



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

LAND CASE NO. 11 OF 2014

JOSEPH OGOLA ASIAGO.....1ST PLAINTIFF

JOEL OUMA ASIAGO.....2ND PLAINTIFF

VERSUS

JOSEPH ABONGO APUDO.....1ST DEFENDANT

BARRACK OPIYO OMAMBE.....2ND DEFENDANT

JOHN OTIENO.....3RD DEFENDANT

JASON GEL KOTOLO.....4TH DEFENDANT

JUDGMENT

By a plaint dated 22nd January, 2014 the plaintiff's herein sued the defendants jointly and severally seeking for the following orders:

- a) An order for permanent injunction restraining the defendants either by themselves, their assigns, or as members of St. Jeremiah Holy Ghost Church of East Africa from entering, dealing in any way and or constructing on plot No.4777—WAWIDHI 'A' adjudicator section.
- b) Cost of the suit; and
- c) Interest on (b) above.

The Defendants filed a Statement of Defence dated 13th February, 2014 and stated that on 31st August, 2013 they deposited sand, ballast and murram on land parcel number 6231 Wawidhi "A" Adjudication section belonging to them and not on land parcel number 4777 Wawidhi "A" Adjudication and as such the Plaintiffs' claim should be dismissed with costs.

PLAINTIFFS' CASE

PW1 Joseph Ogola Asiago gave evidence and stated that his father had given Musanda Holy Ghost Church a place to put up a temporary church on his land but in 1984 the temporary structure came down after leadership wrangles.

PW1 further stated that he obtained a letter dated 6th November, 2013 from the Ministry of Lands confirming that the Plaintiffs are the proprietors of Plot Number 4777 Wawidhi "A" Adjudication Section which necessitated the filing of this suit against the defendants who conducted a funds drive on Plot Number 4777 Wawidhi "A" Adjudication Section and deposited building materials on the suit land with a view of building a church.

On re-examination PW 1 stated that he is not opposed to Musanda Holy Ghost Church using their land but that he has a problem with St. Jeremiah Holy Ghost Church using it.

PW2 Walter Wambogo Asiago testified and stated that Plot Number 4777 Wawidhi "A" Adjudication Section is not registered as it is in an adjudication area. That Musanda Holy Ghost Church was previously built on Ogola's land but it was destroyed by the floods that took place in 1984.

It was PW2's evidence that in 1985, the leaders of the church who were PW 2's uncles approached his father to request him to allow them to

construct a temporary church structure on Plot Number 4777 Wawidhi "A" Adjudication Section which structure is currently being used by St. Jeremiah Holy Ghost Church of East Africa.

PW2 stated that their father tried to engage the defendants to resolve the issue but they did not come to a solution hence the filing of this suit.

On cross examination, PW 2 stated that the Plaintiffs were opposed to the construction of a permanent church and confirmed that he was presented with a letter confirming that Plot Number 6231 Wawidhi "A" Adjudication Section is registered in the name of Musanda Holy Ghost Church which letter was questionable.

PW3 Benjamin Otieno Onduge a Land Adjudication and Settlement Officer holding the position of Assistant Director testified on behalf of the Plaintiffs and stated that in 2013 he was the District Land Adjudication and Settlement Officer Nyando and that he has the records of Wawidhi A area as it falls within Nyando Adjudication Area. He produced a consent for the filing of the instant claim dated 15th January, 2014 and a letter dated 6th November, 2013 confirming that the Plaintiffs are the lawful owners of Plot Number 4777 Wawidhi "A" Adjudication Section.

On cross examination PW 3 stated that L.T Ochieng was a Land Assistant Surveyor in Nyando Sub County or a Land Adjudication and Settlement Assistant at the Divisional Office at Ahero and that L T Ochieng had no authority to write a letter to confirm the ownership of land in an adjudication area. He stated further that although he had never been to Plot Number 4777 Wawidhi "A" Adjudication Section when a trespass report was filed, he sent an officer to the suit parcel herein

The plaintiffs' urged the court to allow the prayers in the plaint with costs.

DEFENDANTS' CASE

DW1 Jason Gas Kotolo testified on behalf of the Defendants' and stated that Musanda Church is located on Plot Number 4777 Wawidhi "A" Adjudication Section which is on Plot Number 6231 Wawidhi "A" Adjudication Section.

