



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CAUSE NO. 732 OF 2016

FORMERLY KISII ELC CAUSE NO. 49 OF 2012

LAWRENCE MARITA OMURWA.....PLAINTIFF

-VERSUS-

JOSPEH OMWENGA.....1ST DEFENDANT

MOCHAMA OMURWA.....2ND DEFENDANT

JUDGEMENT

The Plaintiff had commenced this suit by way of a suit that was filed in court on 1st February, 2012. The Plaintiff avers that at the material times to the suit his brother one Nyangau Omurwa was the registered owner of the suit land and the same was registered as **WEST KITUTU/MWANGICHANA/1194** and measured about 1.3ha and that he has been taking care of the land as the plaintiff lived in Tanzania.

That the Defendant on 30th January, 2012 trespassed on the said land and started sub-dividing the land and sold portions thereof without the authority of the original owner. The plaintiff claims against the Defendant is for a permanent injunction restraining the Defendant from trespassing, remaining on and to be in possession of the suit land plus costs of the suit.

The Defendants filed a statement of defence filed tilted the defence of 1st and 2nd defendants and aver that the plaintiff herein has never received or was given consent by the owner of the suit land and further that the owner one Nyangau Omurwa is their brother and uncle respectively.

The Defendants further aver that Mr. Nyangau was not even present during the land adjudication process and that when he was allocated the land the same remained under the custody of plaintiff and 2nd defendant and lastly the defendants have no locus standi to sue.

When the case came before me for hearing on 29th March, 2017 the same did not proceed as I observed that a hearing notice was served on the defendants and therefore I direct that the Defendants be served and the suit heard on 16th May, 2017.

On the 16th May, 2017 the suit herein proceeded for hearing in the absence of the defendants who despite service of a hearing notice which the court was satisfied was proper and not shown up.

The plaintiff testified and was his testimony that 2nd defendant is his brother who was deceased. He further stated that land reference No. **KITUTU MWAGICHIANA/1194** was for his brother who lives in Tanzania. He produced a search certificate that showed the land was registered in name of the one Nyangau Omurwa. He averred that he has been using the land since 1992 when the 1st defendant came to the land and started sub-dividing the same. He says he wants an injunction to restrain the defendants from trespassing on the land.

During the hearing the defendants though they filed a defence did not appear and have the opportunity to cross-examine the witnesses and further give oral testimony to buttress their claim.

I have read the pleading herein and have testimony from the plaintiff and his witness and the issues for determination is:-

i. Who is the owner of the suit

ii. Does the plaintiff have locus standi to commence the suit herein

iii. What remedies are available

In answering the 1st question it is not in dispute that the suit land is a parcel of land known as Kitutu Mwangichana is registered in the name of one Nyangau Omurwa. This is contained in a copy of certificate of search that the plaintiff has produced as an exhibit and marked as P. Exhibit 1. The plaintiff did not avail and/or explain where the original title to the land is.

The Defendants in their defence do not dispute the fact that the land is registered in the name of Nyangau Omurwa but dispute that it is in the custody of the plaintiff.

One thing that the court found puzzling is what has prevented the said Nyangau Omurwa to protect his land. The plaintiff in his evidence said that he was in Tanzania and he was given consent to take care he neither states who gave him the said consent nor produce a written consent or authority.

The above position thus lends to the 2nd question as to whether the plaintiff has locus standi and/or authority to commence the proceeding herein. Since the plaintiff has not produced any consent as written authority to commence the suit herein it is my considered view that he lacks the requisite capacity and hence a mere busy body.

In view of the above I have no option but to dismiss the suit herein with costs.

Dated, Signed and Delivered in open court at KISII on this 19th day of October, 2017

Mohammed Noor Kullow

Judge

In the presence of:-