



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 172 OF 2015**

**MICHAEL KOJIEM ODOTTE.....PLAINTIFF**

**VERSUS**

**ATIN KUMAR AGGARWAL T/A FARM & TRANSPORT TECHNICAL SERVICES...1<sup>ST</sup> DEFENDANT**

**GAURI METHA.....2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, KISUMU.....3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By Plaintiff further amended on 14/12/2018 and filed on 17/12/2018, Amos Ochieng Odotte Kojiem suing as the administrator and legal representatives of Michael Kojiem Odotte (deceased) sued Atin Kumar Aggarwal t/a Farm & Transport Technical Services, Gauri Metha, District Land Registrar, Kisumu and Attorney General claiming that at all material times the deceased Michael Kojiem Odotte has been the sole registered proprietor of all that parcel of land known as KISUMU MUNICIPALITY/BLOCK 12/142 onto which stands a residential premises.

On or about 1<sup>st</sup> day of September 2013 the deceased Michael Kojiem Odotte entered into a lease agreement with the 2<sup>nd</sup> Defendant for a term of 5 years with effect from 1.10.13 at a monthly rent of Kshs. 80,000/=. The deceased Michael Kojiem Odotte relied on the spirit and the letter of the lease agreement for its full force and effect.

That it was a term of the said lease agreement that the 2<sup>nd</sup> Defendant as lessee would pay to the deceased Michael Kojiem Odotte as lessor a security deposit equivalent to two (2) months' rent and in addition three (3) months' rent payable quarterly in advance with effect from 1<sup>st</sup> October 2013.

That pursuant to the aforesaid lease agreement in which the 1<sup>st</sup> Defendant acted as the 2<sup>nd</sup> Defendant's witness and guarantor, the 1<sup>st</sup> Defendant on behalf of the 2<sup>nd</sup> Defendant paid a sum of Kshs. 240,000/= being 3 months' rent in advance and promised to pay 2 months' deposit shortly thereafter.

That in accordance with the lease agreement the deceased Michael Kojiem Odotte handed over the keys to the suit premises and access thereto to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

That sometimes in December 2013 noting that the 2<sup>nd</sup> Defendant and/or the 1<sup>st</sup> Defendant had not paid the security deposit and the next quarter of rent being due, made a routine visit to the suit premises in order to address the outstanding tenancy issues with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants but to his surprise noticed that the 2<sup>nd</sup> Defendant had changed the gate to the premise and replaced with her own and proceeded to convert the deceased Michael Kojiem Odotte premises into a garage.

That the deceased Michael Kojiem Odotte further consternation was that the security guards planted at the gate by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied the deceased Michael Kojiem Odotte entry into his premises and instead directed him to seek clearance from the 1<sup>st</sup> defendant.

The Defendants fraudulently transferred the suit land to themselves and had the 3<sup>rd</sup> Respondent register a transfer to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant remained in possession of the suit property between January 2014 until July 2014 when the plaintiff obtained possession of the suit property and rent had not been paid. The defendant's properties were attached and sold and after deducting his fees the auctioneer

remitted to the plaintiff's advocate Kshs. 38,084 as paid rent arrears received leaving a balance of 521,946.

Due to the extensive damage to the premises, it took 3 months for the repairs to be completed during which period the property was not available for rent and the plaintiff lost rent of Kshs. 240,000. The Plaintiff claims:-

**a) Kshs. 240,000/- being lost rent for the period between 28.7.14-28.10.14 necessitated by repair.**

**b) Kshs. 521,946/= being rent arrears for the period between January 2014- July 2014.**

**c) Cost of Repair – Kshs. 528,925/-**

**d) Permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from trespassing upon the suit property, leasing, selling, transferring or in any other way dealing with the suit property in any way adverse to the deceased Michael Kojjem Odotte rights and privileges as proprietor of the suit property.**

**e) A declaration that the entries made on the land register on 12.6.13, 21.5.13 and 22.5.14 were fraudulent hence ought to be cancelled and ownership do revert to the deceased Michael Kojjem Odotte upon cancellation of the Certificate of lease held by FARM & TRANSPROT TECHNICAL SERVICES.**

**f) Costs of the suit.**

**g) Interest on (a), (b I & ii) & (c) above.**

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a statement of defence whose gist was that if the suit property was registered in the name of the 1<sup>st</sup> defendant, and that the transfer and registration was effected with the knowledge, consent, permission and/or authority of the plaintiff. The 1<sup>st</sup> defendant denies the particulars of fraud or forgery attributed to him therein. The 1<sup>st</sup> and 2<sup>nd</sup> defendants in response to paragraph 22 of the plaint, aver that the charges mentioned therein are mere allegations which have not been proved against them and therefore cannot be a basis of this case. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a defence which was a mere denial.

