



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 61 OF 2012

PLISTA AKUMU

BAYI.....PLAINTIFF

VERSUS

1. SUSAN ONGARO

BAYI

2. JOHN META

BAYI

3. ALPHONCE ODIWUOR BAYI..... DEFENDANTS

JUDGMENT

1. The Plaintiff is the registered proprietor of all that parcel of land known as **LR No. Kanyamkago/Kawere I/1351** (hereinafter referred to as "**the suit property**"). The Plaintiff brought this suit against the defendants on 21st February, 2012 seeking; a declaration that the plaintiff is the registered and/or lawful owner of the suit property, an order for the eviction of the defendants from the suit property, a permanent injunction to restrain the defendants from entering upon, re-entering, trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with the suit property or any portion thereof and general damages for trespass. In her plaint dated 18th February, 2012, the Plaintiff averred that, on or about 25th January, 2012, the defendants without any right, lawful authority or consent of the Plaintiff unlawfully entered the suit property and started erecting temporary structures thereon. In addition to putting up the said structures, the defendants also commenced cultivation of a substantial portion of the suit property. The plaintiff averred that as a result of the said acts of trespass by the defendants, the plaintiff has been deprived of her right to enter, occupy and use the said portions of the suit property which have been occupied by the defendants. The Plaintiff averred that the defendants have refused and/ or declined to vacate the suit property even after a demand and notice of intention to sue 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. They entered appearance and filed a joint statement of defence on 26th April, 2012 to the Plaintiff's claim. In their defence, the defendants contended that the plaintiff was at all material times the first wife of one, Alfred Bai Obilo, deceased (hereinafter referred to only as "the deceased"). The defendants contended that the 1st defendant is the second wife of the deceased while the 2nd and 3rd defendants are the 1st defendant's sons with the deceased. The defendants denied that the plaintiff is the owner of

the suit property. The defendants contended that the suit property was at all material times owned by the deceased and that during the land adjudication process, the deceased caused the suit property to be registered in the name of the plaintiff as his first wife to hold in trust for the deceased's family comprising of herself and her children, and the 1st defendant and her children. The defendants contended therefore that the plaintiff holds the suit property in trust for them and the other members of the deceased's family. The defendants denied the plaintiff's claim that they trespassed on the suit property on 25th January, 2012 and contended that the 1st defendant has occupied the suit property since she was married with the deceased in 1975 and that the 2nd and 3rd defendants who are 33 years old and 29 years old respectively have occupied the suit property since they were born. The defendants termed the plaintiff's suit bad in law and an abuse of the court process.

3. When the suit came up for hearing on 2nd April, 2014, the plaintiff gave evidence and closed her case without calling any witness. After the plaintiff had closed her case, the defendants advocate Mr. Oyoo indicated to the court that he intended to call five (5) witnesses who were not in court. On his application for adjournment, the court stood over the matter to 6th November, 2014 for the hearing of the defence case. On 6th November, 2014, neither the defendants nor their advocate Mr. Oyoo appeared in court for the hearing of the defence case. In the circumstances, the court marked the defence case as closed and called upon the plaintiff's advocate to make his closing submissions. The plaintiff's advocate Mr. Oguttu Mboya informed the court that the plaintiff wished to rely entirely on the evidence on record. I have considered the pleadings filed by the parties and the evidence tendered before me by the plaintiff in proof of her claim against the defendants.
4. In her evidence, the Plaintiff testified that;the 1st defendant is her co-wife while the 2nd and 3rd defendants are the 1st defendant's sons. The plaintiff and the defendants were at all material times residing in different homesteads situated on different parcels of land until 25th January, 2012 when the defendants entered the suit property without her permission, set up a jaggery and started to cultivate a portion thereof. The plaintiff told the court that the suit property did not belong to the deceased. She stated that she purchased the suit property using her own money and had the same registered in her name. The plaintiff testified that she has been unable to utilize the portion of the suit property which is occupied by the defendants. She told the court that she has nowhere to cultivate because the defendants are cultivating the entire parcel of land comprised in the title of the suit property.
5. In cross-examination by the defendant's advocate and examination by the court, the plaintiff stated that the defendants have houses on the suit property which they put up forcefully. She stated that the 1st defendant's house on the suit property had been in existence for about 6 years as at the date of her evidence while the 2nd defendant's house had been in place for about 3 years. She stated further that the defendants' houses were put up earlier than 25th January, 2012. She could however not remember the exact dates when the houses were erected. She told the court that she purchased the suit property from one, Zacharia Ogoda at Ksh. 17,000/= and that the agreement for sale between her and the seller of the said property was in writing but the same got burnt when her house caught fire. The plaintiff told the court that the defendants were all along occupying a two(2) acre parcel of land that is registered in the name of the deceased on which the deceased had settled the 1st defendant before the defendants vacated the said parcel of land and forcefully came to settle on the suit property. The plaintiff told the court that the said two (2) acre parcel of land is still available and that the defendants are using a portion thereof for cultivation while the other portion, they have let out to third parties. The plaintiff informed the court that she has no interest in the said parcel of land on which the deceased had settled the 1st defendant. The plaintiff produced in evidence as exhibits in support of her claim over the suit property, a copy of a certificate of official search on the title of the suit property and a certified copy of the register for the suit property.

6. The Plaintiffs' claim against the defendants 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 (see paragraph 18-10) and that proof of ownership is prima facie proof of possession (see paragraph 18-110). In this case therefore, the Plaintiff was under a duty to prove that the defendants have unjustifiably entered the suit property that was in her 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 acts of trespass on the suit property. The Plaintiff has proved that the suit property is registered in her name. The Plaintiff produced in evidence a certified copy of the register for the suit property and a certificate of official search which have confirmed that the Plaintiff was registered as the proprietor of the suit property on 23rd July, 1981.
7. The Plaintiff testified that the 1st defendant is her co-wife and that the 1st defendant and the plaintiff were settled by their deceased husband on different parcels of land which they occupied peacefully during the life of the deceased. The plaintiff testified that whereas the 1st defendant was settled on a piece of land measuring 2 acres that is registered in the name of the deceased, the plaintiff was settled by the deceased on the suit property which she had purchased. The plaintiff testified that the defendants vacated the parcel of land where they had been settled by the deceased and came and occupied the suit property without the plaintiff's permission or consent. They also started cultivating the suit property without the plaintiff's permission. The defendants failed to tender any evidence at the trial to disprove these claims by the plaintiff. The Plaintiff's testimony was therefore not controverted. Although the defendants had claimed that the suit property is held by the plaintiff in trust, the defendants did not adduce any evidence in proof of the said trust.
8. It is my finding therefore that the Plaintiff has proved that she is the registered proprietor of the suit property and that the defendants have trespassed thereon. The Plaintiff is therefore entitled to the prayers sought in the plaint save for general damages for trespass. The plaintiff did not tender any evidence or place before the court any material that would have assisted the court to assess appropriate general damages to award in the circumstances of this case. In conclusion, I hereby enter judgment for the plaintiff against the defendants jointly and severally as prayed in paragraphs (i), (ii) and (iii) of the plaint dated 18th February, 2012. Due to the relationship between the parties, each party shall bear its own cost.

Delivered, signed and dated at KISII this 19th day of December, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE



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