



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CIVIL SUIT NO. 59 OF 2005**

**BETWEEN**

**KAREN ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**LAWRENCE MUSANGO OKETCH ..... 1<sup>ST</sup> DEFENDANT**

**PETER OPIYO ..... 2<sup>ND</sup> DEFENDANT**

**JOYCE WANJAWA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff's claim is that it is the registered owner of the parcel of land registered as grant No. 1R 67384 being Land Reference No. 16345 measuring 3.361Ha within Kisumu County ("the suit property"). According to the plaint dated 26<sup>th</sup> May 2005, the plaintiff alleged that defendants, without colour of right, trespassed on the suit property and constructed semi-permanent buildings. It prayed for possession of the suit property, an order compelling the defendants to demolish their structures thereon, a permanent injunction restraining the defendants from trespassing on the suit property, general damages for trespass and costs of the suit.

2. The defendants filed a statement of defence dated 21<sup>st</sup> June 2015 in which they denied the plaintiffs allegations. They alleged that the grant issued in respect of the suit property was did not exist and if it did, it was a forgery. They contended that the land belonged to them and several other people who were on the land and that they had occupied the land for several generations. They also stated that the suit property had not been demarcated and surveyed and was yet to be declared an adjudication area hence no title deeds could have been issued. They further contended that the plaintiff could not enforce any rights over the inhabitants of the area. The defendants challenged the jurisdiction of the court on the basis of the ***Land Disputes Tribunal Act (repealed)*** and that the case was basically a boundary dispute to be resolved by the Land Registrar.

3. After the pleadings closed, the plaintiff filed an application for summary judgment. The application was heard and dismissed by Warsame J. (as he then was) on 27<sup>th</sup> April 2006. Thereafter the matter was set down for hearing. The case was heard in part by Mwera J., who took the testimony of the plaintiff's witness. Before the case could be heard further, the Municipal Council of Kisumu entered the suit property and in due course two suit other were filed in relation to the suit property. Ali Aroni J., heard two defence witnesses and in the course of the proceedings, this suit was consolidated with ***HCCC NO. 36 of 2009***. This suit was stayed pending hearing of that case but the order was reviewed and the stay order discharged on 11<sup>th</sup> February 2011.

4. In June 2013, this matter was transferred to the Environment and Land Court but in view of the fact that it was already part-heard Kaniaru J., ordered that it be referred back to the High Court for hearing and disposal. After several adjournments, I took over the conduct of the matter on 29<sup>th</sup> September 2016 and fixed the matter for hearing of the defence case as the plaintiff had closed its case. On 4<sup>th</sup> April 2017, counsel for the defendants indicated that he did not wish to call any more witnesses. After the close of the defence case, I reserved the matter for judgment. The parties filed written submissions which I have considered and taken into account. A summary of the evidence is as follows.

5. The plaintiff's case is supported by the testimony of Dr Christopher Walter Obura (PW1) who testified that he was a director of the plaintiff company. He told the court that the suit property situated at Migosi Estate, Kisumu. He further testified that the land was vacant in 1996 and remained so until 2004 when the defendants entered the suit property and put up various semi-permanent structures without the plaintiff's permission or consent. He therefore prayed for the court to give him possession. In cross-examination, he denied that the title was a forgery. He pointed out that a private school had been built on the property and that his agent had issued notice to the defendants to vacate the land.

6. The first defence witness, Musango Oketch (DW 1) told the court that the suit property did not belong to the plaintiff but belonged to his grandfather, Joshua Agula, who left it to his father Walter Oketch. He testified that his father left the land to him and he resided there with his family. He stated that the land had not been surveyed and did not have title and that the title obtained by the plaintiff was a fraud. He sought the court's assistance to continue staying on the land. He further testified that the title was forgery.

7. DW 1's cousin, Michael Odera John (DW 2), supported DW 1's testimony. He told the court that he resided on the suit property and that it belonged to their grandfather and had been left to DW 1 by his father. He also contended that the plaintiff's title was a forgery. He told the court that he had sued the Commissioner of Land and the Attorney General in ***Kisumu HCCC No. 36 of 2009***.