On cross examination, by counsel for the plaintiff, DW 1 stated that although the Land Adjudication Office had told them that the church was built on Plot Number 4777 Wawidhi "A" Adjudication Section, a Land Adjudication Officer called Ochieng issued the Defendants with a letter confirming that the Church is on Plot Number 6231 Wawidhi "A" Adjudication Section. Further that he did not know whether the church and Mr. Asiago's home are on the same compound.

DW1 also confirmed during re-examination that the church is on Plot Number 6231 Wawidhi "A" Adjudication Section and that it has no claim over Plot Number 4777 Wawidhi "A" Adjudication Section.

DW2 Zachary Ochieng Onjiko testified and stated that the church is located on Plot Number 6231 Wawidhi "A" Adjudication Section and that the land was donated by his grandfather Zachariah who died in 1958.

It was DW2's evidence that in 1986 a borehole was sunk and a permanent church house built in 1990 and does not know Plot Number 4777 Wawidhi "A" Adjudication Section that the Plaintiff claims.

On cross examination, DW 2 stated that Plot Number 4777 Wawidhi "A" Adjudication Section on which Mr. Asiago's home is situate neighbours Plot Number 6231 Wawidhi "A" Adjudication Section.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff filed submissions and listed four issues for determination of the court as follows:

- a) Whether the plaintiffs are the registered owners of the said parcel of land PLOT No.4777-WAWIDHI "A" ADJUDICATION SECTION.
- b) Whether the Plaintiffs have obtained consent from the Adjudication officer before filing the case herein.
- c) Whether the Defendants have encroached on the plaintiff's parcel of land.
- d) Whether the Plaintiffs have any remedies.

On the issue as to whether the plaintiffs are the registered owners of the said parcel of land PLOT No.4777-WAWITHI "A" ADJUDICATION SECTION, counsel submitted that the plaintiffs have produced a copy of registration documents from the land office to confirm ownership of the suit parcel of land.

On the second issue whether the Plaintiffs have obtained consent from the Adjudication officer before filing this case, counsel stated that the plaintiffs obtained a consent from the Land Adjudication Officer Nyando sub-county before filing the instant suit herein which was filed as item two on the Plaintiffs' list of documents dated 22nd January 2014.

On the issue as to whether the defendants have encroached on the plaintiff's parcel of land, it was counsel's submission that the plaintiffs

have proved encroachment by attaching photographs showing the Defendant's activities on the parcel of land and demand notices to the defendant.

Mr Ariko also stated that the defendant's activities have denied the plaintiffs an opportunity to use the suit parcel of land hence the need to restrain them.

On the issue as to whether the plaintiffs are entitled to the remedies, counsel submitted that the plaintiffs have demonstrated that they are the registered owners of the suit parcel of land hence entitled to the remedies sought and relied on the case of

JOSPHAT KURIA GATHONI V JAMES MAINA NJOROGI & 3 OTHERS [2019] eKLR where the learned judge held as follows.

“Whichever way I look at it, I do not see how the Plaintiff can fail in his suit. He is the title holder and the defendants have not demonstrated a right over the suit land. As title holder it is the plaintiff who is vested with all rights over the suit land including the right of ingress, egress, and exclusive use. The defendants have no right to be on the land without the permission of the plaintiff. They were trespassers all along and thus the plaintiff is entitled to compensation in the form of damages for trespass. The plaintiff is otherwise entitled to the orders of eviction and permanent injunction as he has prayed for in the plaint against the defendants, I will give the defendants 30 days to vacate the land and if they do not do so the plaintiff is at liberty to apply for their eviction. The plaintiff will also get costs and interest at court rates.”

Counsel therefore urged the court to allow the prayers as per the plaint with costs.

DEFENDANT'S SUBMISSIONS

Counsel reiterated the evidence of both parties on record and urged the court to dismiss the plaintiff's case with costs to the defendant.

ANALYSIS AND DETERMINATION

From the pleadings and the evidence, the issues that arise for determination in this case are:

- a) Who is the lawful proprietor of Plot Number 4777 Wawidhi “A” Adjudication Section
- b) Whether Plot Number 6231 Wawidhi “A” Adjudication Section is the same as of Plot Number 4777 Wawidhi “A” Adjudication Section
- c) Whether the Plaintiffs are entitled to the remedies sought.

