



**Otieno v Osembo (Environment & Land Case 7 of 2015)
[2023] KEELC 16604 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16604 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 7 OF 2015**

**BN OLAO, J
MARCH 28, 2023**

BETWEEN

LEONARD OCHIENG OTIENO PLAINTIFF

AND

SAMUEL OTIENO OSEMBO DEFENDANT

JUDGMENT

1. Leonard Ochieng Otieno (the Plaintiff herein) is the current registered proprietor of the land parcel No BUKHAYO/MUNDIKA/5042 measuring approximately 0.05 Hectares (the suit property). He holds the title deed thereto issued on 8th October 2014. The suit property was previously registered in the name of Samwel Otieno Osembo (the Defendant herein) who held the title deed thereto issued on 28th February 2011. However, the Defendant had charged the suit property and the developments thereon to the Kenya Commercial Bank (the Bank) as security for a loan of Kshs.525,000 on 15th February 2012. The loan was not serviced and the Bank, in exercise of its power of sale, advertised the said property for auction to recover the sum due. The Plaintiff attended the auction, bid for it and having been declared the highest bidder purchased it together with all the developments thereon. It was then transferred to him on 6th October 2014.
2. Notwithstanding the fact that the Plaintiff had been registered as the proprietor of the suit property and inspite having prevailed upon the Defendant, his servants, tenants and agents to give him vacant possession, the Defendant has illegally and unlawfully remained in possession of the same and continues to receive the rent therefrom at the Plaintiff's detriment.
3. The Plaintiff therefore moved to this Court vide his plaint dated 19th January 2015 in which he seeks judgment against the Defendant in the following terms:
 1. An order of vacant possession of the suit property or in the alternative, an order for the eviction of the Defendant from the suit property and an order of permanent injunction restraining the



Defendant by himself, his servants, workers and agents from interfering in any way with the Plaintiff's quiet occupation and use of the said property.

2. A declaratory order that the Defendant is a tenant in the suit property and ought to pay the Plaintiff rent at the market rates of BUSIA TOWN with effect from December 2014.
 3. Costs of this suit.
 4. Any other relief that this Honourable Court deems fit and just to grant.
4. The Plaintiff filed his statement dated 27th January 2015 and which is basically a rehash of the pleadings in his plaint. He also filed the following documents in support of his claim:
1. Title deed for the land No BUKHAYO/MUNDIKA/5042 in the name of Plaintiff.
 2. Official Certificate of Search for the land parcel No BUKHAYO/MUNDIKA/5042.
 3. Title deed for the land parcel No BUKHAYO/MUNDIKA/5042 initially in the name of the Defendant.
 4. Transfer of Land Form.
 5. Public notice for the auction by Valley Auctioneers.
 6. Newspaper Advertisement dated 10th July 2014.
 7. Valuation report by Keriasek & Company Ltd.
 8. Letter from Survey Office dated 27th October 2014 (this was not filed).
 9. Demand letter dated 10th October 2014.

Although the Plaintiff also filed a list of ten (10) witnesses who he proposed to call in support of his case, he was the only one who testified in support of his case.

5. In resisting the Plaintiff's claim, the Defendant filed his defence dated 11th February 2015 in which he denied the averments by the Plaintiff. He added that he has only been utilizing his plot No BUKHAYO/MUNDIKA/5042 and that the averments made by the Plaintiff are in bad faith and can only be canvassed through a visit by the County Land Registrar and County Land Surveyor.
6. The Defendant also pleaded that the Plaintiff's claim is premature and he would be seeking its dismissal at the earliest time possible. He also added that the jurisdiction of this Court would be challenged through a Preliminary Objection. However, there is nothing to show that this issue was canvassed.
7. In his statement also dated 11th February 2015, the Defendant states that he resides on the land parcel No BUKHAYO/MUNDIKA/5041 and which borders the suit land belonging to the Plaintiff. That he has built a permanent house on his land while the suit land is intact. He described the Plaintiff's suit as full of falsehoods and which should be dismissed with costs adding that the District Land Registrar and District Surveyor should visit the land and mark the boundaries. He filed the following documents as per his list dated 11th February 2015:
 1. Official Certificate of Search for the land parcel No BUKHAYO/MUNDIKA/5041.
 2. Copy of his identify card.
8. And just like the Plaintiff, the Defendant filed a list of his witness but he was the only witness who testified.



