Akeyo & another v Lake Basin Development Authority (Environment & Land Case 3 of 2020) [2023] KEELC 21287 (KLR) (6 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21287 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT & LAND CASE 3 OF 2020

SO OKONG'O, J

NOVEMBER 6, 2023

BETWEEN

HARUN OMOM OKAL AKEYO ..... 1ST PLAINTIFF

DAVID OKAL OMOM ..... 2ND PLAINTIFF

AND

LAKE BASIN DEVELOPMENT AUTHORITY ..... DEFENDANT

JUDGMENT

1. The 1st Plaintiff brought this suit against the Defendant by way of a plaint dated 12th September 2012. The plaint was amended on 25th May 2016 to add the 2nd Plaintiff to the suit. In the amended plaint, the Plaintiffs sought the following reliefs;

    1. A declaration that the Plaintiffs were the absolute proprietors of all those parcels of land known as Kisumu/Tonde/91, Kisumu/Tonde/92 and Kisumu/Tonde/128 (hereinafter together referred to as "the suit properties" and individually as "Plot Nos. 91,92 and 128" respectively).

    2. A permanent injunction restraining the Defendant by itself, its servants, representatives, assigns and agents from interfering or in any way dealing with the suit properties.

    3. Costs of the suit.

2. The Plaintiffs averred that the 1st Plaintiff was the registered proprietor of Plot No. 91 and Plot No. 128 while the 2nd Plaintiff was the registered proprietor of Plot No.92. The Plaintiffs averred that between 7th March 2011 and 7th June 2011 while the Plaintiffs were ploughing the suit properties to plant sugar cane thereon, the Defendant interfered with the said activity claiming that it was the proprietor of the said properties. The Plaintiffs averred that the said acts of interference by the Defendant amounted to trespass on the suit properties.

3. The Defendant filed a statement of defence and counterclaim on 19th February 2013. The Defendant amended its defence and counterclaim on 7th June 2016. The Defendant denied that the Plaintiffs were the registered proprietors of the suit properties. The Defendant averred that if at all the Plaintiffs caused themselves to be registered as the proprietors of the suit properties, such registration was procured illegally and fraudulently since the suit properties were public land set aside for the Defendant's use. The Defendant averred that the titles held by the Plaintiffs in respect of the suit properties were illegal, null and void.

4. The Defendant denied that it had stopped the Plaintiffs' farming activities on the suit properties. The Defendant averred that since the suit properties had been set aside for use by the Defendant, the same was always occupied and used by the Defendant. The Defendant averred that the suit properties were a portion of the hitherto larger parcel of land measuring 345.40 acres registered in the name of Settlement Fund Trustees but set aside for use by the Defendant. The Defendant averred that the Plaintiffs were not entitled to the reliefs sought in the amended plaint.

5. In its counterclaim, the Defendant reiterated the contents of its defence and averred that the process leading to the registration of the Plaintiffs as the owners of the suit properties was tainted with irregularities and illegalities that vitiated the titles held by the Plaintiffs. The Defendant sought judgment against the Plaintiffs for;

    1. A declaration that the process leading to the registration of the Plaintiffs as the proprietors of the suit properties was illegal and hence the titles held by the Plaintiffs in respect of the suit properties were null and void.

    2. An order that the titles issued to the Plaintiffs in respect of the suit properties be cancelled and the said properties do revert to the ownership of Settlement Fund Trustees.

    3. Costs of the counterclaim.

6. The Plaintiffs filed a reply to defence and defence to counterclaim on 1st August 2016. The Plaintiffs denied that they acquired the suit properties illegally and fraudulently and that their titles to the said properties were null and void. The Plaintiffs averred that they acquired the suit properties legally and procedurally. The Plaintiffs denied that they misrepresented to the Settlement Fund Trustees that they were needy squatters on the suit properties and that they needed to be settled. In their defence to the counter-claim, the Plaintiffs averred that they acquired the suit properties legally and procedurally and as such, the titles that were issued to them were lawful and conferred upon them valid proprietary rights over the properties. The Defendant filed a reply to the Defendant's defence to counterclaim on 2nd August 2016. The Defendant joined issue with the Plaintiffs in their defence to counterclaim.

