



Omotto & 2 others (Suing as the Officials of Kisumu-Nyando Mwalimu Sacco) v Ramogi & 3 others (Environment and Land Case Civil Suit E002 of 2020) [2023] KEELC 20609 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20609 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E002 OF 2020
SO OKONG'O, J
OCTOBER 12, 2023**

BETWEEN

**DANIEL OMOTTO 1ST PLAINTIFF
ALBERT AJIGO ABOTH 2ND PLAINTIFF
SAMUEL OGINGA 3RD PLAINTIFF
SUING AS THE OFFICIALS OF KISUMU-NYANDO MWALIMU SACCO**

AND

**YONAH RAMOGI 1ST DEFENDANT
KITOTO ONG'AWO 2ND DEFENDANT
SIMON OOKO AWILI 3RD DEFENDANT
MICHAEL OWINO ABWAO 4TH DEFENDANT**

JUDGMENT

1. The Plaintiffs brought this suit against the Defendants through a plaint dated 17th September 2020. The Plaintiffs averred that at all material times to this suit, they were the beneficial owners of all those parcels of land known as Kisumu Municipality L.R. No. 28423 measuring approximately 1.794 Ha. and Kisumu Municipality L.R. No.20779 measuring approximately 2.00 Ha. having purchased the same from the registered owners on 6th October 2010 and 1st July 2008 respectively on behalf of their members.
2. The Plaintiffs averred that sometime in 2015, the Defendants without the consent, authority, and knowledge of the Plaintiffs encroached on the suit properties and constructed thereon temporary structures on the portions thereof. The Plaintiffs averred that the encroachment on the said portions



of the suit properties by the Defendants was unlawful, unprocedural, and amounted to interference with the Plaintiffs' right to use and own the properties. The Plaintiffs averred that due to the said illegal acts of trespass by the Defendants, the Plaintiffs had been denied their right to use and occupy the suit properties.

3. The Plaintiffs prayed for judgment against the Defendants jointly and severally for:
 - a. A permanent injunction restraining the Defendants, their families, servants, agents and/or any other person authorised by them from trespassing, encroaching, continuing to stay on or in any other way interfering with the Plaintiffs, their members or persons authorised by them from peaceful ownership and occupation of the suit properties.
 - b. An order of eviction against the Defendants, their families, servants and/or agents from the suit properties and handing over of vacant possession to the Plaintiffs.
 - c. Damages for trespass.
 - d. Cost of the suit.
 - e. Any other relief the court may deem fit and just to grant.
4. The 1st, 3rd and 4th Defendants filed a joint statement of defence and counter-claim on 30th June 2021. The 1st, 3rd and 4th Defendants denied the Plaintiffs' claim in its entirety and put the Plaintiffs to strict proof. In their counter-claim, the 1st, 3rd and 4th Defendants averred that the suit properties were their ancestral land and that they had occupied the same for 45 years. The 1st, 3rd and 4th Defendants averred that they inherited the suit properties from their parents who had also inherited the same from their grandparents. The 1st, 3rd and 4th Defendants averred that they had developed the suit properties with temporary and permanent structures. The 1st, 3rd and 4th Defendants averred that they had been in lawful, peaceful, continuous, and uninterrupted occupation of the suit properties for more than 12 years. The 1st, 3rd and 4th Defendants averred that the Plaintiffs' interest if any in the suit properties had been extinguished by operation of law.
5. The 1st, 3rd and 4th Defendants averred in the alternative and without prejudice to the foregoing that, the suit properties were community land and that the same had not been demarcated or adjudicated and as such, the Plaintiffs' alleged ownership of the same was unprocedural. The 1st, 3rd and 4th Defendants averred that the titles held by the Plaintiffs were in the circumstances defeasible. The 1st, 3rd and 4th Defendants averred further that the sale of the suit properties to the Plaintiffs was irregular, fraudulent, illegal, and null and void. The 1st, 3rd and 4th Defendants prayed that the Plaintiffs' suit be dismissed with costs and judgment be entered for the 1st, 3rd and 4th Defendants against the Plaintiffs for:
 - a. A declaration that the 1st, 3rd and 4th Defendants have acquired title and ownership of the suit properties by adverse possession.
 - b. A permanent order of injunction restraining the Plaintiffs their agents, employees and /or any other person acting on their behalf from encroaching, trespassing into, alienating, occupying, cultivating, claiming, leasing, or interfering with the 1st, 3rd and 4th Defendants' peaceful possession, occupation and use of the suit properties.
 - c. Costs of this suit and interest thereon.
6. The Plaintiffs filed a reply to defence and defence to the 1st, 3rd and 4th Defendants' counter-claim on 23rd August 2021. The Plaintiffs joined issue with the 1st, 3rd and 4th Defendants in their statement of defence and denied the 1st, 3rd and 4th Defendants' counter-claim in its entirety. The Plaintiffs denied



