



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.400 OF 2014

SIMON ABUKI OMBOTOPLAINTIFF

VERSUS

KISII COUNTY GOVERNMENT1ST DEFENDANT

EXECUTIVE COMMITTEE MEMBER, LANDS

KISII COUNTY GOVERNMENT 2ND DEFENDANT

RULING

1. Background

The plaintiff's case is that he is the registered proprietor of all that parcel of land known as **LR No. Kisii Municipality/Block II/219** (hereinafter referred to as "**the suit property**"). The plaintiff purchased the suit property from one, **Samwel Kenani Omwando** on or about 15th September, 2014. Samwel Kenani Omwando (hereinafter referred to only as "**Kenani**") on his part purchased the suit property from one, **Zachary John Ondieki Onchuru** (hereinafter referred to as "**Onchuru**") on or about 17th January, 2011. The suit property is leasehold. The same was allocated to Onchuru by the commissioner of lands on or about 12th September 1997. After survey was conducted, Onchuru was issued with a lease by Gusii County Council for a term of 99 years with effect from 1st September 1997. The said lease was registered on 9th January 2001 after which Onchuru was issued with a certificate of lease dated 9th January 2001. This is the title that was transferred to Kenani and subsequently to the plaintiff.

2. The suit before the court;

The plaintiff has claimed that between 4th October and 13th October, 2014 the defendants herein by themselves and through their agents and/or employees entered the suit property without the plaintiff's permission and erected thereon a sign post or signage with the words "**Public property, No Entry**" inscribed or written thereon. The plaintiff has claimed further that in addition to putting the said sign post on the suit property, the defendants' agents or employees also destroyed the boundary fence that had been put around the suit property which boundary was in place when the suit property was sold and transferred to the plaintiff as aforesaid. The plaintiff has contended that as a result of the said acts of trespass on the part of the defendants, the plaintiff has been prevented from accessing the suit property. He has therefore been deprived of his right to use and/or develop the suit property. It is on account of the foregoing that the plaintiff brought this suit against the defendant seeking;

- i. **A declaration that the plaintiff is the registered and/or lawful owner of the suit property.**
- ii. **A permanent injunction to restrain the defendants from entering upon, re-entering, trespassing onto, laying a claim to, building on, interfering with and/or in any other manner dealing with the suit property and/or any portion thereof in any manner whatsoever and/or howsoever.**
- iii. **General damages for trespass.**
- iv. **Interest at court rates.**
- v. **Costs**
- vi. **Such further and/or other relief as the court may deem fit and expedient to grant.**

3. **The application:**

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 15th October 2014 seeking; a mandatory injunction to compel the defendants to remove and/or uproot the signage and/or sign post carrying and/or inscribed with the words “**PUBLIC PROPERTY, NO ENTRY**” which they have placed on the suit property, a temporary injunction to restrain the defendants from entering upon, re-entering, trespassing onto, laying a claim to, building on, interfering with and/or in any other manner dealing with the suit property and/or any portion thereof in any manner whatsoever and/or howsoever pending the hearing and determination of this suit and, an order that the OCS Kisii Police Station do enforce and/or implement the orders sought herein if granted. The application was brought on the grounds that were set out on the face of the application and on the affidavit of the plaintiff sworn on 15th October 2015. In his affidavit in support of the application, the plaintiff reiterated the contents of the plaint that I have highlighted at the beginning of this ruling.

4. The plaintiff has deposed that apart from putting up a sign post on the suit property with a warning that it is public property and destroying the boundary fence, the defendants through their agents or servants have also been sending to him threatening messages warning him to desist from entering or carrying out any development on the suit property. The plaintiff has contended that as a result of the said activities being carried out by the defendants on the suit property, his rights and/or interests on the suit property has been restricted, limited and/or interfered with as he has been unable to take possession of the property. The plaintiff has contended that he has established a prima facie case against the defendants and that unless the orders sought are granted he is bound to suffer irreparable loss or damage. The plaintiff has contended that it is necessary in the circumstances for the injunction sought to be issued to preserve the suit property pending the hearing of this suit. The plaintiff’s application was opposed by the defendants. The defendants filed a replying affidavit, sworn by the 1st defendant’s committee member for Lands, Housing and Urban Development, Moses Onderi on 2nd December 2014.

