



Church Commissioners for Kenya St Francis Church & another v Board of Management Oljoro Orok Primary School (Environment & Land Case 277 of 2017) [2022] KEELC 12713 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 277 OF 2017
YM ANGIMA, J
SEPTEMBER 22, 2022
(FORMERLY NAKURU ELC 420 OF 2016)**

BETWEEN

**CHURCH COMMISSIONERS FOR KENYA ST FRANCIS
CHURCH 1ST PLAINTIFF
ANGLICAN CHURCH OF KENYA OLJORO OROK 2ND PLAINTIFF**

AND

**BOARD OF MANAGEMENT OLJORO OROK PRIMARY
SCHOOL RESPONDENT**

JUDGMENT

A. The Plaintiffs' Claim

1. By a plaint dated October 3, 2019 the 1st and 2nd plaintiffs sued the defendant seeking the following reliefs:
 - a. A declaration that the 1st plaintiff is the registered proprietor while the 2nd plaintiff is the beneficial owner of LR Nyandrua/Ol Joro Orok Township/79 and that they are entitled to exclusive use, enjoyment and possession of the same.
 - b. A declaration that the defendant is a trespasser on the suit land and that it be ordered to vacate and remove its moveable properties therefrom.
 - c. A permanent injunction restraining the defendant by itself, its servants, employees, agents, representatives, members of the school, proxies or otherwise howsoever from returning on, entering on, remaining on, cultivating, erecting fences, building structures or carrying out any activity whatsoever on the suit plot or any part thereof.



- d. General damages for trespass, costs and interest.
2. The plaintiffs pleaded that sometime in 1990 the 2nd plaintiff applied to the defunct County Council of Nyandarua (the Council) for allocation of Plot No 79 for extension of the church which application was duly approved on October 25, 1990. It was pleaded that the Commissioner of Lands afterwards issued a letter of allotment dated December 5, 1996 to the 1st plaintiff and upon following all necessary processes it was issued with a lease and a certificate of lease for Nyandarua/Ol Joro Orok Township/79 (the suit property) in 2016.
3. The plaintiffs' further pleaded that the 2nd plaintiff as the beneficial owner had been in possession of the suit property since 1990 and that sometime in 2015 the defendant trespassed and encroached thereon claiming ownership thereof. It was also pleaded that sometime in 2016 the defendant damaged the plaintiffs' fence and commenced construction of some structures on the suit property in violation of the plaintiffs' proprietary rights.
4. The plaintiffs further pleaded that sometime in 2015 the defendant lodged a complaint before the National Land alleging that the plaintiffs had grabbed the suit property from it but upon hearing all the concerned parties it was determined that the suit property was lawfully acquired by the plaintiffs.

B. Defendant's Defence and Counterclaim

5. The defendant filed a defence dated September 26, 2017 to the suit denying the plaintiff's claim in its entirety and putting them to strict proof thereof. The defendant pleaded that the suit property was public land which was set aside for a nursery school in 1980. The defendant denied that the plaintiffs had been in possession of the suit property and contended that it had been in possession of the suit property since 1980 until 2015 when the plaintiffs started claiming the same.
6. The defendant admitted that it lodged a complaint against the plaintiffs before the National Land Commission (NLC) but denied that the same was determined in favour of the plaintiffs. The defendant further pleaded that it was the legitimate owner of the suit property hence it should be allowed to enjoy all property rights pertaining to its ownership.
7. The defendant also filed a counterclaim dated September 26, 2017 against the plaintiffs. It was pleaded that the plaintiff's title was not lawfully obtained since the suit property was not available for allocation or alienation as a result of the aforesaid reservation for a nursery school. The defendant further pleaded that the plaintiffs' title was acquired irregularly, illegally and fraudulently hence liable to cancellation on account thereof.
8. As a result of the aforesaid, the defendant sought the following reliefs in its counterclaim:
 - a. An order of permanent injunction against the defendants in the counterclaim from his continued use and/or ownership of any part of the suit parcel that was set aside for the construction of the school.
 - b. A declaration that land parcel Nyandarua/Ol Joro Orok Township/79 belong to the Government of Kenya and was set aside for the construction of a school
 - c. An order that the plaintiffs do surrender the title deed issued to the defendant in respect to Nyandarua/Ol Joro Orok Township/79 to the chief land registrar immediately for cancellation.
 - d. Costs of the suit; and
 - e. Any other relief the court deems fit to grant.



