



NO.79

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT KISII

LAND CASE NO. 106 OF 2010

CHARLES MOGIRE

ONDIEKI.....PLAINTIFF

VERSUS

CLIVANCE OWINO OJWANG.....1ST DEFENDANT

LINET OCHIENG.....2ND DEFENDANT

MORRIS OMORO.....3RD DEFENDANT

CAROLINE AOKO.....4TH DEFENDANT

JUDGMENT

1. The Plaintiff is the registered proprietor of all that parcel of land known as LR No. Kasipul/ Kojwach Kawere/310 (hereinafter referred to as “the suit property”). The Plaintiff brought this suit against the defendants by way of a Plaint dated 20th April, 2010 in which the Plaintiff sought an order of eviction against the defendants from the suit property and the

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costs of the suit. In the said Plaint, the Plaintiff claimed that, he became the registered sole proprietor of the suit property on 23rd September, 2003 and that on diverse dates in the year 2007, the defendants without any right, lawful authority or consent of the Plaintiff unlawfully entered the suit property and commenced cultivation thereon and have since forcefully remained thereon. The Plaintiff claims that the defendants have refused and/ or declined to vacate the suit property even after a demand was served upon them to do so thereby rendering the filing of this suit necessary.

2. The defendants were served with the summons to enter appearance and neither entered appearance nor filed a statement of defence to the Plaintiff’s claim. The Plaintiff requested for interlocutory

judgment in default of appearance on 14th June, 2010 which judgment was entered on 1st October, 2010. The suit was thereafter fixed for formal proof on 13th

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March, 2013. Although it was not necessary to serve a hearing notice upon the defendants, interlocutory judgment having been entered against them in default of appearance, the Plaintiff did cause a hearing notice to be served upon them. The defendants failed to appear in court on that day and the hearing of the case proceeded in their absence. The Plaintiff gave evidence and called no witness. In his evidence, the Plaintiff testified that; he purchased the suit property from one, Ocharo Bwari after which the same was transferred to his name. He produced a copy of a title deed for the suit property and a copy of a certificate of official search as exhibits in proof of his ownership claims over the suit property. He testified further that sometimes in the year 2007, the 1st defendant entered the suit property and allocated portions thereof among the other defendants. Whereas the 2nd and 3rd defendants vacated the suit property soon after the filing of this suit, the 1st and 4th

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defendants have remained in possession of the suit property on which they have put up houses in which they reside. The Plaintiff told the court further that the 1st defendant is the 4th defendant's father in law and that when he purchased the suit property the 1st defendant was residing on the upper part of the said property and that it was agreed that the Plaintiff would cause the suit property to be sub-divided so that the 1st defendant would keep the upper portion of the suit property under his occupation while the Plaintiff would be registered as the proprietor of the lower portion of the suit property. The Plaintiff testified that the lower and upper portions of the suit are separated by a road and that the 4th Plaintiff is currently in occupation of the lower part of the suit property on which the 1st defendant put up for her a homestead when her husband who was the 1st defendant's son died which son was buried on that portion of the suit property forcefully. The Plaintiff told the

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court that his interest is only on the lower part of the suit property which is under the occupation of the 4th defendant.

3. The Plaintiff's advocate Mr. G. Masese in his final submissions relied on the evidence on record and urged the court to enter judgment for the Plaintiff as prayed in the Plaint. I have considered the Plaintiff's case as pleaded and the evidence tendered in support thereof. The Plaintiffs' claim against the defendant is based on the tort of trespass. In the book, **Clerk & Lindsell on Torts, 18th Edition at paragraph 18-01**, trespass to land is defined as consisting of **"any unjustifiable intrusion by one person upon land in the possession of another."** In the same book, it is stated that trespass is actionable at the suit of the person in possession of the land (paragraph 18-10) and that proof of ownership is a prima facie proof of possession (paragraph 18-110). In this case

therefore, the Plaintiff was under a duty to prove that the defendant had unjustifiably

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entered the suit property which was in his possession. I am satisfied from the Plaintiff's testimony and the documents produced by the Plaintiff in evidence that the Plaintiff has proved on a balance of probability that the defendants have committed an act of trespass on the suit property. The Plaintiff proved that the suit property is registered in the name of the Plaintiff. The Plaintiff produced in evidence a title deed for the suit property in the name of the Plaintiff and a certificate of official search which confirmed that the Plaintiff was registered as the proprietor of the suit property on 21st September, 2003. The Plaintiff testified that when he purchased the suit property from the original owner, the 1st defendant was in occupation of the upper portion thereof already and it was agreed that the Plaintiff would cause the suit property to be subdivided so that the 1st defendant could retain the said upper part while the Plaintiff get registered as the proprietor of the lower part only

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of the suit property and before this was done, the 1st defendant entered the said lower part of the suit property without the Plaintiff's permission and not only put up a homestead for his deceased son who was the husband of the 4th defendant but also allocated portions thereof to the 2nd and 3rd defendants who have since vacated the suit property. The defendants although served did not enter appearance and as such failed to tender any evidence at the trial to disprove these allegations. The Plaintiff's testimony was therefore not controverted. It is my finding therefore that the Plaintiff has proved that he is the registered proprietor of the suit property and that the 1st and 4th defendants have trespassed thereon by the 4th defendant occupying the same without the Plaintiff's permission and the 1st defendant causing the house under occupation by the 4th defendant to be put up. On the relief sought, the Plaintiff has sought an order of eviction against all the defendants. The

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Plaintiff testified however that the 2nd and 3rd defendants have since vacated the suit property. The order of eviction cannot therefore issue against them. As for the 1st defendant, the Plaintiff testified that he is in occupation of the upper portion of the suit property which portion was in his possession when the Plaintiff acquired the title to the suit property. The Plaintiff told the court that he is not interested in that portion of the suit property in occupation of the 1st defendant. Again, no orders of eviction can issue against the 1st defendant in the circumstances. This leaves the 4th defendant as the only party against whom an order of eviction sought by the Plaintiff can issue. The 4th defendant was purportedly settled on the suit property by the 1st defendant who had no title to the property and therefore had no right to appropriate the same. The Plaintiff is therefore entitled to recover the portion of the suit property which is in the occupation of the 4th defendant. In

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conclusion therefore, it is my finding that the Plaintiff has proved his case against the 1st and 4th defendants on a balance of probability. I therefore enter judgment for the plaintiff against the 1st and 4th defendants as follows;

- i. **As against the 4th defendant, vacant possession of the portion of the suit property in possession of the 4th defendant within ninety (90) days from the date of the 4th defendant being personally served with a copy of this judgment and the decree arising therefrom;**

- ii. **As against the 1st defendant, the costs of this suit .**

Signed, dated and delivered at KISII this 14th day of June, 2013

S. OKONG'O,

JUDGE.

In the presence of:-

Miss. Sagwa holding brief for G. Masese for the Plaintiff

No appearance for the Defendants

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

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