



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC NO. 419 OF 2016

WILSON ONYANGO AKUMA.....1ST PLAINTIFF
BENSON MAGEMBE ONYANGO.....2ND PLAINTIFF
KEFAH OGANDA ONYANGO.....3RD PLAINTIFF
EDGAH OKONGO ONYANGO.....4TH PLAINTIFF
OMBAGO ONYANGO.....5TH PLAINTIFF
EDWARD MICHIEKA ONYANGO.....6TH PLAINTIFF

VERSUS

TOWN COUNCIL NYAMACHE.....1ST DEFENDANT
THE COUNTY GOVERNMENT OF KISII.....2ND DEFENDANT
THE NATIONAL LAND COMMISSION.....3RD DEFENDANT
THE ATTORNEY GENERAL.....4TH DEFENDANT
THE DIRECTOR OF LAND ADJUDICATION.....5TH DEFENDANT

J U D G E M E N T

1. The plaintiffs, all members of the family of Wilson Onyango Akuma the 1st plaintiff herein commenced this suit by way of plaint dated 15th March 2011 against the Town Council of Nyamache but subsequently amended the plaint on 6th December 2013 to enjoin the 2nd to the 6th Defendants. The plaintiffs case is that the 1st plaintiff was during the land adjudication and land consolidation registered as the proprietor of land parcel **Bassi/Bondonya/405** but aver that in or about 1968 some community members unlawfully trespassed onto the 1st plaintiff's land parcel **Bassi/Bondonya/405** stating that they wanted to have a Nursery School put up on a portion of his land. The 1st plaintiff did not agree to their overtures and sued the said Community members at Kuja African Court Civil in Case No.18 of 1968 for compensation for trespass. The 1st plaintiff was awarded Ksh600/= compensation and an appeal against the award was dismissed by the Kisii Resident Magistrate's Court in Civil Appeal No.24 of 1969 on 3rd June, 1969.

2. The plaintiffs averred that from 1969 they have peacefully occupied the parcel of land **Bassi/Bondonya/405** save for the portion of land that the 1st plaintiff donated to the Seventh Day Adventist Church after the community made a request to him. The 1st plaintiff stated that the portion he donated to SDA church measured approximately 0.54Ha which was surveyed and delineated and that the church has occupied the portion since 1966 and had constructed a permanent church thereon. The 1st plaintiff stated that he first subdivided land parcel **Bassi/Bondonya/405** in 1981 to excise the church portion. The initial subdivisions were **Bassi/Bondonya/1839** and **1840**. The portion for the church was land parcel 1840 and he retained land parcel 1839. The 1st plaintiff averred that at the time he effected the subdivision for the church he was unaware that his land parcel 405 had in fact been unlawfully subdivided without his consent to create land parcel **Bassi/Bondonya/1734** allegedly for Mogutano Nursery School and church.

3. The 1st plaintiff subsequently subdivided land parcel **Bassi/Bondonya/1839** amongst his family members resulting in the creation of land parcels **Bassi/Bondonya/3037** to **3049**. The land upon which the subdivisions were effected was land parcel **Bassi/Bondonya/405** which included the portion that had been illegally and unlawfully excised from the parcel **Bassi/Bondonya/1734** without the consent and/or authority of the 1st plaintiff. The plaintiffs sought the cancellation of land parcel **Bassi/Bondonya/1734**.

4. The 1st and 2nd defendants filed a joint statement of defence on 17th February 2015 and the 2nd defendant separately filed a counter claim against the plaintiffs. The defendants denied that land parcel **Bassi/Bondonya/1734** was fraudulently carved out of the 1st plaintiff's land parcel **Bassi/Bondonya/405** and contended that the land parcel **Bassi/Bondonya/1734** was set apart for public use and was designated for use as a Nursery School and Mogutano SDA Church. The 1st and 2nd defendants averred that land parcel **Bassi/Bondonya/1734** was registered in the name of Gusii County Council (the precursor of the 2nd defendant) and its title was indefeasible. The 1st and 2nd defendants contended that the plaintiffs illegally and unlawfully annexed the land intended for public use and unlawfully constructed permanent houses thereon. The 1st and 2nd defendant denied that the plaintiffs would be entitled to the orders sought and prayed for in the plaint.

5. The 2nd defendant by the counter claim prayed for judgment for:-

(a) *A declaration that land parcel known as **Bassi/Bondonya/1734** measuring about 2.8 hectares is a public and is legally registered in the name of Gussi County council(the precursor to the 2nd defendant).*

(b) *An order directing the plaintiffs to give vacant possession of the land parcel known as **Bassi/Bondonya/1734** in favour of the 2nd defendant*

(c) *Costs of the suit.*

(d) *Any other just relief the Court may in the interest of justice grant*

6. That although the 3rd, 4th, 5th and 6th defendants were served and entered appearance through the Attorney General Vide a memorandum of appearance dated 25th June 2014, they filed no defence and neither did they participate in the proceedings. Further although the 1st and 2nd defendants were represented by counsel on 30th April 2018 when the hearing opened and the 1st plaintiff testified and on 1st August 2018 when the Court visited the locus in quo in the presence of the Land Registrar and County Surveyor, the 1st and 2nd defendants did not participate in the further proceedings. The 1st plaintiff and two other witnesses, Philips Moison Ombuyi (PW2) and Peter Maragia Nyanga (PW3) testified in support of the plaintiffs case.

The Plaintiff case

7. The 1st plaintiff Wilson Onyango Akuma testified that he was allocated land parcel **Bassi/Bondonya/405** during the land adjudication process that took place in 1968. He stated that in 1966 he had donated and given the Seventh Day Adventist Church (SDA) a portion of about 0.5 Hectares (1 ¼ acres) out of his land where the they constructed a semi-permanent church. He stated the SDA has since constructed permanent structures on the portion he gave them.

8. The 1st plaintiff explained that after the completion of the Land Adjudication he excised off the portion he had donated to the SDA church and they were issued with a title number **Bassi/Bondonya/1840** and his portion remained as land parcel **Bassi/Bondonya/1839**.

9. The 1st plaintiff however stated that during the land adjudication process in 1968 some members of the local community approached him and requested him to donate/give some land for the construction of a Nursery School but he refused/declined to do so as he had already given some land to the SDA. The Community wanted him to give additional land which he was not prepared to do. He stated that the Adjudication Committee and the members of the Community wanted to forcibly apportion his land and when he and members of his family resisted, they were arrested and were taken to the chief's camp where they spent a night before they were released. The 1st plaintiff stated the persons who had invaded his land with the intention of hiving off a portion for the school had damaged his fence and crops and he sued them at Ogembo Law Courts and they were ordered to compensate him for the damage and their subsequent appeal against the order for compensation was dismissed by the High Court. The 1st plaintiff was not aware that his land parcel 405 had been excised to create the portion for the Nursery School. The 1st plaintiff was in occupation of his entire parcel 405 measuring approximately 15.5 hectares. The 1st plaintiff testified that he was issued title for the land parcel **Bassi/Bondonya/405** in 1971 and that in 1981 he subdivided the land into land parcels 1839 and 1840.

10. Land parcel 1840 measuring 0.25 Ha was the portion he had donated to the church and parcel 1839 measuring 15.25 Ha was the remainder after the subdivision of land parcel 405. The 1st plaintiff testified that on his land parcel 1839 he had constructed 5 permanent houses, a shop, and 2 semi- permanent houses. He affirmed he had since subdivided land parcel 1839 into 13 portions which he had given to his children.

11. The 1st plaintiff further testified that in the year 2010 whilst on a visit to the USA where he had visited his son he got a call from his other son, Samuel notifying him that Nyamache Town Council had given him a 21 days' notice to vacate from land parcels **Bassi/Bondonya/1734** which the notice indicated had been reserved for a Nursery School . The 1st plaintiff stated that the portion shown as land parcel 1734 was part of his land and comprised the portion that he had donated to the SDA Church. He averred that parcel 1734 was super imposed on his land parcel 405 stating that he and his family have occupied the portion designated as parcel 1734 since the land adjudication in 1968 and he had effected permanent developments thereon.

12. The SDA Church sits on the portion that Nyamache Town Council claims to be part of land parcel 1734 yet as per the subdivision

effected in 1981 from land parcel 405 the SDA church land parcel is 1840. The 1st plaintiff in his evidence interalia stated as follows:-

--On the portion 1734 I have bananas and bluegum trees and I have occupied the same over a long period of time from 1968. The documents used to create land parcel 1734 are not authentic. The church is physically on the portion said to be land parcel 1734. Land parcel 1734 is super imposed on my land parcel 405. The natural boundary of my land is the river but parcel 1734 is shown to be across the land where my land is."

