



**Owino v Jotham (Environment & Land Case 91 of 2012)  
[2023] KEELC 19871 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19871 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 91 OF 2012**

**E ASATI, J**

**SEPTEMBER 21, 2023**

**BETWEEN**

**PIUS SHEM OWINO ..... PLAINTIFF**

**AND**

**PHILIS OMBUYA JOTHAM ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff in this suit, Pius Shem Owino, is the registered owner of land parcel numbers KISUMU/MARERA/3239 and KISUMU/MARERA/3241 (herein called the suit lands). His case is that sometimes in the year 2012 the Defendant, Philis Ombuya Jotham trespassed onto the suit lands and unlawfully erected two houses thereon. That by reason of the Defendant's unlawful actions aforementioned, the Plaintiff has suffered and continue to suffer immense loss and damage. He therefore sued the Defendant herein vide the plaint dated 6<sup>th</sup> November, 2012 seeking for;
  - a. An order of permanent injunction to issue against the Defendant, her agents, servants and employees restraining them from interfering in any way with the Plaintiff's quiet and peaceful possession of the suit lands.
  - b. Costs of the suit.
  - c. Other or further award the court may deem just, fit and/or convenient to make in the circumstances of the case.
  
2. In response to the plaintiff's claim, the Defendant vide the written statement of defence dated 22<sup>nd</sup> November 2012 denied the Plaintiff's claim and contended that she is the administrator of the estate of one Jotham Ombuya Onundi, deceased, who was the registered owner of a parcel of land known as WEST KISUMU/MARERA/2499 measuring 0.4 Hectares which was always in the occupation of the deceased. That the said parcel of land had been bought by the deceased from one Jesca Siwa Oyondi



and was a product of sub-division of land parcel known as WEST KISUMU/MARERA/734. She denied any trespass onto the suit land as claimed.

### **The Evidence**

3. The evidence of the Plaintiff comprised of the testimonies of the Plaintiff and the two witnesses that he called and exhibits produced. The plaintiff who testified as PW1 stated that the suit lands were registered in his name and title deeds issued to him on diverse dates. That upon acquiring the lands, he commenced development thereof. That he ploughed part of it. That around the year 2012, the Defendant entered the suit lands and put up illegal structures. That although he needed to put up a home, he has not been able to have the property.

On cross-examination, he stated that he was aware of land parcel NO.KISUMU/MARERA/2499 which was expunged from the register by the Registrar of Lands. That he got his title to the suit lands in the year 2008. That he was not utilizing the suit lands. That there is no church built on the lands. That there is a commercial building. That he is not related to Jotham Ombuya Onundi. He testified further that he reported the trespass incident to the area Assistant Chief and police at Maseno and that he did not have a police abstract to show. That the suit lands were a product of sub-division of land parcel No.3174. That the Defendant's land parcel No.2499 does not exist. That the land was surveyed before he bought the suit lands.

4. PW2 was Patrick Otieno Onyunda. He testified that land parcel NO.KISUMU/MARERA/734 was in the name of Oyondi Okello who was his father. That they did succession. That he sold No.3239 and 3241 to Pius Owino.

That he knew Jotham Ombuya who entered their land and took the title deed and took L.R No.2499 as his own land. That he did not know when or how Jotham got title. That he did succession and sold the land to Coptic church who hold title No.2783. That he sold No.2782 to David Okello and he remained with No.2781. That he subdivided No 2781 into five pieces of which Pius Owino got Numbers 3239 and 3241. That Pius Shem is the proprietor of the suit lands because he (PW2) transferred the lands to him (Pius Shem). That parcel No.2499 was cancelled by the Registrar.