The Plaintiffs' case

7. At the trial, the 1st Plaintiff gave evidence on his own behalf and on behalf of the 2nd Plaintiff. He told the court that the 2nd Plaintiff was his son. The 1st Plaintiff adopted his witness and further witness statements dated 4th September 2012 and 4th October 2017 as part of his evidence in chief and produced the documents attached to his list of documents dated 4th September 2012 as exhibits. In his witness statement dated 4th September 2012, the 1st Plaintiff stated that he was the registered owner of the suit properties. He stated that he was allocated Plot No. 91 by the Government and purchased Plot Nos. 92 and 128 from third parties who had been allocated the same by the Government. He stated that although he had been issued with titles in respect of the suit properties, the Defendant's employees had refused to accept his ownership of the suit properties. In his further witness statement dated 11th February 2021, the 1st Plaintiff stated that he was the owner of the suit properties. He stated that

in 1991, he applied to the District Land Allocation Committee to be allocated land. He stated that he received letters of allotment which he accepted and paid the required amount. He stated that the properties were subsequently registered in his name. The 1st Plaintiff averred that when he attempted to fence the suit properties, he was barred from doing so by the Defendant who claimed that the suit properties belonged to it. The 1st Plaintiff stated that his ownership of the suit properties was confirmed by the Minister of Lands on the floor of Parliament.

8. In their submissions dated 9th May 2023, the Plaintiffs framed two issues for determination namely; whether the Plaintiffs were the bona fide owners of the suit properties, and who should bear the costs of the suit. On the first issue, the Plaintiffs submitted that the suit properties were allocated to them by the Government through the Settlement Fund Trustees (SFT). The Plaintiffs averred that they acquired the suit properties legally and procedurally. The Plaintiffs submitted that their ownership of the suit properties was confirmed by the Minister of Lands in a report that was presented to the National Assembly on 23rd May 2012 and 6th June 2012. The Plaintiffs submitted that the boundaries of the suit properties were established by the surveyors on 15th June 2012. The Plaintiffs submitted that the suit properties were subsequently valued on 9th February 2018. The Plaintiffs averred that after acquiring the suit properties, they were issued with title deeds in respect thereof which are prima facie evidence that they were the absolute and indefeasible owners of the suit properties.

9. The Plaintiffs submitted that apart from the many letters that the Defendant wrote to various bodies complaining about the alleged encroachment on its land, the Defendant did not place any material of substance before the court in support of its claim to the suit properties. The Plaintiff submitted that although the Defendant claimed that the Plaintiffs acquired the suit properties illegally, fraudulently and through misrepresentation, no evidence was tendered before the court in proof of these allegations. The Plaintiffs submitted that fraud must be specifically pleaded and distinctly proved. The Plaintiffs submitted that the Defendant did not prove that it had any interest in the suit properties.

10. The Plaintiffs submitted that they had proved their claim against the Defendant and the Defendant's counter-claim was not proved. The Plaintiffs urged the court to enter judgment in their favour as prayed and for the dismissal of the Defendant's counterclaim.