C. Reply to Defence and Defence to Counterclaim

9. The plaintiffs filed a reply to defence dated October 18, 2017 joining issue upon the defendant on its defence. The Plaintiffs denied the allegations contained in the defence and stated that the suit property had never been set aside for construction of a nursery school as alleged or at all. The plaintiffs further pleaded that it was lawfully allocated the suit property by the Government of Kenya hence entitled to protection under article 40 of the Constitution of Kenya and section 26 of the Land Registration Act 2012.
10. By their defence to counterclaim the plaintiffs reiterated the contents of the plaint and denied that the defendant had any legitimate claim over the suit property. The plaintiffs pleaded that due process was followed in the allocation of the suit property and they denied all the particulars of fraud, illegality and trespass pleaded against them in the counter-claim and put the defendant to strict proof thereof. The plaintiffs further pleaded that no objection was raised to their acquisition of the suit property when relevant notices were published in the Kenya Gazette Notice of July 29, 2005 and the Standard Newspaper. They consequently prayed for dismissal of the counterclaim with costs.

D. The Issues for Determination

11. The court has noted that the parties did not file an agreed statement of issues for determination. Accordingly, the court shall proceed to frame the issues for determination in accordance with the law. Under order 15 rule 2 of the Civil Procedure Rules a court may frame issues from any of the following:
 - a. The allegations contained in the pleadings.
 - b. The contents of documents produced by the parties.
 - c. The statements made on oath by or on behalf of the parties.
12. The court has considered the pleadings, documents and evidence on record. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the suit property was reserved for a nursery school prior to its allocation to the plaintiffs.
 - b. Whether the suit property was regularly allocated and leased to the plaintiffs.
 - c. Whether the plaintiffs obtained registration of the suit property through fraud, illegality or misrepresentation.
 - d. Whether the plaintiffs are entitled to the reliefs sought in the plaint.
 - e. Whether the defendant is entitled to the reliefs sought in the counterclaim.

E. Analysis and Determination

(a) Whether the suit property was reserved for a nursery school prior to its allocation to the Plaintiffs

13. The court has considered the material and submissions on record on this issue. It is the defendant which pleaded that the suit property was at all material times reserved for a nursery school hence not available for allocation to the plaintiffs. So, what evidence was tendered by the defendants to support the reservation? The first was a part development plan which was listed as document No 1 in the defendant's list of documents but not attached to the list of documents. However, it was attached to the supporting affidavit of DW1 sworn on December 20, 2017. A perusal of the said plan dated July



22, 1980 and marked as approved development plan No 13 reveals in its legend that it is actually a plan for a “proposed site for PCEA Church” and not a reservation for a primary school. It does not indicate any reservation for a nursery school.

14. The second piece of evidence relied upon was a certificate of official search dated May 8, 2015 for the suit property which simply indicated that the proprietor of the land was the Government of Kenya. There is no indication in the certificate that it was reserved for a nursery school. The third piece of evidence was a letter dated June 4, 2014 from the District Land Registrar, Nyandarua to the Chairman of the NLC. The said letter indicated that the suit property was registered in the name of the government and recommended its allocation to Ol Joro Orok primary school since it had established a nursery school thereon. The registrar did not claim that there was any prior reservation of the suit property for a nursery school.
15. The court is thus far from satisfied that there is any credible evidence on record to demonstrate that the suit property was ever reserved for a nursery school by the Government of Kenya. None of the documents and exhibits produced by the defendant demonstrated the alleged reservation. It would, therefore, follow that the 1st issue is answered in the negative.

(b) Whether the Suit Property was Regularly Allocated and Leased to the Plaintiffs

16. The court has considered the evidence and submissions on record on this issue. The plaintiffs’ evidence was that it applied for allocation of the suit property which was adjacent to the church through the Council in 1990. There is evidence on record that the application was considered by the relevant committee of the council and approved vide Min WTPM 37/90 (i). There is also evidence on record to demonstrate that a part development plan was prepared, circulated and approved in the ordinary course of business. A formal letter of allotment was ultimately issued on December 5, 1996 to 1st defendant.
17. There is documentary evidence on record to demonstrate that the completion of the PDP for the suit property was published in the newspaper on or about April 8, 2005 as well as in the Kenya Gazette on July 29, 2005 inviting objections thereto within 60 days from the respective dates of publication. There is no evidence on record to demonstrate that the defendant or any government agency raised any objection to the proposed plan. The Ministry of Lands then proceeded to issue a lease and certificate of lease to the 1st defendant in 2016.
18. The court has not found any irregularities in the allocation of the suit property to the 1st defendant or in the preparation of the lease and certificate of lease. The material on record further indicates that when the defendant lodged a complaint with the NLC over the Plaintiffs’ acquisition of the suit property, the Nyandarua County Land Management Board heard all the concerned parties and made a determination dated September 20, 2015 holding that the 1st plaintiff had followed due process in its acquisition of the suit property and that the same should be retained by the plaintiffs.