5. On cross-examination he stated that he has no relation with the Plaintiff and Phylis Ombuya and that they do not stay close. That Jotham Ombuya Onundi entered their land and took title No.2499. That he (PW2) did succession and sold the land to Coptic Church whose title is No.2783. That No.2782 he sold to David Okello and he remained with No.2781. That he sub-divided the land so Pius Owino got Numbers 3239 and 3241. That No.2781 was sub-divided into five (5) parcels. That the land was surveyed. That this was in the year 2007. He stated further that parcel No.2499 came from NO.734 in a year he (PW.2) could not remember. That No.2499 was in the name of Jotham Ombuya Onundi. That No.734 was in the name of Oyondi Okello who died in the year 1969. That he did not know how parcel No.2499 came into place. That Jotham Ombuya transferred the land without succession. That No.2499 was cancelled by the Registrar. That he did succession in the year 1995.

6. PW.3 was David Okeyo. He testified that land parcel No.734 was sub-divided to produce parcel Numbers. 2781, 2782, 2783. That parcel No.2781 was sub-divided to produce parcel Numbers 3147 and 3148. That parcel No.3147 was further subdivided to produce parcel Numbers 3239 and 3241.

That his piece of land was No.2782. That PW2 was the Administrator of the estate. That parcel No.2499 was non-existent. That parcel No.2499 was a fraud. That the trespassers have put up structures.



7. On cross-examination by learned Counsel for the Defendant, he stated that he got title to his land NO.2782 on 14/1/1997. That he got the title from Patrick Otieno Oyondi from whom he had purchased the land in 1995.

That parcel No.2783 belonged to Coptic Church. That No.3148 belongs to Charles Obongo Omondi. That parcel Numbers 2329 and 3239 and 3241 are his closest neighbours.

That the Defendant is a widow. That he did not know her husband. That he was not aware of parcel No.2499. That the trespass was still on going and that the structures were still there. That there are also trees on the land.

8. The Plaintiff produced exhibits in the suit namely title deed for the suit lands as exhibit P1 and exhibit P2 and photographs as exhibit P3 (a) and (b).

9. The evidence by the defence comprised of the testimony of the Defendant and the exhibits she produced. She testified as DW1 and adopted her witness statements dated 22<sup>nd</sup> November, 2012 as her evidence in chief. In the witness statement, she had stated that she was the widow of Jotham Ombuya Onundi, deceased, who died on 12<sup>th</sup> May, 2009. That she has Letters of Administration to the state of the deceased. That her husband bought a parcel of land at Marera measuring 0.4 hectares from one Jesica Siwa and Patrick Otieno Oyondi in the year 1989. That the property was part of a larger parcel of land owned by the seller. That the property was sub-divided and a title deed issued to her husband in the year 1993.

That subsequently, a church was erected on the property. That church claimed to have bought the same property. That she took the matter to the lands office at Kisumu who restrained the church from any further activities on the land. That the land has 2 houses under construction by her son by the name William Makale as a beneficiary.

10. She produced mutation form, map, succession petition for Letters of Administration, the Grant of Letters of Administration and a Letter from area Chief as exhibits. She stated that she utilizes the suit land where she has built a house, a store and shop and planted trees. She denied that she has trespassed onto the Plaintiff's land.
11. On cross-examination, she stated that her late husband was the owner of land knowns KISUMU/MARERA/2499. That the land was a product of sub-division of parcel No.734. That Jesca and Patrick did not have title.

### **Submissions**

12. At the close of the evidence, parties filed submissions on the case.
13. Written submissions dated 24<sup>th</sup> May 2023 were filed by Odhiambo Robin Advocate on behalf of the Plaintiff. Counsel submitted that section 24 of the [Land Registration Act](#) provides that registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto. That section 26 of the same Act provides that certificate of title issued by the Registrar shall be taken by all courts as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner subject only to the conditions set out in the said section. That the plaintiff had demonstrated ownership of the suit land.
14. On whether land parcel No.KISUMU/MARERA/2499 was fraudulently registered, Counsel submitted that in order for land to be transmitted from the name of a deceased person to a beneficiary, succession has to be undertaken. Counsel relied on the provisions of section 45 of the [Law of Succession Act](#) which prohibits any person from, for any purpose, taking possession of, disposing or otherwise



intermeddling with any free property of a deceased person. That there is no evidence that at the time the Defendant's husband bought the land the seller was the legal representative of the deceased registered owner. That hence the title deed produced in respect of KISUMU/MARERA/2499 was fraudulently registered and that the Defendant should not be allowed to benefit from the illegality.