5. **The defendants response:**

The defendants contended that the suit property is Government land and as such, public land. The defendants contended further that the plaintiff has not produced the minutes and/or resolutions by Gusii County Council pursuant to which the suit property was allocated to Onchuru. The defendants contended that the suit property does not exist on the ground. The defendants contended that the signpost or signage that is the subject of the plaintiff’s complaint has been placed on a parcel of land which lies between government houses Nos. 34 and 35. The defendants averred that even if the suit property exists on the ground and the same is registered in the name of the plaintiff, the transfer of the property to the plaintiff was irregular and invalid as clause 9 of the lease was not complied with. The defendants contended that since the suit property was allocated to Onchuru, it has changed hands between blood brothers which transfers have been stage managed for ulterior motives. The defendants averred that no consent was obtained from the lessor Gusii County Council before the suit property was transferred by Onchuru to Kenani and by Kenani to the plaintiff.

6. The defendants denied the plaintiff’s claim that the sign post complained of was put up on the suit property by the defendants between 4th and 13th October, 2014. The defendants contended that the sign post was actually placed on the disputed property in January, 2014 before the plaintiff

acquired the suit property. The defendants averred that, this fact is clear from the photographs annexed to the plaintiff's affidavit in support of the plaintiff's application which were taken on 29th August 2014. The defendants contended that since the signpost complained of was put up in January 2014, there is no urgency involved in having the same removed. The defendants contended further that the conditions in the letter of allotment were not accepted by Onchuru within the time that was stated therein. The defendants denied that they destroyed the boundary fence on the suit. The defendants contended that there is no evidence of the said boundary or the demolition thereof. The defendants also denied that they have been sending threatening messages to the plaintiff. The defendants averred that the plaintiff has never taken possession of the suit property and that this suit is an attempt by the plaintiff to gain possession of the property through the assistance of the court although the same was acquired in questionable circumstances.

7. **The submissions:**

When the plaintiff's application came up for hearing on 2nd December 2014, Mr. Oguttu Mboya advocate appeared for the plaintiff while Mr. Onsembe advocate appeared for the defendants. In his submission in support of the application, Mr. Oguttu adopted the grounds set out in the body of the application and the contents of the affidavit that was sworn by the plaintiff in support of the application. Mr. Oguttu submitted that the suit property was trust land that was hitherto owned by Gusii County Council. He submitted that under section 158 of the repealed Constitution of Kenya, the commissioner of lands had the power to allocate trust land. He submitted that the suit property was allocated to Onchuru by the commissioner of lands in accordance with the said provisions of the old constitution and that the commissioner of land could not have allocated the suit property if it was not available for allocation. Mr. Oguttu submitted that following the allocation of the suit property to Mr. Ochuru, he was issued with a certificate of lease that conferred on him inalienable rights that was transferred to Kenani who subsequently transferred the same to the plaintiff. Counsel submitted that the plaintiff's title is indefeasible and should be protected pursuant to the provisions of sections 24, 25 and 26 of the Land Registration Act, 2012. Counsel submitted that the plaintiff has established a prima facie case against the defendants with a probability of success. He submitted further that if the orders sought are not granted, the plaintiff would suffer irreparable harm. Counsel submitted further that the defendant's claim that the suit property is Government land has no basis. Finally, he contended that even if the suit property was Government land, that was not a license for the defendants to seize it forcefully without following the due process.