The Defendant's case

11. The Defendant called one witness, Michael Okello Okuk (DW1). DW1 told the court that he was the Deputy Director of Legal Services at the Defendant Corporation. DW1 adopted his witness statement dated 7th March 2022 filed in court on 8th March 2022 as his evidence in chief. He produced the documents attached to the Defendant's list of documents and further list of documents dated 7th March 2022 and 7th February 2023 respectively as defendant's exhibits 1 to 8. In his written statement, DW1 stated as follows: On 8th March 1982, Kisumu District Development Committee gave approval for the Defendant to be allocated Government Land at Muhoroni for its Livestock Development Programme known as Muhoroni Livestock Multiplication Centre. The land that was set apart for the Defendant measured 345.4 acres. The land was initially owned by the Settlement Fund Trustees and the Department of Livestock Development. At a meeting that was held on 12th June 1994 which was attended by the representatives of the Provincial Administration, Ministry of Lands, the Defendant and Ministry of Livestock, it was resolved that the land measuring 345.4 acres that was referred to as the Holding Ground would be divided and utilised as follows; 130 acres for the Ministry of Agriculture and Livestock Development, 130 acres for the settlement of squatters, 25 acres for public utilities and 60 acres for the settlement of persons whose allotment of Plot No. 463 was cancelled. The settlement of the squatters was to be conducted by the District Settlement Plot Selection Committee. The settlement of squatters commenced in 1999 and was concluded in 2000 after the settlement of 167 households.

The process of settling the squatters was high jacked and land measuring 129.25 acres was hived off from the original parcel of land and allocated to persons who were not squatters. The defendant was left with land measuring 94.25 acres only. The "new" squatters obtained title deeds for this portion of the original parcel of land and sought to take possession of the same from the Defendant who had occupied the land since 1982. This led to many suits being filed against the Defendant. A site visit by the Defendant's members of the Board on 15th December 2011 ascertained that the squatters were allocated land measuring 106 acres only and that the remaining 224 acres of the original land belonged to the Defendant. As at 28th June 2012, the Defendant had remained with land measuring 197.2 acres only. Tonde Settlement Scheme was meant for the settlement of squatters. The Plaintiffs herein were neither needy nor squatters and as such they did not qualify to be allocated land that was meant for squatters.

12. DW1 told the court that the Plaintiffs' names did not appear in the list of the squatters who were to be settled on a portion of the original Holding Ground land. DW1 stated that the titles held by the Plaintiffs for the suit properties should be cancelled since the Plaintiffs were not squatters and as such were not supposed to benefit from the land they were claiming. He stated that the Plaintiffs' titles were issued irregularly. He stated that the 1st Plaintiff was not a needy person as he was a senior person in the Kenya Army. DW1 stated that the land claimed by the Plaintiffs used to be called Muhoroni Livestock Multiplication Center. He stated that the same was now called Muhoroni Technology Transfer Center. He stated that the land was public land and that the land was given to the Defendant which is a government parastatal. DW1 urged the court to dismiss the Plaintiffs' suit and to have the Plaintiffs' titles cancelled.

13. In its submissions dated 4th May 2023, the Defendant framed two issues for determination namely; whether the Plaintiffs acquired the suit properties legally and procedurally, and who was liable for the costs of the suit. The Defendant submitted that the procedure for allocation of land set out in Section 14 of the *Land Act* 2012 was not followed in the purported allocation of the suit properties to the Plaintiffs. The Defendant submitted that 150 acres of the original Muhoroni Holding Ground that had Land Reference No. 42331 was set aside for Livestock Development under the Ministry of Agriculture and Livestock (the Ministry). The Defendant submitted that the Ministry handed over the same to the Defendant for its Livestock Development Programme. The Defendant submitted that the allocation of the portion of Muhoroni Holding Ground measuring 106 acres to the purported squatters was carried out secretly. The Defendant submitted that there was no transparency in the process. The Defendant submitted that it was not sufficient for the Plaintiffs to waive their title deeds for the suit properties. The Defendant submitted that the Plaintiffs had a duty to demonstrate that they acquired the suit properties lawfully and procedurally. The Defendants cited several authorities in support of this submission. The Defendant submitted that the suit properties were public land under the Ministry of Agriculture and Livestock. The Defendant submitted that the Ministry handed over the suit properties to the Defendant for its Livestock programmes. The Defendant submitted that the District Land Allocation Committee proposed that the Muhoroni Holding Ground be allocated to four groups. The Defendant submitted that the Plaintiffs had a duty to show in which group they fell to qualify for the land they were claiming. The Defendant submitted that the best the Plaintiffs did was to wave title deeds.

