



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 155 OF 2014

EUNICE AKOTH OCHIENG.....1ST PLAINTIFF

GEORFFREY OTIENO OCHIENG.....2ND PLAINTIFF

VERSUS

AGISO LWANDE.....DEFENDANT

JUDGMENT

1. EUNICE AKOTH OCHIENG and GEOFREY OTIENO OCHIENG, the Plaintiffs, commenced this suit against AGISO LWANDE, the Defendant vide the plaint dated 3rd June 2014 seeking for the following;

- a) **“An order of eviction and/or vacant possession of LR. NO. KISUMU/WATHOREGO/372.**
- b) **An order of permanent injunction restraining the Defendant himself, his agents, servants, employees or assigns from occupying or remaining on Land Parcel LR NO. KISUMU/WATHOREGO/372.**
- c) **Costs of the suit and interest.**
- d) **Any other relief the Honourable court may deem expedient to grant.”**

The Plaintiffs aver that they are the registered proprietor of Land Parcel Kisumu/Wathorego/372 measuring 0.38 hectares onto which the Defendant trespassed onto a portion of and erected a dwelling house without their permission or authority. That despite notice to vacate, the Defendant has declined and hence this suit.

2. That M/S M. A. Ochanji Opondo & Co. Advocates entered appearance for the Defendant vide their memo dated 12th June 2014 and filed on the 17th June 2014. The Plaintiffs then applied for interlocutory judgment through their letter dated 11th July 2014 and the same was entered on the same date. The Defendant then filed the defence and counterclaim dated 10th July 2014 on the 29th September 2014. That when the suit came up for formal proof on the 28th April 2016, the Court drew the attention of the Counsel to the Plaintiffs to the defence and counterclaim filed on 29th September 2014. The Counsel informed the Court that the defence and counterclaim has never been served upon his chambers. The suit was then placed for mention on 6th June 2016 when another hearing date of 8th November 2016 was fixed. That on that date, Counsel for the parties were present and directions were given among them being that the Defendant’s Counsel do take steps to regularize the Defendant’s pleadings in view of the interlocutory judgment entered earlier. That when the matter came up for mention on the 15th February 2017, the defence and counterclaim dated 10th July 2014 and filed on the 29th September 2014 was struck out for having been filed outside time, without leave and before applying and obtaining orders to set aside the interlocutory judgment entered on the 11th July 2014. The Court then set the hearing of formal proof on the 26th September 2017 when the 1st Plaintiff testified as PW1.

3. The Plaintiffs’ case as given by PW1 is that the 2nd Plaintiff is her son. She produced a copy of the certificate of official search showing that the suit land was registered in their names on the 26th July 2013. She disclosed that her late husband had allowed the Defendant to settle on a quarter of the land in 2004 but when he was asked to vacate in 2010, he declined and continued to reside there forcefully. That after the death of her husband, she personally asked the Defendant to vacate from the land in 2013 but he refused and hence this suit.

4. The following are the issues for determination;

- a) **Whether the Plaintiffs have established a case for eviction orders against the Defendant to issue.**
- b) **Who pays the costs.**

5. That after considering the pleadings filed by the Plaintiffs, the oral and documentary evidence tendered by PW1, the written submissions by learned Counsel for the Plaintiffs, the Court has come to the following findings;

a) That the certificate of official search of land parcel Kisumu/Wathorego/372 produced as exhibit by PW1 confirms that the Plaintiffs are the registered proprietors of the said land from the 16th July 2013. That in accordance with Section 26 of Land Registration Act No. 3 of 2012, the Court takes the Plaintiffs as the absolute and indefeasible owners of the land in dispute and hence entitled to all the rights and privileges of registered proprietors.

b) That the testimony of the 1st Plaintiff that the Defendant had settled on a portion of the land in 2004 with permission or authority of her late husband has not been disputed or controverted. That further, the evidence that the 1st Plaintiff's late husband asked the Defendant to vacate from the land in 2010 has not been rebutted. That the testimony of PW1 that she personally asked the Defendant to leave the land in 2013 has also not been challenged. That the foregoing shows that the Defendant settled on the suit land as a licensee in the year 2004 which license was revoked in 2010. That the Defendant cannot claim to have been in adverse possession of the suit land for the period of 2004 to 2010.

c) That the continued stay on the suit land by the Defendant from 2010 became adverse to the title of the registered owner. That this suit was filed in 2014 and by today only about eight (8) years has lapsed since the possession or occupation of the suit land by the Defendant became adverse to the suit land's title holder in 2010. That the Plaintiffs initiated the process of recovering that portion of the suit land under the occupation of the Defendant before the period of limitation expired, through this suit and the defence of adverse possession is not available to the Defendant.

6. That having considered the evidence presented by the Plaintiffs, the Court finds that they have proved their case against the Defendant on a balance of probabilities as required by the law. The Court enters judgment for the Plaintiffs against the Defendant in the following terms;

a) That an order is hereby issued that the Defendant do vacate from the portion of land parcel Kisumu/Wathorego/372 in his occupation within ninety (90) days after being served with a copy of this order and in default eviction order to issue.

b) The Defendant to pay the Plaintiffs costs of the suit and interests thereof.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 16TH DAY OF MAY 2018

In the presence of:

Plaintiffs Absent

Defendant Absent

Counsel Mr. Mwasigwa for Kimanga for Plaintiffs

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE