



**Owino v Abura & 5 others (Environment & Land Case
16 of 2021) [2022] KEELC 52 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 52 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 16 OF 2021**

GMA ONGONDO, J

APRIL 28, 2022

FORMERLY MIGORI ELCC NO. 213 OF 2017 AND KISII ELCC NO. 488 OF 2015

BETWEEN

ALEX ACHOLA OWINO PLAINTIFF

AND

MOSES ABURA 1ST DEFENDANT

OSUMBA ATTITO 2ND DEFENDANT

POLYCAP OLOO AMOLO 3RD DEFENDANT

ONYANGO AKEYO 4TH DEFENDANT

JIM ATTITO 5TH DEFENDANT

VICTOR OTIENO 6TH DEFENDANT

JUDGMENT

A. Introduction

1. The instant dispute involves the whole of title number Kanyamwa/Kabonyo/Kwandiku/1070 measuring approximately eight decimal zero hectares (8.0 Ha) in area (Hereinafter referred to as the suit land). The same is contained in Registry Map Sheet Number 33. It is located in Homa Bay County within the Republic of Kenya.
2. The plaintiff, Alex Achola Owino appears in person in this suit.
3. The 1st, 2nd, 3rd, 4th and 5th respondents are represented by Learned counsel, Mr J.Oumo of M/S Oumo and Company Advocates.
4. The 6th respondent, Victor Otieno is unrepresented herein.



5. Initially, this suit was lodged at Kisii Environment and Land Court but was transferred to Migori Environment and Land Court on February 21, 2017. Subsequently, the same was transferred to this court, upon its establishment, for further hearing and determination with effect from September 20, 2021.
6. It must be noted that originally, the suit was heard ex parte on January 23, 2017 and judgment rendered in favour of the plaintiff on February 7, 2018. However, by this court's ruling delivered on 19th September 2019, the said judgment was set aside with thrown away costs of kshs. 5,000/= to the plaintiff in the best interest of justice further to the 1st to 5th defendants' application by way of notice of motion dated April 1, 2018.

B. The gist of the plaintiff's case**

7. In an amended plaint (Fast Track) filed in court on February 13, 2019 where the 6th defendant was added to these proceedings, the plaintiff is claiming against the defendants jointly and/or severally the orders infra;
 - a. A declaration that he is the lawful and legitimate owner of the suit land.
 - b. A permanent injunction restraining the Defendants by themselves, their agents servants or employees from trespassing and continuing to trespass or remain on further construction, cultivating, transferring, alienating and/or in any other manner whatsoever from interfering with my quit user, occupation and/or enjoyment of the suit land.
 - c. A mandatory injunction against the Defendants ordering them to forthwith demolish, remove, and/or pull down the structures that they have illegally erected on the suit land.
 - d. The cost of this suit.
 - e. Any other relief that this Honourable court may deem fit to grant.
8. The plaintiff laments that he bought the suit land from Jones Magoro (Deceased herein) in the year 1974 during land adjudication and returned to his place of work. That the suit land is registered in his name. That in the year 2013, he discovered that the defendants had entered the suit land without his authority and or any justification. That the defendants started cultivating thereon and were in the process of sub dividing and selling the same against the prescribed right of the plaintiffs. Thus, the actions of the defendants provoked the instant suit.
9. On November 6, 2019, the plaintiff (PW1) testified, inter alia, that in the year 1994, the defendants unlawfully entered the suit land which he had bought from the deceased. To fortify his claim, he relied on the plaint and list of documents dated 14th September 2015 serial numbers 1 to 17 (PExhibits 1 to 17 respectively) which include a title deed (PExhibit 1) and a certificate of official search (PExhibit 2) in respect of the suit land.
10. In the submissions dated January 28, 2022 and filed herein on 31st January 2022, PW1 made reference to the plaint, the orders sought therein and the statement of defence in this matter. He identified three issues for determination, inter alia, whether the 3rd defendant trespassed into the suit land. He submitted that he has demonstrated his claim against the defendants to the requisite standards.
11. PW1 relied on *Halsbury's Laws of England 3rd Edition* Volume 21 paragraph 739 page 352-366, to fortify his submissions. He further relied on *Giella v Cassman Brown Company Limited* (1973) EA 358 and *Njenga v Njenga* (1991) KLR 401, among other authorities.



