PExhibit 1." (emphasis provided)

11. It is abundantly clear from the testimony of PW1 that he is allottee of the suit land. He is entitled to enjoy all proprietary rights of the land to the exclusion of all others as recognised in **Waas Enterprises case** (supra). PW1 testified that he found the defendant showing films and conducting church services thereat without permission. He stated that:-

"I had no given consent to the defendant to use the land. He is in occupation of it. I need to use the suit land.

12. The evidence of PW1 reveals that the defendant trespassed into the suit land. The defendant had no consent of PW1 to enter the suit land and carry out activities and or business thereon.

13. The term "trespass" is defined by **Concise Oxford English Dictionary 12th Edition** as;

"Enter someone's land or property without permission."

14. I have looked at the proceedings certified on 2/7/2013 in Rongo RMCC 100 of 2010. They are listed as No. 9 in the defendant's list of documents dated 16th August, 2012. From the proceedings, a ruling was rendered on an application dated 26th February, 2010, by the trial magistrate who remarked:-

"The parties in Civil No. 100 of 2010 are Flora Okore In the two Civil suits the parties are not wholly the same."

15. On the claim by the defendant that this suit is a duplication of Rongo RMCC No. 100 of 2000, I note the ruling in the Rongo case and I find that neither Section 6 nor Section 7 of the Civil Procedure Act, 2010 is applicable in this suit. I find the defendant's claim in his

statement of defence misconceived and untenable.

16. The reliefs sought in the Plaint are within the jurisdiction of this Court. Admittedly, the said jurisdiction flows from **Article 162 (2) (b) of the Constitution of Kenya, 2010, Section 13 of the Environment and Land Court Act, 2015 (2011), Section 101 of the Land Registration Act, 2012, Section 150 of the Land Act Revised Edition 2016 (2012).**

17. Blacks Law Dictionary 9th Edition defines mesne profits as the profits of an estate received by a tenant in wrongful possession between two dates. PW1 claimed general damages /mesne profits. He did not refer to and claim any specific sum in his plaint and evidence. By their nature, mesne profits are akin to special damages and the plaintiff has failed to prove them in the circumstances of the instant case.

18. PW1 has proved by way of PExhibits 1 and 2 that he is the registered proprietor of the suit land. The defendant is unlawfully in occupation of the land. **Section 152A of the Land Act, 2016 (2012)** provides for prohibition to unlawful occupation of land and it reads:-

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

19. Under **Section 152B of the Land Act, 2016 (2012)**, eviction is to be undertaken in accordance with the Act. The section provides:-

“An unlawful occupant of private community or public land shall be evicted in accordance with this Act.”

20. In **Linus Kiongo case** (supra), G. V. Odunga, J held that the plaintiffs had given evidence on oath and were entitled to succeed. In the instant suit, I find that the plaintiff gave uncontroverted evidence against the defendant. He has proved his claim against the defendant on a balance of probability.

21. In the result, I enter judgment for the plaintiff against the defendant for the following orders;-

a) A declaration, eviction, permanent injunction and costs as sought in the plaint.

b) Eviction shall be undertaken in accordance with Sections 152A, 152B, 152E, F, G, H and I of the Land Act, 2016 (2012).

DELIVERED, SIGNED and DATED in open court at MIGORI this **8th** day of **March, 2018**

G. M. A. ONGONDO

JUDGE

In the presence of;

Mr P. Ochwangi learned counsel for the plaintiff

No appearance for the defendant

Tom Court Assistant

G. M. A. ONGONDO

JUDGE