



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 99 OF 2014

MATIUS BWANA MUGA.....PLAINTIFF

VERSUS

PETER OJWANG AGOLA.....1ST DEFENDANT

JAMES ODHIAMBO NDEGE.....2ND DEFENDANT

J U D G M E N T

1. The plaintiff instituted the present suit against the defendants vide a plaint dated 11th March 2014. The plaintiff is the registered owner of land parcel number **LR No. North Mugirango/Magwagwa II/1089** measuring 3.08hectares (hereinafter referred to as “**the suit property**”). The plaintiff avers that the defendants have unlawfully and without any justifiable reason trespassed onto the suit property where they have constructed structures and persist in such trespass.

2. The plaintiff prays for judgment against the 1st and 2nd defendants for:-

- (a) Declaration that the plaintiff is the registered and/or lawful owner of LR No. North Mugirango/Magwagwa II/1089.**
- (b) An order of eviction and demolition of structures erected on the suit land by the defendants.**
- (c) Permanent injunction restraining the defendants by themselves, agents, servants and/or anyone claiming under the defendants, from re-entering, trespassing onto, building structures, cultivating, interfering with and/or in any other manner whatsoever, dealing with the suit land, that is LR No. North Mugirango/Magwagwa II/1089.**
- (d) General damages for trespass.**
- (e) Costs of the suit.**
- (f) Such further and/or other relief as the honourable court may deem fit and expedient so to grant.**

3. Though the defendants were served with summons to enter appearance on 15th March 2014 as per the filed affidavit of service dated 14th April 2014 they did not file their appearance until 9th May 2017 together with a defence. In the filed defence, the 1st defendant alleges that the plaintiff obtained title to the suit land fraudulently. The 1st defendant further averred that he had been staying on the suit land for over 22 years and thus denied he was in trespass as alleged by the plaintiff.

4. The suit was fixed for hearing on 15th February 2018. The defendants were served with a hearing notice as per the affidavit of service sworn by David Okumu Ojil dated 13th February 2018 and filed in court on 14th February 2018. The court having been satisfied the defendants were duly served with the hearing notice allowed the plaintiff to proceed with the hearing ex parte.

5. The plaintiff testified that he was the registered owner of the suit property and produced in evidence a title deed for **LR No. North Mugirango/Magwagwa II/1089** issued in his name on 6th November 2011. He stated that the suit property was a subdivision from land parcel number **North Mugirango/Magwagwa II/272** which was owned by his late father. He testified that the defendants have unlawfully trespassed onto his land and constructed structures thereon and that despite they having been requested to vacate by him and the local administration they have refused to do so and persist in such trespass which has necessitated the filing of the instant suit. The plaintiff stated that the defendants deceased father had his land which he distributed to the defendants within the area but the defendants refuse to relocate to their land. The plaintiff in fact testified that the 2nd defendant’s mother’s land is adjacent to his land but the 2nd defendant refuses to relocate there.

6. The plaintiff called his mother Hellen Aoko Muga (PW2) who reiterated the evidence given by the plaintiff. She confirmed that the defendants are in occupation of the plaintiffs land. It was her evidence that the defendants forcibly entered the land and have refused to vacate. PW2 also affirmed the defendants have land within the area but have refused to move to their own parcels of land.

7. Having reviewed the pleadings, the documents and the evidence by the plaintiff and PW2 I am satisfied that the plaintiff is the registered owner of land parcel **North Mugirango/Magwagwa II/1089** as verified by the copy of the title deed dated 6th April 2011 and the copy of the certificate of official search availed dated 10th March 2014. The copy of the certificate of search affirms that the plaintiff is the registered owner of land parcel **LR No. North Mugirango/Magwagwa II/1809** he having been registered as owner on 6th April 2011. Under Section 24 of the Land Registration Act, 2012 upon registration a proprietor of land is vested with absolute ownership rights. Section 24(a) provides:-

24. Subject to this Act –

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

8. Section 25 of the Act provides that the rights of a proprietor are absolute and indefeasible and may only be challenged in the manner provided under the Act. Section 25(1) of the Act provides:-

25(1) The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of 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-

(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

9. The plaintiff as the registered proprietor of the suit property is entitled to the exclusive possession and use of the same. He has testified that the defendants have unlawfully and without his permission occupied a portion of his land. The plaintiff's mother (PW2) confirmed that indeed the defendants have occupied a portion of the plaintiff's land. This evidence by the plaintiff and PW2 was uncontroverted. The defendants defence alleges fraud on the part of the plaintiff in acquiring title to the land. No particulars of fraud were pleaded and there is no basis upon which the court can find that the plaintiff's title to the suit property was fraudulently acquired. The defendants did not attend the court for the hearing of the suit and there is absolutely no evidence to support their defence. The defence is unsustainable and I dismiss the same.

10. Considering all the evidence and material placed before the court, I am satisfied that the plaintiff has proved his case on a balance of probabilities. I find that the defendants are trespassers on the plaintiff's land parcel **LR No. North Mugirango/Magwagwa II/1089** and they have no right to be on the land. I find that although the plaintiff has made a claim for general damages for trespass, the plaintiff has not provided any basis upon which an assessment for damages could be made. I decline to make any award for general damages.

11. In the final result, I enter judgment for the plaintiff against the defendants jointly and severally on the following terms:-

1. A declaration be and is hereby issued that the plaintiff is the lawfully registered owner of land parcel North Mugirango/Magwagwa II/1089.

2. The defendants together with their agents and servants be and are hereby ordered to vacate land parcel North Mugirango/Magwagwa II/1089 within 60 days from the date of service of the decree herein upon them.

3. In the event the defendants fail to comply with order (2) above an eviction order for their forcible removal to issue on application by the plaintiff.

4. Costs of the suit awarded to the plaintiff as against the defendants.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 13TH DAY of APRIL, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Plaintiff present in person

N/A for the 1st and 2nd defendants

Ruth court assistant

J. M. MUTUNGI

JUDGE