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| Judge: | Florence Nyaguthii Muchemi |
| Citation: | TOM SIKUKU & another v ISAAC MANDILA SIMIYU & another [2009] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | - |
| History Magistrates: | - |
| County: | - |
| Docket Number: | - |
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| Case Outcome: | - |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Case 91 of 2003

TOM SIKUKU1ST PLAINTIFF

BEATRICE KHASOHA2ND PLAINTIFF

~VRS~

ISAAC MANDILA SIMIYU1ST DEFENDANT

CONSOLATA NASIPWONDI MANDILA.....2ND DEFENDANT

JUDGMENT

The Plaintiffs Tom Sikuku and Beatrice Khasoha are man and wife. In their amended plaint dated 29th March 2007 and filed in court on 3/4/2007 pray for:

- a) *An order of eviction against the Defendants from the Plaintiffs' land reference number BUNGOMA/TONGAREN/2122.*
- b) *A permanent injunction restraining the Defendants, their servants, agents, family members or any person claiming through them from trespassing or interfering with the Plaintiffs peaceful possession of the suit land.*
- c) *Mesne profits at Ksh.50,000/= annually since 2002 to date.*
- d) *Costs of the suit.*

The evidence of the Plaintiffs is that they jointly bought three acres of land from the 1st Defendant Isaac Mandila Simiyu in the year 2000. The land was still registered in the name of one Augustine Simiyu, deceased who had sold the three (3) acres to the 1st Defendant. The wife of deceased (PW3) sold one quarter (1/4) of an acre to the Plaintiffs later. The two portions together formed the 3 ¼ acre parcel now registered in the joint names of the Plaintiffs. This was after PW3 bequeathed the land to them in the Succession Cause for the estate of the deceased.

At the time the land was bought, the 1st Defendant had taken possession of it and was residing there with his two (2) wives namely Beatrice and Christine. The 1st Defendant vacated the land with his first wife Beatrice. The 2nd Defendant Christine Nasipwondi Mandila refused to vacate the land and continued residing there with her children. The Plaintiffs started using the land but in the year 2002, the 1st Plaintiff was assaulted by the family of 2nd Defendant and driven out of the land. He is still the registered owner of the land.

PW3 testified on how she sold the land to the 1st Defendant who later sold to the Plaintiffs. She said she was aware of the assault case where the 1st Plaintiff was assaulted by the 2nd Defendant and her children. The 1st Defendant is residing on the land to date with her family.

The 1st Defendant testified that he sold the land to the Plaintiffs and has no claim against them. He moved out of the land with his wife Beatrice while the other wife the 2nd Defendant refused to move out. The 1st defendant testified that he has reserved a parcel of land for the 2nd Defendant and her children. He has three parcels of land all measuring nine (9) acres. Only one parcel is occupied by him and the house of Beatrice. He supports the Plaintiffs' claim against the 2nd Defendant that she should be evicted from the land.

The 2nd Defendant did not attend court despite being duly served with the hearing notice. The 2nd Defendant's counsel Sifuna & Co. were not in court during the hearing. The date was taken on 16/4/2008 and Sifuna & Co. served on 16/7/2008.

In her amended statement of defence, the 2nd Defendant states that she has lived on the suit land since 1991 in her capacity as wife to the 1st Defendant. She avers that she has no place to go and live with her four children.

It has not been claimed that the registration of the land in the name of the Plaintiffs was fraudulent. The ownership of the land is not disputed. The Plaintiffs have produced documentary evidence to prove ownership. PW3's and 1st defendant's evidence was very clear as to how the transactions on sale of the two portions of land now forming the current title L.R. BUNGOMA/TONGAREN/2122 were conducted. They were genuine and free of any fraud or mistake. The two witnesses supported the Plaintiffs' case that the 2nd Defendant and her children have refused to move out of the Plaintiffs' land. The 2nd Defendant and her family have manifested hostility by assaulting the 1st Plaintiff and 1st Defendant on the land issue. This is in outright defiance and violation of the Plaintiffs' rights of ownership under section 27 of the Registered Land Act. The 1st Defendant testified that he has one parcel of land reserved for the 2nd Defendant and her children. The only tangible thing she said in her defence is that she has nowhere to go.

The Plaintiffs have no duty to give the 2nd Defendant a place to stay. The 1st Defendant, who is her husband is obligated to settle his family. He has said he has land for that purpose. The defence of 2nd Defendant does not disclose any reasonable

defence. Having stayed on the land since 1991 does not give her any legal right to continue being there. The ownership of the land changed hands with her full knowledge. The owners took possession and 2nd Defendant drove them out. The occupation of 2nd Defendant on the land has been disturbed over the years. It cannot qualify to be quiet and undisturbed possession to form a legal basis for a claim of adverse possession. The 2nd Defendant has not even taken such a remedy as an option most probably because she is fully aware of the facts.

The Plaintiffs have shown that they have been deprived of their land for the last seven (7) years. Evidence was adduced to the effect that the land would yield crops worthy Ksh.216,000/= per year. The evidence is not controverted by the 2nd Defendant. The mesne profits claim is for Ksh.50,000/= a year. The 1st Defendant has exonerated himself from the blame of preventing the Plaintiffs to use their land. The Plaintiffs in their evidence blame the 2nd Defendant. I therefore find the 1st Defendant not liable. The Plaintiffs have proved their claim against the 2nd Defendant on the balance of probabilities. I enter judgment in their favour for the orders sought in the plaint against the second Defendant. The Plaintiff is awarded mesne profits at the rate of Ksh.30,000/= annually for nine (9) years amounting to Ksh.270,000/= . The 2nd Defendant to meet the costs of the suit.

F. N. MUCHEMI

JUDGE

Dated, Delivered and Signed at Bungoma

This 9th day of December, 2009 in the presence of

Absence of the parties.



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