- that the suit properties were the 1st, 3rd and 4th Defendants' ancestral land and that the 1st, 3rd and 4th Defendants had occupied the same for 45 years. The Plaintiffs averred that the suit properties were acquired by the government and the owners were fully compensated. The Plaintiffs denied further that the suit properties were community land and that the Plaintiffs acquired the same illegally and fraudulently. The Plaintiffs urged the court to dismiss the 1st, 3rd and 4th Defendants' counter-claim.
7. The 2nd Defendant did not defend the suit. At the trial, the 1st Plaintiff, Daniel Antony Otieno Omotto adopted his witness statement dated 17th September 2020 as part of his evidence in chief. He stated that they purchased L.R No. 20779 from George Adede Nyagowa on 1st July 2008 at Kshs. 7.5 Million and the land measured 5 acres. He stated that they entered into a sale agreement on the same date with George Adede Nyagowa. He produced the sale agreement dated 1st July 2008 as P.Exh.1. The 1st Plaintiff stated that George Adede Nyagowa held a letter of allotment dated 17th June 1999 in respect of the property. He produced the same as P.Exh2.
 8. The 1st Plaintiff stated that they purchased L.R No. 28423 from Fredrick Kowido t/a Link Line Communications on 6th October 2010. He produced the agreement between them and Fredrick Kowido as P.Exh.3. He stated that L.R No. 28423 had a title No. I.R 126558 which he produced as P.Exh.4. The 1st Plaintiff stated that after purchasing the two parcels of land, they went to the ground in 2015 to take possession. He stated that they found the Defendants in occupation. He stated that the Defendants who were very hostile prevented them from taking possession. He produced as P.Exh.5 photographs showing the structures that the Defendants had put up on the suit properties. He stated that they engaged a surveyor to survey the said parcels of land to establish their boundaries. He stated that the said surveyor prepared a report in which he indicated the extent of the encroachment on the two parcels of land by the Defendants. The 1st Plaintiff produced the said report as P.Exh.6. The 1st Plaintiff stated that when they purchased the suit properties, the same were vacant. He denied that the suit properties were the Defendants' ancestral land.
 9. On examination by the court, the 1st Plaintiff stated that the suit properties were situated at Kanyakwar behind Lake Basin Mall towards Uzima University. He stated that it took them time to take possession because they were still processing the titles and the people on the land were also hostile. He stated that they were yet to obtain titles for the suit properties. He stated that they had difficulties in processing the titles. The 2nd and 3rd Plaintiffs adopted their witness statements as their evidence in chief.
 10. The 1st, 3rd and 4th Defendants and their advocates did not attend court for the trial. They did not therefore tender any evidence in their defence and in support of their counter-claim against the Defendants. They did not also make closing submissions. The Plaintiffs made closing submissions in writing. In their submissions dated 13th March 2023, the Plaintiffs framed 2 issues for determination. The first issue was whether the Defendants had trespassed on the suit properties and whether the Plaintiffs could maintain an action for trespass. The second issue was whether the Plaintiffs were entitled to damages for trespass.
 11. The Plaintiffs submitted that they were the beneficial owners of the suit properties having purchased the same from an allottee and a registered owner for valuable consideration. The Plaintiffs submitted that their testimony that the Defendants entered the suit properties in 2015 and put up temporary structures thereon was not rebutted. The Plaintiffs submitted that their contention that the Defendants had encroached on the suit properties was supported by a surveyor's report that placed the Defendants' structures on the suit properties. The Plaintiffs submitted that there was clear evidence that the Defendants had trespassed on the suit properties despite the fact that the Plaintiffs had no titles for the suit properties in their names.



