



REPUBLIC OF KENYA



KENYA LAW
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**Omino v Agola & 2 others (Civil Appeal 60 of 2021)
[2023] KEELC 20518 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20518 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
CIVIL APPEAL 60 OF 2021
E ASATI, J
OCTOBER 5, 2023**

BETWEEN

ALBERT OMINO APPELLANT

AND

SUSAN AGOLA 1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU 2ND RESPONDENT

MARK MUHAMBE EHETE 3RD RESPONDENT

(Being an appeal from the Judgement and decree of Hon C. Yalwala Senior Principle Magistrate, Maseno delivered on 7th July 2021 in the original Maseno PM ELC NO. 64 OF 2018)

JUDGMENT

Introduction

1. By the Memorandum of Appeal dated the 20th July, 2021, the Appellant appealed against the whole of the Judgment delivered by Hon. C. Yalwala, Senior Principal Magistrate on 7th July, 2021 in Maseno PM ELC NO. 64 OF 2018 (herein called the suit). The appellant was the plaintiff in the suit wherein he sought for the following orders as against the Respondents:
 - a. A declaration that the registration by the 2nd Defendant of the 1st and/or 3rd Defendant and/or their predecessors as proprietors of the original L. R. No. Maseno Township No 9341/128 was fraudulent, illegal, irregular and therefore null and void.
 - b. An order that the Plaintiff is the bona-fide and registered proprietor of L. R No. Maseno Township No.9341/128.
 - c. In the alternative an order directing cancellation of the registration of the 1st and /or 3rd Defendants as the proprietors of L.r No. Maseno Township No 9341/128.



- d. A Permanent injunction restraining the 1st and/or 3rd Defendants whether by themselves, agents or servants from dealing with, selling, disposing of or otherwise parting with possession of L.r No. Maseno Township NO. 9341/128.
 - e. An order directed to the Defendants to return 8000 bricks, 2 lorries of sand ,1 lorry of stones that they took from the suit property belonging to the Plaintiff.
 - f. Damages for destruction of a pit latrine that was constructed on the suit property.
 - g. General damages for trespass to the property as against the 1st Defendant.
 - h. Costs of the suit and interests on such costs from the date of filing suit until payment in full.
2. The suit was initially filed at the ELC Kisumu as Kisumu ELC NO, 201 OF 2013 and vide the court order dated 25/9/2018, it was transferred to Maseno Law Courts for hearing and determination.
 3. The appellant's case as can be gathered from the amended plaint dated 23rd November 2016 was that he was the registered proprietor of a lease from the government of the Republic of Kenya for a term of 99 years from 1.10.1981 in respect of all that parcel of land known as L.R. No Maseno Township No. 9341/128 measuring 0.1560 Hectares (herein called the suit property). That the 2nd Respondent after unlawfully repossessing the suit property entered the suit land on 26th July 2013 and demolished the fence and a pit latrine and took away the appellant's 8000 bricks, 2 lorries of sand and 1 lorryful of concrete stones. That the 2nd Respondent unlawfully transferred the suit land to the 1st Respondent who in turn transferred it to the 3rd Respondent.
 4. The Respondents vide their respective statements of defence denied the appellant's claim.
 5. The trial court at Maseno heard the suit and vide the judgement appealed against herein, found that the appellant had not proved his claim to the required standard and dismissed the suit and awarded costs to the Respondents.
 6. Being dissatisfied with the whole of the Judgment, the appellant filed this appeal on the grounds that;
 - a. The Learned Magistrate erred in fact and in law in finding that the 2nd Respondent's repossession of the suit property L.R. NO. Maseno Township No.9341/128 (hereafter referred to as the suit property), was lawful despite the failure by the 2nd Respondent to comply with the law as set out in Section 17 of the [Rating Act](#), Cap 267 Laws of Kenya and Section 39 of Trust [Land Act](#), Cap.288 Laws of Kenya.
 - b. The Learned Magistrate erred by failing to find that the failure by the 2nd Respondent to follow the law in repossessing the suit property could not lawfully transmit any interest therein to the 1st Respondent and thereafter to the 3rd Respondent.
 - c. The Learned Magistrate erred in fact and in law in failing to find that the re-allocation of the suit property to the 1st and 3rd Respondents was unlawful and un-procedural and were therefore nullities, incapable of taking away the Appellant's interest over the suit property
 - d. The Learned Magistrate erred in fact and in law in failing to consider the effect of the failure by the 2nd Respondent to present evidence in its defence and in failing to find that such omission meant that the 2nd Respondent's pleadings on the re-possession of the suit property and its re-allocation to the 1st and 3rd Respondents, stood unsubstantiated.
 - e. The Learned Magistrate erred in law and in fact in failing to find that the action of the 2nd Respondent of repossessing the suit property was an exercise of administrative power



enjoining the 2nd Respondent to act fairly. The omission to issue the necessary notices or issuing misleading notices was a contravention of the Appellant's right to a fair hearing and fair administrative action as enshrined in the Constitution of Kenya, 2010 and the Fair Administrative Actions Act.