15. On whether the Defendant trespassed onto the suit lands, Counsel relied on the provisions of section 3(1) of the *Trespass Act* and submitted that trespass is an intrusion by a person onto land of another who is in possession and ownership and that the plaintiff had produced photographic evidence to demonstrate the trespass. That the photos show damaged fence and buildings erected by the Defendant with an aim to illegally alienate interest in the suit lands.
16. Counsel relied on the case of Duncan Nderitu Ndegwa vs KPLC Limited & another (2013) eKLR where it was held that once trespass is established it is actionable per se and indeed no proof of damage is necessary for the court to award damages. Counsel prayed that the plaintiff be awarded damages to compensate him for the tortious acts of the Defendant.
17. Relying on the case of Miller vs Minister of Pensions (1942) 2 ALL ER 372, Counsel submitted that the Plaintiff proved his case on a balance of probabilities.
18. Written submissions dated 23<sup>rd</sup> May 2023 were filed by the firm of Siganga & Company Advocates on behalf of the Defendant. Counsel submitted that in a claim of trespass the plaintiff must prove that he is the owner of the premises, that the Defendant has entered the premises without the permission of the plaintiff or a justifiable reason to do so and that as a result, the plaintiff has suffered and/or continue to suffer damage.
19. Counsel submitted that both parties have produced titles to their claimed parcels of land. That the plaintiff never called any officer, Land Registrar or Surveyor as witness. That the evidence implicating the Defendant was hearsay hence inadmissible. That the Plaintiff has failed to challenge the Defendant's title as required under section 26 of the *Land Registration Act*. Counsel relied on the case of Jeremiah Gakuru Ng'ang'a vs Brown Inziani Shagwira & another [2022]eKLR and the provisions of sections 107 and 108 of the *Evidence Act* to support the submissions.
20. Relying on the case of Miller vs Minister of Pensions (1947)2 ALL ER 372, Counsel submitted that the Plaintiff had failed to discharge the burden of proof and prayed that the suit be dismissed.

### **Issues for Determination**

21. The parties in their respective submissions framed the issues for determination in the suit. According to the Plaintiff, the issues for determination are;
  - a. Whether the Plaintiff is the registered owner of the suit parcel numbers KISUMU/MARERA/3241 and KISUMU/MARERA/3239;
  - b. Whether land parcel No.KISUMU/MARERA/2499 is fraudulently registered;
  - c. Whether the Defendant trespassed onto the suit parcels.
  - d. Whether the Plaintiff has proven his case on a balance of probabilities to warrant the orders sought herein.

And according to the Defendant, the issues for determination are;

- a. Whether the Defendant trespassed onto the suit parcels of land;



b. Whether the Plaintiff is entitled to his prayers.

22. From the pleadings evidence and submissions placed before me I find that the issues as framed by the parties in their submissions raise one substantive issue for determination in this matter; whether or not the Defendant trespassed onto the suit lands herein. There is no dispute that the Plaintiff is registered as owner of the suit lands. His evidence and more particularly the title deeds produce as exhibits 1 and 2 prove this. Under sections 26 of the Land Registration Act certificate of title is prima facie evidence of ownership. The plaintiff's complaint is that the Defendant entered onto the suit lands in the year 2012 and unlawfully erected structures thereon thereby denying the plaintiff full enjoyment thereof. He produced photographs to show the activities on the land. The Defendant on the other hand contended that she had not trespassed onto the suit land as her activities were on land parcel known as No.2499 which she inherited from her late husband.

23. In the section 3 of the Trespass Act, Cap 294 Laws of Kenya trespass to land is stated to happen when:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or tills or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.”

