



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

HCC NO.142 OF 2012

HOSEA ALUBAKA ONYOYO.....PLAINTIFF

VERSUS

1. ONYANGO ODONGO ODUOR
2. GEORGE OCHIENG ONYANGO
3. BEATRICE KARETI OGALO
4. DISTRICT LANDS REGISTRAR KISUMU
5. COMMISSIONER OF LANDS
6. HON. ATTORNEY GENERAL.....DEFENDANTS

J U D G M E N T

1. The Plaintiff – **HOSEA ALUBAKA ONYOYO** – Instituted this case here on 23/7/2012. The case is against 6 defendants – **ONYANGO ODONGO ODUOR** (1st defendant), **GEORGE OCHIENG ONYANGO** (2nd defendant), **BEATRICE KAREJI OGALO**(3rd defendant), **DISTRICT LANDS REGISTRAR, KISUMU** (4th defendant), **COMMISSIONER OF LANDS** (5th defendant) and **THE HON. ATTORNEY GENERAL** (6th defendant).
2. The suit concerns Land Parcel NO.**EAST KISUMU/DAGO/559** (hereafter the suit land) situated within Kisumu owned by the plaintiff but fraudulently and unlawfully transferred to 1st, 2nd and 3rd defendants in successive periods by 4th, 5th and 6th defendants jointly and/or singly.
3. In effecting the transfer the defendants made several illegal entries in the relevant land register. The suit land was charged to Kenya Commercial Bank at the time the entries were made and the first illegal move was to purport that Kenya Commercial bank (simply bank hereafter) had discharged the suit property. For that entry No.4 was made in the encumbrance Section of the land Registered on 5th December, 1991.
4. Henceforth, records were made to look like the plaintiff had transferred the suit land to 1st defendant on 20/12/1991 while 1st defendant is shown to have transferred the suit land to 2nd defendant on 16/12/2009. Finally, the 2nd defendant is shown to have transferred the land to 3rd defendant on 4/7/2011. To effect all this the relevant register had illegal entries entered as Nos.4,7,8,9,10 and 11.
5. At the time all this was being done, the suit land was charged to the bank for various monies advanced to the plaintiff at different times. The plaintiff said that on 3/1/1981 he obtained a loan of 10,000/= from the bank and gave the suit land title as security. On 28/2/1985 he obtained yet another loan using the same title as security. And finally on 15/11/1991 he obtained a loan of 40,000/= from the bank. All this time, the title was in bank's custody and he only got it back on 28/6/2012 after paying all the monies back.

6. The plaintiff observed that he is purported to have transferred the suit land to 1st defendant on 20/12/1991, a period when he was still repaying his loan of 40,000/= to the bank. He couldn't, and didn't, transfer the suit land, he said, as he had no capacity to do so.
7. The plaintiff wants a permanent injunction to issue against the defendants whether by themselves, their officers, servant or agents from entering, taking possession, trespassing, evicting the plaintiff, disposing off, selling, alienating, transferring, charging, pledging, leasing, wasting, or in any manner dealing or interfering with the plaintiff's quiet possession of the suit land or any of the assets thereon. He wants too that entries nos. 4,7,8,9,10 and 11 illegally entered in various sections of the relevant land register cancelled. Costs of the suit and interests are also asked for.
8. It appears clear that the 1st, 2nd, and 3rd defendants were not traced for personal service and the plaintiff applied for, and was given, an order to serve them by way of substituted service. Such order is in the court file and is dated 23/7/2012 and the service itself appeared as an advertisement in the standard daily newspaper of 26th July, 2012 (in the Digger Classified section at page 54). An affidavit of service to that effect was filed in Court on 2/8/2012.
9. The 1st, 2nd, and 3rd defendants however didn't enter appearance or file defence and on 8/10/2012 a written request for entry judgment against them was made. Such judgment was entered on 11/10/2012. The hearing that took place on 26/6/2013 must therefore be taken as formal proof against 1st, 2nd and 3rd defendants. This judgment is in effect the final judgment against them following formal proof.

10. The 4th, 5th and 6th defendants were however served as usual and entry of appearance was done followed by filing of defence here on 29/8/2012.

11. The defence contains, inter alia, denials that the plaintiff is the registered owner of the suit land; that the 4th, 5th and 6th defendants were party to or perpetrated fraud; that the plaintiff executed a discharge of charge; or that there was forgery and falsification of documents to effect or facilitate illegal entries in the relevant land register. There is denial too that the plaintiff obtained the various loans he is alleging from the bank or that he never had any land dealing with the 1st defendant.

12. The matter came for hearing on 26/6/2013 and the plaintiff's evidence is substantially a re-statement of what the plaint contains. During hearing, the following exhibits were availed:

- Plaintiff's land certificate (Plf EX.No.1)
- Extract of green card and Search certificate (Plf EX No.3a & b)
- Copy of discharge of charge from the bank (plf EX No.5)
- Copy of plaintiff's letter request for discharge of charge (plf EX No.4).
- Notice of intention to sue the government (plf EX No.6)

During cross – examination of the plaintiff by Nyauma from the state law office, the plaintiff explained that he sued 4th, 5th and 6th defendants because of illegally altering the relevant records.

13. After the close of the plaintiff's case, the 4th, 5th and 6th defendants requested for time to present a defence. The Court gave them time. No defence however was ever presented. The defence also didn't make any submissions.

14. The plaintiff made written submissions and emphasized the illegality of the transactions he alleged in the pleadings and maintained his stand that all along, the suit land was charged to the bank when the alleged transactions are shown to have taken place.

15. A considered view of the presentations made show that the Court has to decide whether the plaintiff is the owner of the suit land; whether he had obtained loan facilities as he alleged; whether there was fraud by the defendants; whether notice to sue was issued to AG; whether the suit has merit; whether the plaintiff is entitled to damages; and the issue of costs.

16. The plaintiff availed his original land certificate (plf EX.No.1) so he owned the land. He was able also to show clearly that he had various loan facilities with the bank and had offered his title as

- security (see plf EX No5). He showed too that he gave the AG Notice of intention to sue (plf EX No.6).
- 17.The plaintiff also showed a copy of green card which clearly shows the entries he has complained of and which also shows the period of the entries as the same period he was repaying the various loans to the bank.
 - 18.When all is considered therefore, the plaintiff has a good case which he has well proved on balance. He showed well he didn't have the requisite capacity to sell land to the 1st defendant as he had already charged the suit land to the bank. It seems to me therefore that the issuance of title to 1st defendant was a move that was null and void. The title issued therefore meant nothing in law and couldn't confer any interest to 1st defendant. It follows therefore that the 1st defendant conferred nothing to the 2nd defendant and the 2nd defendant had nothing to confer to 3rd defendant. This is so inspite of clear entries showing title to have passed to the 1st, 2nd and 3rd defendants.
 - 19.And there was justification to sue 4th, 5th and 6th defendants because they are the custodians of records illegally altered. Their actions were injurious not only to the plaintiff himself but also to the bank which had advanced the plaintiff some loans.
 - 20.I am however unable to award the plaintiff damages. He needed to demonstrate the loss he may have incurred. His evidence concentrated on other areas and left out this issue. Indeed, even the submissions availed do not propose any figure as quantum.
 - 21.The upshot is that the plaintiff gets injunctive relief as asked for in prayer (a) and he also gets the order for cancellation of entries as stated in prayers (c)(d)(e) and (f) in the plaint. Prayer (g) which is for costs and interests, is also granted.

A.K. KANIARU – JUDGE

29/5/2014