



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ENVIRONMENT AND LAND COURT**

**ELC CASE NO. 417 OF 2017**

**(Formerly Kisii ELCC No. 949 of 2016)**

**MAROA PETER NYAMOHANGA.....PLAINTIFF**

**-versus-**

**SAMWEL NICHOLAS KEBOYE.....DEFENDANT**

**JUDGMENT**

1. The plaintiff who appears in person filed this suit against the defendant by way of plaint dated 31<sup>st</sup> July, 2012. He has sought the following reliefs:-

**i. Spent**

**ii. A permanent injunction restraining the defendant from trespassing in land parcel BUKIRA/BUHIRINGERA/7 and eviction to issue.**

**iii. Cost and interest at court rates.**

**iv. Any other relief this court may deem fit to the grant.**

2. Briefly the plaintiff's case is that he is the owner of the suit land namely LR NO. BUKIRA /BUHIRINGERA/7. The defendant only leased part of the suit land for farming and upon expiry of the lease, he placed a caution on the land claiming that he had purchased it from the plaintiff. The presence of the defendant on the suit land prevented the plaintiff from transacting any dealings on land hence it provoked the present suit.

3. The defendant who is represented by learned counsel, Mr. Kerario Marwa denied the plaintiff's claim in his statement of defence dated 30<sup>th</sup> November 2012. He claimed that he owns 4.5 acres (half) of the suit land having purchased it from the plaintiff for consideration. He further claimed that the plaintiff has been attempting to resell the said portion of the suit land which prompted him to place a caution on it's title to protect his interest as a purchaser. He sought dismissal of the suit with costs.

4. The plaintiff's counsel was duly served with hearing notice of the suit as shown on an affidavit of service sworn on 17<sup>th</sup> May, 2018 by Mr Walter Juma Opiyo, a duly licensed process server. During the hearing of the suit on 16<sup>th</sup> July, 2018, neither the plaintiff nor his counsel appeared in court hence hearing proceeded ex parte .

5. At the hearing of the suit, the plaintiff (PW1) testified and called a witness Thomas Nyamosi Oweno (PW2), (PW1) produced the following exhibits:-

**a) Certified copies of proceedings in Kehancha SRM's court Criminal Case No. 577 of 2014 whereby PW1 was discharged under Section 87 (a) of the Criminal Procedure Code on 15<sup>th</sup> September 2015 (PEXhibit 1).**

**b) A copy of title deed to the suit land issued to PW1 on 21<sup>st</sup> December 2010 (PEXhibit 2).**

**c) A copy of certificate of official search dated 17<sup>th</sup> January 2011 (PEXhibit 3)**

6. I have considered the entire plaint, statement of defence the evidence of PW1 and PW2 herein. The issues for determination in a suit generally flow from either pleadings or as framed by the parties; see Galaxy Paints Ltd – V- Falcon Grounds Ltd (2000) 2EA 385. The parties never framed any issues for determination. Therefore the issues that flow from the pleadings for determination are whether:-

- a) **The plaintiff is the registered proprietor of the suit land.**
- b) **The defendant trespassed on the land.**
- c) **The plaintiff is entitled to the reliefs sought in the plaint.**

7. It was the testimony of PW1 that he obtained the suit land from his late grandfather, Joseph Mogosi and that he has PExhibit 2 in relation to the land. He stated, inter alia;-

**“ I obtained the suit land from my late father Joseph Mogosi Marwa in the year 1990. He passed on in the year 1990. This is a title deed obtained on 21/12/2010 in my names (PExhibit 1) as per this certificate of official search dated 17/1/2011, (PExhibit 3).”**

8. PW2 (Thomas Nyamosi Oweno) stated that the suit land belonged to PW1. This witness told the court that is he a neighbor to PW 1 and confirmed that the defendant cultivated the land having trespassed thereon.

9. PExhibits 1 and 2 clearly revealed that PW1 is the registered proprietor of the suit land. The term **“Proprietor”** is defined under Section 2 of the Land Registration Act,2012 (the LRA) as follows;-

- a) **In relation to a land or lease, the person named in the register as the proprietor; and**
- b) **In relation to a change of land or a lease, the person named in the register of the land or lease as the person in whose favour the charge is made;**

10. The rights of proprietor to land are indefeasible except as provided in the LRA Act ;Section 25 (1) of the Act provides:-

**“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 belonged thereto, free from all other interests and claim what;-**

- a) **To lease, charges and other encumbrances and to the conditions and restrictions, if any show in the register; and**
- b) **To such liabilities, rights and interest 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**

11. I note that PExhibit 2 is a certificate of title which is taken as prima facie evidence that PW1 is the absolute and indefeasible owner and shall not be subject to challenge except as provided under Section 26 of the Land Registrar Act. There is no evidence or material placed before this court to challenge PExhibit 2 which was issued on 21<sup>st</sup> December 2010, in favour of PW1 in regard to the suit land.

12. In Lepore Ole Maito –v- Letwat Kortom & 2 Others ( 2016) eKLR at paragraph 13,,Mutungij expressed himself thus:-

**“On the present case the plaintiff has established that he is the registered owner of land parcels Trans Mara/Mapashi/48 and 318 and that such registration was obtained following the adjudication of rights and interest (Emphasis added).**

13. On trespass,PW1 stated at paragraph 5 of the plaint that :-

**“The plaintiff has been unable to transact business in the said entry because of the presence of the said caution.”**

14. Black’s law Dictionary 9th Edition, defines the term trespass as follows;-

**“An unlawful act committed against the person or property of another.”**

15. PW1 further testified that the defendant is illegally in occupation of the suit land as he has cultivated Potatoes and Cassava thereon. Prohibition to unlawful occupation of land is provided for under Section 152 A of the Land Act,2016 (2012) which reads;-

**“ A person shall not unlawfully occupy private community or Public land.”**

16. In the circumstances, I find that the plaintiff has shown that he is the absolute and indefeasible proprietor of the suit land onto which the defendant has trespassed. The defendant’s written statement of defence is a mere denial which has failed to undermine the plaintiff’s case which is firmly built and proved on a balance of probability.

17. Consequently and for those reasons, I enter Judgment for the plaintiff against the defendant in terms of permanent injunction and eviction order sought in the plaint dated 31<sup>st</sup> July 2012. The defendant shall be evicted from the suit land in accordance with **Section 152B, 152E, 152G and 152F** of the **Land Act,2016 (2012)**.

18. The costs of the suit shall be borne by the defendant.

**DELIVERED, DATED and SIGNED at MIGORI this 30<sup>th</sup> day of JULY 2018.**

**G.M.A. ONGONDO**

**JUDGE**

**In presence of :-**

The Plaintiff in person,

Tom Maurice – Court Assistant.