



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 375 OF 2015

ISMAEL NGAJI AKUNGU

(Suing as the administrator of the estate of

MASLANOUS MAGADI MATHIDAPLAINTIFF

VERSUS

WALTER MAINYA OYUOYO DEFENDANT

J U D G M E N T

1. The plaintiff filed the instant suit vide a plaint dated 3rd August 2015. The plaintiff brought the suit as the administrator of the estate of **Maslanous Magadi Mathida** (deceased) who had been adjudged to be the owner of land parcel number **Karungu/Kanyasa/623** hereinafter referred to as the “**suit property**”. The plaintiff claimed that the defendant on or about 2005 without any justification entered into and occupied a portion measuring $\frac{1}{2}$ acre of thereabout of the suit property. The plaintiff states that the defendant’s acts constitute trespass onto the suit premises and prays for judgment against the defendant for:-

- 1. A declaration that the defendant is a trespasser on the parcel of land known as Karungu/Kanyasa/623 and for vacant possession to the plaintiff.**
- 2. An order restraining the defendant either by himself, servant, agent or anybody claiming through him from cultivating, constructing and/or developing the suit property or interfering with the plaintiff’s possession of all that parcel of land known as Karungu/Kanyasa/623.**
- 3. General damages.**
- 4. Costs of the suit.**
- 5. Any other relief that the honourable court may deem fit and just to grant.**

2. The record shows that the defendant was served with summons to enter appearance on 7th September 2015 as per the affidavit of service by one **Robinson Ouma Ojwang** dated 14th September 2015 filed in court on 5th October 2015. The defendant did not enter appearance or file a defence. The court on 24th May 2016 gave directions for the suit to be fixed for formal proof hearing with notice to the defendant. The suit was fixed for hearing on 24th April 2017 but as the defendant had not been served with a hearing notice, the hearing was adjourned to 10th July 2017 to enable the defendant to be served.

3. On 10th July 2017 only the plaintiff and his advocate appeared. The defendant as per the record was served with a hearing notice on 16th May 2017 as per the affidavit of service sworn by **Robinson Ouma Ojwang** dated 23rd May 2017 filed in court on 22nd May 2017. The court being satisfied that the defendant had been duly served permitted the hearing to proceed ex parte.

4. The plaintiff, Ismael Ngaji Akungu, testified as the sole witness in support of his claim. He testified that the late **Maslanous Magadi Mathida** (deceased) was his cousin and that he died without leaving any wife or children. The plaintiff stated that the deceased died in the year 2005 as per the certificate of death (**PEX1**) annexed to the bundle of documents. The plaintiff obtained grant of letters of administration to the deceased estate on 10th July 2012 (**PEX2**) as per document annexed to the bundle of documents as number two (2). The plaintiff stated that the deceased was adjudicated as the owner of land parcel **Karungu/Kanyasa/623** and produced a letter from the District Land Adjudication and Settlement Officer dated 28th March 2012 (document No. 4 in the bundle of documents) as **PEX3** which confirms that the suit land was registered in the deceased name. The plaintiff further produced a letter dated 28th February 2010 from the chief South East Karungu location (document No. 3 in the bundle of documents) as **PEX4** where the chief confirmed that the suit land was registered in the name of the late **Maslanous Magadi Mathida** (deceased). The chief's letter also indicated the plaintiff was the person entitled to inherit the suit land.

5. The plaintiff stated that the defendant trespassed onto a portion of the suit land and has constructed a homestead thereon. The plaintiff further testified that the defendant has no right whatsoever to be on the suit land and that although he has requested the defendant to vacate and he has also been asked by the land adjudication officer to vacate he has refused and/or neglected to vacate rendering the institution of the instant suit necessary.

6. Following the closure of the trial, the plaintiff's counsel Mr. Ngani advocate filed written submissions where he argued the plaintiff had proved the defendant was a trespasser on the suit land and ought to be ordered to vacate failing which eviction should issue.

7. I have reviewed the pleadings and the evidence by the plaintiff and the submissions by counsel and I am satisfied in the absence of any evidence contravening the evidence by the plaintiff that the plaintiff has proved his case on a balance of probabilities. There is uncontraverted evidence that the late **Maslanous Magadi Mathida** (deceased) was the registered owner of the suit property as per the letter by the District Land Adjudication and Settlement Officer Migori and Nyatike Districts dated 28th March, 2012. The chief's letter dated 28th February 2010 further confirms the deceased was the registered owner of the suit property. The plaintiff is duly authorized to represent the estate of the deceased as per the grant of letters of administration dated 10th July 2012.

8. The defendant was served with summons to enter appearance together with the plaintiff's pleadings and was further served with a hearing notice but never appeared and/or attended court during the hearing. The court is in the premises left with only the unchallenged evidence presented by the plaintiff. On the basis of the evidence, I am satisfied the defendant has no valid reason to remain on land parcel number **Karungu/Kanyasa/623** and it is my finding and holding that he is there as a trespasser.

9. I however find no basis upon which I could award any general damages for trespass. The plaintiff did not adduce any evidence that he was at any time utilizing the portion he now claims the defendant has unlawfully occupied and by reason of such occupation has been denied of the use thereof. Although proof of trespass per se should be sufficient for the court to award damages for trespass my view is that where damages are claimed in circumstances as in the present case, the claimant ought to provide some basis to enable the court to make an assessment. As no such basis has been laid, I would decline to make any award for general damages for trespass. I may also mention the plaintiff in his evidence did not allude to any claim for damages and properly abandoned the claim for general damages.

10. On the whole appraisal of the evidence it is my holding and finding that the plaintiff has proved his claim against the defendant on a balance of probabilities and I accordingly enter judgment in favour of the

plaintiff on the following terms:-

- 1. A declaration be and is hereby issued that the defendant is a trespasser on land parcel number Karungu/Kanyasa/623.**
- 2. That the defendant is ordered to vacate and deliver vacant possession of the suit land to the plaintiff within 60 days of being served with the decree herein.**
- 3. In the event the defendant fails to comply with (2) above an order for his forcible eviction to issue on application by the plaintiff.**
- 4. The costs of the suit are awarded to the plaintiff.**

Judgment dated, signed and delivered at Kisii this 13th day of October, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Wesonga for Ngani for the plaintiff

N/A for the defendant

Milcent court assistant

J. M. MUTUNGI

JUDGE