C. The gist of the defendants' case

12. The 1st to 5th defendants' statement of defence dated 16th February 2016 was duly filed in court on February 17, 2016. The said defendants stated therein, inter alia, that they are all purchasers for value having bought the suit land on July 11, 1994 from the deceased. That they have been in occupation of the same and lived thereon to-date. They alleged fraud on the part of the plaintiff and set out the particulars thereof at paragraph 8 of the statement of defence. They urged the court to dismiss the suit with costs.
13. On February 1, 2021, the 1st defendant (DW1) relied on his statement of defence dated February 16, 2016 as part of his evidence. He further relied on his list of documents dated 20th February 2017 (DExhibits 2 to 7) in respect of LR No. Kanyamwa/Kabonyo Kwandiku/431. He stated, among other things, that he was not aware of the suit land and that the land in dispute is LR No. Kanyamwa/Kabonyo/Kwandiku/3176 which belongs to him.
14. The 4th defendant (DW2) relied on DExhibits 2, 3, 4, 5, 6 and 7 in his testimony. He stated that he is the lawful proprietor of LR No. Kanyamwa/Kabonyo/Kwandiku/431 which he bought in the year 1994. He denied the plaintiff's claim and termed the same misplaced.
15. DW3 was Tiberius Ndege, Land Registrar in charge of Homa Bay County. He testified and relied on a certified copy of the adjudication record (DExhibit 3) and a Green card opened on 14th August 1992 in regard to the suit land (DExhibit 4). He told the court in part that PW1 is the 1st owner registered owner of suit land which is not related to land reference numbers Kanyamwa/Kabonyo Kwandiku/431 and 3176
16. Learned counsel for the 1st to 5th defendants filed submissions dated 23rd February 2022 in court on February 28, 2021. Counsel provided a gist of the parties' respective pleadings, the evidence and framed issues for determination namely whether the defendants trespassed into the suit land and whether PW1 is entitled to orders sought in the plaint. In the analysis of the issues, counsel submitted that whereas PW1 is the registered owner of the suit land, he has never taken possession of the same. That he has failed to prove the allegations of trespass against the defendants.
17. To reinforce the submissions, counsel cited section 3 (1) of the *Trespass Act* Chapter 294 of the Laws of Kenya regarding the offence of trespass. Counsel therefore, implored upon this court to dismiss the suit with costs to 1st to 6th defendants.
18. The 6th defendant was duly served on 31st October 2019 as disclosed in the affidavit of service sworn on 4th November 2019 and the proceedings of 6th November 2019 herein. Be that as it may, he failed to file any statement of defence in this suit.

D. Points for determination

19. This court is conscious of the definition of the term "suit" under section 2 of the *Civil Procedure Act* Chapter 21 Laws of Kenya. In a suit generally, the issues for determination flow from either the pleadings or as framed by the parties for the court's determination as held in the case of *Galaxy Paints Company Limited-vs-Falcon Grounds Company Limited* (2000) 2 EA 385.
20. I have duly considered the plaint, the 1st to 5th defendants' statement of defence and their respective submissions including the framed issues therein which are hereby partially endorsed. So, I am of the considered view that the following triple issues arise herein for determination;
 - a. Is the plaintiff the lawful proprietor of the suit land?



- b. Has the plaintiff proved on a balance of probabilities that the defendants trespassed into the suit land?
and
- c. Are the orders sought in the plaint available to the plaintiff in this suit?