(c) Whether the Plaintiffs Obtained Registration of the Suit Property Through Fraud, Illegality or Misrepresentation

19. This issue was raised by the defendant in its counterclaim. It was contended that the plaintiffs had obtained registration of the suit property through fraud, illegality, misrepresentation and ‘bad faith’. The defendant enumerated the following particulars of fraud, illegality and bad faith in paragraph 6 of the counterclaim:
 - a. Fraudulently acquiring title documents in respect of the suit property without due regard of the law.



- b. Misrepresenting facts that it was lawfully allocated.
 - c. Encroaching into a parcel of land that belongs to a public school.
 - d. Trespassing into the school compound.
 - e. Disturbing the peaceful enjoyment of the property by the school.
 - f. Disturbing the daily running of the school's activities by causing anxiety among pupils.
20. It is evident from the above list that items (c), (d), (e) and (f) cannot constitute particulars of fraud, illegality or misrepresentation in obtaining registration of the suit property by the plaintiffs. Particulars which can vitiate a title must be those acts which facilitated the improper registration or acquisition of title and not merely acts of trespass or disturbance.
21. It has been held that allegations of fraud and illegality are serious allegations which must not only be pleaded with particularity but also strictly proved to the required standard. In the case of *Peter Gicharu Njiriri v Richard Wanyonyi Sitati* [2019] eKLR the Court of Appeal held that:
- “(29) In *Kuria Kiarie & 2 Others –vs- Sammy Mogera* [2018] eKLR, this court addressing the issue of fraud stated as follows:
- ’25The law is clear and we take it from the case of *Vijay Marjaria –vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged 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 also distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.
- The same procedure goes for allegations of misrepresentation and illegality. See Order 2 rule 4 of the Civil Procedure Rules...”
22. The defendant's allegations of fraud and misrepresentation were predicated on the assumption that the suit property was already reserved for a nursery school at the time of its allocation to the 1st plaintiff. The allegation of illegality was based on the assumption that due process was not followed in the allocation of the suit property. As indicated earlier, there is no evidence on record to demonstrate the alleged reservation and the alleged fraud. There is equally no evidence to demonstrate that there was any misrepresentation made by the Plaintiffs in the acquisition of the suit property. The NLC has previously considered the dispute on the impugned allocation and it found no irregularities or improprieties in the allocation of the suit property. This court finds no evidence of fraud, illegality, misrepresentation or any irregularities in the Plaintiffs' acquisition of the suit property either. Accordingly, the 3rd issue is answered in the negative.

(d) Whether the Plaintiffs are Entitled to the Reliefs Sought in the Plaint

23. The court has found that the suit property was properly allocated and leased to the plaintiffs by the concerned government authorities. The court has also found that the 1st Plaintiff's registration was



not tainted with fraud, illegality or misrepresentation. Accordingly, the court is inclined to grant the Plaintiffs the various prayers sought in the plaint in order to vindicate their propriety rights over the suit property.

24. The court has considered the plaintiffs' prayer for general damages for trespass against the defendant. The court concurs with the plaintiffs' submissions that trespass is a tort which is actionable per se hence the aggrieved property owner does not have to demonstrate specific loss as a result of trespass. The court has, however, considered the fact that the defendant was acting in defence of perceived public rights over the suit property. The court has further considered that the defendant was also misled by the District Land Registrar, Nyandarua County into believing that the suit property was reserved for a nursery school. In the premises, the court is of the opinion that the defendant should be condemned to pay nominal damages of Kshs 10,000/= only.

(e) Whether the Defendant is Entitled to the Reliefs Sought in the Counterclaim

25. The court has found that the defendant has failed to demonstrate that the suit property was reserved for a nursery school at the time of its allocation to the 1st plaintiff. The court has further found that the suit property was regularly allocated to the 1st plaintiff and that there was no evidence that it obtained the suit property through fraud, illegality or misrepresentation. Accordingly, the defendant has failed to prove its counterclaim against the plaintiffs. In the premises, the defendant is not entitled to the reliefs sought or any one of them.

F. Conclusion and Disposal

26. The upshot of the foregoing is that the court finds and holds that the plaintiffs have proved their claim against the defendant to the required standard whereas the defendant has failed to prove its counterclaim against the plaintiffs to the required standard. Accordingly, the court makes the following orders for disposal of the suit and counterclaim:
- a. The plaintiffs' suit is hereby allowed in terms of prayers (a), (b) & (c) of the plaint dated October 3, 2016.
 - b. The 1st plaintiff is hereby awarded nominal damages of Kshs 10,000/= as nominal damages for trespass to land.
 - c. The defendant's counterclaim is hereby dismissed in its entirety.
 - d. Each party shall bear its own costs of the suit and counterclaim

It is so ordered.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 22ND DAY OF SEPTEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Gicheha for the Plaintiffs

Ms. Wanjeri for the Attorney General for the Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE

