



Shikanga & 2 others v Kisumu City Board & 2 others; Faulu Microfinance Bank Limited (Interested Party) (Environment and Land Case Civil Suit E012 of 2021) [2023] KEELC 20289 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20289 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E012 OF 2021
SO OKONG'O, J
SEPTEMBER 28, 2023**

BETWEEN

**KEVIN MUHATI SHIKANGA 1ST PLAINTIFF
FLORENCE LILIAN AKINYI OKOTH 2ND PLAINTIFF
PETER COLLINS OKOTH 3RD PLAINTIFF**

AND

**KISUMU CITY BOARD 1ST DEFENDANT
COUNTY GOVERNMENT OF KISUMU 2ND DEFENDANT
OXFORD INVESTMENTS LIMITED 3RD DEFENDANT**

AND

FAULU MICROFINANCE BANK LIMITED INTERESTED PARTY

JUDGMENT

1 The plaintiffs brought this suit against the defendants by way of a plaint dated February 8, 2021. The interested party joined the suit on March 10, 2021. The plaint was amended on December 4, 2021. In their amended plaint, the plaintiffs averred that at all material times, the 1st plaintiff was the registered proprietor of all that parcel of land known as Kisumu/Municipality Block 10/805 while the 2nd and 3rd plaintiffs were jointly registered as the proprietors of all that parcel of land known as Kisumu/Municipality Block 10/806. The plaintiffs averred that they purchased the suit properties from the 3rd defendant in 2019. The plaintiffs averred that on February 3, 2021, the 1st and 2nd defendants served them with a 7 days' notice to vacate the suit properties failure to which their developments on the suit



properties would be demolished by the 1st and 2nd defendants. The plaintiffs averred that the said notice was unlawful.

2 The plaintiffs averred that prior to the 1st and 2nd defendants' act of putting markings on the walls of Kisumu/Municipality Block 10/805 indicating that the same would be demolished, the 1st plaintiff had let out the same to a tenant who was paying a monthly rent of Kshs 150,000/-. The plaintiffs averred that following the marking of the said property for demolition by the 1st and 2nd defendants, the said tenant vacated the property. The plaintiffs averred that from the time the said tenant vacated the premises on February 16, 2021, the 1st plaintiff had not succeeded in getting another tenant for the property owing to the markings that the 1st and 2nd defendants had made on the property that the same was due for demolition. The plaintiffs averred that as a consequence of the foregoing, the 1st plaintiff suffered and had continued to suffer loss of rental income from the property at the rate of Kshs 150,000/- per month from February 2021 until such a time that the 1st and 2nd defendants would cease their threat to demolish the property.

3 The plaintiffs sought judgment against the defendants for;

1. A declaration that the public notice dated February 3, 2021 issued by the 1st and 2nd defendants in respect of the suit properties was unlawful, illegal and null.
2. A permanent injunction restraining the 1st and 2nd defendants, their agents, servants and/or whomsoever jointly and severally from trespassing into, pulling down, removing, destroying, evicting the plaintiffs and/or in any way whatsoever interfering with the suit properties.
3. In the alternative, the 3rd defendant should indemnify the plaintiffs for the loss of the suit properties at the current market rate inclusive of any unforeseen expenses.
4. The OCS Kisumu Police Station to ensure compliance with this order by protecting the plaintiffs' properties from demolition or the plaintiffs from eviction and also to maintain law and order.
5. An order compelling the 1st and 2nd defendants to remove the demolition markings they painted on the perimeter walls of the suit properties.
6. Payment by the 1st and 2nd defendants to the 1st plaintiff of Kshs 150,000/- per month plus interest being the loss of rental income from February 2021 until the date when the 1st and 2nd defendants shall remove the demolition markings from the walls of the suit properties.
7. Costs of the suit together with interest.

4 The 1st and 2nd defendants filed an amended statement of defence on March 29, 2022. Save that they served the plaintiffs with a notice on or about February 7, 2021 giving them 7 days' notice to vacate the suit properties in default of which they would destroy the developments that the plaintiffs had put up on the suit properties, the 1st and 2nd defendants denied the plaintiffs' claims against them and urged the court to dismiss the same with costs. The 3rd defendant filed a defence on February 26, 2021 to the original plaint. The 3rd defendant admitted that it sold and transferred the suit properties to the plaintiffs in 2019. The 3rd defendant averred that it had no dispute with the 1st and 2nd defendants over the ownership of the suit properties for the entire period they owned the same. The 3rd defendant averred that the 1st and 2nd defendants' notice to the plaintiffs to vacate the suit properties was baseless since the suit properties were all along being used for residential purposes. The 3rd defendant averred that the 1st and 2nd defendants were estopped from claiming that the suit properties were acquired by



the 3rd defendant and the plaintiffs illegally and/or fraudulently. The 3rd defendant urged the court to dismiss the plaintiffs' suit against it with costs.

