



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC NO. 150 OF 2013

KIMINISI OLE NGENDAPLAINTIFF

VERSUS

1. MATAIYA KANTAI

2. NEYIO KANTAI.....DEFENDANTS

JUDGMENT

The plaintiff was at all material times the registered owner of all that parcel of land known as **LR No. Trans-Mara/Moita/503** (hereinafter referred to as “**the suit property**”). The plaintiff brought this suit against the defendants on 3rd April 2013 seeking the following reliefs:-

- a. A declaration that the plaintiff is the registered and/or lawful owner of LR No. Trans-Mara/Moita/503("the suit property") measuring 15.82 ha.
- b. An order of eviction against the defendants, their servants and/or agents from the suit property.
- c. Permanent injunction restraining the defendants by themselves and/or their agents, servants and/or anyone claiming under them from entering upon, re-entering, trespassing onto, cultivating, grazing on, building structures, cutting down trees, interfering with and/or in any other manner dealing with the suit property and/or any portion thereof.
- d. General damages for trespass.
- e. Interest on(d) at court rates
- f. Costs of the suit together with interest thereon.
- g. Such further and/or other relief as the court may deem fit and expedient to grant.

In his plaint dated 2nd April, 2013, the Plaintiff averred that he purchased the suit property from one, John Mutetia who was lawfully registered as the owner thereof on 19th December, 2012. The suit property was thereafter transferred and registered in his name on 20th December, 2012. The plaintiff averred that in the month of February 2013, the defendants entered the suit property without his permission or authority and commenced cultivation thereon. The plaintiff averred further that on 15th March 2013, the defendants began putting up structures on the suit property on which structures the 2nd defendant had started residing. The plaintiff averred that the defendants' activities aforesaid have deprived him of the use of the suit property and the benefits attendant thereto.

The defendants entered appearance and filed a joint statement of defence on 9th May 2013. The defendants denied the plaintiff's claim in its entirety and contented that John Mutetia had no valid title to the suit property that he could pass to the plaintiff. The defendants contended that the purported agreement for sale that the plaintiff entered into with John Mutetia in respect of the suit property was unlawful and illegal because the title that John Mutetia had in the suit property had been extinguished by

operation of law.

The defendants denied having trespassed on the suit property in the year 2013 as claimed by the plaintiff and contended that they had been in open, peaceful and uninterrupted occupation of the suit property for a period of 12 years prior to the filing of this suit and as such they are entitled to be registered as proprietors of the suit property under the doctrine of adverse possession.

When the suit came up for hearing on 30th June 2015, neither the defendants nor their advocates attended court. After satisfying myself that the defendant's advocates on record were served with a hearing notice, I allowed the hearing of the case to proceed. The plaintiff gave evidence and did not call any witness. The plaintiff (PW1) testified that he purchased the suit property from John Mutetia. He stated that prior to entering into the transaction, he conducted a search and established that John Mutetia was indeed the registered proprietor of the suit property. After the search aforesaid, he entered into an agreement for sale with John Mutetia on 21st November 2012. The plaintiff produced a copy of the said agreement as plaintiff's exhibit 1.

The plaintiff stated further that the suit property was vacant when he bought it and that the defendants are not related in any way to the previous owner of the property, John Mutetia. The plaintiff produced as exhibits, a copy of the title deed for the suit property dated 20th December 2012 in his name and a copy of a certificate of official search on the register of the suit property dated 26th March 2013 showing that the plaintiff is the registered owner of the suit property.

The plaintiff told the court that the defendants have prevented him from taking possession of the suit property since he purchased the same and they have threatened him with harm should he enter the property. He stated that the defendants entered the suit property in February 2013 and have since put up houses thereon. They have also been cultivating and grazing their cattle on the property. The plaintiff stated that the defendants have no right to occupy the suit property as their parcels of land are elsewhere. On examination by the court, the plaintiff stated that the defendants have put up approximately six houses on the suit property which they are using as their residences. He reiterated that the defendants started putting up the said houses upon entering the suit property in February 2013. After the close of the plaintiff's case, the plaintiff's advocate Mr. Ochwangi informed the court that he did not wish to make any closing submissions. He informed the court that he wished to rely entirely on the evidence on record and urged the court to enter judgment for the plaintiff against the defendants as prayed in the plaint.

The plaintiff's claim against the defendants is based on the tort of trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. What I need to determine therefore is whether the plaintiff has proved that he is the owner of the suit property and that the defendants entered and occupied the same without any justifiable cause. The plaintiff has demonstrated that he is the registered owner of the suit property by producing in evidence a copy of the title deed for the suit property in his name and a copy of a certificate of official Search on the register of the suit property. Under section 24 of the Land Registration Act, 2012, the registration of the plaintiff as the proprietor of the suit property vests 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 defended by the defendants but the defendants failed to appear in court and tender evidence in their defence at the trial. Although the defendants had contended in their statement of defence that they are in occupation of the suit property as of right having acquired the same by adverse possession, they placed no evidence before the court in support of that contention. The plaintiff's testimony and evidence was therefore not controverted by the defendants. The plaintiff's title to the suit property is therefore not contested. The plaintiff's testimony that the defendants have entered onto and occupied the suit property without his consent or authority is also not challenged. 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 in terms of prayers (i), (ii) and (iii) in the plaint dated 2nd April, 2013. I have declined to grant prayer (iv) because no evidence was led in respect thereof. The defendants shall vacate and handover possession of the suit property to the plaintiff within ninety (90) days from the date of service of a copy of the decree extracted from this judgment upon them failure to which the plaintiff shall be at liberty to apply for their forceful eviction. The plaintiff shall file in court an affidavit of service of the said decree upon the defendants. The filing of the said affidavit of service shall be a condition precedent to any further proceedings herein at the instance of the plaintiff. The plaintiff shall have 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**