



**Matata Oyondi Nyakenya v Moseti & 4 others (Environment & Land
Case 781 of 2016) [2024] KEELC 1206 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1206 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 781 OF 2016**

M SILA, J

MARCH 6, 2024

BETWEEN

MATATA OYONDI NYAKENYA PLAINTIFF

AND

SAMWEL MATAYO MOSETI 1ST DEFENDANT

ELGON VIEW COLLEGE LIMITED 2ND DEFENDANT

THE LAND REGISTRAR-KISII 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

MICHAEL NYAMWAMU ONYANCHA 5TH DEFENDANT

RULING

(Suit by plaintiff asserting that he is the genuine owner of the suit property and that a parallel register was created so as to purport to give title to the 1st defendant; 1st defendant disposing of his title to the 2nd defendant; at the time of filing suit title with the 2nd defendant; court issuing an order of status quo for the preservation of the property pending hearing of the suit; despite the court order title of the 2nd defendant transferred to the 5th defendant and the 5th defendant proceeding to develop the property; suit proceeding for hearing with only the plaintiff testifying as the defendants absented themselves during the hearing; court persuaded that the plaintiff has proved that he is the genuine owner of the suit property and court nullifying the titles of the 1st, 2nd and 5th defendants; exemplary damages; whether exemplary damages awardable in the case at hand; court persuaded that exemplary damages ought to be awarded to obliterate any benefit that one obtains through violation of a court order; inter alia exemplary damages awarded equivalent to the disclosed selling price as against the 2nd defendant and for the estimated rent collected by the 5th defendant as the sale and developments were made in contravention of the status quo orders)



A. Introduction And Pleadings

1. This suit was commenced through a plaint filed on 23 March 2012 initially against the 1st to 4th defendants. The plaintiff pleaded that he was the registered proprietor of the leasehold title comprising the land parcel Kisii Municipality/Block 1/602 which lease is for 99 years with effect from 1 June 1986. He pleaded that on 23 November 2010, he discovered that his name had been deleted from the register, and instead, the names of the 1st and 2nd defendants inserted in his place. On 29 March 2018, the plaintiff amended his plaint to include the 5th defendant, one Michael Nyamwamu Onyancha. This is because on 22 May 2015, while the case was still pending hearing, and despite an order of status quo having been issued, the 2nd defendant, Elgon View College Limited, transferred her title to the 5th defendant. It is the position of the plaintiff that the titles of the 1st, 2nd and 5th defendants are fraudulent and that it is him who holds good title to the suit land. In his amended plaint, the plaintiff seeks the following orders :-
 - a. A declaration that the plaintiff is the sole and exclusive owner of the leasehold in respect of LR No. Kisii Municipality/Block I/602;
 - b. Order directing the 3rd defendant to deregister the name of the 1st, 2nd and 5th defendants from the register and reinstate the plaintiff's name in the register held at the District sub registry to accord with the records held at the Commissioner of Lands office (now National Land Commission or Ministry of Lands Nairobi).
 - c. An order directing the Land Registrar Kisii County to expunge and delete all trail of entries procured by the defendants which purports to have conferred any rights or interests over the suit property to the defendants.
 - d. Order of permanent injunction restraining the defendants herein, their agents, and/or servants, either jointly and severally from in whatsoever manner interfering with the plaintiff's occupation and ownership over the suit land.
 - e. An order for exemplary damages for unlawful and illegal acts of the defendants.
 - f. Costs of the suit and interest.
 - g. Any further relief that the court may deem fit and expedient to grant.
2. The 1st defendant appointed counsel and filed a defence on 24 May 2012. He pleaded that it is the documents of title of the plaintiff that were fraudulently obtained, inter alia, that the plaintiff forged a lease and certificate of lease and created a parallel register for the suit land. He averred that he holds a Lease and Certificate of Lease in his name conferring exclusive ownership to him.
3. The 2nd defendant also appointed counsel and filed a defence on 26 April 2012. She pleaded that she is a bona fide purchaser without notice and that she has good title to the suit land. She also pleaded that if the plaintiff ever held good title the same has been extinguished by operation of law under the [*Limitation of Actions Act*](#) and the suit is time barred. She availed documents to show that she purchased the suit land from the 1st defendant and obtained registration in her name on 15 September 2010.
4. The Attorney General filed defence for the 3rd and 4th defendants on 21 May 2012. They averred that the suit land was allocated to the 1st defendant for a term of 99 years with effect from 1 June 1986; that a Lease in favour of the 1st defendant was presented on 24 September 1992, and the 1st defendant was subsequently issued with a Certificate of Lease in his name on the same day; that on 13 September



