

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Case 44 of 2002

PETER JOHN
ODINGAPLAINTIFF

VERSUS

CLEOPHAS OTIENO
OBURADEFENDANT

JUDGEMENT

On 24.4.2002, Peter John Odinga (the Plaintiff) filed in this court a suit by way of a Plaint against Cleophas Otiemo Obura (the Defendant) seeking eviction of the latter from the land, title No. S/Wanga/Bungasi/753 on the ground that the Defendant was a trespasser. It seems from the evidence tendered that on 13.10.89, the said land was transferred from the Defendant, Cleophas Otsieno Obura, to Peter John Odinga, the Plaintiff. In his statement of defence, the Defendant denied being a trespasser and contended that the land belonged to his father and that he was entitled to it. I ordered that his defence would be treated also as a counter-claim.

In his evidence before me on 25.1.05, the plaintiff conceded that the Defendant is his cousin as the Plaintiff's father and the Defendant's father were brothers. He stated that the defendant moved into the land in 1985 and has been there with his entire family since and that the latter occupies 3.5 acres while he, the plaintiff, occupies the rest of the land. But according to the Green Card of the suit land produced during the hearing, 3.5 acres is all the land comprised in the title to S/Wanga/Bungasi/753!

The Plaintiff had in Kakamega HCCC. No.27 of 1992(O.S) against the Defendant and Thomas Obura Watako sought a declaration that he, the Plaintiff, had acquired the title to the suit land No. S/Wanga/Bungasi/753 by way of adverse possession of more than 12 years. That suit was however on 3.3.98 dismissed for want of merit.

In December 1998, the Plaintiff filed in Kakamega SPM's Court Misc. Civil application No. 192 of 1998 against Thomas Obura Watako seeking an order for adoption as a judgement of the court the award made on 10-7-91 by the Mumias Land Disputes Tribunal. The adoption order was made on 6.10.99. The trial Magistrate also ordered the Executive Officer to sign the Transfer instrument to transfer the land to the Plaintiff. The instrument of Transfer dated 16.2.2000 was signed by the Executive Officer and the suit land transferred to the plaintiff on 11.4.2000 from the name of the Defendant who was not a party to the Kakamega SPM. Misc. application No. 192/98. At no time was Thomas Obura Watako the proprietor of the suit land. In the suit herein, the Plaintiff has sought judgement and eviction of the Defendant because he had become the registered proprietor of the land thus.

In his evidence, the Defendant stated that Thomas Obura Watako was his father and that he died in 1997 and he wondered why the Plaintiff had instituted Kakamega SPMC.Misc. Civil Application No. 192/98 against his deceased father when he the Defendant, was the registered owner at the time. He said he moved into the land in 1982 and that the Plaintiff was his relative.

I have carefully considered the evidence of the Plaintiff, the Defendant, the land Registrar, Philip Munyoki, and the transfer and title documents relating to the suit land as well as the court proceedings and the history reflected therein in relation to the suit land and the parties.

The registration of the plaintiff as the proprietor of the suit land on 11.4.2000 was irregular. First, the order of Mumias Land Disputes Tribunal purporting to award the title of the suit land to the Plaintiff was made without jurisdiction on the said Tribunal's part and was null and void on that ground. At the time when that award was made by the said Land Disputes Tribunal on 10-7-91, the land was registered in the name of the Defendant who was not made a party to the proceedings in the said Land Disputes Tribunal and did not participate in the same. The said Tribunal therefore dealt with the dispute of the said land without involving its proprietor and purported to make a decision adverse to him. And it had no power to deal with or determine disputes relating to title to land. When the Plaintiff moved to the Snr. Principle magistrate's court in Misc. application No. 192 of 1998, seeking adoption of the award as a judgement of the court, he cited as the Respondent, Thomas Obura Watako. The latter was not the proprietor of the suit land and clearly the order to transfer the suit land from him to the plaintiff was preposterous and invalid.

The Executive Officer executed the transfer and unlawfully inserted the Defendant's name in the Transfer instead of the name of Thomas Obura Watako who was the Respondent in Kakamega Senior Principle Magistrate's Civil Application No. 192 of 1998. He did not execute the Transfer of the suit land on behalf of the proprietor, who is the Defendant, Cleophas Otieno Obura. The latter was not privy to the proceedings. The transfer was a nullity. The fact that the Plaintiff had the document of title in his hand did not entitle him to the suit land nor could it legitimately vest the title to the suit land in his name. The land Registrar acted illegally and was mischievous in inserting the name of the Defendant in the Transfer instrument.

I am satisfied that the Plaintiff is not entitled to the order he seeks. It is my finding that the award of the Mumias Land Disputes Tribunal dated 10.7.91 seeking to transfer the land from a non-owner (Thomas Obura Watako) to the Plaintiff was a nullity as the said Tribunal had no jurisdiction to deal with an issue of title to land as it did. The order by the District Magistrate II made on 6.10.99 purporting to adopt the said award as a judgement of the court was irregular and improper as the person (Thomas Obura Watako) whom the land was purportedly being transferred from was not the proprietor thereof and in any case the award was null and void for want of jurisdiction.

The Transfer instrument signed by the Executive Officer pursuant to the said Order was of no effect. I hereby declare the said award, the order adopting it, and the Transfer dated 16/2/00 null and void. I hereby cancel the said Transfer dated 16.2.00) purporting to transfer the suit land No.S/Wanga/Bungasi/753 to Peter John Odinga. I order that the name of the Defendant Cleophas Otsieno Obura be restored immediately as the proprietor of the land title No.S/Wanga/Bungasi/753. I further order that entries numbers three (3) and four (4) in part B of the Proprietorship Section of the Register of the said land (No. S/Wanga/Bungasi/753) be cancelled forthwith.

In the result, the Plaintiff's suit fails and is dismissed. The Defendant's counter claim succeeds. There shall be no order as to costs.

Dated at Kakamega this 17th day of February, 2006.

G. B. M. KARIUKI

JUDGE