9. The Plaintiff testified before Kaniaru J on 1st February 2017. He told the Court how he saw an advertisement in the Daily Nation Newspaper of 16th July 2015 offering the suit property for sale by Valley Auctioneers through a public auction on 6th August 2014. He attended the auction, placed the bid and purchased it at a consideration of Kshs.950,000. He produced the newspaper advertisement (Plaintiff's Exhibit 1) and the Certificate of Sale issued to him after the auction (Plaintiff's Exhibit 2). He was also issued with Memorandum of Sale (Plaintiff's Exhibit 3) and subsequently title deed to the suit property which previously belonged to the Defendant.
10. On his part, the Defendant confirmed that the suit property previously belonged to him having purchased it from one Jane Kamau. Then he offered it as security for a loan of Kshs.1 million taken by his brother one William Owino Osembo. His brother however defaulted in repaying the loan and the suit property was auctioned and purchased by the Plaintiff. He added that he lives on the land parcel No BUKHAYO/MUNDIKA/5041 which is adjacent to the suit property. That since the two parcels of land were adjacent to each other and both belonged to him, he had removed the boundary between them. He testified however that the two homes which he occupies are on the land parcel No BUKHAYO/MUNDIKA/5041 and he has no claim over the suit land. He stated further that only the DISTRICT SURVEYOR can resolve this dispute.
11. Submissions were thereafter filed both by Mr Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates for the Plaintiff and by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the Defendant.
12. I have considered the evidence by the parties including the documents filed and the submissions by counsel.
13. It is common ground that the suit property is registered in the name of the Plaintiff who holds the title thereto issued on 8th October 2014 after he purchased it in an auction following the default of the Defendant's brother to service a loan for which it was a security. As the registered property, the Plaintiff enjoys all the rights and privileges protected by Section 25 of the [Land Registration Act](#). Those rights include the right to evict the Defendant therefrom, to injunct the Defendant from interfering with his occupation thereof and to earn reasonable rent from any tenants enjoying the same. Those are the remedies which the Plaintiff herein is pursuing. His title deed to the suit property is conclusive evidence, as provided under Section 26 of the [Land Registration Act](#), that the Plaintiff "is the absolute and indefeasible owner" of the suit property subject to any encumbrances and easements, if any, endorsed on the title. It can only be challenged on grounds of fraud or misrepresentation to which the Plaintiff was a party or if it is demonstrated that the title was acquired illegally, unprocedurally or through a corrupt scheme. I did not hear the Defendant try to impeach the Plaintiff's title to the suit land. When he testified before Kaniaru J on 29th November 2017, he said:

"I know land parcel No BUKHAYO/MUNDIKA/5042. It was my land. I bought it from Jane Kamau. It then got registered in my name. Then my brother William Owino Osembo took a loan using the land as security. I guaranteed him using that land. The loan amounted to 1 million shillings. My brother defaulted in loan payment. My land was auctioned. The Plaintiff bought the land through action. I have no claim on parcel NO 5042 that is vacant. I live on parcel No 5041."



In his submissions, Mr Ashioya appears to be questioning the validity of the Plaintiff's title to the suit property by suggesting that the provisions of the [Land Registration Act](#) and the [Auctioneers Act](#) were not adhered to including the 45 days notice. Counsel then adds:

“Your Lordship, on account of the lack of this crucial document, it is our submission that the Plaintiff has failed to prove his case and we urge you to dismiss it with costs; the High Court and the Court of Appeal has in innumerable occasions stated that where upon a title deed is challenged, it is not enough for the Plaintiff to flush it out in court and there in after insist that he/she is the owner of the land in dispute; he/she must prove to the Court by documentation that he/she obtained it legally; although a discharge of charge has been displayed in the Plaintiff's exhibits, it was incumbent upon the Plaintiff to furnish before Court a consent transfer of the land into his names in tandem with provisions of Section 8 of the [Land Control Act](#) which states as follows ...”

Counsel is of course correct in submitting that where a title is under a challenge, it is not enough to wave it to the Court. That is what the Court of Appeal held in the case of *Munyu Maina -v- Hiram Gathiha Maina* 2013 eKLR when it said:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.” Emphasis mine.