- 5 At the trial, the 1st plaintiff adopted his witness statement dated February 8, 2021 as his evidence in chief. He told the court that he was the owner of Kisumu Municipality/Block 10/805(hereinafter referred to as "Plot No 805"). He stated that he acquired Plot No 805 for commercial purposes. He stated that he was occupying the property. He stated that Plot No 805 had a 4-bedroomed house with servant quarters. He stated that on February 5, 2021, the 1st and 2nd defendants pasted a notice on the wall of the building on Plot No 805 stating that the plot was acquired irregularly and that he should move out of the same failure to which he would be evicted. The 1st plaintiff produced the 1st plaintiff's bundle and supplementary bundle of documents dated January 9, 2021 and December 6, 2021 respectively as exhibits. He urged the court to grant him the reliefs sought in the amended plaint.
- 6 The next to give evidence was the 2nd plaintiff who gave evidence on her own behalf and on behalf of the 3rd plaintiff. The 2nd plaintiff told the court that the 3rd plaintiff was her husband. She adopted her witness statement filed together with the original plaint as her evidence in chief. She also produced the 2nd and 3rd plaintiffs' bundle of documents as exhibits. The 2nd plaintiff told the court that together with the 3rd plaintiff, they purchased the parcel of land known as Kisumu Municipality/ Block 10/806(hereinafter referred to as "Plot No 806") from the 3rd defendant. She stated that they received a notice from the 1st and 2nd defendants to the effect that they had acquired Plot No 806 irregularly. She urged the court to grant the reliefs sought by them in the amended plaint.
- 7 The 1st and 2nd defendants did not tender any evidence in their defence. The 3rd defendant called one witness, Rajnikant Shah(DW1). He admitted that the 3rd defendant sold the suit properties to the plaintiffs. He stated that prior to the sale of the suit properties to the plaintiffs, the 1st and 2nd defendants had never made any claim of ownership in respect thereof. He stated that the 3rd defendant sold the suit properties to the plaintiffs as developed properties. He stated that the suit properties were not used for parking when the 3rd defendant acquired the same. He stated that the 3rd defendant was not involved in any fraud in acquiring the suit properties. He stated that the indemnity sought against the 3rd defendant by the plaintiffs had no basis. He adopted his witness statement filed in court on February 17, 2022 as part of his evidence in chief. He also produced the 3rd defendant's bundle of documents filed on February 26, 2021 as exhibits.
- 8 After the close of evidence, the parties made closing submissions in writing. The plaintiffs filed a joint written submission on March 28, 2023. The 3rd defendant filed its submission on April 14, 2023 while the interested party filed its submission on May 18, 2023. I have considered the pleadings and the evidence tendered by the plaintiffs in proof of their case and the 3rd defendant in its defence. I have also considered the written submissions on record and the authorities cited in support thereof. The issues arising for determination in this suit in my view are the following;
1. Whether the plaintiffs are the lawful proprietors of the suit properties.
 2. Whether the 1st and 2nd defendants unlawfully gave the plaintiffs a notice of 7 days to vacate the suit properties failure to which the 1st and 2nd defendants would enter the properties and demolish the structures put up thereon by the plaintiffs.
 3. Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.
 4. Who is liable for the costs of the suit.



Whether the plaintiff are the lawful proprietors of the suit properties

9 I am satisfied from the evidence on record that the plaintiffs are the registered proprietors of the suit properties. The plaintiffs produced evidence showing that the suit properties were previously owned by the 3rd defendant and that the 1st plaintiff acquired Plot No 805 from the 3rd defendant on March 25, 2020 while the 1st and 2nd defendants acquired Plot No 806 from the 3rd defendant on 12th Mach 2020. The plaintiffs acquired the suit properties from the 3rd defendant for valuable consideration. The 1st and 2nd defendants did not dispute the plaintiffs' titles to the suit properties. It is my finding that the plaintiffs are the lawful proprietors of the suit properties.

Whether the 1st and 2nd defendants unlawfully gave the plaintiffs a notice of 7 days to vacate the suit properties failure to which the 1st and 2nd defendants would enter the properties and demolish the structures put up thereon by the plaintiffs.

10 The plaintiffs' claim against the 1st and 2nd defendants is based on trespass. The plaintiffs claimed that the 1st and 2nd defendants entered the suit properties and pasted a notice dated February 3, 2021 on the perimeter walls thereof to the effect that Plot No 805 and Plot No 806 were reserved as a parking area and/or open space and that the plaintiffs had acquired and developed the same illegally and fraudulently. The plaintiffs averred that the 1st and 2nd defendants demanded that the plaintiffs vacate the suit properties within 7 days from the date of the said notice in default of which the 1st and 2nd defendants would demolish the structures that the plaintiffs had put up on the suit properties. The plaintiffs averred that the 1st and 2nd defendants also put markings on the said perimeter walls to the effect that the same would be demolished.