The plaintiffs gave evidence and stated that they are the registered owners of the suit land and produced documents from the Lands office indicating the same. PW 3 a Land Adjudication and Settlement Officer holding the position of Assistant Director produced a letter dated 6th November, 2013 confirming that the Plaintiffs are the owners of the suit property herein. The evidence of the Land Adjudication Officer corroborated the plaintiffs' assertion that they are the rightful owners of the suit land. Further the content of a letter dated 6th November 2013 by the Land Adjudication office has not been challenged either by oral or documentary evidence.

In the case of **JAMES THEURI WAMBUGU V MELLE MBERA [2016] eKLR** the Court held as follows:

The evidence adduced by the plaintiff establishes that he is indeed presently the registered owner of land parcel Transmara/Ololchani/863. The plaintiff tendered as evidence copy of title for land parcel Transmara/Ololchani/863 dated 19th October 2010 which shows he is the registered owner. The copy of certificate of official search dated 4th October 2010 confirms the plaintiff to be the registered owner having been registered on 30th September 2010. The certificate of official search shows no encumbrances are registered against the title. The plaintiff in his evidence stated that he was awarded the land during the adjudication process during the 1980s and he produced a letter from the District Land Adjudication and Settlement Officer dated 1st February 2006 which confirmed that Plot No. 863 was registered in the plaintiff's name (PEX1). The plaintiff also produced a copy of a certified sketch plan showing the delineation of land parcel Transmara/Ololchani/ 863 (PEX.3). On the basis of the evidence adduced by the plaintiff, I am satisfied the plaintiff is the registered proprietor of the suit property.

In the case of **FESTO SEWE OBIERO VS CALEB OMONDI OPIYO & 2 OTHERS [2020] eKLR** the Court held as follows:

That from the oral and documentary evidence tendered by PW1 and PW4, Parcel No. 2088 – Kochogo Adjudication Section, the suit land, was upon adjudication and objection process created from the parent parcel that belonged to the Plaintiff's late father and registered with the Plaintiff. That the Land Adjudication and Settlement Officer's letters dated 26th January 2010, 31st January, 2012 and 29th December 2011 produced by PW1 as exhibits 1, 6 and 7 respectively, and whose content have not been challenged, and or rebutted confirms that the suit land is registered with the Plaintiff.

I therefore find that there being no evidence to the contrary to challenge the plaintiffs' ownership, that the letter dated 6th November 2013 shows proof that Plot Number 4777 Wawidhi “A” Adjudication Section belongs to the Plaintiffs. Further it is not in dispute that the plaintiff's sought and obtained a consent for the Land Adjudication Officer before filing this suit as per section 30 of the Land Adjudication Act as was produced by PW3.

In the case of **WILLIAM MUTUURA KAIRIBA V SAMUEL NKARI & 2 OTHERS [2018] eKLR** the Court held that consent is a mandatory requirement under Section 30(1) of the Land Adjudication Act Cap 484.

Section 30(1) of the Land Adjudication Act, Cap 284 provides as follows:

Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.

The issue as to whether Plot Number 6231 Wawidhi "A" Adjudication Section is the same as of Plot Number 4777 Wawidhi "A" Adjudication Section. PW3 stated that he is not aware of the existence of Plot Number 6231 Wawidhi "A" Adjudication Section. When he was presented with a letter to the effect that Plot Number 6231 Wawidhi "A" Adjudication Section is owned by the Defendants, he stated that he cannot comment on the genuineness of the letter as t L.T Ochieng who had authored the letter was a Land Adjudication and Settlement Assistant at the Divisional Office at Ahero had no authority to issue an ownership confirmation letter. The plot in question is Plot No. 4777 Wawidhi "A" Adjudication Section and not 6231 Wawidhi "A" Adjudication Section which was introduced by the defendant with no proof of its existence. The defendants also stated that they do not have a claim on parcel No. 4777 Wawidhi "A" Adjudication Section.

It follows that the plaintiff's having established that they are the rightful owners of the suit plot, I find that they are entitled to the remedies sought with costs. I therefore make specific orders as follows:

a) An order for permanent injunction is hereby issued restraining the defendants either by themselves, their assigns, or as members of St. Jeremiah Holy Ghost Church of East Africa from entering, dealing in any way and or constructing on plot No.4777—WAWIDHI 'A' adjudicator section.

b) Defendants to pays costs of the suit to the plaintiffs.

DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF APRIL, 2021

M. A. ODENY

JUDGE