14. In the circumstances of this case, however, the Defendant has not challenged the Plaintiff's title to the suit property. As is clear from his testimony in chief which I have quoted in extenso above he concedes that he has “no claim on parcel NO 5042.” Indeed even in his defence, the Defendant did not challenge the Plaintiff's title to the suit property nor seek its cancellation for having been obtained fraudulently, unprocedurally or through an illegal process. What counsel has therefore tried to do is to challenge the Plaintiff's title by way of submissions. However, submissions are not evidence upon which a judgment can be based – *Daniel Toroitich Arap Moi -v- Mwangi Sptehon Muriithi & Another* 2014 eKLR.
15. The bottom line really is that there is no challenge to the Plaintiff's title to the suit property and the Defendant would have no basis for doing so. Indeed other than his own concession that the Plaintiff purchased the suit property, when the Plaintiff approached the Court seeking to restrain the Defendant from collecting the rent from the tenants therein, *KIBUNJA J* vide a ruling delivered on 8th July 2015 held as follows:

“That the Court further finds that the Applicant, as the registered proprietor of the suit land, is entitled to the right of a proprietor in accordance with Section 25 of the [Land Registration Act](#), 2012. That as the owner of the suit land, the Applicant also owns all that which is appurtenant on it, including the developments thereon. The Applicant is therefrom entitled to the rent arising from those occupying the developments on the suit land as to hold otherwise would lead him to suffer to irreparable loss. The Applicant has therefore established a prima facie case and his application has merit.”

16. That ruling was delivered on an interlocutory application. However, it must now be clear from the evidence above, including the title held by the Plaintiff and the Defendant's own admission, that the



Plaintiff's title to the suit property is beyond reproach. Nothing would have stopped the Defendant from impeaching it by counter-claiming for its cancellation.

17. The next issue for my determination is whether the Defendant is utilizing his own land parcel No BUKHAYO/MUNDIKA/5041 or has in fact continued to illegally occupy the suit land and collect rent from the developments thereon to the detriment of the Plaintiff.
18. Although both parties listed the District Registrar and District Surveyor Busia as their witnesses, none of them called the said officers to testify. No doubt the evidence of those two witnesses would have been key in determining this dispute. However, this Court must determine the dispute on the basis of the evidence before it.
19. It is conceded by the Defendant that the Plaintiff purchased the suit property in a public auction. The Plaintiff has produced among his documentation evidence through auction advertisement by Valley Auctioneers published in the Daily Nation newspaper of 10th July 2014 as well as the valuation report prepared by Keriasek & Company Ltd. Those are the documents that this court will rely on in determining what developments are on the suit property.
20. The newspaper advertisement by Valley Auctioneers is in very small print and hardly legible. It is not of much help. Counsel must always ensure that documents filed in aid of any claim must be legible enough to be read. It does not help your clients case to file documents which can only be read with the aid of a magnifying glass. In any event, magnifying glasses are not part of judges and magistrates tools of trade and I have never seen any in our libraries.
21. The valuation report by Keriasek & Company Ltd is quite legible. It is dated 11th March 2014 and was therefore prepared when the suit property was still registered in the name of the Defendant and was prepared at his request. It is headed: "Valuation Survey Report For A Residential Property Title No BUKHAYO/MUNDIKA/5042 BUSIA COUNTY." For purposes of this judgment, what is relevant is at page 3 of the report under "Improvements" and "accommodation." I shall therefore reproduce those parts of the report in extenso.

1. "Improvements

The property is developed with a permanent residential building and an ablution unit. A section of the building spreads to plot NO 5041 which is also owned by the same proprietor of NO 5042."

2. "Accommodation

The building accommodates two (2) No family units comprising:

1st Unit - Living room

KitchenOne (1) No bedroomBathroom.

2nd Unit - Living room

KitchenTwo No bedroomsBathroomTotal plinth area 80m² less 30m² area of the building section on plot No 5041

Note: The 1st unit is on the subject Plot No. 5042 while a section of the 2nd unit is on plot No. 5041."

It is therefore clear from the above that while the 1st unit comprising of a living room, kitchen, one bedroom and a bathroom are on the suit property, "a section of the 2nd unit" comprising a living room, kitchen, two (2) bedrooms and bathroom are on the land parcel No BUKHAYO/MUNDIKA/5041 which is registered in the name of the Defendant. The report shows that



a “Section of the 2nd Unit is on the Plot NO 5041.” It goes further to add that the total plinth area of the unit is 80m² less 30m² of the building which is on parcel No BUKHAYO/MUNDIKA/5041. Perhaps this explains why both the Land Registrar and Surveyor gave these proceedings a wide berth. A shame really bearing in mind that they are considered as the experts. This Court however, can only do the best it can with the available evidence. I cannot dissect the 2nd unit to determine which portion thereof is on the suit property and which one is on the Defendant’s land parcel No BUKHAYO/MUNDIKA/5041. And I am not prepared to open up another round of litigation by asking the parties to go back to the ground and partition the 2nd unit. And since it was the Plaintiff who had pleaded that the Defendant was receiving rent from the developments on the suit property, the onus was on him, under Sections 107, 108 and 109 of the *Evidence Act*, to lead evidence that the whole of the 1st and 2nd units were developed on the suit property because, as provided under Section 108 of the *Evidence Act*, he is the “person who would fail if no evidence at all were given on either side.”

22. I am satisfied from the evidence that the Plaintiff, as the registered proprietor of the suit land, is entitled to an order of vacant possession thereof or, in the alternative, an order for the eviction of the Defendant therefrom. He is also entitled to an order permanently restraining the Defendant by himself, his servants, workers or agents from interfering in any way with the Plaintiff’s occupation of the suit property including the developments thereon and in particular the house described in the report by the valuer as unit 1 and the section of unit 2 which is on the suit property.
23. The Plaintiff also sought the declaratory order that the Defendant is his tenant on the suit property and ought to pay him rent at the market rates for Busia town with effect from December 2014. This is clearly a special damages claim which must be specifically pleaded and proved – Hahn -v- Singh C.a. Civil Appeal No 42 of 1983 [1985 KLR 716]. In the circumstances, it is not enough for the Plaintiff to plead, as he has done in paragraph 10 of his plaint, that the Defendant:

“ ... ought to pay him rent at the market rates of Busia town with effect from the month of December 2014.”

How is this Court expected to ascertain the rent of Busia town unless it is specifically proved? That claim is clearly not available to the Plaintiff. It is declined.

24. Ultimately therefore, there shall be judgement for the Plaintiff against the Defendant in the following terms:
 1. The Defendant his servants, agents or any one claiming through him shall within 3 months of this judgment vacate the land parcel No BUKHAYO/MUNDIKA/5042 including the 1st unit thereon as described in the valuation and survey report dated 11th March 2014 comprising the living room, kitchen, one (1) bedroom and bathroom. He and his agents, servants or anyone claiming through him shall also within the same period vacate the 2nd unit comprising the living room, kitchen two (2) bedrooms, bathroom and specifically the 30m² section which is on the land parcel No BUKHAYO/MUNDIKA/5042 as described in the same report.
 2. The Defendant shall retain the portion covered by the remaining 50m² since the total plinth area of the 2nd unit is 80m² as per the same report.
 3. In default of (2) above, the Defendant, his servants, agents or tenants shall be evicted from the land parcel No BUKHAYO/MUNDIKA/5042 and in particular, the developments described as the 1st unit in the report and a portion measuring 30m² of the development described as the 2nd unit in the same report.



4. Thereafter, the Defendant, his servants, agents, tenants or any other person claiming through him shall be permanently enjoined from interfering with Plaintiff's quiet occupation and enjoyment of the properties as described in (1) above.
5. The claim for payment of rent from December 2014 is declined.
6. The Defendant shall meet the Plaintiff's costs of this suit.
7. Meanwhile, and given the circumstances obtaining on the ground with respect to the two land parcels No BUKHAYO/MUNDIKA/5041 and 5042 and in particular that some of the developments thereon appear to traverse into the land parcel NO BUKHAYO/MUNDIKA/5041, the parties may consider attempting to negotiate so that one can buy out the other's interest or pursue other modes of settlement agreeable to both. To allow for that, should the parties agree, the execution of this judgment is hereby stayed for 30 days to allow for those negotiations.
8. The 3 months period in (1) above shall therefore start running from the time those negotiations collapse.
9. Either party is at liberty to apply.

BOAZ N. OLAO

JUDGE

28TH MARCH 2023

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 28TH DAY OF MARCH 2023 AT BUSIA ELC BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 16TH FEBRUARY 2023. RIGHT OF APPEAL

BOAZ N. OLAO

JUDGE

28TH MARCH 2023

