



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 408 OF 2015

STANLEY ALUKONYA NDIBIRE (*Suing through*

***guardian and next friend SELINA NDIBIRE*).....PLAINTIFF**

VERSUS

ATANAS MUKOBERO.....DEFENDANT

JUDGMENT

Stanley Alukonya Ndibire (*hereinafter referred to as the plaintiff*) has sued **Atanas Mukobero (*hereinafter referred to as the defendant*)** claiming that at all material times to this suit, the Plaintiff was the registered owner and of all that pieces of land and/or property known as LUGARI/LIKUYANI BLOCK 1 (VIHIGA)/173 measuring approximately 3 acres (*hereinafter referred to as 'the suit property'*) situated at Vihiga Farm — Likuyani Location within Kakamega County. At all said times, relevant to this suit the Defendant was the owner and in possession of the land adjoining the suit property, it being known as LUGARI/LIKUYANI BLOCK 1 (VIHIGA)/172. The Plaintiff avers that on or about the year 2010, the defendant wrongfully trespassed, entered into and took possession of a portion of the suit property amid the Plaintiff's protests and wishes.

In view of the foregoing, the Plaintiff avers that he initiated legal proceedings with the Land Dispute Tribunal with a view to obtaining clear demarcation of the land and eviction of the Defendant from the suit property. The Plaintiff further avers that the Tribunal after consideration of the matters raised ordered that the District Land Surveyor conduct a survey with a view to demarcating and delineating the boundaries between the Plaintiff's and Defendant's parcel of land. The Plaintiff avers that the foregoing order by the Tribunal was adopted by the Principal Magistrate's Court in Butali on 7th February, 2013.

The Plaintiff avers that pursuant to the aforesaid court order, the District Land Surveyor proceeded on 10th April, 2013 to demarcate the land and that the District Land Surveyor vide her report dated 19th April, 2013 concluded that there had been encroachment by the Defendant on to the Plaintiff's portion of land.

The Plaintiff avers that the extent of the aforesaid encroachment by the Defendant was marked in a survey map annexed to the Survey Report and the Surveyor proceeded to erect beacons to mark the rightful portions of the parties.

In view of the foregoing, the Plaintiff avers that the Defendant made an undertaking to the Surveyor to retract from the encroached portion and the Surveyor urged both parties to respect the boundaries that were delimited in exercise of the court order.

Despite the foregoing, the Plaintiff avers that shortly thereafter, the Defendant in complete contravention of the court order and the boundaries demarcated by the Surveyor proceeded to uproot the beacons erected by the Surveyor and resumed encroachment over the suit property.

The Plaintiff avers that on 21st August, 2013, the Plaintiff moved via an application to Principal Magistrate's Court in Butali seeking eviction orders against the Defendant. In addition, the application also sought enforcement of the findings of the District Land Surveyor as mentioned hereinabove. The Plaintiff avers that on 14th August, 2013, the Principal Magistrate's Court, Butali, in a Ruling dismissed the aforesaid application by the Plaintiff on a procedural technicality, finding that the same had been filed under the wrong Civil Procedure Rules and thus was fatally defective.

Despite the foregoing, the Plaintiff maintains that the substantive issues in the aforesaid application and the findings of the Surveyor as mentioned herein were however neither challenged nor vitiated in the court Ruling. The Plaintiff avers that to-date, the Defendant has never contested nor appealed against the finding of the District Land Surveyor that determined he had encroached on the Plaintiff's property.

The Plaintiff avers that instead, the Defendant has proceeded in complete defiance of the recommendations of the Surveyor and orders of the court to uproot beacons erected demarcating the boundaries between the parties and intends, unless restrained by this Honourable Court, to continue to remain in wrongful trespass and occupation of the suit property. Furthermore, the Plaintiff the Defendant has on numerous occasions threatened to visit physical harm upon the Plaintiff in the event that the Defendant was evicted from the suit property.

Despite pleas by the Plaintiff to the Defendant to cease the trespass, the Plaintiff avers that the Defendant has persisted in his trespass and wrongful occupation of the suit property.