12. The Plaintiffs submitted that even if they had no titles, they had possession of the suit properties as purchasers, and as such entry on the suit properties without their permission amounted to trespass. The Plaintiffs cited *Samuel Mwangi v. Jeremiah M'Itobu* [2012] eKLR and submitted that the law of trespass protects the possessor of the land and as such it is not necessary to prove ownership to maintain an action. The Plaintiffs submitted that a person need only to demonstrate possession or a right to immediate possession and interest or right on land to maintain an action in trespass.
13. The Plaintiffs submitted that they had demonstrated that they bought the suit properties from the registered owners thereof and took possession. The Plaintiffs submitted that they had established that they had a right to immediate and exclusive possession of the suit properties. In support of their submission in this regard, the Plaintiffs cited *Guchu Muiruri v. Laban Njuguna* [2012] eKLR, *M'kiriara M'mukanya & Another v. Gilbert Kabeere M'mbijiwe* [1984] eKLR, *Gathenya Ngumi v. Eric Kotut & 4 Others* [2022] eKLR and *PME & Another v. PNE* [2019] eKLR.
14. On whether they were entitled to damages for trespass, the Plaintiffs submitted that the Defendants having put up structures on the suit properties thereby limiting the full use of the properties by the Plaintiffs, should be made to pay damages for trespass. The Plaintiffs submitted that they had been deprived of the right to make full use of the suit properties since 2015. The Plaintiffs submitted that an award of damages in the sum of Kshs. 2,000,000/= for trespass would be a reasonable compensation. In support of this submission, the Plaintiffs cited *Ochako Obinchi v. Zachary Oyoti Nyamongo* [2018] eKLR.
15. The Plaintiffs submitted that they were also entitled to an order of a permanent injunction to restrain the Defendants from any further encroachment on the suit properties as they had proved their case on a balance of probabilities. The Plaintiffs urged the court to grant the reliefs sought in the plaint and to dismiss the counter-claim with costs.

Analysis and Determination

16. I have considered the pleadings, the evidence on record and the submissions by the Plaintiffs. I am of the view that the issues arising for determination by the court are the following;
 - i. Whether the Plaintiffs have proved trespass by the Defendants on the suit properties.
 - ii. Whether the Plaintiffs are entitled to the reliefs sought.
 - iii. Whether the Defendants are entitled to the reliefs sought in their counter-claim.
17. Trespass is defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, *Clerk & Lindsell on Torts*, 18th Edition, page, 923, paragraph, 18-01. In *Gitwany Investments Limited v. Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. To maintain an action for trespass, a claimant must either be in possession or have a title to land that entitles him to immediate possession. The Plaintiffs told the court that they purchased the suit properties between 2008 and 2010 and that when they went to take possession of the same in 2015, the Defendants who were in occupation of the properties became hostile to them. Although the Plaintiffs claimed that they took possession of the suit properties, no evidence in support of the allegation was placed before the court. The Defendants never tendered evidence at the trial. The Plaintiffs however still had the burden of proving their case to the required standard. It is my finding that the Plaintiffs did not take possession of the suit properties after purchasing the same. The Plaintiffs cannot therefore maintain an action for trespass against the Defendants based on possession of the suit properties.