14. The Defendant submitted that the Settlement Fund Trustees (SFT) was supposed to allocate the land in accordance with the resolutions of the District Land Allocation Committee and not otherwise since it was holding the land in trust for the Government. The Defendant submitted that Section 135 of the *Land Act* which establishes the Settlement Trust Fund provides for the purposes for which the fund may be used. The Defendant submitted that the Plaintiffs who were not squatters were not entitled to benefit from the Settlement Fund. The Defendant submitted further that the suit properties were not

available for allocation to the Plaintiffs since the same had already been allocated to the Defendant. The Defendant submitted that the allocation was either fraudulent or mistaken. The Defendant submitted that in the circumstances, the Plaintiffs' title was defeasible. On the issue of costs, the Defendant submitted that costs follow the event. The Defendant urged the court to dismiss the Plaintiffs' suit and allow its counterclaim. The Defendant also prayed for the costs of the suit.

Analysis and determination

15. I have considered the pleadings, the evidence tendered by the parties and the closing submissions by the advocates for the parties. From the pleadings, I am of the view that the issues arising for determination in this suit are the following;

    1. Whether the Plaintiffs acquired the suit properties lawfully and as such hold valid titles in respect thereof.

    2. Whether the Plaintiffs are entitled to the reliefs sought in their amended plaint.

    3. Whether the Defendant is entitled to the reliefs sought in its counter-claim.

    4. Who is liable for the costs of the suit and the counterclaim?

Whether the Plaintiffs acquired the suit properties lawfully and as such hold valid titles in respect thereof.

16. In determining this issue, some historical background to the dispute that I have gathered from the evidence on record is necessary to put the dispute into perspective. The Government of Kenya owned parcels of land in Muhoroni known as Muhoroni Settlement Complex, and Livestock Holding Ground. For some time, various Government Ministries and Departments were unable to agree on how the said parcels of land could be optimally utilised. In a meeting that was held on 12th May 1994 at Munara in Koru, various stakeholders and interested parties discussed the various issues that had arisen over the utilisation of the said parcels of land and reached an agreement over the same. The meeting agreed on various issues concerning Muhoroni Settlement Complex that touched on Munara Township and the properties of the Settlement Fund Trustees that were situated therein. The dispute before the court does not concern Muhoroni Settlement Complex. It has been mentioned only for the historical background of the dispute that touched on it. At the said meeting, there was also an agreement on the utilisation of Muhoroni Livestock Holding Ground. Muhoroni Livestock Holding Ground (hereinafter referred to only as Holding Ground) was owned by the Settlement Fund Trustees and the Department of Livestock. The Holding Ground measured 345.4 acres. The Holding Ground was handed over to the Defendant in the 1980s to use as Livestock Multiplication Centre. At the time of the stakeholders meeting on 12th May 1994, the Defendant was in occupation of part of the Holding Ground. Also in occupation of the land were 125 squatter families. The meeting observed that the Holding Ground was not being fully utilised and that the same was too large for the purpose for which it was set apart. The meeting resolved that the Holding Ground land be subdivided and utilized as follows; 130 acres to remain with the Ministry of Agriculture and Livestock Development under which the Defendant's activities on the land fell, 130 acres was to be utilised to settle the squatters who were occupying a portion of the land, 25 acres was to be used for public utilities and 60 acres was to be utilised to settle persons who were allotted a parcel of land known as Plot No. 463 whose allotment had been cancelled. From the resolutions reached at this meeting, the Defendant's operation was to be limited to the portion of the Holding Ground measuring 130 acres only (approximately 52.61 Hectares). The remaining portion of the Holding Ground measuring 215.4 acres was to be used by the Settlement Fund Trustees for the purposes that had been agreed upon at the said meeting of 12th May 1994.