2010, the 1st defendant transferred his interest to the 2nd defendant who was issued with a Certificate of Lease on 15 September 2010. It was denied that the plaintiff holds any title to the suit land.

5. I have mentioned that the 5th defendant was joined in the suit later and he filed his defence on 17 May 2018. He pleaded that the 1st defendant has been the holder of the genuine title to the suit land. He pleaded that he purchased the title from the 2nd defendant in 2015 and started constructing a permanent structure which was ongoing at the time that he filed defence. He asserted that he is the one holding good title to the suit land.

B. Evidence of The Parties

6. The plaintiff testified and produced various documents to demonstrate that it was him with good title to the land. He testified that he applied for the plot from the Kisii Municipal Council and he got an allotment letter dated 6 June 1986 for an unsurveyed Plot No. 57 . He testified that he made the payments outlined in the allotment letter and he was issued with a Lease. The Lease is dated 25 August 1993. He was subsequently issued with a Certificate of Lease on 26 August 1993. He testified that after receiving his title he fenced the property. In the year 2010, he got information that some people had been seen on the suit property. He conducted an official search and was surprised to find the property registered in the name of the 2nd defendant after transfer from the 1st defendant. He wrote a complaint to the Commissioner of Lands who wrote back to him affirming that he was the genuine owner. He also reported to the Kisii Police Station. It was his view that the register does not reflect the correct position. He testified that as at 2010 there was no construction but now there is a four-storey building constructed in the year 2015 when he was away in India for treatment. He continued to aver that the transfer of the property to the 5th defendant was in violation of orders of status quo.
7. Cross-examined, he testified that some people removed (his) documents from the Land Registry though he had no evidence of this. He did not have a search and White Card (leasehold register) to show that he was ever registered as owner. He was of opinion that the White Card in the registry (bearing the name of the 1st , 2nd and 5th defendants) is fake. Nobody was arrested despite him reporting to the police. He acknowledged that he did not produce receipts to show that he paid for the allotment letter. He affirmed that the allotment letter required him to avail building plans within 6 months which he claimed he did though he did not develop the property.
8. With the above evidence the plaintiff closed his case. The defendants did not appear on 19 September 2023 when the matter was fixed for further and defence hearing. I did not find merit in their applications for adjournment and declined to adjourn. No application was ever filed subsequently for this order to be set aside. Thus, no evidence was ever offered by the defendants.
9. I invited counsel to file submissions but only counsel for the plaintiff and counsel for the 1st defendant and 5th defendants filed submissions. I have taken these into account before arriving at my decision.

C. Analysis and Disposition

10. The case of the plaintiff is that it was him who was allocated the suit land and he was issued with title. The defendants filed defences contending that the plaintiff's title is the one which is fraudulent and that it is them who hold the genuine title. However, they offered no evidence to support the genuineness of their title. I have gone through the documents exhibited by the plaintiff. He produced a letter of allotment dated 6 June 1986 for an unsurveyed residential Plot No. 57 – Kisii Municipality. He also produced a letter dated 28 January 2011 from the Commissioner of Lands addressed to the District Land Registrar, Kisii. That letter was in response to the plaintiff's complaint that other persons have been registered as proprietors of the suit property. The letter states that it is the plaintiff who is the



genuine owner and that he was allocated the plot in 1986 after making all the required payments and a Lease forwarded for registration vide a letter Ref No. 117243/12 of 30 June 1993. The plaintiff did display the Lease instrument which shows that it was registered on 25 August 1993. He also produced the Certificate of Lease which shows that it was issued on 26 August 1993. I see nothing wrong with the documents of the plaintiff which appear to have support from the entity that was in charge of issuing titles then, that is the office of the Commissioner of Lands. His documents must have been in the Lands office especially given the contents of the letter by the Commissioner of Lands dated 28 January 2011, but they mysteriously disappeared.