18. With regard to ownership, it was not disputed that the Plaintiffs had not obtained titles to the suit properties at the time of filing this suit and even in 2023 when they gave evidence in the matter. The documents that the Plaintiffs produced at the trial were a letter of allotment dated 17th June 1999 in the name of George A. Nyagowa and an agreement for sale dated 1st July 2008 in respect of L.R No. 20779, and Grant No. I.R 126558 in the name of Fred Kowido Odia t/a Linkline Communication Company and an agreement of sale dated 6th October 2010 in respect of L.R No. 28423. These documents could not pass titles in the suit properties to the Plaintiffs. The letter of allotment dated 17th June 1999 neither conferred a title to L.R No. 20779 upon George A. Nyagowa who purportedly sold the property to the Plaintiffs or to the Plaintiffs. A letter of allotment is not a title. There is no evidence that upon being issued with the said letter of allotment, George A. Nyagowa accepted the terms thereof and paid a sum of Kshs. 191,340/- on account of stand premium and other charges within 30 days. There is also no evidence that George A. Nyagowa was issued with a title in respect of the property that he could transfer to the Plaintiffs.
19. For L.R No. 28423, the same was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). Under section 23(1) of the said Act, a certificate of title is conclusive evidence that the person named in the certificate is the absolute and indefeasible owner of the property. Section 32(1) of the Act provides that an unregistered instrument cannot pass land or any interest in land. Neither Grant No. 126558 for L.R No. 28423 in the name of Fred Kowido Odia t/a Linkline Communication Company nor the agreement of sale dated 6th October 2010 between Fred Kowido Odia t/a Linkline Communication Company and the Plaintiffs could pass title in L.R No. 28423 to the Plaintiffs. The Plaintiffs did not give any reasonable explanation why for over 10 years after purchasing the suit properties, the same had not been transferred and registered in their names. They did not even make an attempt to demonstrate that they indeed paid for the two properties.
20. Due to the foregoing, the Plaintiffs did not have legal titles to the suit properties. It was therefore not by coincidence that the Plaintiffs described themselves in the pleadings and submissions as beneficial owners of the suit properties. In *Black's Law Dictionary*, 10th Edition, a beneficial owner is defined as
- “one recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else; especially, one for whom property is held in trust.”
21. Could the beneficial ownership of the suit properties alone without possession entitle the Plaintiffs to maintain an action for trespass? In my view, when a suit is to be brought for trespass based on ownership of land, only a legal owner of land can bring an action for trespass against a third party. A beneficial owner of land who is not in possession can only sue where the legal owner who in that case is a trustee refuses to bring a claim against the third party to protect the interest of the beneficial owner and even in that case, the beneficial owner must join the legal owner as a co-defendant in the suit. The court asked the 1st Plaintiff at the trial why they did not join the vendors in the suit and his answer was that they did not consider if there was a need to do so.
22. In *Joseph Hayim Hayim v. Citibank NA* [1987] 1 AC 730 the court stated that:
- “... A beneficiary has no cause of action against the third party save in exceptional circumstances, which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate, or to protect the interests of the beneficiary in the trust estate.”



23. It is my finding from the foregoing that the Plaintiffs had no locus standi to sue the Defendants for trespass. The Plaintiffs have failed in the circumstances to prove the acts of trespass alleged against the Defendants.
24. On whether the Plaintiffs are entitled to the reliefs sought, the answer is negative. The Plaintiffs having failed to establish that the Defendants are trespassers on the suit properties are not entitled to the injunction and an order of eviction sought. They are also not entitled to damages for trespass. Regarding the Defendants' counter-claim, no evidence was provided in proof thereof. The reliefs sought are therefore not for granting.
25. In conclusion, I find no merit in the Plaintiffs' suit and the Defendants' counter-claim. Both are dismissed. Each party shall bear its own costs of the suit and the counter-claim.

DELIVERED AND DATED AT KISUMU ON THIS 12TH DAY OF OCTOBER 2023.

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. P.D.Onyango for the Plaintiffs

Mr. Abira h/b for Mr.Misiga for the Defendants

Ms. J. Omondi-Court Assistant