17. It appears that apart from the squatters who had settled on a part of the Holding Ground for whose benefit a portion of the land measuring 130 acres was set aside for settlement, the Ministry of Lands had a list of high ranking Government Officials, employees of the Ministry of Lands, politicians and other well-connected persons who were eagerly waiting to pounce on this Holding Ground land a portion of which was set aside to settle squatters and other persons who needed settlement. On the basis of the resolutions passed at this meeting of 12th May 1994 that did not even refer to these unofficial "squatters", the Director of Land Adjudication and Settlement in a letter dated 13th October 1995 sought the approval of the Minister for Lands and Settlement to allocate to 17 high ranking Government Officials who were mostly in the military a total of 67.2 acres of the land that was set aside for squatters and other needy Kenyans. The 1st Plaintiff herein who was a Warrant Officer II in the Kenya Army at the material time was one of the lucky beneficiaries of the land that was set aside for settlement of squatters. The 1st Plaintiff acquired one of the plots from his colleague, a Major in the Kenya Army at the time who was also a beneficiary of the land set apart for the settlement of squatters. The 1st Plaintiff acquired his third plot also from this small special group of 17. I have seen in the list of the 17 officials, other two army majors and a Senior Sergeant. A part from the said 17 high ranking Government Officials, the other group in the Director of Land Adjudication and Settlement's letter to the Minister of Lands dated 13th October 1995 who were also to benefit from Holding Ground land set aside for squatters was the Ministry of Land's "committed members of staff". These were also 17 in number. They were allocated a total of 26.2 acres of land. All these parcels of land were agricultural land that was meant for the settlement of the squatters or other persons in need of settlement. From the foregoing, it can be seen that land measuring about 93.4 acres was allocated to the people in the Ministry of Land's list of allottees who were not factored in when the Holding Ground was being apportioned during the meeting of 12th May 1994. These people were neither squatters nor in need of settlement. Since they were not factored in during the apportionment of the Holding Ground, the Ministry of Lands had to get some land for them either from the 130 acres that was set apart for the Defendant's use or the 130 acres that was set apart for the genuine squatters. They could also be allocated the 25-acre portion of the Holding Ground that was set apart for public utilities and the 60-acre portion that was set apart for the settlement of other needy persons whose land allotments had been cancelled.

18. As soon as the Minister for Lands and Settlement approved the allocation of land to these unofficial squatters on 2nd November 1995 following the said proposal by the Director of Land Adjudication and Settlement, the unofficial squatters were issued with letters of allotment on the following day that is; 3rd November 1995. They were thereafter issued with title deeds for the parcels of land that were allocated to them. In the meantime, the same Ministry of Lands saw no urgency in demarcating and registering the land measuring 130 acres that was set apart for the use of the Defendant for its activities. This led to unnecessary conflicts between the Defendant, the genuine squatters, and the unofficial squatters from the Ministry of Lands. These Ministry of Land allottees of the Holding Ground armed with title deeds were claiming land that the Defendant and the genuine squatters claimed to be part of the Holding Ground that was set apart for them. According to the Ministry of Lands, following the subdivision of the Holding Ground, the Defendant was allocated land measuring 43.01 hectares (approximately 106.5 Acres) only. There is no explanation as to what became of the 23.5 acres that would bring the total land that was set apart for the Defendant's use to 130 acres. The said land measuring 106.5 acres claimed to belong to the Defendant is said to have been given Parcel Numbers 113, 114, 115, 116 and 117 during the subdivision of the Holding Ground. According to the list of allottees of the Holding Ground produced in evidence by the Defendant, the Defendant was only allocated Parcel No. 113 measuring 37.7 hectares (93.16 acres). Parcels Nos. 114, 115, and 116 were allocated to Otondi, Dorothy Oluoch, and James Opiyo respectively while Parcel No. 117 was set apart for a playground.

There is no evidence that the Defendant which is a state corporation has been issued with a title for the land measuring 43.01 hectares claimed by the Ministry of Lands to have been allocated to it or the land measuring 37.7 hectares that I have referred to above.

