



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU

E & L CASE NO. 795 OF 2015

SEFANIA AKELO LALA

[Substituted by JULIUS OCHEING AKELO

vide Order made on 20th December, 2020].....**PLAINTIFF**

VERSUS

EZEKIEL OKINYO GOMBA.....**1ST DEFENDANT**

SILIBA OGADA IMBIRA.....**2ND DEFENDANT**

SAMUEL AKECH.....**3RD DEFENDANT**

JUDGMENT

1. **Sefania Akello Lala**, the Plaintiff, commenced this suit against **Okinyo Gomba**, **Silibia Ogada Imbira** and **Samwel Akech**, the defendants, through the Plaint dated 6th April, 2011, seeking for permanent injunction restraining them from trespassing, ploughing, planting sugarcane or in any other way interfering with her land **Kisumu Wawidhi II/962**, the suit land. He also prays for costs and interests. The Plaintiff avers that he is the owner of the suit land. That the Defendants trespassed onto the said land in January, 2011, ploughed it and planted sugarcane without his consent thereby causing him damage and loss.

2. The suit is opposed by the Defendants through their defence and counterclaim dated the 25th April, 2011. The Defendants aver that the suit land does not lawfully exist as it was created through the fraudulent transactions involving the Plaintiff, Fanuel Ongombe and the Land Registrar, when **Appeal Case No. 664 of 1985** involving the parent title parcel No. 593 Wawidhi A II, between their late father and Fanuel Ongombe, was pending. That unlike the Plaintiff, the Defendants reside on the suit land.

3. The counterclaim is between **Ezekiel Okinyo Gomba** as the Plaintiff and **Fanuel Ongombe** and **Sefania Akello Lala** as the Defendants. The Plaintiff avers that his late father's and the 1st Defendant's **Land Appeal No. 664 of 1985** to the Minister was pending when the 1st Defendant fraudulently subdivided the subject land parcel, Kisumu/Wawidhi A II/593 and Kisumu/Wawidhi A II/962 and others, despite the existence of a caution, and purported to sell it to the 2nd Defendant. The Plaintiff prays for a declaration that the sale and or transfer of Kisumu/Wawidhi A II/962, and the title deed issued thereof, are null and void. He also prays for special damages, general damages, costs and interests.

4. The counterclaim is opposed by Sefania Akello Lala, the 2nd Defendant and Plaintiff in the original suit, through his reply to the defence and defence to the counterclaim dated 3rd May, 2011.

5. The Plaintiff in the main suit who is also the 2nd Defendant in the counterclaim, testified as **PW1**. He told the Court that he bought the suit land, parcel Kisumu/Wawidhi A II/962, from one Fanuel Ongombe and was issued with a title deed. That the Defendants however, trespassed onto the land, ploughed it and planted sugarcane without his permission. That he had his advocate write to the Defendants to stop the trespass but they did not, hence necessitating this suit. He prayed for an order stopping the Defendants from trespassing onto the land and costs of the suit. During cross examination, PW1 stated that it is the 1st Defendant, who is the Plaintiff in the counterclaim, who has been cultivating on the suit land. Fanuel Ongombe Ogola testified as **PW2** that he had sold the suit land to PW1 and transferred it to him in 2002. That he had put the Plaintiff into possession of the suit land. That the Plaintiff later told him the Defendants had trespassed onto the land, and when he went there, he found it had been cultivated. During cross examination, PW2 testified that his father had given the Defendants' grandfather called Olango, a piece of land to farm. That the last-born son of Olango called Owino and himself had a dispute over a different parcel of land that went up to the Minister and he was victorious. That he thereafter subdivided the land into several parcels including the suit land. He denied knowledge of any caution having been filed against the suit land by Olango. That by the time he sold the suit land to the Plaintiff, the dispute between him and **Owino Olango** had been resolved in his favour before the Minister and the Court.

6. Ezekiel Okinyo Gomba, the 1st Defendant and Plaintiff in the counterclaim, testified as **DW1**. He testified that he resides on the land parcel Kisumu/Wawidhi A II/593 that is registered in the names of Fanuel Ongombe (**PW2**) and his late father named **Jackson Owino**. That he is not aware of that land being subdivided. He also stated that he does not know where land parcel Kisumu/Wawidhi A II/962 he is alleged to have trespassed onto is situated. That he is aware the case his late father Jackson Owino had with PW2 before the Minister over land parcel Kisumu/Wawidhi A II/593 is still pending and the Court should allow him to continue using the land. During cross examination, DW1 testified that the 2nd and 3rd Defendants are his mother and brother respectively, and he has authority to represent them. He admitted that they have been ploughing the land for their mother and that he has no claim over Kisumu/Wawidhi A II/962.

7. That after both sides closed their cases, on the 15th June 2017, the Court issued directions for filing and exchanging written submissions. The learned Counsel for the Plaintiff filed their written submissions dated the 2nd May, 2018 but none has been filed for the Defendants.