8. In his submissions in reply, Mr. Onsembe adopted the contents of the replying affidavit that was sworn by Moses Onderi on 2nd December 2014. Mr. Onsembe submitted that the plaintiff misled the court when he claimed that the defendants put up a sign post on the suit property between 4th and 13th October, 2014 while the photographs annexed to the plaintiff's affidavit show clearly that the said sign post was placed on the disputed property earlier. Mr. Onsembe submitted further that the suit property does not exist on the ground. Counsel submitted that the parcel of land claimed by the plaintiff is occupied by Government House No. 36 which house is occupied by one of the defendants' employees. He submitted that the sign post complained of by the plaintiff is not on or outside this house but outside Government House No. 34 and that the said signpost was placed there in January 2014. Counsel submitted that the said signpost was erected before the plaintiff became the registered proprietor of the suit property. Counsel submitted that the lease agreement between Onchuru and Gusii County Council had conditions that provided for consent to be obtained before the property was transferred. There was also a condition that required the property to be developed within 6 months. Counsel submitted that these conditions were not complied with. He submitted that there was no evidence that consents were obtained before the property changed hands from the original allottee, Onchuru. He submitted further that there is no evidence that the suit property has been developed. Counsel submitted that the plaintiff's title to the suit property is questionable. He submitted that the sign post complained of by the plaintiff has been erected on land that belongs to the County Government of Kisii. Counsel submitted that the plaintiff has not established a prima facie case against the defendants.
9. He submitted further that the plaintiff who has never taken possession of the suit property will not suffer irreparable loss if the orders sought are not granted. He submitted that if the prayers sought by the plaintiff are granted, the defendants would suffer great inconvenience as the plaintiff would

take possession of land lying between two (2) Government Houses occupied by the employees of the defendants. Counsel submitted further that the defendants cannot be restrained from occupying or entering the suit property because they are already in possession. Finally, counsel submitted that the plaintiff has not exhibited minutes of Gusii County Council that approved the allotment of the suit property to Onchuru and the subsequent transfer thereof to Kenani and the plaintiff. He submitted that the sanctity of the plaintiff's title was vitiated by the irregular manner in which the said title was acquired.

10. Consideration of the parties' respective cases and determination on whether a case has been established to warrant the grant of the orders sought:-

The law on temporary injunction is now well settled. The plaintiff has claimed both prohibitory and mandatory temporary injunction. In the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A. 358** it was held that:-

- a. **An applicant for a temporary injunction must show a prima facie case with a probability of success.**
- b. **An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.**
- c. **If the court is in doubt as to the above, it will decide the application on a balance of convenience.**

11. For a temporary mandatory injunction the threshold to be met is higher. In the court of appeal case of **Kenya Breweries Ltd. –vs- Washington Okeyo [2002] 1 E. A 109** the court while laying down the test to be applied while considering whether to grant a mandatory injunction at interlocutory stage cited a passage from **Halsbury's Law of England, Volume 24, 4th Edition paragraph 948** where the authors have stated as follows:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks, it ought to decide at once or if the act done is simple and summary one which can be easily remedied or if the defendant attempts to steal a match on the plaintiff a mandatory injunction will be granted on an interlocutory application.”

In the case of **Locabail International Finance Ltd –vs- agro-Export & Another [1986] 1 AllER 901**, it was held that:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction is directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than was required for a prohibitory injunction.”

12. It is on the foregoing principles that the plaintiff's application herein would be considered. The plaintiff's case simply put is that he is the registered proprietor of the leasehold interest in the suit property and that the defendants have unlawfully entered the suit property and erected thereon a signage or sign post with the words **“Public Property, No Entry.”** The plaintiff has claimed further that the defendants have demolished the fence that marked the boundary of the suit property and have through their servants or agents been sending threatening messages to him warning him of dire consequences should he enter or develop the suit property. The plaintiff's contention is that the actions by the defendants aforesaid have prevented him from entering the suit property or developing the same. His property rights guaranteed under the Constitution of Kenya and sections 24, 25 and 26 of the Land Registration Act, 2012 have therefore been