19. In Munyu Maina v. Hiram Gathiha Maina[2013]eKLR, the Court of Appeal stated as follows:

> " We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

20. In Daudi Kiptugen v. Commissioner of Lands & 4 Others [2015] eKLR, the court stated that:

> "...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein."

21. The suit properties were registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). The Registered *Land Act* was repealed by the *Land Registration Act* No.3 of 2012. Sections 27, 28 and 143 of the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed) provides as follows:

27. Subject to this Act -

(a) a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

143.

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

Sections 24, 25 and 26 of the *Land Registration Act* No. 3 of 2012 that repealed the Registered *Land Act* provides as follows:

24. Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

22. From the foregoing, it is clear that under the current land registration system and the land registration regime under which the suit properties were registered, the Plaintiffs' titles are indefeasible unless any illegality, procedural impropriety, corrupt scheme, mistake or fraud in the manner in which the same were acquired is established. At the trial, 1st Plaintiff produced evidence showing that Plot No. 91 was offered to him by the Settlement Fund Trustees (SFT), he accepted the offer and made the necessary payments. The Plaintiff produced evidence showing that Plot No. 91 was transferred to him by the SFT on 2nd June 2009 and he was issued with a title deed on the same date. For Plot No. 92, the Plaintiffs proved that the same was allocated to one, Edward Jura Oyaro by the SFT and that the said Edward Jura Oyaro paid the full purchase price. The 1st Plaintiff led evidence that he purchased Plot No. 92 from the said Edward Jura Oyaro and the same was registered in his name on 25th September 2008 on which date he was also issued with a title deed. The Plaintiffs placed before the court evidence showing that on the same date, namely 25th September 2008, the 1st Plaintiff transferred Plot No. 92 to the 2nd Plaintiff who was also issued with a title deed on the same date. For Plot No. 128, the 1st Plaintiff proved that the property was allocated to Major Suleiman Nyamwaya who paid the full purchase price and was registered as the owner of the property on 14th July 2005. The 1st Plaintiff placed before the court evidence showing that Plot No. 128 was transferred to him by Major Suleiman Nyamwaya Okoth on 4th June 2008 on which date he was also issued with a title deed.

23. The Plaintiffs proved from the foregoing that they were the registered proprietors of the suit properties. The Plaintiffs also explained how they came to be registered as the proprietors of the suit properties. I have found earlier in the judgment that the suit properties were created from the Holding Ground. The Defendant's contention in this suit is that the Plaintiffs acquired the suit properties illegally and fraudulently in that the Plaintiffs were not squatters as such were not entitled to benefit from a portion of the Holding Ground that was set aside for the settlement of squatters. I am of the view that it was not the business of the Defendant to supervise the settlement of squatters. During the division or apportionment of the Holding Ground, a portion thereof measuring 130 acres was set apart for the Defendant's use. In my view, this was the only parcel of land in which the Defendant had an interest and which it had a duty to protect. This portion of the Holding Ground having been set aside for the Defendant, the same was not available for allocation to any other person or body. Any allotment of a portion of this land would be illegal null and void.

24. The Plaintiffs having proved their titles, the burden shifted to the Defendant to prove that the suit properties were created from the 130-acre portion of the Holding Ground that was set apart for it.

25. In Kurshed Begum Mirza v. Jackson Kaibunga [2017] eKLR, the court stated as follows:

"(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

26. The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

"13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

27. While the legal burden of proof is static, the evidential burden of proof keeps shifting during the trial. The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR had the following to say on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law..."