8. The issue in this case is straightforward and it is whether the plaintiff is entitled to the suit property? The plaintiff produced a copy of the certificate of title for the suit property certified by the Registrar of Land. Being the holder of a title, the plaintiff is entitled to rely on the indefeasibility conferred by statute to protect its right to property. This is the effect of **section 23** of the ***Registration of Titles Act (Repealed)*** and its successor **section 26(1)** of the ***Land Registration Act, Act No. 3 of 2012***. **Section 23(1)** of the ***Registration of Titles Act*** provided as follows:

*The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.*

9. The certificate of title issued by the Registrar under the **Act** is conclusive proof of ownership and the owner thereof is entitled to exercise and enjoy all the incidents that ownership confers. The principle of indefeasibility has been accepted in several cases including ***Wreck Motors Enterprises v The Commissioner of Lands and Others Nairobi Civil Appeal No. 71 of 1997 (UR)***, ***Nairobi Permanent Markets Society and Others v Salima Enterprises and Others Nairobi Civil Appeal No. 185 of 1997 (UR)***). In ***Dr Joseph N K arap Ng'ok v Justice Moiwo ole Keiwa and Others Nairobi Civil Application No. NAI 60 of 1997(UR)***, the Court of Appeal summarized the principle as follows:

*Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in*

*jeopardy.*

10. In light of the clear title by the plaintiff, the burden of proof fell on the defendants to establish fraud or misrepresentation on the part of the plaintiff to defeat the title. Under **Order 2 rule 10(1)(b)** of the **Civil Procedure Rules** a party must plead particulars of fraud or misrepresentation. In **Vijay Morjaria v Nansingh Madhusingh Darbar & Another Civil Appeal No. 106 of 2000 [2000] eKLR**, Tunoi JA., stated that:

*It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. [Emphasis mine]*

11. In order to support its case, the defendants ought to have filed a counterclaim setting out particulars of the fraud and forgery alleged. As regards that standard of proof, it was held in **R. G. Patel v Lalji Makhani [1957]EA 314** that:

*[A]llegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.*

12. I note from the defendants' written submissions that counsel made extensive reference to the historical maps of the area and the manner in which the original land was subdivided. Unfortunately, submissions are not evidence hence I must disregard them (see **Douglas Odhiambo Apel & Another v Telkom Kenya Ltd NRB CA Civil Appeal No. 115 of 2006 [2014]eKLR**). Although the defendants filed an application dated 25<sup>th</sup> February 2014 to join a 4<sup>th</sup> defendant, amend the defence to include a counterclaim, it was not prosecuted hence it is not open to this court to make any finding on the basis of fraud or to determine any issues raised in that application.

13. Finally, the allegations that the land was not surveyed or demarcated and had not been adjudicated cannot be entertained in the face of the statutory protection offered to the title holder of the suit property. On its face, the certificate of title confirms that the land was surveyed and demarcated and a deed plan prepared before the Grant was issued by the Commissioner of Lands by powers conferred under **section 7** of the **Registration of Titles Act**.

14. The defendants did not deny that they occupied the suit property. Their case was that they were entitled to be on the land. Since the plaintiff is the registered proprietor of the suit property, it is entitled to exercise full rights appurtenant to the title including permitting people on the land. In the circumstances, I enter judgment for the plaintiff against the defendants as follows;

- a. The defendants, their servants and or agents, are directed to vacate the suit property being land registered as grant No. 1R 67384 being Land Reference No. 16345 after thirty (30) days from the date of service of the decree issued herein and the notice to vacate the suit property.
- b. Upon vacating the property land registered as grant No. 1R 67384 being Land Reference No. 16345, the defendants and or their agents are restrained for interfering in any manner whatsoever with the plaintiff's possession of the said property.
- c. The defendant shall bear the costs of this suit.

**DATED and DELIVERED at KISUMU this 23<sup>rd</sup> day of May 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Mwesigwa instructed by Behan Okero and Company Advocates for the plaintiff.

Mr Omondi T. instructed by Mwamu and Co., Advocates for the defendants.