And according to Black's Law Dictionary 11<sup>th</sup> edition Bryan and Garner at page 667 trespass to land is:

“ an interference with or intrusion into another's property.”

In the case of Alex Waigara Mwaura -vs- China Power Company Limited and another [2020]eKLR the court defined it as

“ an intrusion by a person into land of another who is in possession or ownership.”

24. In order to prove trespass, the plaintiff has the burden to demonstrate to the required degree that the Defendant entered his (Plaintiff's) land without his permission or justifiable cause and thereby interfered with the plaintiff's possession thereof. In the present case, the burden of proof rested with the plaintiff to prove that the Defendant indeed did enter the suit land without the Plaintiff's consent, and put up the houses as pleaded in the plaint. See section 106 to 109 of the evidence Act Cap 80 Laws of Kenya.

25. Although there was evidence that both the suit lands and parcel No.2499 originated from one original parcel namely parcel No.734, there was no evidence to demonstrate how these parcels relate on the ground, that is; whether the piece of land registered as the suit lands was the same one also registered as parcel No.2499. PW2 testified that when he did succession to the estate of his father, he subdivided the original land into 3 pieces namely No. 2781, 2782 and 2783. That he sold No.2783 to Coptic Church. DW1 testified that a church organization entered her land parcel No 2499 purporting to have bought the same land and started to build a church but were stopped by the land Registrar and she proceeded to develop the land. That her son was putting up 2 houses on the land. It was necessary to produce evidence to show that it was on the suit lands and not parcel No.2783 belonging to the church that the Defendant had trespassed onto.

26. Secondly though the Plaintiff alleged that parcel No.2499 was unlawfully obtained, that it was expunged from the register hence does not exist, no evidence was tendered in the form of copy of register in respect of parcel No.2499 or testimony by Land Registrar to confirm that parcel No.2499 was unlawfully registered and later cancelled by the Land Registrar and hence does not exist. The plaintiff testified that the title No.2499 was obtained fraudulently before succession was done to the



estate of the deceased registered owner of the original parcel. Counsel for the plaintiff rightly submitted that land of a deceased person can only be lawfully transmitted to the beneficiaries after succession has been undertaken. There was however no evidence as to when succession to the estate of the deceased registered owner was undertaken. No grant of Letters of Administration for the estate of the deceased original registered owner was produced to show that indeed succession to the estate has been undertaken and that the same was undertaken after the title No.2499 had been obtained,

27. Thirdly, though the Plaintiff complained of trespass, no evidence was produced in the form of a surveyor's report to connect the activities complained of and the suit lands; there was no evidence that the structures erected by the Defendant were actually erected on the suit lands. The plaintiff produced photographs to demonstrate the trespass. Counsel submitted that the photographs show a damaged fence and houses erected by the Defendant. There is however nothing on the photographs to show that those activities have been done on the suit lands. In a case like this where both parties have exhibited title deeds it is only a Surveyor's evidence that can provide the answer as to whether there is trespass or not.
28. The degree of proof required in cases of this nature is proof on a balance of probabilities. Both parties relied on the case of *Miller vs Minister of Pensions* (1947) 2 ALL ER 372 on what amounts to proof on a balance of probabilities. In that case the court said
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: ‘We think it is probable than not’, the burden is discharged, but if the probabilities are equal, it is not.”
29. In the instant case both parties have title deed. The plaintiff has not produced evidence to impeach the title of the Defendant. Section 26 requires the court to take a certificate of title issued by the Land Registrar as prima facie evidence of ownership.
30. I find that the Plaintiff has failed to prove his case on a balance of probabilities. The suit is hereby dismissed.

Each party to bear own costs.

Orders accordingly.

**JUDGEMENT READ AND DATED AT KISUMU, DELIVERED VIRTUALLY THROUGH TEAMS VIDEO CONFERENCING PLATFORM THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023.**

**E. ASATI,**

**JUDGE**