- f. The Learned Magistrate erred in fact and law in failing to find that the 1st and 3rd Respondents were liable for trespass to the suit property and that the Appellant was entitled to damages for trespass. In this regard, the Learned trial Magistrate made a critical procedural error in failing to assess damages.
 - g. The Judgment of the trial Court was against the weight of the evidence before the trial Court.
7. The appellant sought for:
- a. A declaration that the registration by the 2nd Defendant of the 1st and/or 3rd Defendants and/or their predecessors as proprietors of the original L. R No. Maseno Township No 9341/128 was fraudulent, illegal, irregular and therefore null and void that the appellant is the bona-fide and registered proprietor of L. R No. Maseno Township No.9341/128.
 - b. An order directing cancellation of the registration of the 1st and /or 3rd Defendants as the proprietors of L.R. No.maseno Township No 9341/128
 - c. A Permanent injunction restraining the 1st and 3rd Defendants whether by themselves, agents or servants from dealing with, selling, disposing of or otherwise parting with possession of L.R NO. Maseno Township No.9341/128.
 - d. General damages for trespass to the property as against the 1st and 3rd Respondents.
 - e. The costs of the appeal and the suit be awarded to the appellant.
8. Directions were taken on 5th October 2022 that the appeal be canvassed by way of written submissions.
9. Written submissions dated 28th April 2023 were filed by the firm of Owiti, Otieno, Ragot & Co Advocates behalf of the appellant. Written submissions dated 9th November 2022 were filed on behalf of the 1st and 3rd Respondents by the firm of Otieno, Yogo, Ojuro & Company Advocates. No submissions were filed by the 2nd Respondent.

Issues for determination

10. The appellant framed the issues for determination in the appeal to be:-
- a. Whether or not the appellant is the registered Grantee of the suit land, whether the Grant had special conditions and whether the appellant met the special conditions.
 - b. What is the procedure for repossession of land under section 17 of the Rating Act (Chapter 267 of the Laws of Kenya).
 - c. Whether or not the 2nd Respondent's repossession and re-allocation of the suit property to the 1st and 3rd Respondent was unlawful and void, having failed to comply with section 17 of the Rating Act Chapter 267 Laws of Kenya).
 - d. Whether or not the 2nd Respondent failed to give the appellant a fair hearing before repossessing the suit land.
 - e. Whether the appellant is entitled to damages for trespass.



- f. The effect of the omission of 2nd Respondent/Defendant to testify.

