



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT KISUMU**

**ELC. NO. 826 OF 2015**

**JULIUS ONIANGO ETOLE.....PLAINTIFF**

**-VERSUS-**

**MOSES ONYANGO ADIGO.....DEFENDANT**

**JUDGEMENT**

1. Julius Oniango Etole, the plaintiff, filed the suit against Moses Onyango Adigo, the defendant, vide the plaint dated the 27<sup>th</sup> December, 2004 seeking for an order of permanent injunction and eviction in respect of North Gem/Marenyo/140, the suit land. He also seeks for general damages for trespass, mesne profits, costs and interests. He avers that he is the registered proprietor of the suit land and that the defendant trespassed onto the said land in the year 2004 by constructing houses on it and cultivating and has declined to vacate.

2. The defendant disputed the plaintiff's claim through the statement of defence filed on the 30<sup>th</sup> September 2010. He averred that he had constructed his homestead on the suit land lawfully. That the plaintiff had fraudulently obtained registration of a bigger portion than his entitlement in the suit land. That the plaintiff's entitlement was 0.5 hectares and not 0.7 hectares.

3. The hearing of the suit commenced on the 25<sup>th</sup> September, 2017 when the plaintiff testified as PW 1. The defendant then testified as DW 1 and called Joanes Obare Siudu and Gilbert Oliendi who testified as DW 2 and DW 3 respectively.

4. That at the close of the oral evidence, the defendant and counsel for the plaintiff filed written submissions dated the 4<sup>th</sup> April, 2018 and 20<sup>th</sup> March, 2018 respectively.

5. The following are the issues for the court's determination;

- a. Whether the plaintiff is the registered proprietor of the suit land.
- b. Whether the defendant has legal and or beneficial rights to the suit land.
- c. When the defendant moved onto the suit land.
- d. Who pays the costs of the suit.

6. The court has carefully considered the oral and documentary evidence present by and for the parties, written submissions and come to the following determination.

a. That before the filing of this suit on the 27<sup>th</sup> October, 2009, the dispute had been heard in Siaya Land Dispute Tribunal Land Case No. 108 of 2009 where it was noted in the findings of 15<sup>th</sup> October, 2009 that the land described as East Gem/Marenyo/140 was originally registered in the name of Wandore Wahore, the plaintiff's father, on the 28<sup>th</sup> November, 1967. The tribunal also noted that the plaintiff became the registered proprietor of the land on the 15<sup>th</sup> May, 2009. The tribunal further identified the dispute to be a portion of that land which the defendant herein claimed the plaintiff had grabbed and together registered with his land. The tribunal therefore ordered as follows:

- That the District Surveyor to visit the land and establish its acreage in relation to defendant's parcel East Gem/Marenyo/155, and confirm if the later has encroached into the former.
- That the surveyor, with the assistant of the chief, to replant the boundary if need be.

b. That the copy of the proceedings in Siaya P. M Court Land Case No. 97 of 2009 shows that the court had on the 24<sup>th</sup> May, 2011 adopted the Provincial Surveyor Report and recommendations dated 28<sup>th</sup> April, 2011 pursuant to which the Adjudication officer's report dated 11<sup>th</sup> August, 2011 was filed. The Provincial Surveyor had among others found the defendant's claim over a portion of parcel 140 to be without merit and recommended that he vacates.

c. That the copy of Siaya P.M Court Land Dispute Tribunal case No. 97 of 2009 also shows that the court had on the 30<sup>th</sup> August, 2011, dealt with the Siaya Land Adjudication Officers report dated 11<sup>th</sup> August, 2011 that is annexed, and advised the parties to come to the superior court. The summary of the adjudication officers report is as herein under;

- That the officer's visit to the land on 10<sup>th</sup> August, 2011 with the Area Chief showed the dispute was over a claim of a portion of parcel 140 by the owner of parcel 155 which started in 1987, when a complaint with the Assistant chief was filed before being referred to the Land Dispute Tribunal in 2009.
- That the officer did not have the original demarcation register and could not confirm the veracity of the documents used in the registration of the parcel.

d. That as between the plaintiff and the defendant herein, only the plaintiff has availed documentary evidence supporting his entitlement to the suit land described as North Gem/Marenyo/140. The copy of the title deed and certificate of official search for North Gem/Marenyo/140 confirms that the plaintiff became the registered proprietor on the 15<sup>th</sup> May, 2009 under entry number 2. That the land was first registered on the 28<sup>th</sup> November, 1967. That it was the plaintiff's evidence that his late father was the first registered proprietor of the suit land after adjudication and that he inherited it through succession.

e. That though the defendant alleged in his pleadings and testimony in court that the plaintiff had the portion in dispute registered with his land as parcel North Gem/Marenyo/140 fraudulently, the particulars of the fraud were not pleaded nor has any evidence in proof been tendered. That the fact that the defendant believes the land should have been registered under East Gem/Marenyo, instead of North Gem/Marenyo, is not on its own evidence of fraud in the way the plaintiff or his later father before him acquired registration with the suit land.

f. That the plaintiff sued over land parcel North Gem/Marenyo/140 and has availed documentary evidence in the form of copy of the title deed and certificate of official search issued by the Land Registrar. That under **Section 26 (1)** of the Land Registration Act No. 3 of 2012 the court is obliged to take the documents as prima facie evidence that the plaintiff is the absolute and indivisible owner of the said land, until and unless his registration is successfully challenged in accordance with the law.

g. That **Section 107** of the Evidence Act Chapter 80 of Laws of Kenya places a burden on the person alleging a fact with the responsibility of proving it. That the defendant has not discharged that duty as he has not tendered evidence of fraud attributable to the plaintiff in the way he acquired the registration. The court agrees with the finding in **Alice Chemutai Too –Vs- Nickson Kipkurui Korir & 2 Others [2015] eKLR** where Munyao J held;

*“Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part.”*

That the defendant's claim appears to be based on the disputed fact that his late father was using that portion of parcel 140 that is in dispute. That may have been the case but the adjudication process later placed that portion as part of the land registered with the plaintiff's father. That there appear not to have been any objection on that move during the adjudication process and all through the life time of the fathers to the plaintiff and defendant, who appear to have been related through marriage. That the defendant is reported to have moved and settled onto the disputed portion in 2004 and he has not adduced any evidence to establish a beneficial or customary right interest over that portion of the land.

That from the foregoing and having noted that the two surveyors reports had not noted any encroachment of the defendant's land onto the plaintiff's land, the court find that the defendant had no legal right to move, reside and farm on that portion of North Gem/Marenyo/140 and his entry and stay on that land amount to trespass.

That the plaintiff has proved his case against the defendant on a balance of probabilities. That however, due to the parties relationship and so as to encourage good neighbourliness, no damages will be awarded

7. That the court therefore enters judgement against the defendant and orders as follows:-

- a. That the defendant do give the plaintiff vacant possession of that portion of North Gem/Marenyo/140 that he occupies within ninety (90) days and in default eviction order do issue.
- b. That upon the defendant giving vacant possession of, or being evicted from North Gem/Marenyo/140, an order of permanent injunction be and is hereby issued restraining him, his agents, servants, employees or any of them whomsoever from trespassing upon, constructing, cultivating or in any other way interfering with the plaintiff's quiet enjoyment and possession of the said land.
- c. The defendant do pay the plaintiff's costs of this suit and interests thereof

Order accordingly.

**S. M. KIBUNJA**

**ENVIRONMENT & LAND - JUDGE**

**DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF DECEMBER, 2018.**

In presence of;

Plaintiff Present

Defendant Present

Counsel Mr. Mukabwa for Plaintiff

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**