



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 73 OF 2017

FILIS ATEMI WANDERA.....PLAINTIFF

VERSUS

NOAH IMANZA KIDIGA.....1ST DEFENDANT

JOSEPH MWATU KIDIGA.....2ND DEFENDANT

J U D G E M E N T

1. By a plaint initially filed here on 4/4/2017 and dated 3/4/2017, then amended and re-filed on 16/11/2017 and re-dated 15/11/2017, the Plaintiff – **FILIS ATEMI WANDERA** – complained that the two Defendants – **NOAH IMANZA KIDIGA** and **JOSEPH MWANDU KIDIGA** – have trespassed onto her land parcel No. **BUKHAYO/EBUSIBWABO/3031** (“disputed land” hereafter) and occupied it. According to the Plaintiff, the Defendants have constructed on the land and are cultivating it. She pleaded that the Defendants are also a nuisance but the aspect of nuisance was not pursued during hearing.

2. The Plaintiff is seeking the following orders against the Defendants:

- a. That an order of eviction do issue evicting the Defendants from the Plaintiff land parcel BUKHAYO/EBUSIBWABO/3031.
- b. That OCS, Nambale Police Station to effect the eviction of the Defendants from the Plaintiff’s land parcel No. BUKHAYO/EBUSIBWABO/3031.
- c. That an order of permanent injunction to issue against the Defendants, their agents, servants, family members and persons claiming through them from trespassing, ploughing, and/or using in any manner the Plaintiff’s land parcel number BUKHAYO/EBUSIBWABO/3031.
- d. Damages for trespass to the land.
- e. Costs of the suit.
- f. Any such further relief this honourable court may deem fit to grant.

3. It appears clear that the Defendants were served but they never entered appearance and/or file defence. The first service was effected on 6/4/2017. The second service, which sought to inform the Defendants of the hearing date, was on 17/8/2017. The hearing date was 8/11/2017.

4. The court heard the matter *ex parte* on 8/11/2017 since the Defendants did not turn up. The Plaintiff testified as PW1. She confirmed that she is the registered owner of the disputed land, having inherited it from her late mother – VERONICA ELI TERA. In the course of hearing, the Plaintiff showed her ID Card (PEX No.1), her title deed (PEX No. 2), a copy of her late mother’s title deed (PEX No. 3), confirmed grant issued to her by the court relating to her late mother’s estate (PEX No. 4) and demand letters sent to the Defendants before instituting the suit (PEX No. 5a & b).

5. The Plaintiff called one witness – BENJAMIN WANDERA – who testified as PW2. This witness was the village elder of the area where the land is situated. He said, *inter alia*, that the Plaintiff’s late mother had purchased the disputed land from one Philip Ongure. She constructed a house there and settled on the land but she later bought some other land elsewhere and migrated. The 1st Defendant later came and bought 1½ acres in the immediate neighbourhood. When he called the surveyor to conduct the survey, he misled the surveyor and the

land of the Plaintiff's mother was surveyed as his own.

6. The Plaintiff's mother was still alive then and she got to know what had happened. She lodged a complaint locally. The complaint appears to have been made first to PW2. It then escalated to the area chief before finally ending up in court. The ultimate decision was that the land belonged to the Plaintiff's mother. The necessary process was then undertaken and the Plaintiff's mother got the title deed to the land. This is the land that the Defendants still occupy. It is the land that the Plaintiff inherited from her late mother. She would like the Defendants evicted and restrained from returning there.

7. The Plaintiff's counsel, Calistus Nyengenye, filed submissions on 15/2/2018. The submissions were essentially a summation of the evidence tendered.

8. This is an uncontroverted matter. The Plaintiff demonstrated well that she is the owner of the disputed land. She also demonstrated that the Defendants are on the land. It is clear from evidence that the Defendants have no right to be on the disputed land.

The Plaintiff asked for damages but she did not lead evidence on this. Infact there is no mention of damages even in the Plaintiff's counsel submissions. It is therefore not possible to grant this prayer. The evidence availed only enables the court to grant prayers (aa), (b), (c) and (e). The Plaintiff is granted these prayers, having proved her case on a balance of probabilities.

9. The court has granted the prayer of eviction, it is necessary to point out that the Defendants should first be given a 90 days notice to remove themselves. If the Defendants fail to comply, then eviction should be carried out with the area O.C.S. giving assistance as prayed for in prayer (b).

Dated, signed and delivered at Busia this 24th day of April, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

1st Defendant:

2nd Defendant:

Counsel of Plaintiff.....

Counsel of Defendants.....