Analysis and determination

11. This being a first appeal, this court has reminded itself of the duty to re-examine and analyse the evidence placed before the trial court.
12. The first issue for determination is whether or not the appellant is the registered Grantee of the suit land, whether the Grant had special conditions and whether the appellant met the special conditions. The evidence produced is that the appellant had been given a grant over the suit property L. R NO Maseno Township No.9341/128 under the Registration of Titles Act for a period of 99 years from 1.10.1981. A copy of the grant was produced as exhibit. That the Grant had special conditions namely; that the appellant was not to erect any buildings on the land without approved building plans by the relevant local authority and in this case the County Council of Kisumu. Secondly, the Grantee was to, within six (6) months of the commencement of the term, submit in triplicate to the local authority plans (including block plans showing the position of the building and a system of drainage for the disposal of sewerage surface and sullage water), drawings, elevations and specifications of the building the Grantee proposes to erect and the land and shall within 24 months of the commencement of the term complete erection of such buildings and construction of the drainage system in conformity with such plans, drawing elevations and specifications as amended(if such be the case) by the local authority.
13. The appellant's evidence was that after allotment he dutifully paid the land rates, he entered the land accumulated building materials and did building plans. Counsel for the appellant submitted that by reason of the developments the appellant had done on the land, he (appellant) complied with the special conditions in the Grant.
14. I find that the appellant did not meet the special conditions of the Grant. There is no evidence that the building plan was approved by the relevant Local authority within the specified time. There was also no evidence that the building had been erected and construction of the drainage system done as envisaged in the Grant.
15. The second issue for determination is what is the procedure for repossession of land under section 17 of the *Rating Act* (Chapter 267 of the Laws of Kenya) and whether repossession of the suit property by the 2nd Respondent was lawful and transmission to the 1st Respondent and thereafter to the 3rd Respondent was lawful. The Appellant submitted that the provisions of Section 17 of the *Rating Act* as well as Section 39 of the Trust *Land Act* explain in detail the procedure to be followed by the County Council of Kisumu being the 2nd Defendant and the Rating Authority where a person defaults in the payment of rates before repossession of a parcel of Land is done. Counsel summarized the steps to be followed. He submitted that the Appellant/Plaintiff has all along been paying rates to the 2nd Respondent/Defendant. That instead of the 2nd Respondent/Defendant in absolute disregard for the procedure laid down under the stated provisions, unlawfully and illegally issued a notice in the Daily Nation dated 25th October, 2011(produced as DEX-8), of the intended repossession of the Appellant/Plaintiff suit Land. The 1st Respondent/Defendant also produced DEX-9 a copy of the Gazette notice no.2774 dated 2nd March, 2012, which stated that plots in Maseno Township were being repossessed and re-allocated as per the *rating Act*.
16. That the 2nd Respondent/Defendant repossessed the suit land, following non-payment of the rates and not because of failure to develop the suit property. That there was no evidence to show that any demand notice in prescribed form was issued to the Appellant/Plaintiff to pay any outstanding rates in compliance with the provisions of Section 17(1) of the *Rating Act*. That as required by Section



- 17(2) of the [Rating Act](#) the 2nd Respondent/Defendant did not file any suit against the Plaintiff for any outstanding rates as statutorily required. That having failed to abide by the mandatory provisions of Section 17 of the [Rating Act](#) as well as section 39 of the Trust [Land Act](#), that any subsequent repossession and reallocation of the suit land by the 2nd Respondent/Defendant to the 1st and 3rd Respondent/Defendant was irregular, illegal, null and void.
17. Counsel relied on the case of Rinya Hospital Limited vs Awendo Town Council & 21 others(2010)eKLR and the case of Rukaya Ali Mohamed Versus David Gikonyo Nambacha & Another (Kisumu HCCS No. 9 of 2009) Warsame J (as he then was) held that: -
- “Once (an) allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers (an) absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation, or that the allotment was outrightly illegal or it was against the public interest.”
18. The 1st and 3rd Respondent submitted that the remedy of re-entry and ceasing of the lease in case of breach by the lessee is not only a condition in the lease agreement but also has a legal backing. They relied on section 12(9) of the [Land Act](#), 2012. That the plaintiff was in breach of the terms and conditions of the said lease. That re-entry of the suit property and termination of the lease by the 2nd Respondent was inevitable. That the law makes it automatic for the undeveloped allocated land to revert to the Government.
19. I have read the provisions of the section 17 of the [Rating Act](#). It makes provision for enforcement for payment of rates. It provides the procedure and steps which a rating authority should take including filing of a suit in the subordinate court and application of the procedure provided for in the Civil Procedure Rules on execution of decree so as to recover unpaid rates. I find no provision in that part of the law on repossession of land.
20. The rates aside, the appellant was in breach of the special conditions of the grant. The Grant which the appellant had accepted was clear on the special conditions and the consequences of breach. The grant provided that
- “provided that notwithstanding anything to the contrary contained or implied in the Trust [Land Act](#), if default shall be made in the performance or observance of any of the requirements of the conditions, it shall be lawful for the county Council or any person authorized by the County Council to re-enter into and upon the land or any part thereof in the name of the whole and thereupon the term hereby created shall cease but without prejudice to any right of action or remedy of the County Council in respect of any antecedent breach of any conditions herein contained.”
21. I find that the 2nd Defendant followed the procedure for repossession of the land as provided for in the grant.
22. The third issue is whether or not the 2nd Respondent’s repossession and re-allocation of the suit property to the 1st and 3rd Respondent was unlawful and void, having failed to comply with section 17 of the [Rating Act](#) Chapter 267 Laws of Kenya). On the basis of breach of the special conditions of the grant, I find that the repossession of the suit land by the 2nd Respondent and re-allocation of the same to the 1st and 3rd Respondents was not void or unlawful.



