



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND CASE NO. 854 OF 2016

(FORMERLY HCC NO. 190 OF 2012)

DAVID MOGIRE NGOKO.....PLAINTIFF

VERSUS

PETER BOGONKO OMINDU.....DEFENDANT

J U D G M E N T

1. The plaintiff initiated the instant suit by way of a plaint dated 31st May 2012 filed in court on the same date. The plaintiff states that he is and was at all material times the registered owner of land parcel number **West Kitutu/Bogeka/4130** measuring approximately 0.25Ha (**“the suit property”**). The plaintiff avers the defendant on or about 23rd April 2011 unlawfully and forcefully invaded and occupied the suit property and erected a temporary structure thereon without any authority and/or permission of the plaintiff. The defendant despite demand by the plaintiff has refused to remove the illegal structure and/or to vacate from the suit property necessitating the institution of the present suit.

2. The plaintiff prays for judgment against the defendant for:

(a) An eviction order against the defendant his servants and/or agents;

(b) A permanent injunction restraining the defendant, his servants and/or agents from entering and/or erecting any structures on land parcel number West Kitutu/Bogeka/4130.

(c) Costs of the suit and interest thereon.

3. The defendant appeared and filed a statement of defence on 29th June 2012. By the defence the defendant denied the various averments made against him in the plaint by the plaintiff. Under paragraphs 6 and 7 of the defence the defendant pleaded thus:

6. That the defendant has houses on his parcel of land known as West Kitutu/Bogeka/4130 registered in his name and not as alleged by the plaintiff.

7. That the defendant states that the plaintiff sued the defendant in CMC at Kisii in Misc. No. 118 of 2011 being same facts as the present/instant case and the suit was dismissed.

The defendant vide paragraph 8 of the defence averred that this court lacked jurisdiction to hear and determine a suit determined by a competent court.

4. The suit was fixed for hearing on 20th June 2018 and the defendant in spite of being served with a hearing notice did not attend court and the court permitted the plaintiff to proceed with the hearing ex parte. The plaintiff gave evidence that he was the registered owner of land parcel number **Kitutu West/Bogeka/4130** a resultant subdivision from land parcel number **West Kitutu/Bogeka/1291** which was owned by his father. The plaintiff stated that the suit property was transferred to him by his father following the subdivision. The plaintiff produced a copy of the title for land parcel 4130 and the mutation form for the subdivision of land parcel 1291 as **“PEX.1”** and **“PEX.2”** respectively. The plaintiff explained that the defendant sometime during 2010/2011 encroached onto the suit land and constructed a temporary structure thereon. The plaintiff made a complaint before the Mosocho Land Disputes Tribunal in 2011 and there was a tribunal hearing where the defendant was found to have unlawfully encroached onto the plaintiff’s land and directed that the defendant should vacate from the suit land failing which he was to be evicted. The Tribunal proceedings were produced as **“PEX.3”**. The defendant despite demand being made by the plaintiff through his advocates demand letter dated 8th May 2012 produced as **“PEX.4”** did not vacate and the plaintiff now seeks the prayers sought vide the plaint.

5. The evidence tendered by the plaintiff in support of his case was not controverted as the defendant did not attend and/or adduce any

evidence. The defendant in spite of filing a defence did not file any documents in support of his defence. His assertion in the defence that he was the registered owner of the suit land parcel **West Kitutu/ Bogeka/4130** was not supported. To the contrary the plaintiff adduced evidence to the effect that land parcel **West Kitutu/Bogeka/ 4130** was a subdivision from land parcel **West Kitutu/Bogeka/1291** owned by his father as evidenced by the mutation form produced as **"PEx.2"**. The defendant produced a copy of the title deed for land parcel **West Kitutu/Bogeka/4130** which shows the parcel of land was registered in his name on 15th June 2011. The proprietorship Section Part B of the title notes that the suit land was a subdivision of land parcel **1291**.

6. The plaintiff produced as **"PEx.3"** the proceedings and decision of the Mosochi Land Disputes Tribunal dated 26th November 2011 where the Tribunal vide its decision had found the defendant had trespassed and/or had encroached onto the plaintiff's land parcel and required the defendant to vacate or he be evicted. On the basis of the evidence, I am satisfied that the plaintiff has established and proved he is the registered owner of the suit property and that the defendant has unlawfully encroached thereon. The plaintiff as the registered owner is vested all the rights of ownership and is entitled to exclusive possession and use as provided under Sections 24, 25 and 26 of the Land Registration Act No. 3 of 2012. The plaintiff has absolute rights of ownership which are indefeasible and which can only be challenged under the limited grounds set out under Section 26 1(a) and (b) of the Land Registration Act, 2012.

7. The defendant's occupation of a portion of the plaintiff's land is unlawful and constitutes trespass. The defendant has no right to occupy the plaintiff's land without his permission or authority. Although in the defence filed the defendant was laying claim to the plaintiff's land parcel was **West Kitutu/Bogeka/4130** no evidence whatsoever has been availed to support this assertion and I find the defendant's claim unsustainable. In the proceedings before the Tribunal, the defendant is recorded as stating his land parcel **West Kitutu/Bogeka/1287**. There is no evidence to show how this parcel **1287** relates to the suit property, if at all.

8. On the whole evaluation of the evidence, I am satisfied that the plaintiff has proved his case on a balance of probabilities and I accordingly enter judgment in favour of the plaintiff as against the defendant on the following terms:-

1. That the defendant be and is hereby ordered to vacate land parcel West Kitutu/Bogeka/4130 within 30 days from the date the decree herein is served upon him.

2. In the event of default to comply with (1) above an order for the eviction of the defendant, his servants and agents to issue upon application by the plaintiff.

3. A permanent injunction be and is hereby issued restraining the defendant, his servants and agents from reentering and/or erecting any structures on land parcel number West Kitutu/Bogeka/4130.

4. The costs of the suit are awarded to the plaintiff.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 20TH DAY OF JULY 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Nyagancha for Bigogo for the plaintiff

N/A for the defendant

Ruth Court Assistant

J. M. MUTUNGI

JUDGE