11 The plaintiffs produced in evidence the said notice dated February 3, 2021 from the 2nd defendant that was issued under the County Governments Act 2012 and Urban Areas and Cities Act 2011. The plaintiffs also produced in evidence photographs showing markings that the 1st and 2nd defendants had put on the perimeter walls of the suit properties identifying them for demolition. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01. I have already made a finding that the plaintiffs are the lawful owners of the suit properties. As the owners of the suit properties, the plaintiffs were entitled to quiet possession and enjoyment thereof. The suit properties were registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). At the time the plaintiffs acquired the suit properties, the Registered Land Act had been repealed by the Land Registration Act, 2012. Sections 27 and 28 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) provides as follows:

“ 27. Subject to this Act-

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.



28. The rights of a proprietor, whether acquired on first registration or whether acquired 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 leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

12 Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

13 The two sections have been reproduced in sections 24 and 25 of the [Land Registration Act, 2012](#) as follows:

“24. Subject to this Act—

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) 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 leases, 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 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.



14 In their notice to the plaintiffs dated February 3, 2021, the 1st and 2nd defendants claimed that the plaintiffs acquired the suit properties illegally and fraudulently since the same were reserved as parking area/open space. The defence filed by the 1st and 2nd defendants to the plaintiffs' claim was a mere denial. The 1st and 2nd defendants did not also tender any evidence at the trial in their defence against the plaintiffs' claim. The evidence that was adduced by the plaintiffs on how they acquired the suit properties were not challenged by the 1st and 2nd defendants. The titles that were produced by the plaintiffs in evidence in proof of their ownership of the suit properties were also not disputed by the 1st and 2nd defendants. The 1st and 2nd defendants admitted in their defence that they served the said notice dated February 3, 2021 upon the plaintiffs. The 1st and 2nd defendants did not place any evidence before the court in support of their claim that the suit properties were reserved for parking and/or open space and that the plaintiffs acquired the same illegally and fraudulently. It is my finding that the said notice dated February 3, 2021 that was served by the 1st and 2nd defendants upon the plaintiffs was unjustified as the same had no basis in law. The said notice together with the markings that the 1st and 2nd defendants had made on the perimeter walls of the suit properties to identify the same for the proposed demolition amounted to trespass on the suit properties.

Whether the plaintiffs are entitled to the reliefs sought in the amended plaint

15 I have set out herein earlier the reliefs that were sought by the plaintiffs in their amended plaint. From my findings above, I am satisfied that the plaintiffs have proved their claim against the 1st and 2nd defendants. I have not found any wrongdoing on the part of the 3rd defendant. The plaintiffs are entitled to prayers (a), (b), (d) and (g) of the amended plaint. No basis was laid for the grant of prayer (h) of the amended plaint and as such the same is not available to the 1st plaintiff. The plaintiffs are also entitled to the costs of the suit as against the 1st and 2nd defendants. The 1st and 2nd defendants shall also pay the costs of the suit incurred by the 3rd defendant and the interested party who were joined to the suit as necessary parties.

Conclusion

In conclusion, I hereby make the following orders in the matter;

1. I declare that the 1st and 2nd defendants' public notice dated February 3, 2021 with respect to the plaintiffs' parcels of land, Kisumu/Municipality Block 10/805 and Kisumu/Municipality Block 10/806 was unlawful, null and void.
2. A permanent injunction is issued restraining the 1st and 2nd defendants by themselves or through their employees, agents or servants and/or whomsoever jointly and severally from trespassing on, pulling down, removing, destroying, or evicting the plaintiffs from Kisumu/Municipality Block 10/805 and Kisumu/Municipality Block 10/806 and/or in any other way whatsoever interfering with the said parcels of land.
3. The OCS Kisumu Central Police Station shall ensure compliance with the order given in 2 above by protecting the buildings and other structures on Kisumu/Municipality Block 10/805 and Kisumu/Municipality Block 10/806 from demolition and the plaintiffs from eviction by the 1st and 2nd defendants.
4. The 1st and 2nd defendants shall within 30 days from the date of service of the decree extracted from this judgment upon them remove the "x" markings that they had placed on the perimeter walls of the suit properties.
5. The suit against the 3rd defendant is dismissed.



6. The 1st and 2nd defendants shall pay the costs of the suit to the plaintiffs, the 3rd defendant, and the interested party.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER 2023

S. OKONG'O

JUDGE

Judgment read virtually through Microsoft Teams Video Conferencing platform in the presence of;

Ms. Omondi h/b for Mr. Odeny for the Plaintiff

N/A for the 1 and 2nd Defendants

N/A for the 3rd Defendant

N/A for the Interested Party

Ms. J. Omondi-Court Assistant