By reason of the matters aforesaid, the Plaintiff has suffered loss and damage thus the Plaintiff has been deprived of the use and quiet enjoyment of the suit property. The Plaintiff has been deprived economic gains and profit that he would have otherwise obtained from suit property had he been allowed lawful access and quiet enjoyment. The Defendant's misuse of the suit property, including tilling the land and erecting of semi-permanent structures on the suit property has caused detriment to the suit property. Further the Defendant has prevented the Plaintiff from accessing a portion oi the suit property to erect a perimeter boundary wall thereon. The Defendant is a trespasser to the suit property and his continued trespass is causing the Plaintiff to suffer enormous financial loss, inconvenience and emotional hardship. The Plaintiff is keen and anxious to expand his farming enterprise on the suit property but he is unable to do so until the Defendant vacates the property. The Defendant's erection of structures on the said portion of the suit property is an eye sore, the same having defaced and devalued the suit property.

Despite demand and notice of intention to sue having been issued to the Defendant, the Defendant has refused, neglected and/or otherwise failed to vacate the suit property hence necessitating this suit.

Other than the Land Dispute Tribunal award adopted by Butali Principal Magistrates Court as Award No. 12 of 2011, the Plaintiff avers that there is no other suit pending in any Court between the Plaintiff and the Defendants in respect of the subject matter of this suit. The cause of action arose within the jurisdiction of this Honourable Court.

Reasons wherefore, the plaintiff prays for judgment in terms of a declaration that the Plaintiff is the absolute registered owner of the land parcel known as LUGARI/LIKUYANI BLOCK 1 (VIHIGA)/173 and that the Defendant, whether by himself, his servants or agents otherwise howsoever, is wrongfully in occupation of the suit property and is accordingly, a trespasser on the same and an eviction order do issue against the Defendant, his servants, agents and or employees. A permanent injunction restraining the Defendant, whether by himself, his servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit property and or interfering with the Plaintiff's peaceful possession and enjoyment of the suit property. The plaintiff prays for vacant possession of the suit property, mesne profits and general damages for trespass and lastly costs of this suit together with interest thereon at such rate and for such period of time as this Honourable court may deem fit to grant.

The plaintiff through Selina Idaya Alukonya filed a statement and stated under oath that at all material times to this suit the Plaintiff who is mentally unwell was the registered owner and of all that pieces of land and/or property known as LUGARI/LIKUYANI BLOCK 1 (VIHIGA)/173 measuring approximately 3 acres situated at Vihiga Farm — Likuyani Location within Kakamega County. That at all times relevant to this suit, the Defendant was the owner and in possession of the land adjoining the suit property, it being known as LUGARI/LIKUYANI BLOCK 1 (VIHIGA)/173. That on or about the year 2010, the Defendant wrongfully trespassed, entered into and took possession of a portion of the suit property amid and protests and wishes.

That she initiated legal proceedings with the Land Dispute Tribunal with a view to obtaining clear demarcation of the land and eviction of the Defendant from the suit property. That the Tribunal after consideration of the matters raised ordered that the District Land Surveyor conduct a survey with a view to demarcating and delineating the boundaries between her and the Defendant's parcel of land. That the foregoing order by the Tribunal was adopted by the Principal Magistrate's Court Butali on 7th February, 2013. That pursuant to the aforesaid court order, the District Land Surveyor proceeded on 10th April, 2013 to demarcate the land.

The District Land Surveyor vide their report dated 19th April 2013 concluded that the Defendant had encroachment by on to her portion of land. That the extent of the aforesaid encroachment by the Defendant was marked in a survey map annexed to the Survey Report and the Surveyor proceeded to erect beacons to mark the rightful portions of the parties. The Defendant made an undertaking to the Surveyor to retract from the encroached portion and the Surveyor urged both parties to respect the boundaries that were delimited in exercise of the court order.