E. Discussion and determination

21. In respect of the first issue, the *Concise Oxford English Dictionary* 12th Edition page 1151 defines the term “Proprietor’ thus;
“a holder of property”
22. The plaintiff (PW1) stated that he bought the suit land from the deceased at Kshs. 7,000/= in the year 1974. That the land was adjudicated in 1978 and that the land adjudication officer, the deceased and himself, among others, were present during adjudication. In examination in chief, he stated that;
“.....the suit land was lawfully allocated to me and thereafter I was issued with it’s title deed (PEXhibit 1). I am the absolute registered owner of the suit land.....” (Emphasis added)
23. During cross examination, PW1 maintained that he bought the suit land from the deceased in the year 1974. That the written agreement thereof got lost as shown by affidavit of loss of agreement and abstract from police records relating to the said loss (PEXhibits 16 and 17 respectively).
24. Clearly, the testimonies of DW1 and DW2 are captured in paragraphs 12 and 13 hereinabove. DW1 further stated that he did not know PW1 prior to the instant suit. He denied the plaintiff’s claim.
25. DW3 made reference to DEXhibits 3 and 4. He was emphatic that PW1 is the 1st registered owner of the suit land which is not related to Land reference numbers Kanyamwa/Kabonyo/Kwandiku/431 and 3176.
26. It is noted that the suit land was registered in the name of PW1 on 14th August 2010 and title deed was issued to him on 10th August 2011 as revealed in PEXhibits 1 and 2 and DEXhibit 4. This court is aware of sections 27, 28 and 30 of the *Registered Land Act* Chapter 300 Laws of Kenya (Repealed Act) under which the suit land was registered as read with sections 24, 25, 26 and 28 of the *Land Registration Act*, 2016 (2012).
27. PEXhibits 1, 2, 16 and 17 prove the legality of ownership of the suit land by PW1 who is the absolute and indefeasible proprietor thereof. He has shown by PEXhbts 1,2,16 and 17 how he acquired the title thereto and that the said acquisition was legal, formal and free any encumbrances; see *Munyu Maina-vs-Hiram Gathiba Maina* (2013) eKLR.
28. As regards the issue of trespass, section 3 (1) of the *Trespass Act* (supra) is quite instructive. In *Clerk and Lindsell on Torts* (18th Edition) paragraph 18-01, the term “Trespass” means;
“An unjustifiable entry by one person upon the land in possession of another.”
29. Protection of right to property is anchored on Article 40 (1) of *the Constitution* of Kenya, 2010. I bear in mind the definition of the terms “Property” and “Land” under Article 260 of the said Constitution.
30. PW1 testified that the defendants are in unlawful occupation of the suit land to which he is entitled as stated in paragraphs 29 (*supra*). The defendants merely denied the claim, termed the same misplaced and referred to other parcels of land as stated in paragraphs 13 and 14 (*supra*). PW1 has proved that the



defendants are trespassers on the suit land and section 152 A of the Land Act, 2016 (2012) prohibits unlawful occupation of private land.

31. On the third issue, PW1 has sought permanent and mandatory injunctions against the defendants. This court is guided by the decisions in *Giella* and *Njenga* cases (*supra*), among other authoritative pronouncements thereof.
32. Indeed, an injunction is an equitable remedy. The duration of an order of injunction is at the sole discretion of the trial judge as held in the case of *National Bank of Kenya Ltd-vs-Shimmers Plaza Limited* (2009) KLR 278 at 283
33. Section 13 (7) (a) of the *Environment and Land Court Act*, 2015 (2011) provides for permanent preservation orders inclusive of permanent and mandatory injunctions sought in the plaint in this suit. PW1 is entitled to the said remedies in light of his evidence and further to article 40 (1) and section 152 A (*supra*)
34. It was the plaintiff's submissions that he has suffered loss of economic benefit of Kenya Shillings thirty thousand (Kshs. 30,000). The alleged loss is in the form of mesne profit as defined under section 2 of the *Civil Procedure Act* Chapter 21 Laws of Kenya and in the case of *Rioki Estate Co Ltd (1970) Ltd v Kinuthia Njoroge* (1977) KLR 146.
35. Be that as it may, PW1 failed to plead and prove a specific amount as mesne profit which is a form of special damage as held in the case of *Nakuru Industries Ltd v S S Mehta and sons* (2016) eKLR. Thus, he is not entitled to that specific relief.
36. In the end, it is the finding of this court that the plaintiff has proved on a balance of probabilities that he is absolute and indefeasible proprietor of the suit land. That the defendants are in unlawful occupation of the same thus, he is entitled orders sought in the plaint.
37. Wherefore, judgment be and is hereby entered for the plaintiff against the defendants jointly and severally in terms of orders sought in the plaint and as captured in paragraph 7 (a) to (d) herein above.
38. Regarding any other relief as pleaded in paragraph (e) of the plaint, the defendants may be living on the suit land and or in occupation and use of the same. I therefore, direct that the defendants vacate the suit land and hand over vacant possession to the plaintiff within the next ninety (90) days from this date failing which eviction order to issue; see *Mubiddin (suing for and on behalf of the estate of Mohammed Mubiddin Mohamed Hatimy) v Jackson Muthama and 108 others* (2014) eKLR.
39. It is so ordered.

DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 28TH APRIL 2022

G.M .A ONG'ONDO

JUDGE

PRESENT

Plaintiff, present in person

4th defendant, present. His counsel absent

No appearance for the 1st, 2nd, 3rd, 5th and 6th defendants

Terence, Court Assistant.

G.M .A ONG'ONDO



JUDGE