8. That the record shows that the Plaintiff passed on the 26th November, 2017 and **Julius Ochieng Akelo** moved the court through the Motion dated the 13th January, 2020 seeking for the revival of the abated suit and to be allowed to substitute the deceased plaintiff in this suit. That application was allowed on 14th December, 2020.

9. The following are the issues for the Court's determinations;

(a) Whether the Plaintiff was a bonafide purchaser for value and without knowledge of any defect in the title of Kisumu/Wawidhi A II/962, the suit land.

(b) Whether Plaintiff and the 1st Defendant in the counterclaim, plus the Land Registrar fraudulently and unlawfully subdivided land parcel Kisumu/Wawidhi A II/593 to create Kisumu/Wawidhi A II/962 and transfer it to the Plaintiff.

(c) Who pays the costs?

10. The Court has carefully considered the pleadings as summarized above, the testimonies by **PW1**, **PW2** and **DW1**, the learned Counsel's written submissions, the superior court's decision cited thereon and come to the following conclusions;

(a) That from the copy of the title deed for Kisumu/Wawidhi A II/962, the suit land, produced by the Plaintiff as exhibit, and copies of the green cards for Kisumu/Wawidhi A II/593 and 962 annexed to the 1st Defendant's affidavit sworn on 25th April, 2011, it is apparent the suit land is a subdivision from Kisumu/Wawidhi A II/593 that occurred on the 27th December, 2000. That the green card for Kisumu/Wawidhi A II/593 further shows that the parcel was first registered on the 3rd November, 1988 in the name of Fanuel Ongombe, who the Court takes to be the one who testified as **PW2**. That it further shows that one Jackson Owino Olango filed a Caution against the title claiming licensee's interest on the 21st May, 2006 that was subsequently removed by the District Land Registrar on the 24th August, 2009 reportedly on the basis of the Chief's letters dated 7th June, 1999 and 10th August, 1999. That it follows that contrary to the Defendants' claim, there was no Caution in force against the said parcel of land by the time it was subdivided on 27th December, 2000 to create Kisumu/Wawidhi A II/962, the suit land.

(b) That the green card for Kisumu/Wawidhi A II/962 confirms that the register was opened on the 27th December, 2000 in the name of Fanuel Ongombe. That it further shows that the land was registered in the name of Sefania Akelo Lala, the Plaintiff, on the 17th March, 2003 and by that date there was no caution or restriction registered against the title.

(c) That though the Defendants appear to challenge or doubt the existence of land parcel Kisumu/Wawidhi A II/962 through their pleadings and testimony of DW1, the testimonies of PW1 and PW2 leaves the Court with no doubt that the suit land does indeed exist. That evidence clearly shows that land parcel Kisumu/Wawidhi A II/962 came from Kisumu/Wawidhi A II/593 upon subdivision by the registered proprietor, PW2. That though the Defendants had through their pleadings and testimony of DW1 alleged that their late father's appeal to the Minister over Kisumu/Wawidhi A II/593 was still pending, there was no documentary evidence tendered in support. That in the absence of evidence to show that the transactions leading to the registration of Kisumu/Wawidhi A II/593 with PW2, its subsequent subdivision and transfer of one of the parcels thereof, being Kisumu/Wawidhi A II/962 to the Plaintiff, were fraudulent or unlawful, the 1st Defendant's counterclaim has no basis. The court further finds that the Plaintiff's acquisition and registration as proprietor of Kisumu/Wawidhi A II/962 has not been disputed by the previous owner who testified as **PW2**. That the Plaintiff was therefore a *bonafide* purchaser of the suit land for value and without any defect in its title.

(d) That the Plaintiff, as the registered proprietor of the suit land, is under **Section 26 of the Land Registration Act No. 3 of 2012** to be taken as the absolute and indefeasible owner of the said land subject to the encumbrances, easement, restrictions and conditions contained or endorsed thereon. That the Defendants' challenge of the Plaintiff's title has failed and they have no basis of interfering with his use of the suit land without his permission. That as DW1 confirmed in his testimony that they have been cultivating the land for their mother, that amounts to trespassing on the suit land as they had not obtained the Plaintiff's permission.

(e) That under **Section 27 of Laws of Kenya** costs should follow the events, and as the Plaintiff is successful in his claim, the Defendants should pay the Plaintiff costs in both the main suit and counterclaim.

11. That flowing from the foregoing, the Court finds and orders as follows;

(a) That the 1st Defendant has failed to prove his claim in the counterclaim and the same is dismissed with costs.

(b) That the Plaintiff has proved his claim against the Defendants on a balance of probabilities and judgment is entered for the

Plaintiff against the Defendants in terms of prayer **(b)** with costs and interest at Court's rates.

Orders accordingly.

Dated and signed at Eldoret this 10th day of March, 2021.

S. M. KIBUNJA

JUDGE

Delivered and signed this 30th day of April, 2021.

A. OMBWAYO

JUDGE