



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**ENVIRONMENT AND LAND CIVIL CASE NO. 145 OF 2013**

**JOHN NTABO NYAIRO .....PLAINTIFF**

**VERSUS**

**SABASTIANO OMWENGA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit against the defendant on 28<sup>th</sup> March 2013 seeking the following reliefs;

- (i) **A declaration that LR No. Wanjare/Bomariba/3099 belongs to the plaintiff.**
- (ii) **Permanent injunction restraining the defendant either by himself or through his agents, servants and/or any one authorized or claiming under the defendant from re-entering, trespassing onto, building, cultivating, interfering with and/or in any other manner dealing with the suit land namely, LR No. Wanjare/Bomariba/3099 and an order that the district land registrar and district surveyor Kisii District do visit the suit land and fix the boundary between the suit land, LR No. Wanjare/Bomariba/3099 and land parcel LR No. Wanjare/Bomariba/ 3092.**
- (iii) **Costs of the suit.**
- (iv) **Such further and/or other relief as the court may deem fit and expedient to grant.**

2. In his plaint dated 28<sup>th</sup> March 2013, the plaintiff averred that at all material times he was and still is the registered proprietor and/or owner of all that parcel of land otherwise known as **LR No. Wanjare/Bomariba/3099** measuring 0.19ha (hereinafter referred to as “**the suit property**”) while the defendant was the registered proprietor of all that parcel of land known as **LR No. Wanjare/Bomariba/ 3092** (hereinafter referred to as “**Plot No. 3092**”). The plaintiff averred that sometime in January 2013, the defendant without the plaintiff’s authority or any justifiable cause removed the common boundary between the suit property and Plot No. 3092 with the intention of entering the suit property and commencing cultivation thereon. The plaintiff averred that as a result of the defendant’s said acts of trespass, the plaintiff has been deprived of possession, use and enjoyment of the suit property thereby subjecting him to loss and damage. The defendant was served with the summons to enter appearance but

failed to do so within the prescribed time. On application by the plaintiff, interlocutory judgment was entered against the defendant on 27<sup>th</sup> June, 2013. The matter was thereafter fixed for formal proof on 3<sup>rd</sup> July, 2014. Although the defendant was served with a hearing notice, he did not attend court for the hearing on 3<sup>rd</sup> July 2014.

3. The plaintiff gave evidence and did not call any witness. He told the court that he purchased a portion of land from the defendant in the year 2008 at a consideration of Ksh. 20,000/=. He entered into a written agreement for sale with the defendant dated 30<sup>th</sup> March 2008. He produced a copy of the said agreement as P.Exh. 1. The plaintiff stated that he had earlier purchased a separate portion of land from the defendant's son one, Cosmas Mogendi Omwenga at a consideration of Ksh.84,000/=. This was pursuant to a separate written agreement for sale dated 18<sup>th</sup> January 2008 that he entered into with the defendant's said son. He produced this agreement for sale as P. Exh.2. The plaintiff testified that the portions of land that he purchased from the defendant and his son were from the same parcel of land.

4. The plaintiff stated that the two portions of land were consolidated into one parcel after survey and subdivision of the hitherto larger parcel and registered in his name as LR No. Wanjare/Bomariba/3099("the suit property"). After the suit property was registered in his name, he was issued with a title deed on 5<sup>th</sup> February, 2013. He produced a copy of the title deed in evidence as P.Exh. 3. He also produced in evidence a certificate of official search on the title of the suit property and a receipt for the payment that he made for the same which were marked as P. Exhibit 4 (a) and (b) respectively. The plaintiff also produced in evidence a copy of the registry index map (RIM) for the area which shows the ground location of the suit property. The RIM was marked as P. Exh. 5. The plaintiff stated that following the subdivision that gave rise to the suit property, the defendant remained with a parcel of land known as LR No. Wanjare/Bomariba/3092 ("Plot No. 3092") that is registered in his name. The defendant stated that the defendant destroyed the fence that had been erected by the plaintiff around the suit property, entered thereon in January, 2013 and started cultivating the same. The plaintiff reported the trespass at Gesonso Police Station from where he was referred to the land's office for assistance. He was advised at the land's office to seek redress from court. He produced a copy of the letter dated 1<sup>st</sup> March 2013 that was written by the Officer Commanding Gesonso Police Station to Kisii County Land Registrar and Surveyor that was marked as P.Exh.6.

5. On being examined by the court, the plaintiff stated that the defendant essentially dispossessed him of the portion of the suit property that the defendant had sold to him. He had been cultivating maize on the whole of the suit property before the defendant's act of trespass. After the close of the plaintiff's case, the plaintiff's advocate made closing submissions in writing. The plaintiff's written submissions were filed on 18<sup>th</sup> December 2014.

6. I have considered the pleadings and the evidence tendered by the plaintiff in proof of his case. I have also considered the written submissions that were filed by the plaintiff's advocates. The plaintiff's claim against the defendant is based on the tort of trespass. Trespass has been defined as any intrusion by a person on the land in 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 defendant has entered and occupied 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 certificate of official search on the title of the suit land which shows that the property is registered in his name.

7. Under section 24 of the Land Registration Act 2012, the registration of the plaintiff as the proprietor of the suit property vests upon him 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:

**“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 lease, 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 are not to require noting on the register unless the contrary is expressed in the register.**

8. The defendant did not defend the plaintiff's claim. The plaintiff's evidence to the effect that he is the registered owner of the suit property and that the defendant entered and occupied a portion thereof without his consent was therefore not controverted by the defendant. The plaintiff having proved his ownership of the suit property and the defendant's entry and occupation thereof, the onus was upon the defendant to justify his occupation of the property. In the absence of any evidence from the defendant, the only conclusion that this court can make is that, the defendant has no justifiable cause for entering and occupying the suit property and as such he is a trespasser.

9. For the foregoing reasons, I am satisfied that the plaintiff has proved his claim against the defendant on a balance of probability. I therefore enter judgment for the plaintiff against the defendant as prayed in paragraphs (i), (ii) and (iii) of the plaint dated 28<sup>th</sup> March 2013. The plaintiff shall meet the cost of fixing the boundary of LR No. Wanjare/Bomariba/3099 and LR No. Wanjare/Bomariba/3092.

**Delivered , Signed and Dated at Kisii this 20<sup>th</sup> day of March, 2015.**

**S.OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Agure Odero h/b for Sagwe                      for the plaintiff

N/A                                                              for the defendant

Mr. Mobisa                                                      Court Clerk

**S.OKONG'O**

**JUDGE**