



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII

ELCC NO. 556 OF 2015

JOHN ONKOBA MARANDO.....PLAINTIFF

VERSUS

BENARD NYANDIKA OMBASA.....DEFENDANT

JUDGMENT

1. By a plaint (Fast Track) dated 15th December, 2015, the Plaintiff namely John Onkoba Marando sued the Defendant, Benard Nyandika Ombasa for;

i) Eviction orders against the Defendant from land parcel South Mugirango/Boikanga/1904, 30 days after judgment.

ii) Costs

2. The Plaintiff is represented by Josiah Abobo of Josiah Abobo and company Advocates. The Defendant neither entered appearance nor filed defence despite the fact that summons to enter appearance were given and issued to him on 18th December, 2015.

3. The claim by the Plaintiff is that he is the registered owner of land parcel No.South Mugirango/Boikanga/1904 approximately 0.07 hectares (the suit land). He states that sometimes in year 2015, the Plaintiff encroached the suit land, removed fence and tills the land without the consent and authority of the Plaintiff. He further states that the Defendant has committed acts of waste upon the land. That due to the acts of trespass, the nature of suit land is bound to change.

4. This court ordered notice to issue to the Defendant for hearing of the suit fixed for 24th May 2017. He was duly served with a hearing notice dated 29th March, 2017 by a duly authorised process server, Peter Nyakundi Isoe on 29th March, 2017 as per affidavit of service sworn on 22nd May 2017.

5. On 24th May, 2017, having been satisfied that the Defendant was duly served, the hearing proceeded ex parte in the interest of justice as envisaged under **Article 159 (2) (b) Constitution of Kenya, 2010**. The Plaintiff testified, identified and produced the following documents as per list of documents dated 15th December, 2015;

a) letter of consent dated 6th August,1987 (P Exhibit 1)

b) Title deed issued to the Plaintiff and in his favour on 5th August 1989 (P Exhibit 2)

- c) Certificate of official search dated 28th August 2015 (P Exhibit 3)
- d) Mutation form dated 16th October 1987 and sketch (P Exhibits 4a and b)
- e) Certified copy of green card (P Exhibit 5)
- f) Two photographs of the structures on the suit land (P Exhibits 6a and b)

6. The Plaintiff's counsel called only one witness, the Plaintiff/PW1. The counsel informed this court that he did not wish to submit on the matter thus he presented no submissions..

7. I have considered the plaint, evidence of the Plaintiff/PW1 including P Exhibits 1 to 6 b. In the case of **Great Lakes Transport Co. (U) Limited-vs-Kenya Revenue Authority (2009) KLR 720 at 732 and 733**, the Court of Appeal referred to the case of **Galaxy Paints Co Ltd –vs-Falcon Grounds Ltd (2000) 2 EA 385**, and stated;

“ It is trite law and the provisions of Order XIV of the Civil Procedure Rules are clear, that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with....., the trial court,..... May only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination.” (Points underlined)

Therefore, in the instant suit, the issues for determination that flow from the pleadings are;

- a) PW1 is the proprietorship of the suit land.*
- b) The Defendant has unlawfully occupation of the land.*
- c) Costs of the suit.*

8. On proprietorship of the suit land, PW1 testified that he bought the land in 1985 from the Defendant's grand-mother. In his testimony, he produced in P Exhibits 1 to 5 in support of the transaction and ownership of the suit land. **Article 40 (1) of the Constitution of Kenya, 2010** provides;

Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

- a. of any description, and*
- b. in any part of Kenya.* (Emphasis mine)

The above Constitutional provision governs protection of right to property. **Article 65 of the Constitution** provides for landholding by non citizens in Kenya.

9. By PExh2, PW1 complied with **Section 6 of the Land Control Act (Cap 302 Laws of Kenya)**, a mandatory step towards the ownership of the land. P.W.1 obtained P Exhibit 2 which is conclusive evidence of ownership of the land. **Section 26 (1) Land Registration Act, 2012**, reads;

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt*

scheme. (Points emphasized)

10. Under **Section 2 of the Land Registration Act** (Ibid), “proprietor” means-

a) In relation to land or lease, the person named in the register as the proprietor, and

b) In relation to a charge of land or lease...

P Exhibit 5 is a certified copy of the record in respect of the suit land. The person named in PExhibit 5 as the proprietor is PW1. I hold that he is the proprietor thereof.

11. In regard to trespass to the suit land, private land is defined under **Articles 61 (2) and 64 of the Constitution of Kenya, 2010**. The Plaintiff stated in the Plaint and he told the court that the Defendant encroached on his land. He testified, inter alia;

“ In year 2015, the Defendant encroached my land. He has tilled, fenced of the suit land and built on it without any colour of right. These 2-photos of two structures or buildings he has built on it...” (Emphasis added)

12. The testimony of PW1 on encroachment and occupation of his land by the Defendant is exhibited by two (2) Photos (PEXH 6a and b. It is unlawful in the circumstances. Moreover, **Section 152A Land Act, 2016 (2012)** provides;

“ A person shall not unlawfully occupy private, community or public land”

13. The term “Land” is defined under **Article 260 Constitution of Kenya, 2010** to include the surface of the earth. The parties to this suit are disputing over the suit land. Indeed land is the single most fundamental factor of production which evokes emotions in society. It is the home of man on which he cultivates to get food and other basic needs . In the case of **Mwangi and Anor vs Mwangi (1986) KLR 328**, it was observed in obiter that land is extremely important aspect of lives of society.

14. Be that as it may, the Plaintiff’s evidence is clear, cogent and uncontroverted. He has proved that he is the absolute and indefeasible Proprietor of the suit land which the Defendant is unlawfully in occupation. I find that the Plaintiff has proved his claim against the Defendant on a balance of probability

15. A fortiori, I grant an eviction order as sought in prayer (a) of the plaint. However, it shall be undertaken as provided under **Sections 152 B to 152 I of the Land Act (Supra)**

16. Costs follow the event and it is within the discretion of the court pursuant to the proviso to **Section 27 (1) Civil Procedure Act (Cap 21 Laws of Kenya)**. Therefore, the costs of this suit shall be borne by the Defendant.

Delivered, signed and dated in open court at Kisii this 26th day of May, 2017.

GEORGE M A ONGONDO

JUDGE

In the presence of;

Mr Abobo counsel for the Plaintiff

Ruth, Court Assistant