28. I have found it difficult to understand the Defendant's claim in relation to the Holding Ground. From its pleadings and evidence adduced at the trial, it is not clear whether the Defendant is claiming the entire Holding Ground that measured 345.4 acres or 130-acre portion of the Holding Ground that was set apart for it during the meeting of 12th May 1994 or 224 acres of land it claimed to have remained after the genuine squatters were settled on a portion of the Holding Ground measuring 106 acres. It is common ground that the suit properties were created from the Holding Ground. The question that needs an answer is whether the suit properties were created from the portion of the Holding Ground that was set apart for the Defendant. The Defendant did not challenge the resolutions of the meeting that was held on 12th May 1994. The Defendant was well represented at that meeting. The Defendant cannot therefore be allowed to go back to its pre-12th May 1994 status when the whole Holding Ground was set apart for it. I am of the view that the Defendant's valid claim is limited to the land measuring 130 acres that was set apart for it during the 12th May 1994 meeting. The burden was on the Defendant to establish that the suit properties were created within the 130-acre portion of the Holding Ground that was set apart for it. The Defendant did not produce evidence showing the location of its 130-acre portion of land vis-a-vis the suit properties. It was until the tail end of his testimony while being examined by the court that the Defendant's witness told the court that the suit properties formed part of the 130-acre portion of the Holding Ground that was given to the Defendant during the meeting held on 12th May 1994. The Defendant however produced no evidence to back up this claim. It is my finding that the Defendant is entitled to land measuring 130 acres of what was formerly the Holding Ground. It is also my finding that the Plaintiffs were not entitled to be settled on the Holding Ground

since they were not squatters. I am however not sure as to which portion of the Holding Ground the suit properties are situated. The Defendant has not convinced me that the suit properties are within the 130-acre portion of the Holding Ground that was set apart for them. Although the Plaintiffs were not genuine squatters and as such were not entitled to benefit from land set aside for squatters, it was not for the Defendant to fight for the rights of the squatters. From the evidence on record, the squatters have an association known as TONASO which fights for their rights. If any of the 130-acre portion of the Holding Ground that was set apart for the squatters was allocated to the Plaintiffs who were not squatters, it was for TONASO to challenge the allocation. The Defendant is not competent to challenge such allocation as it is not affected thereby. In the absence of evidence that the suit properties were created from the Defendant's parcel of land, I have no reason to hold in a suit by the Defendant that the properties were acquired by the Plaintiffs unlawfully and that the titles held by them are null and void.

Whether the Plaintiffs are entitled to the reliefs sought in their amended plaint.

29. I have found that the Plaintiffs and the persons from whom they purchased two of the suit properties were neither squatters nor persons in need of settlement in terms of the agreement that was reached in the meeting held on 12th May 1994. The Plaintiffs were therefore not entitled to be allocated land in the Holding Ground. In view of that finding, I am unable to declare the Plaintiffs as absolute proprietors of the suit properties. The Plaintiffs are however entitled to an injunction restraining the Defendant who has not established any valid interest in the suit properties from interfering with their possession and use of the said properties.

Whether the Defendant is entitled to the reliefs sought in its counterclaim.

30. The Defendant has not persuaded me that it has any interest in the suit properties. The Defendant has no basis in the circumstances for challenging the process through which the Plaintiffs acquired the suit properties. I find no merit in the Defendant's counter-claim.

31. On the issue of costs, costs follow the event unless the court for good reason orders otherwise. In this case, I would order each party to bear its own costs. I am of the view that to award the Plaintiffs the costs of the suit would be to sanction the irregular allocation of part of the Holding Ground to them and the persons from whom they purchased two of the suit properties. As I have stated earlier, the Plaintiffs and the persons from whom they purchased two of the suit properties were neither squatters nor persons in need of settlement.

Conclusion

32. In conclusion, I hereby make the following orders in the matter;

    a. An order of injunction is issued restraining the Defendant whether by itself, its servants, employees, representatives or agents from interfering or in any way dealing with the parcels of land known as Kisumu/Tonde/91, Kisumu/Tonde/92 and Kisumu/Tonde/128.

    b. The Defendant's counter-claim is dismissed.

    c. Each party shall bear its own costs of the suit and the counter-claim.

DELIVERED AND DATED AT KISUMU THIS 6TH DAY OF NOVEMBER 2023

S.OKONG'O

JUDGE

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

Mr. Mwamu for the Plaintiffs

Mr. Ojuro for the Defendant

Ms. J. Omondi-Court Assistant