violated. The defendants have denied that they have put up the signage or sign post complained of on the suit property. They have contended that the suit property does not exist on the ground. They have contended that the signage or signpost that they have put up has been put up on a parcel of land between Government Houses No. 34 and 35 which are far from the location that the plaintiff claims the suit property is situated on the ground. The defendant has contended further that if the suit property exists on the ground then it was created unlawfully and it has changed hands from the original allottee irregularly, unlawfully and in breach of the terms of the lease which is the foundation of the plaintiff's title. I have considered the affidavit filed in support of and in opposition to the plaintiff's application.

1. I have also considered the rival submissions by the respective advocates for the parties. The origin of the plaintiff's title can be traced to the letter of allotment dated 12th September 1997 that was issued by the commissioner of lands on behalf of Gusii County Council to Onchuru. In the letter of allotment, the commissioner of lands on behalf of Gusii County Council (hereinafter referred to only as "**the council**") allocated to Onchuru un-surveyed residential plot within Kisii Municipality measuring 0.1625 hectares. Onchuru accepted the allotment and paid the requisite charges on 17th December 1997. Thereafter, the suit property was surveyed and given land reference number Kisii Municipality/Block II/219. The commissioner of lands issued a lease in favour of Onchuru on 5th January 2001 in respect of the suit property which lease was executed by Onchuru and the commissioner of lands who executed the same on behalf of the council. The said lease was registered on 9th January 2001 and Onchuru issued with a certificate of lease on the same date. The lease was between the council and Onchuru and it had terms and conditions. I am in agreement with the submissions by the advocate for the plaintiff that the suit property was trust land and that the commissioner of lands had the power to allocate the same on behalf of the council pursuant to the provisions of section 158 of the repealed Constitution of Kenya. I would wish to point out however that unlike Government land, the commissioner of lands could only allocate trust land with the approval or consent of the council. The council's approval which is supposed to accompany applications for such allotment was supposed to take the form of resolutions by the members of the council. See my judgment in the case of **Leah Magoma Ongai vs. The Attorney General, Kisii HCCC No. 40 of 2012(unreported)** where I stated as follows: "**Section 53 of the Trust Land Act gave the Commissioner of Lands power to administer Trust land as an agent of the County Councils and in that regard, the Commissioner of Lands had power among others to execute on behalf of the County Councils, grants, leases, licences and other documents relating to Trust land. Section 13 (2) of the Trust Land Act provides that the setting apart of land by a county council must be approved by a resolution passed by a majority of the members of the council. Although the Commissioner of Lands had power to administer Trust land on behalf of the County Councils, section 53 (a) of the Trust Land Act denied it power to approve the setting apart of Trust land on behalf of the County Councils. In discharge of its duties under the Trust Land Act, the Commissioner of Lands was enjoined to act in accordance with the directions of the County Councils**".
13. The defendants have contended that the council did not approve the allotment of the suit property to Onchuru and as such Onchuru's title to the suit property was acquired unlawfully. The defendants have argued that since Onchuru's title to the suit property was unlawful, he could not pass a better title to the subsequent registered owners of the suit property including the plaintiff. The plaintiff has not placed before the court any resolution that was passed by the council approving the allocation of the suit property to Onchuru. The lease between Onchuru and the council provided that Onchuru was not supposed to sell, transfer, sub-let, charge or part with possession of the suit property without prior consent in writing of the council. The defendants have contended that the suit property was transferred by Onchuru to Kenani and by Kenani to the plaintiff without the consent of the council. The plaintiff did not provide any evidence that the terms of the lease were complied with when the suit property was transferred to him. The plaintiff did not place before the court a consent that was issued by the 1st defendant who is the successor in title to the council authorizing the transfer of the suit property to the plaintiff. The defendants' argument is that in the absence of such consent, the transfer of the suit property by the Kenani to the plaintiff was irregular and unlawful. The other issue that has been raised by the defendants is

that since the suit property was allocated to Onchuru in 1997 and a lease issued in his favour in the year 2001 the suit property has not been developed to date.

