



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC NO. 363 OF 2012

FRANCIS ONTITA GICHANA.....PLAINTIFF

VERSUS

MARIITA KEBATI.....1ST DEFENDANT

NYANGARESI KEBATI.....2ND DEFENDANT

MORIASI SIRO.....3RD DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendants by way of a plaint dated 5th October 2012 seeking the eviction of the defendants from all that parcel of land known as West Kitutu/ Mwangichana/902("the suit property") and an order directing the Land Registrar and District Surveyor, Kisii County to restore the boundary of the suit property that was destroyed by the defendants.

In his plaint, the Plaintiff averred that at all material times, he was the absolute owner of the suit property which measures 0.29 hectares or thereabouts. The plaintiff averred that on a date which is not indicated, the defendants without any colour of right destroyed the common boundary between the suit property and LR. No. West Kitutu/ Mwangichana/ 901("Plot No.901"), entered onto the suit property and put up semi-permanent structures thereon which they have occupied with impunity.

The defendants were served with the summons to enter appearance and they appointed the firm of Job Obure & Company Advocates to act for them. The said advocates filed their Notice of Appointment on 24th October, 2012 but did not file a statement of defence on behalf of the defendants. In the absence of defence, the suit was set down for formal proof on 15th April, 2015 when the plaintiff gave evidence and closed his case without calling any witness. The plaintiff (PW1) testified that he is the registered owner of the suit property. He produced in evidence a copy of the title deed for the suit property dated 4th March 2004 in his name as well as a certificate of official search dated 26th January 2012. The same were marked as plaintiff's exhibits 1 and 2. The plaintiff also produced a copy of the registry index map sheet for Mwangichana Registration Section. The same was marked as plaintiff's exhibit 3.

The plaintiff testified further that the defendants were registered as owners of Plot No.901. The plaintiff stated that in the year 2004, the defendants destroyed the beacons marking the boundary between the suit property and Plot No.901 and entered onto the suit property. He stated that upon entry onto the suit property as aforesaid, the defendants started utilizing the entire parcel of land as if it was one parcel with

Plot No. 901. The plaintiff stated that he lodged a trespass claim against the defendants at Marani Land Disputes Tribunal in the year 2010 but the said tribunal was disbanded before his claim was heard and determined. The plaintiff stated that the defendants had taken over the entire parcel of land and had put up houses on one portion while the remaining portion was under cultivation. The plaintiff stated that before the defendants' trespass onto the suit property, he was the one cultivating the same.

Upon examination by the court, the plaintiff stated that his father was known as Stephen Ontita Onsate (deceased) and that the defendants' father was known as Kebati Oripo (deceased). The plaintiff stated further that he was registered as the owner of the suit property during land adjudication in the area and that his name Ontita Gichana which was initially in the register of the suit property as the owner thereof was later changed to Francis Ontita Gichana after his baptism. After the close of evidence, the plaintiff made closing submissions in writing. The same were filed in court on 28th July, 2015. In his submissions, the plaintiff reiterated his testimony before the court and submitted that he had proved his case on a balance of probabilities.

What I need to determine in this suit is whether the plaintiff has established on a balance of probabilities that he is the owner of the suit property and that the defendants have trespassed thereon. The plaintiff stated in his evidence that he is the registered owner of the suit property. He produced as exhibits a copy of a title deed for the suit property and a certificate of official search in proof of his ownership of the said property. The plaintiff stated that the defendants who are his cousins owned Plot No. 901 which shared a common boundary with the suit property. The plaintiff's evidence was that in the year 2004, the defendants had without his consent, entered the suit property and put up structures thereon. He stated that the defendants have continued in occupation of the suit property a portion of which they use for cultivation.

Under section 24 of the Land Registration Act, 2012, the registration of the plaintiff as the proprietor of the suit property vested upon the plaintiff absolute ownership thereof together with all rights and privileges associated with such ownership. Under section 25 of the said Act, the plaintiff's rights over the suit property are indefeasible except as provided under the said Act. Section 25 (1) of the Land Registration Act, 2012 provides as follows:-

1. The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in 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 but subject:

a. To the 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.

This suit was not defended by the defendants. The evidence that was adduced by the plaintiff regarding his ownership of the suit property was not controverted by the defendants. The defendants did not also contest the evidence that was tendered by the plaintiff regarding their entry and occupation of the suit property. The plaintiff having proved his ownership of the suit property and the defendants' entry and occupation thereof, the onus was upon the defendant to justify their occupation of the property. In the absence of any evidence from the defendants, the only conclusion this court can make is that the defendants have no justifiable cause for entering and occupying the suit property and as such they are trespassers thereon.

For the foregoing reasons, I am satisfied that the plaintiff has proved his claim against the defendants and that he is entitled to the prayers sought in the plaint. I therefore enter judgment for the plaintiff against the defendants jointly and severally on the following terms;

1. The Land Registrar and Land Surveyor, Kisii County shall visit LR No. West Kitutu/ Mwangichana/ 901 and LR No. West Kitutu/ Mwangichana/902 within ninety (90) days from the date of this judgment with notice to the parties and shall determine and fix the boundaries of the two parcels of land.
2. The two officers shall file their report in court within 30 days from the date of visiting the said parcels of land.
3. The Police Officers from the nearest Police Station shall provide the two officers with security.
4. Once the boundaries of the two parcels of land have been determined and fixed as aforesaid, the defendants shall vacate and hand over to the plaintiff within 60 days of such determination, the portions of LR No. West Kitutu/Mwangichana/902 found to be in their possession failure to which the plaintiff shall be at liberty to apply to court for their forceful eviction.
5. The plaintiff shall meet the expenses involved in the fixing of the boundaries of the said parcels of land.
6. The plaintiff shall have half (1/2) the costs of the suit.

Signed at Nairobi this..... day of.....2016.

S.OKONG'O

JUDGE

Delivered and Signed at Kisii this 8th day of April 2016

J.M.MUTUNGI

JUDGE

In the presence of

.....**for the Plaintiff**

.....**for the Defendants**