11. The defendants did not feel brave enough to attend court to defend their purported title. I am particularly disturbed by the conduct of the 2nd defendant in transferring title to the 5th defendant. On 7 February 2013, in the presence of counsel who held brief for counsel on record for the 2nd defendant, the court issued an order of status quo and even explicitly recorded that ‘for the avoidance of doubt the suit property shall not be transferred or alienated.’ In violation of this order of status quo, the 2nd defendant proceeded to transfer the suit property to the 5th defendant on 22 May 2015 when the suit was still ongoing. In further violation of the order of status quo, the 5th defendant proceeded to construct on the suit property. The 2nd and 5th defendants behaved with impunity as if they are above the law. It demonstrates bad faith on their part and a need to cash in on the property before the court makes judgment.
12. The only evidence that I have is that of the plaintiff and it shows that it was him who was issued with title to the suit property. Without the defendants presenting their title for scrutiny and presenting themselves for purposes of being questioned on their title, I am afraid that they have failed to dispel the contention of the plaintiff that it is the plaintiff’s title which is the good title. I am in fact persuaded that the plaintiff has adduced sufficient evidence to demonstrate that it is him (plaintiff) who holds the genuine title to the suit property.
13. It was claimed in the submissions of counsel for the 5th defendant that the plaintiff did not produce any White Card in his name or a search. Well, part of the plaintiff’s case is that his documents were plucked out, and the fact that he had none of these documents cannot be held against him. I have indeed held that he must have had his documents in the Lands Registry and that they mysteriously disappeared.
14. The long and short of it is that I am of the persuasion that the plaintiff has proved his case on a balance of probabilities. I declare that it is him (plaintiff) who holds the genuine title to the suit property. I order the Land Registrar, Kisii, to expunge the register that shows that the 1st, 2nd and 5th defendants hold title to the suit land. I further order the Land Registrar, Kisii, to construct a register showing the plaintiff as the first proprietor of the suit land in accordance with the documents of title that he holds. The result is that as owner of the suit land, the plaintiff is at liberty to take possession of the suit property forthwith in the state that it is. If he wishes to have the property in the manner that it was at the time of filing suit, he should issue a 14 day notice to the 5th defendant to cart away his development at the cost of the 5th defendant, otherwise if no such notice is issued, the plaintiff can take and keep possession of the suit property, as it is, following the principle quic quid plantatur solo solo cedit, that is, whatever is affixed to the soil belongs to the soil. In other words, the developments made on the land go with the land unless the plaintiff, as owner, demands otherwise as I have stated above.
15. I have declared that the 1st, 2nd and 5th defendants have no good title to the suit land, and I thus issue an order permanently restraining the defendants from entering, being upon, or in any way interfering with the suit land, from the time of this judgment.
16. I have little sympathy for the 5th defendant who got proprietorship in violation of a court order and proceeded to develop the land in further violation of the court order. He could have saved himself the



loss by simply abiding by the court order. If at all he feels that he was duped by the 2nd defendant to purchase the property he can try his luck in suing the 2nd defendant but as it has turned out he proceeded to develop on property that belongs to the plaintiff and in contravention of an order of court.

17. In his suit the plaintiff has asked for exemplary damages. In the case of *Rookes v Barnard* [1964] AC 1129, the House of Lords outlined the common law principle underpinning the award of exemplary damages. In his dictum, Devlin LJ stated as follows on the instances which will invite the award of exemplary damages :

“The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category,—I say this with particular reference to the facts of this case,—to oppressive action by private corporations or individuals... Cases in the second category are those in which the Defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff... This category is not confined to moneymaking in the strict sense. It extends to cases in which the Defendant is seeking to gain at the expense of the Plaintiff some object,— perhaps some property which he covets,—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay. To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are expressly authorised by statute.”