That shortly thereafter, the Defendant in complete contravention of the court order and the boundaries demarcated by the Surveyor proceeded to uproot the beacons erected by the Surveyor and resumed encroachment over the suit property. That on 21st August, 2013, she moved via an application to Principal Magistrate's Court Butali seeking eviction orders against the Defendant. In addition, the application also sought enforcement of the findings of the District Land Surveyor as mentioned hereinabove.

That on 14th August, 2013, the Principal Magistrate's Court Butali in a Ruling dismissed the aforesaid application on a procedural technicality, finding that the same had been filed under the wrong Civil Procedure Rules and thus was fatally defective. That the substantive issue in the aforesaid application and the findings of the Surveyor as mentioned herein were however neither challenged nor vitiated in the court Ruling.

To-date, the Defendant has never contested nor appealed against the finding of the District Land Surveyor that determined he had encroached on her property but instead, the Defendant has proceeded in complete defiance of the recommendations of the Surveyor and orders of the court to uproot beacons erected demarcating the boundaries between the parties and intends, unless restrained by this Honourable court, to continue to remain in wrongful trespass and occupation of the suit property.

The Defendant has on numerous occasions threatened to visit physical harm upon her in the event that the Defendant was evicted from the suit property. That despite the pleas the Defendant cease the trespass and the Defendant has persisted in his trespass and wrongful occupation of the suit property. That the Defendant has refused, neglected and/or otherwise failed to vacate the suit property hence necessitating this suit. That she prays for costs and interest of this suit.

I have considered the pleadings and evidence on record and do find that the plaintiff is the next of kin of Stanley Alukonya Ndibire, the registered proprietor of parcel of land No. Lugari/Likuyani Block 1 (Vihiga/172). Stanley Alukonya Ndibire is the proprietor of the suit land. She produced the title deed for the said parcel of land. **Section 24 (a) of Land Registration (Act No.3 of 2012)** provides that: -

“The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

The registration of the plaintiff as proprietors of the suit land, gives the plaintiff absolute proprietorship for the said parcel of land. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

S.25 (i) “The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, subject;

(a) to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

The defendant has not come forward to say what his claim on the suit land is. The plaintiff's complaint is that the defendant is occupying his land illegally. That is in violation of the plaintiff's rights and privileges over the parcel of land as envisaged in Section 24 of the Act. The plaintiff has produced the certificate of lease and the lease documentation duly registered as evidence of ownership and in terms of Section 26 (1) of the Act;

“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 the encumbrances, easements, restrictions and conditions contained and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or miss-representation to which the person is proved to be a party to;

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The plaintiff is the registered owner of the suit land and therefore has an indefeasible right over the property. The plaintiff's rights as proprietor of the land is clearly protected in law and the defendant has no reason to trespass thereon and the law allows the Defendants to challenge the plaintiffs' ownership on grounds of illegality, unprocedural acquisition or corrupt scheme. He did not do that in this suit.

I do find that the Plaintiff has proved his case on a balance of probability to be the absolute proprietor of the suit land therefore entitled to rights and privileges that appurtenant thereto. The plaintiff having proved to be absolute proprietor, is entitled to the orders sought in the plaint. The plaintiff has proved his case on a balance of probabilities.

The plaintiff has proved his case on a balance of probabilities and therefore, I do give judgment in terms of a declaration that the Plaintiff is the absolute registered owner of the land parcel known as LUGARI/LIKUYANI BLOCK 1 (VIHIGA)/173 and that the Defendant, whether by himself, his servants or agents otherwise howsoever, is wrongfully in occupation of the suit property and is accordingly, a trespasser on the same and I do further grant an eviction order against the Defendant, his servants, agents and or employees. I do further grant a permanent injunction restraining the Defendant, whether by himself, his servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit property and or interfering with the Plaintiff's peaceful possession and enjoyment of the suit property. The plaintiff is further granted vacant possession of the suit property. Mesne profits and general damages for trespass have not been proved and therefore are not granted. Lastly, costs of this suit together with interest thereon are granted to the plaintiff at court rates. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 10TH DAY OF OCTOBER, 2017.

A. OMBWAYO

JUDGE