14. The defendants' contention is that Onchuru and Kenani did not even take possession of the suit property before the same was transferred to the plaintiff. Clause 2 of the lease provides that the suit property was supposed to be developed within 24 months from the date of the registration of the lease failure to which the council was entitled to re-enter the suit property after which the lease would be deemed to have ceased. Clause 9 of the lease provides that an application for consent to transfer the suit property would not have been considered until the property was developed. The defendants have argued that the plaintiff and his predecessors in title did not comply with clause 2 of the lease concerning development of the suit property. The defendants were therefore entitled to enter and take possession of the suit property that was neither developed nor occupied. The plaintiff has not placed any evidence before the court that the suit property has been developed or that the lease was varied to extend the time within which it was to be developed before the same was transferred to him. I have also considered the plaintiff's complaint about a signage or signpost with the words "**Public Property, No Entry**" being placed on the suit property between 4th and 13th October, 2014. The defendants have denied putting such signage or sign post on the suit property between 4th and 13th October, 2014 or at all.
15. I have had a close look at the photograph annexed to the plaintiff's affidavit in support of the application herein as annexure "SAO2". The photograph is said to be of the signage or sign post complained of by the plaintiff to have been put on the suit property by the defendants. The sign post or signage in the photograph reads as follows:-

"WARNING, WARNING, THIS LAND IS PROPERTY FOR THE KISII COUNTY GOVERNMENT TRESPASSERS WILL BE PROSECUTED!"

The photograph on the face of it indicates that it was taken on 29th August 2014. The signage or sign post in this photograph cannot be the same one that the plaintiff has referred to in his affidavit. The words "**PUBLIC PROPERTY, NO ENTRY**" which is said to be contained in the signage or sign post on the suit property are conspicuously missing. Again the signage or signpost on the suit property is said to have been put in place by the defendants between 4th and 13th October 2014. This one on the face of it was put in place on or before 29th August 2014 before the plaintiff acquired the suit property on 15th September 2014. There is no proof before me therefore that the defendants did put a signage or sign post on the suit property bearing the words "**PUBLIC PROPERTY, NO ENTRY**" between 4th October and 13th October 2014. The other complaint by the plaintiff concerned, the damaged fence and threatening messages. I am in agreement with the submissions by the defendants advocate that there is no evidence whatsoever of the alleged damage to the fence on the suit property and of the threats that the plaintiff has claimed to have been sent to him. These two complaints in my view are of a criminal nature and the plaintiff should have reported the same to the police and placed before court evidence of such report.

16. For the foregoing reasons, I am not satisfied that the plaintiff has established a prima facie case against the defendants with a probability of success. The foundation of the plaintiff's title is shaky and the manner in which the plaintiff acquired the suit property from Kenani seems to have been irregular the terms and conditions of the lease not having been complied with. The suit property also seems not to have been developed within the time prescribed in the lease. The breach of the development condition in the lease entitles the lessor to re-enter the property. The 1st defendant herein which is the successor in title to the lessor may have been within its rights under the lease dated 5th January 2001 to re-enter the suit property that has been unoccupied and undeveloped for the last 13 years! I have also found the other complaints raised by the plaintiff not to have any basis. Having reached the conclusion that the plaintiff has failed to establish a prima facie case with a probability of success, it is not necessary for me to consider whether the plaintiff stands to suffer irreparable harm if the orders sought are not granted.
17. The upshot of the foregoing is that the plaintiff's application dated 15th October 2014 has no merit. The same is accordingly dismissed with costs to the defendants.

Delivered, signed and dated at KISII this 13th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Bigogo h/b for Mr. Oguttu for the plaintiff

N/A for the 1st and 2nd defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE