



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 3 OF 2019

(FORMERLY CIVIL SUIT NO. 170 OF 2010)

KISHOR DAYALJI.....PLAINTIFF

NILESH DAYALJI.....PLAINTIFF

VERSUS

KISUMU MUNICIPAL COUNCIL.....DEFENDANT

JUDGMENT

Kishor K. L. Dayelji and Nilash Dayelji hereinafter referred to as the Plaintiffs have sued the Kisumu Municipality Council claiming that they have at all material times been the registered proprietors of a Parcel of Land known as KISUMU MUNICIPALITY/BLOCK 9/126, which has since been subdivided into two portions known as KISUMU MUNICIPALITY/BLOCK 9/447 and 448 respectively pending issuance of the certificates of lease.

On 14th September 1999, the Defendant approached the plaintiffs to be allowed to temporarily use their parcel of land known as KISUMU MUNICIPALITY/BLOCK 9/126 as a temporary Bus Park, pending the renovation of the current Main Bus Park in Kisumu.

That on the said date, 14th September 1999, the plaintiffs and the Defendant held an exploratory meeting at the District Commissioner's Office Kisumu where it was agreed that both sides should put their respective positions in writing.

That by letter dated 14th September 1999, from the Defendant to the Plaintiff, the Defendant formally wrote to the Plaintiffs requesting the Plaintiffs inter-alia, to be allowed to temporarily use the Plaintiffs aforementioned parcel of land for a maximum period of five (5) months as a Bus Park, as they renovated the Current Main Bus Park.

That the Defendant further confirmed in the said letter dated 14th September 1999, that on completion of the aforementioned renovation work the area and or parcel of land shall be vacated under the supervision of the Defendant and the Defendant to ensure that area or parcel of land shall be left ready for the Plaintiffs' occupation and further ensuring that any missing survey beacons are appropriately restored.

The Plaintiffs upon receipt of the aforementioned letter, wrote back to the Defendant vide a letter dated 6th October 1999 through their then Advocates, M/s. Kohli, Patel & Raichura Advocates, agreeing to allow the Defendant temporary use of a portion of the plot and or parcel of land aforementioned and on the condition that a trench of two (2) feet deep be dug around the boundary of the portion of the plot not

to be used and strictly to use the plot or parcel of land temporarily for a period of only five (5) months and failure to vacate the same after the agreed five (5) months then rent of Kenya Shillings One hundred Thousand (Ksh. 100,000/=) only per month shall be charged and payable.

The Plaintiffs further gave a condition that if the aforementioned conditions were not agreeable, then the Defendant should not enter not the said plot and or parcel of land.

The Plaintiffs do aver that the Defendant failed and or refused to reply to the Plaintiffs' offer letter aforementioned, refusing and or accepting the above mentioned conditions but instead decided to forcefully, illegally and unlawfully enter the said plot namely KISUMU MUNICIPALITY/BLOCK 9/126, without the express consent of the Plaintiffs thereby creating an illegality and unlawful occupation of the said plot and or parcel of land, which is private property.

The Plaintiffs further aver that upon completion of the renovation of the current Main Bus Park, the Defendants did not and or failed to actually vacate the plot and or parcel of land and instead started illegally and unlawfully using the Plaintiffs plot and or parcel of land which is private property as a dumping site which situation is still obtaining to date.

The Plaintiffs aver that the Defendant's forceful entry into the Plaintiffs private property aforementioned and the Defendant's continued stay and use of the said private property as a dumping site is unlawful, illegal and unconstitutional as the same amounts to a forceful appropriation of land and or private property without due and or adequate compensation.

The Plaintiffs claim to have suffered loss and damage and prays for compensations. They further pray for:

- a) A permanent injunction against the Defendant, its servants or agents from dumping waste matter in the Plaintiffs' plot number KISUMU MUNICIPLAITY BLOCK 9/126.
- b) A declaration that the Defendants are in an unlawful occupation of private land and or property.
- c) A declaration that the Defendant's forceful entry and or continued unlawful use and occupation of the Plaintiffs' land and or property is unconstitutional.
- d) A declaration that the Plaintiffs are entitled to mesne profits at the current market rates from the date of occupation to the date of vacating the aforesaid plot and or parcel of land and the said mesne profits be assessed by this court.
- e) An order of eviction of the Defendant from the Plaintiffs' private property within twenty-one (21) days of the judgment of this court.
- f) An order that the Defendant do restore the Plaintiffs' private property to the same standards or state it was in prior to the illegal and unlawful occupation of the said plot or parcel of land.
- g) An order that the Defendant do pay exemplary damages to the Plaintiffs.
- h) Costs of this suit.
- i) Interest on (d), (g) and (h) above at Court rates from the date of filing till payment in full.
- j) Any other or further relief that this Honourable Court may deem just and fair to grant.

The Defendant filed defence denying that the property belonged to the plaintiff and that the registration in the names of the plaintiffs was fraudulently and without knowledge of the defendant.

The particulars of fraud are that the plaintiffs obtained registration of the property without any council resolution approving the allotment to the plaintiffs without any allotment letter.

The Defendant denies the contents of paragraph 4 of the Plaintiff that on 14th September 1999 the Defendant approached the Plaintiffs to be allowed to temporarily use the Plaintiffs' parcel of land known as KISUMU MUNICIPALITY/BLOCK 9/126 as temporary Bus Park in Kisumu Town.

The Defendant denies that on the aforementioned date, 14.09.1999 the Plaintiffs held an exploratory meeting at the District Commissioner's office Kisumu with them whereat it was agreed that both sides should put their respective positions in writing.

The Defendant denies that by letter dated 14.09.1999, from themselves to the Plaintiffs that they formally wrote to the Plaintiff's requesting the Plaintiffs inter-alia, to be allowed to temporarily use the Plaintiff's aforementioned parcel of land for a maximum period of five (5) months as a Bus Park, as they renovated the current main Bus Park.

The defendant denies that they further confirmed in the said letter dated 14.09.1999 that on completion of the aforementioned renovations work in the area and/or parcel of land shall be vacated under the supervision of the Defendant and the Defendant to ensure that area or parcel of land shall be left ready for the Plaintiffs occupation and further ensuring that missing survey beacons are appropriately restored

The Defendant denies that the Plaintiffs upon receipt of the aforementioned letter, wrote back to the Defendant vide a letter dated 6th October 1999 through their then advocates, M/s Kholi Patel & Raichura Advocates, agreeing to allow the Defendant temporarily use a portion of the plot and/or parcel of land aforementioned and on the condition that a trench of two (2) feet deep be dug around the boundary of the portion of the plot not to be used and strictly to use the plot or parcel of land temporarily for a period of only five (5) months and a failure to vacate the same after the agreed 5 months then rent of Kshs 100,000/= (Kenya Shillings One Hundred Thousand Only) per month shall be charged and payable. Strict proof shall be demanded from the Defendant thereof.

The defendant further denies that the Plaintiff further gave a condition that if the aforementioned conditions were not agreeable, then the Defendant should not enter into the said plot and/or parcel of land.

The Defendant denies having failed and/or refused to reply to the alleged plaintiffs offer letter aforementioned, refusing and/or accepting the above mentioned conditions.

In further response to paragraph 10 the Defendant denies entering the said plot namely KISUMU MUNICIPALITY/BLOCK 9/126 forcefully, illegally, without express consent of the Plaintiff's thereby creating an illegality and unlawful occupation of the said plot and/or parcel of land which is alleged to be private property. The Defendant shall demand the strictest proof from the Plaintiffs on this allegation.

The Defendant denies the averment of paragraphs 11 by the Plaintiffs that upon completion of the renovation of the current main Bus Park, the Defendant's did not and/or failed to actually vacate the plot and or parcel of land and instead started illegally and unlawfully using the Plaintiffs plot and/or parcel of land which is alleged to be private property as a dumping site which situation is still obtaining to date.

The Defendant denies the contents of paragraph 13 of the Plaintiff that the Plaintiffs claim against the Defendant is for an order of eviction from the said private property, mesne profits, and exemplary damages for unlawful occupation and use of private property.

The Defendant filed a Counter-Claim alleging that until 1992 it was the registered owner of property known as KISUMU MUNICIPALITY/BLOCK 9/126 and the same was and is still used as a dumpsite by the Defendant.

The Defendant avers that the Plaintiffs then without the knowledge and/or authority of the Defendant fraudulently secured the ownership of the said property depriving the Defendant of the use thereof. The defendant reiterates that the Plaintiffs obtained the land fraudulently. The Defendant's claim against the Plaintiffs is an order for revocation of the certificate of lease held by the plaintiffs, mesne profits and exemplary damages for conversion of public property.

The defendant claims that on or about the 14th day of September 1999, the defendant on mistaken beliefs that the Plaintiffs were lawfully registered as owners of the said property sought permissions to use the same as a temporary bus park pending the renovation of the current main Bus Park in Kisumu Town.

The Defendant was however suspicious of the legality of certificate of lease held by the Defendant and opted not to consent to conditions given by the Plaintiffs through tier letter dated 6th October 1999 requiring the Defendant to dig a trench around the boundary of the portion not to be used and strictly use the property temporarily for a period of only five (5) months and failure to vacate after the said period the Defendant to pay rent of Kshs. 100,000/= per month to the Plaintiff but instead carry out an investigation.

The Defendant avers that it was until 5th November 2010 when the Defendants received a letter dated 04.11.2010 from KACC stating that the issue of acquisition of the said property alongside other properties was a subject of investigation by KACC to ascertain how the same was acquired.

The Defendant further states that upon receipt of the said letter the Defendant intensified its investigation and its suspicion was confirmed that the Plaintiffs had secured registration of the said property without any Council Resolutions supporting the allotment which is a mandatory procedure and neither was a letter of allotment issued to them transferring interests thereof to them.

The defendant prays for:

- a) An order of revocation revoking the Certificate of lease issued to and held by the Plaintiffs on the said property.**
- b) Mesne profits at current market rates from the date of issuance of the certificate of lease upon the plaintiff till the date of the Defendant's entry into the said parcel of land and exemplary damages for fraudulent misrepresentation.**
- c) Costs of this suit and interest.**

In reply to defence and counter-claim, the plaintiffs deny any act of fraud and puts the defendant to strict proof thereof. The Plaintiffs claim to be innocent purchasers for value without notice of any fraud. They purchased the property in a public auction. The plaintiff denies that the defendant was ever the registered owner of the suit property.

When the matter came for hearing, the 1st Plaintiff testifies that they bought the suit land in a public auction. He has the certificate of lease for the property, given on 26/6/2000. The plaintiffs produced the documents in the of documents as PEX 1 to PEX10 and prayed for Judgment.

On cross examination by Mr. Ragot learned counsel for the defendant, he states that he bought the land in an auction conducted by Barclays Bank. There was advertisement for sale but he did not have the document for advertisement. The auction was on behalf of Post Bank. He does not have transfer by chargee. The transaction was done by his lawyer.

The land belongs to the Government of Kenya but he is a lessee for 99 years. The land is empty and fenced.

The Defendant did not call nay witness but it was agreed by consent that the Replying affidavit of Daniel S. Nkere filed on 21/2/2011 sworn on 21/2/2011 together with the two letters attached to it dated 4/11/2020 from K.A..C.C and response dated 22/11/2020 be marked as exhibits Dex 1 and Dex2 and the witness statement filed on the 21/2/2011 be deemed as evidence in chief.

In the witness statement, the Defendant through Daniel S. Nkere states that until the year 1992 property known as Kisumu municipality/Block 9/126 was in the name of the Defendant and was used as a dumpsite.

The plaintiffs then fraudulently secured letters of allotment and were registered as proprietors of the said property without the knowledge and authority of the council. It is a mandatory requirement that before an allotment and/or registration of one as a proprietor of a property within the Municipality there should be a council resolution in support thereof and a letter of allotment issued transferring interests thereon to the party acquiring proprietorship. This procedure was not followed in acquisition of the property herein.

However, since the plaintiffs had fraudulently managed to acquire the said property and had a certificate of lease issued to them, the unsuspecting defendant mistakenly believed that the Plaintiffs were lawful proprietors of the said property. Based on the said mistaken belief, the Defendant went ahead and sought the Plaintiffs permission to sue the property as a temporary Bus Park since the current Bus Park was under construction.

When the Defendant suspected that the registration by the Plaintiffs as proprietors of the said property might have been fraudulent, it chose not to vacate the said property even upon the expiry of the agreed period of five months but to revert it back to its original function as a dumpsite while it carries on investigation.

The Plaintiffs prepared a development plan and the same was gazetted in the Kenya Notice No. 4364 of 29.06.01 and the Defendant approved the same because at that time it had not gathered sufficient evidence in regard to the suspected fraud hence any objection and/or disapproval of the said development plan could not be justified at that time.

On the 5th day of November 2010, the Defendant received a letter dated 04.11.2010 from KACC stating that the said property alongside other properties were subject of an investigation by KACC and requiring the Defendant to furnish them with details of acquisition and proprietorship of the said property. Upon the receipt of the said letter, the Defendant intensified its investigation and found out that the Plaintiffs allotment of the said property was not supported by council resolutions and neither was a letter of allotment issued to them.

The Plaintiffs therefore acquired the said property fraudulently, the same being a public property and in the name of the Defendant herein.

In the letter dated 4/11/2020 the KACC wrote to the Town Clerk Municipal Council of Kisumu requesting for information on the suit property on the 22/11/2020.

The then Town Clerk Daniel S. Nkere wrote to the KACC stating that until the year 1992, the properties were in the name of the Council and were/are still used by the Council as dumpsite.

Block 9/133 is currently registered in the name of Dominion farms while Block 9/126 is registered in the name of Kishor Davalji & N. Davalji. The allotment/registration was not supported by Council resolutions; neither was any letter issued to the allottees transferring interests thereon to them.

In the year 2006, Dominion Farms Ltd filed a suit against the Council claiming proprietary interest on Block 9/133 vide Kisumu HCC No. 27 of 2006, which suit is yet to be decided.

The council has however treated these plots as public utilities acquired fraudulently and the properties are in fact serving as Council's dumpsite.

The defence case was closed and submissions filed.

I have considered the evidence on record and do find that the plaintiff has proved that he has title to the property. They produced the certificate of lease registered on 26/6/2000 in the names of Kishor Deyalji and Nilash Deyalji. The nature of title is leasehold for a term of 99 years from 1/2/1991.

The plaintiffs have proved that the property belonged to the Postbank credit limited (in liquidation) and that the same was sold to the plaintiff in a public auction in 1998 and by letter dated 16th July 1998, the

liquidation agent of the Postbank Credit Ltd (In Liquidation) agreed to pay land rent and rates due, if not paid by the debtor or the purchasers who were the plaintiffs were to pay and the same was to be subtracted from the purchase price

This is clear evidence that the plaintiffs purchased the property in an auction. The letter dated 23rd June 1999 from Kohli Patel Raichura to Kipkenda &co advocates and copied to the plaintiffs clearly indicate that the plaintiffs paid the latter ksh 165000 the balance of the purchase price. They were later issued with the certificate of lease.

On the 14th of September 1999, the Defendant wrote to the Plaintiff requesting for temporary use of the plot no. Block 9/126. The defendant wrote as follows:

14 September 1999

Mr. Nilesh Dayaiji

Mr. Kishor Dayalji

P.O. Box 442

KISUMU

Dear Sir,

RE: TEMPORARY USE OF YOUR PLOT NO. BLOCK 9/126

Following our discussion at the District Commissioner's office on 14th September, 1999 concerning the above subject, we wish to confirm that:

- 1) The use of the plot shall be a temporary Bus Park as a result of the renovation of the Bus Park and the period shall be a maximum of five (5) months.**
- 2) There shall be some temporary structures to be used for sale of items to be travellers as found in the Bus Park. These structures are also being relocated from the same current Bus Park.**
- 3) On completion of the renovation work, the area shall be vacated by both the buses and the traders/Bus Park vendors. This exercise shall be carried out under our supervision.**
- 4) We shall ensure that at the end of the exercise, the area shall be left ready for your occupation and such items as survey beacons shall be restored if any shall be found to be missing.**

Should there be any issue requiring clarification, please call on me at any convenient time.

Yours faithfully

WYCLIFFE OGALLO

TOWN CLERK

The Plaintiffs responded as follows:

The Town Clerk

Kisumu Municipality

KISUMU

Dear Sir,

RE: TEMPORARY

Your letter dated 14th September 1999 addressed to our client Mr. Nilsash Daaiji and Nishor Dayalji has been placed to us with instructions to reply thereto as follows:

Our clients have agreed to allow you to use their plot except the space marked in red on the enclosed plan.

The condition for allowing to use portion of the plan are as follows:-

(1) A trench two feet deep shall be dug around the boundary of the portion of the plot which is not to be used.

(2) The use of the portion of plot is temporary for a period of five months from the Date of your letter and if the same is not vacated from the date hereof rent at the rate of shs. 100,000/= per month payable after five months.

If you are not agreeable to the above terms, please do not enter into the plot.

Yours faithfully,

For KOHLI, PATEL, & RAICHURA

CC: The District Commissioner

Kisumu District

P.O. Box 1921

KISUMU

H.W. the Mayor

Ag. Town Engineer

Ag. Director Housing

Development

KISUMU

The Defendants were allowed to enter the plot but did not vacate as agreed and did not pay the rent. This prompted the plaintiffs to file this case in the court. The defendants claim that the plot was obtained fraudulently. It has been stated time and again by this court that whoever alleges fraud in a civil case has to prove the same.

The burden of proof is on the person alleging fraud and the standard of proof is higher than the normal standard in Civil Cases.

The law is clear and we take it from the case of Vijay Morjaria 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 be stated on the face of the pleading. The acts alleged to be fraudulent 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

As regards the standard of proof, the court of Appeal in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

In this case, the defendant alleges that the land belonged to the Municipal Council of Kisumu. There are no records produced to this court to demonstrate that the land belonged to the Defendant. There is no evidence of forgery of the title documents

The upshot of the above is that the plaintiffs have discharged their burden of proof that they are the registered owners of the suit property. However, the defendant has not discharged her burden of proof that the property belonged to the municipal council of Kisumu and that the same was obtained fraudulently. Records indicate that the property belonged to the government of Kenya as the lessor and the Plaintiffs as lessee.

There being no evidence of fraud, the defendant’s counter claim is therefore dismissed with costs. The Plaintiffs succeeds and the court grants

- a) A permanent injunction against the Defendant, its servants or agents from dumping waste matter in the Plaintiffs’ plot number KISUMU MUNICIPLAITY BLOCK 9/126.**
- b) A declaration that the Defendants are in an unlawful occupation of private land and or property.**
- c) A declaration that the Defendant’s forceful entry and or continued unlawful use and occupation of the Plaintiffs’ land and or property is unconstitutional.**

The plaintiff has not proved the claim for mesne profits at the current market rates from the date of occupation to the date of vacating the aforesaid plot and or parcel of land and the same is not allowed. Likewise, the prayer for damages does not succeed as the plaintiff has not availed the evidence to prove the loss sustained. Costs of the suit to the Plaintiffs.

DATED AT KISUMU THIS 18th DAY OF MARCH, 2021

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 15th March 2019.

ANTONY OMBWAYO

JUDGE