23. The next issue is whether or not the 2nd Respondent failed to give the appellant a fair hearing before repossessing the suit property. The Appellant submitted that the 2nd Respondent /Defendant was mandated to issue a demand notice in a prescribed form to the Appellant/Plaintiff to pay any outstanding arrears of rates. That by repossessing the suit land without issuing such a notice and granting fair hearing to the Appellant/Plaintiff, the 2nd Respondent /Defendant was in contravention of the right to fair hearing, as envisaged under Article 47 of *the Constitution*. He relied in the case of *Republic v City Council of Nairobi & 3 others* (2014) eKLR where Justice Odunga held that the Respondent acted unfairly in failing to grant the Applicants a hearing, before revoking the letter of allotment and that the mere fact that the Applicants had not complied with the requirements of the Letter of Allotment did not validate the Respondents' action. It was submitted that the Appellant/Plaintiff was the registered owner of the suit land and had a right to be granted an opportunity to be heard before any decisions that would adversely affect his ownership of the land were made.
24. The Respondents submitted that the Appellant acknowledged during trial being aware of the notice issued on the Daily Nation dated 25/10/2011. That the said notice effectively notified the Public of the repossessed plots awaiting reallocation, among them was the suit property. That the said notice also provided that any aggrieved party should clear all the rates outstanding prior to filing an appeal to the office of the Clerk to Council within fourteen days from the date of the said notice. That the Appellant cannot fault the procedure followed by the 2nd Respondent since he knew about the notice but did nothing to secure his interest on the suit parcel.
25. I have considered the rival submissions. The interest held by the appellant in the suit property was conditional upon compliance with the conditions in the grant. The appellant knew that once he defaults the land would revert to the 2nd Respondent. Secondly, the appellant acknowledged knowledge of the existence of the notice of repossession posted in the Newspaper.
26. The next issue is whether or not the appellant is entitled to damages for trespass. The Appellant/Plaintiff submitted that having already established that he is the registered owner of the suit land and that re-possession of the land 2nd Respondent/Defendant and subsequent re-allocation to the 1st and 3rd Respondent /Defendants was unlawful, that the Appellant/Plaintiff is entitled to damages. He relied on the case of *Park Towers Limited versus John Mithamo Njika & 7others* (2014)eKLR to show that where there is trespass , the Appellant/Plaintiff need not prove that he suffered damage.
27. The Respondents relied on Section 3 of the *Trespass Act* and submitted that the suit land is not a private land. That although originally allocated to the Appellant, the land had automatically reverted to the government upon material breach of the terms and conditions of the grant. That upon such reversion, the suit land ceased to be a private land owned by the Appellant.
28. Having found that the appellant's interest in the land ceased when he breached the special conditions of the grant and that the 2nd Respondent's entry onto the suit land was in accordance with the same special conditions, I find no basis to hold that there was trespass and to award damages for the same.
29. The last issue raised by the appellant for determination is the effect of the omission of 2nd Respondent/Defendant to testify. The appellant submitted that the 2nd Respondent was under an obligation to call evidence especially because it is the party that put in motion the chain of events that lead to the allocation of the suit property to the 1st Respondent and authorized a transfer to the 3rd Respondent. The appellant relied on the case of *Kenya Power & Lighting Company vs Samuel Gathiari Cerere* (2019) eKLR and *Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi Milimani HCCs No. 1243 of 2001* on failure of a party to call evidence.



30. The Respondents submitted that the 2nd Respondent had relied on the evidence produced by the 1st Respondent. That considering the similarity in the 1st and 2nd Respondents pleadings, the documents produced by the 1st Respondent substantially proved the allegations by the Respondents.
31. Whether the 2nd Respondent testified or not, the burden of proof rested with the appellant to prove his case to the required standard.
32. For the foregoing reasons, I find that the appellant, though given a grant over the suit property, the grant was conditional and by reason of his breach of the express special conditions, the grant was terminated and the land reverted to the 2nd Respondent on behalf of the government. That the 2nd Respondent had the liberty to re-enter the land and allocate the same to other parties hence the allocation to the 1st Respondent was lawful. That in the circumstances there is no basis for a claim by the appellant for general damages for trespass.
33. I further find that the trial court was did not err in its findings and decision. I find that the appeal is not merited. The appeal is dismissed. Costs to the 1st and 3rd Respondents.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 5TH DAY OF OCTOBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Otieno holding brief for Omollo for the Appellant.

Ojuro for the 3rd Respondents.