When the matter came for hearing the plaintiff testified that sometimes in August 2013, his house fell vacant when the tenant Ogra Foundation moved out. The plaintiff relied on his father's statement which is on record.

The plaintiff is the administrator of the estate of the late Michael Odotte Kojjem. He became such on 9.8.16. That by court order dated 24.10.17 he was enjoined in this suit in substitution of the deceased. At the time of substitution of the late Michael Odotte Kojjem the deceased had already recorded a statement & filed in this court but had not testified.

That during his lifetime the deceased Michel Odotte Kojjem shared with the plaintiff his statement that he recorded and filed herein clearly detailing his side of the story as regards this case which the plaintiff adopted in toto.

That prior to his demise the late Michael Odotte Kojjem lamented to the plaintiff that the Defendants had caused extensive damage on the suit property and on the advice of his lawyer he contracted the services of Chrisca Real estate Valuers to value the extent of the damage so caused and compute the possible repair costs.

The resultant valuation report captured the exact extent of damage and fixed repair costs at Kshs. 528,925/=.

That from January 2014 to July 2014 when his father the late Michael Odotte Kojjem obtained possession of the suit property from the Defendant no rent had been paid.

That through Victoria Blue Services the Defendant's properties were attached and sold and after deducting his fees the auctioneers remitted to their advocate Kshs. 38,054/= as part rent arrears recovered leaving a balance of Kshs. 521,946/=.

That due to the extensive damage to the premise it took 3 months for the repairs to be completed during which time the premise was not available for rental with the result that his late father further lost rent equivalent to Kshs. 240,000/=.

That the exact particulars of the loss and damages to the premise that required repairs are set out in the valuation report of Chrisca Real estate Valuer.

That although they are now in possession of the premises the records at the lands offices still reflects the 1<sup>st</sup> Defendant as the proprietor. That on behalf of the estate of the deceased Michael Odotte Kojjem the plaintiff seeks the prayers set out in the further amended plaint dated 14.12.18. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not call any evidence.

The 3<sup>rd</sup> Defendant and 4<sup>th</sup> Defendant called Mr. Ogeto Nelson a Land Registrar Kisumu. He carried the parcel file for the property and the contents was only the white card. He admitted that the encumbrance section of the green card showed that there was a charge for National Bank of Kenya and there was no discharge of charge. There was no consent to transfer.

I have considered the pleadings, evidence on record and do find that the register for the parcel of land was opened on 28/9/1975. The lessor was the Government of the Republic of Kenya and the lessee was Michael Kojjem Odotta. The Proprietorship of section shows that Michael

Kojiem Odote was registered as proprietor on 28/9/1975.

On 30/11/1981, a note was made in the register that there was charge entry overleaf and that the charge contained agreement in terms of section 70 of the repealed Registered Land Act. On 2/2/1982 a similar entry was made.

On 12/6/2013 the property was registered in the names of the 1<sup>st</sup> Defendant by virtue of non-existent transfer a certificate of lease was issued on the same date. On 4/3/2014 a caution was entered but the same was fraudulently removed on 22/5/2014. On 5/6/2014 the caution was reinstated.

On 10/6/2014 a restriction was entered that no dealings without the physical presence of Mr. Michael Kojiem Odote vide Ouma Njoga & Co. Advocates. The above evidence demonstrate that the property was transferred to the 1<sup>st</sup> and 2<sup>nd</sup> defendants fraudulently because there was no transfer and that the land could not be transferred without a discharge of charge.

I do find that the plaintiff has proved his case on a balance of probabilities. I do grant Judgment in terms of:-

**a) Kshs. 240,000/- being lost rent for the period between 28.7.14-28.10.14 necessitated by repair.**

**b) i. Kshs. 521,946/= being rent arrears for the period between January 2014- July 2014. ii. Cost of Repair – Kshs. 528,925/-**

**c) Permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from trespassing upon the suit property, leasing, selling, transferring or in any other way dealing with the suit property in any way adverse to the decease Michael Kojiem Odote rights and privileges as proprietor of the suit property.**

**d) A declaration that the entries made on the land register on 12.6.13, 21.5.13 and 22.5.14 were fraudulent hence ought to be cancelled and ownership do revert to the deceased Michael Kojiem Odote upon cancellation of the Certificate of lease held by FARM & TRANSPROT TECHNICAL SERVICES.**

**e) Costs of the suit.**

**f) Interest on (a), (b) I & ii & (c) above.**

**Orders accordingly.**

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 23<sup>rd</sup> DAY OF FEBRUARY, 2022**

**ANTONY OMBWAYO**

**JUDGE**

*This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*