18. Thus, under the common law, the court may make an award of exemplary damages in these three categories of cases, that is :-

- (i) Oppressive, arbitrary or unconstitutional action by the servants of the Government;
- (ii) Where the defendant's conduct is calculated so that he can make profit for himself which may well exceed the compensation due to the plaintiff; and
- (iii) Where the same is expressly authorised by statute.

19. My view of *Rookes vs Barnard* is that it outlines the common law principle for the award of exemplary damages but I do not think that a court is incapable of expanding the categories in which exemplary damages are awardable for purposes of punishing the conduct of the defendant. I am of the persuasion that if the facts reveal conduct that is so repulsive and egregious, which conduct needs to be admonished in the strongest terms possible, then an award of exemplary damages may be made, as a statement that our social fabric ought not to be endangered by such conduct.

20. In our case, the actions of the defendants are disturbing. It would appear that the Land Registry created a parallel register to defeat the title of the plaintiff. This ought not to go unpunished and a statement needs to be made that our society cannot condone such activities. The parallel register prepared at the Lands Registry could not have been created without collusion by the 1st defendant. I will make an order in favour of the plaintiff for exemplary damages against the 1st and 3rd defendants jointly in the sum of Kshs. 1,000,000/= (one million) for tampering with the register.

21. I have repeatedly stated that the 2nd and 5th defendants acted in violation of the orders of this court. In fact, their conduct falls in the second category of cases outlined in the case of *Rookes vs Barnard*. Their conduct was calculated to make profit for themselves which would exceed any compensation due to the plaintiff. In the documents of the 5th defendant, it is mentioned that the 5th defendant purchased the property for Kshs. 1,600,000/=. The 2nd defendant, cannot be allowed to keep this money as he received it in violation of a court order. The only way to obliterate the profit that he gained by violating



a court order is to award exemplary damages to the plaintiff which is equivalent to this amount of Kshs. 1, 600,000/=. I will thus order the 2nd defendant to pay to the plaintiff exemplary damages in the sum of Kshs. 1, 600,000/=.

22. The 5th defendant was also in violation of a court order in proceeding to develop the property. He probably had in mind that he can still gain by receiving rent from the property while this case is ongoing and that he will still gain by keeping the rent even if he loses the case. It is such benefit that must be obliterated by an order of exemplary damages. It is not very clear to me how much the 5th defendant received from the properties but from the record I can see that he made a four storey apartment block. Even if I am to be completely conservative and say that he has been receiving Kshs. 10,000/= per floor, this would be Kshs. 40,000/= per month, and Kshs 480,000/= per year which I will round off to Kshs. 500,000/= per year. Since the year 2015 is 9 years and if I multiply by 9 years, which is 2015 to the time of this judgment, this will be Kshs. 4,500,000/=. The only way to pass the message that one cannot benefit by violating a court order is to make an order against the 5th defendant for payment of exemplary damages of Kshs. 4,500,000/= to the plaintiff. I proceed to make an order for the 5th defendant to pay exemplary damages to the plaintiff in the sum of Kshs. 4,500,000/=.
23. These awards of exemplary damages to attract interest from the date hereof till settlement in full.
24. The last order is on costs. The plaintiff shall have the costs of the suit jointly and/or severally against all the defendants.
25. Judgment accordingly.

DATED AND DELIVERED THIS 6 DAY OF MARCH 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in present of:

Plaintiff acting in person – Absent.

Ms. Bosire instructed by M/s. Bosire Gichana & Co. Advocates for the 1st defendant.

Mr. Momanyi instructed by M/s Anassi Momanyi & Co. Advocates for the 2nd defendant.

Ms. Opiyo, State Counsel, for the 3rd & 4th defendants.

Mr. Begi instructed by M/s Aboki Begi & Co. Advocates for the 5th defendant.

Court Assistant – David Ochieng.

