



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. E027 OF 2021 (O.S)

ORPHA ATIENO ONGWEN JOHN OKOTH ONGWEN.....APPLICANTS

VERSUS

PROF. SHELLEMIAH OLOTH KEYA.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

RULING

The Plaintiffs, Orpha Atieno Ongwen and John Okoth Ongwen have come to court for orders that **pending the hearing and determination of this originating summons, there be an order of injunction restraining the 1st defendant, either by himself or through his agents, employees, workers, contracted contractors, or persons claiming under him from alienating, demolishing the applicants houses, fencing, continuing with fencing and blocking access to the applicant's houses or home, harassing the applicants' family members, or in any manner interfering with the applicants interest in their ancestral land parcel LR 15329 and LR 126283 situated at Kisumu Kanyakwar "B" within Kisumu County and more specifically the applicants homestead. Costs of the application be provided for.**

The application is based on grounds that **the applicants are the active occupants of the land known LR 15329 and LR 126283 situated at Kisumu Kanyakwar "B" within Kisumu County, the same being their ancestral home, a place they have been occupying for the last 40 years.**

The said land was purported to have been acquired by the Government through the Kisumu County Council then by way of compulsory acquisition, but the process was not completed as the respective owners including the applicants' family were not compensated as required by the relevant law in place.

The place where the applicants' homestead is situated, was meant to be acquired by the Government of the Republic of Kenya on behalf of the then Kisumu County Council under the Trust Lands Act vide the Kenya gazette Notice No. 3400 of 1976.

The said land was to be acquired and set a part for purposes of put houses and industrial developments and ancillary thereto.

According to the said gazette notice, the residents and/or owners of the respective parcels were to be compensated.

After the said Gazettement and in the period between the year 1982 and 1983, the then Town Clerk of Kisumu Municipal Council organized and forcefully evicted many of the applicants community members from the area marked for acquisition but some families including the applicants' family were never evicted.

The necessary procedures were to be done before the final acquisition and then transferring the title into the name of Kisumu County Council, which procedures were never done todate.

The eviction created open space, which gave room for grabbing and illegal allocations of the applicants' said parcels of land.

The said parcels of land were not utilized by the then Kisumu County Council and the Municipal Council as was the case.

The subject parcels of land ought to have reverted back to the original occupants from whom the same had been acquired.

Instead, those parcels of land were left vacant which spaces and because of the said vacant spaces created, many individuals in conjunction with the then scrupulous officers from the then Commissioner of Lands, (Now National Land Commission), started

issuing titles to some influential people known to them while exhibiting the said Gazette Notice No. 3400 of 1976 as the basis of the allocation and acquisition.

The aforesaid created a lot of problems, difficulties and inconveniences to the applicants' herein, and as a result, the members of the applicants' community who were affected being, Kanyakwar, Kajulu and Kolwa, formed an Association called Kikako Welfare Association to look into those issues of illegality in acquiring the said parcels of land.

Because many people including those working within the Government had directly or indirectly benefited from the said illegal acquisition and allocation, they have not been willing to assist the applicants hence the Association had to petition the National Land Commission.

The National Land Commission did issue Kenya Gazette Notice No. 1995 of 1st March 2019 to look into the issues of compensation in relation to Kenya Gazette Notice No. 3400 of 1976. The National Land Commission is yet to initiate the process.

The applicants are the ones in active occupation of the subject parcel of land and both the respondents knew or had knowledge or ought to have known that the applicants' interests override the 1st Respondent's interest.

The Government's intention was not to acquire the entire area under the trust Lands Act hence the title issued by the Commissioner of Lands or the National Land Commission are illegal and invalid.

Since the subject land was not properly acquired by the Government under the Compulsory Acquisitions Act, and the applicants' families adequately compensated, the purported acquisition of the subject land and the subsequent allocation of the same to other individuals and issuance of titles to them is illegal and the same should be cancelled and reverted back to the applicants.

The plaintiffs lament that Respondent armed with the illegally acquired title, has commenced taking possession of the subject land by alienating, demolishing the applicants' houses and fencing the same, thereby blocking access to the applicants' houses or home constructing a perimeter wall around the applicants' home, and harassing the applicants' family members and rendering them homeless and are afraid. If the orders sought are not granted, the applicants' are likely to suffer irreparable loss and damage as they will be rendered homeless.

The applicants state that they are willing and ready to abide by any condition that this honorable court may give in the interest of justice. It is therefore in the interest of justice that the application be allowed and the orders sought be allowed.

In reply the 1st Respondent states that he is the registered owner of LR NO. 15329 as per grant dated 23/6/2010 for a period of 99 years from 1/12/1990 and precisely that **In 1989, he applied to the Government of Kenya for an allocation of land in the then Municipal Council of Kisumu, in order to develop and undertake commercial activities.**

In response to his said application of 1989, he received a letter of allotment dated 12th November 1990, Ref No. 30973/XL/147.

He replied in appreciation to the Government of Kenya for the allocation and accepted all the terms and conditions of the offer as specified in the offer letter.

In 1991, he visited and informed the then town planner of Kisumu Municipality, Mr. Abel Ocharo about the land allocation whereupon he took him to the site of the said parcel of land situated at Kisumu Kanyakwar. In his company he showed him a contour based sketch illustrating the extent and boundaries of the said land. As at this date, there were no buildings or structures at all on the said parcel of land.

He traced a record of satellite images to verify whether previous development or settlement existed on the ground. The records available confirmed that there were no buildings on the site.

In fulfillment of the terms and conditions pertaining to the offer letter of allotment, he made the following payments:

- Standard premium
- Plot rent
- Registration Fee
- Conveyance and Stamp Duty.
- Rates and Drainage fees amounting to Kshs. 609,277.00 to municipal council of Kisumu via Cheque No. 118011 dated 3/2/2021.

He has made arrangements to develop the property but it has been invaded by people. He erected a fence that was destroyed by people.

I have considered the facts of this case and rival submissions and do find that this is a case to be determined on a balance of inconvenience because the Defendant was registered on 27/6/2010 hence adverse possession might not apply since 12 years have not lapsed to date.

Moreover, the National Land Commission has not given information as to how the land was acquired by the government for public purpose. Moreover, it is arguable that adverse possession does not apply on public land. All these issues will be determined during hearing. In the meantime, to protect the subject matter from waste, I do order that status quo to be maintained pending hearing of the main suit. That is both parties are restrained from putting up any structure on the suit parcel of land and engaging in any wasteful use of the property. Costs in the cause.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 9th DAY OF FEBRUARY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.