13. The 1st plaintiff in his testimony after the Court visited the Locus in quo concluded his evidence by affirming that other than the portion of land he had given to the SDA church he never gave any other land to anybody else. He stated he did not give out land parcel 1734 and did not know how it was created. He stated his land parcel 405 extended from the top of the hill to the river and included the portion claimed by the community for Nursey School as parcel 1734. He stated he had constructed a shop and his children had constructed their permanent homes on the portion claimed as land parcel 1734. He stated that other than the church whom he had given portion of his land nobody else save for his family members had used any part of his land. Mugutano Nursery School who claim land parcel 1734 have had no activities on the suit land and the 1st plaintiff insisted their claim is unjustified and sought orders as per the amended plaint.

14. The plaintiffs called as witnesses PW2 one Philips Mosioma Ombuya and PW3 one Peter Maragia Nyaanga who were both members of SDA Church. Their evidence corroborated the evidence by the 1st plaintiff that he donated and gave them land on which Mugutano SDA Church was constructed. PW2 and PW3 affirmed that the 1st plaintiff gave the Church the land in 1966 and that the Church holds land title **Bassi/Bondonya/1840** in respect of the portion they were given. The witnesses confirmed that land parcel 1734 claimed by the Nursery School includes where the church stands and where the plaintiffs homesteads are constructed. The witnesses stated that the land where the Church has been constructed was never public land and that the land belonged to the plaintiff before it was donated to the church. It was their position that no land had been reserved for the public for use by the school and /or the Church.

15. The defendants as observed herein above did not tender any oral evidence and did not attend Court to cross examine the plaintiffs witnesses. The evidence by the plaintiff and the witnesses remains unchallenged. The statement of defence by the 1st and 2nd defendants and 2nd defendant's counterclaim remain unproven. Where a party proffers a defence but fails to adduce any evidence in support of the same, the defence remains a mere statement of facts but which facts are unproven by any evidence. The same is true of a plaint or counterclaim where no evidence is tendered in proof of the same. The Court in those circumstances, unless there is admission by the opposing party, has to find that the plaint/counterclaim or defence is unproven.

16. In the present case the plaintiffs have led evidence in support of their claim against the defendants which evidence has not been controverted. The Court has no reason or basis to reject the evidence. The evidence by the 1st plaintiff was consistent and credible and was supported by the evidence of PW2 and PW3. The evidence tendered by the Land Registrar and the County Surveyor by way of documents clearly supported the evidence by the 1st plaintiff that upon being allocated land parcel 405 during the process of land adjudication he occupied the whole of it as it was delineated physically on the ground. The developments the plaintiffs effected on the ground attest to this. The Court visited the locus in quo and was able to see for itself how the land had been utilised. The developments on the ground were mainly of a permanent nature and were not undertaken recently. The sketch Plan prepared by the County Surveyor after inspection of the site showed that the SDA Church buildings and all the permanent buildings constructed by the 1st plaintiff and his children are all on land parcel 1734 now claimed by the 1st and 2nd defendants. The 1st and 2nd defendants as per their statements of defence and counterclaim averred land parcel **Bussi/Bundonya/1734** was reserved as a public plot for a Nursery School and church.

17. The 1st plaintiff explained in his evidence that the community had wanted him to donate some land for a School but he refused to grant the request. He maintained he only agreed to donate a parcel of land to the SDA Church which he effected by subdividing his land parcel 405 into parcels 1839 and 1840. The 1st plaintiff infact testified some time in 1968 following land adjudication some members of the Community invaded his land parcel 405 with the object of curving out a portion of land therefrom which action he resisted leading to his arrest together with his son. He stated he subsequently sued the members in Gucha District Magistrates Court in Civil Case No.176 of 1968 for trespass and compensation. The 1st plaintiff was awarded compensation for his damaged fence and crops and a subsequent appeal was dismissed.

18. On the evidence adduced it does appear land parcel 1734 is super imposed on Land parcel 405. On the ground what is said to be land parcel 1734 is fully occupied by the SDA Church and the 1st plaintiff's family. There are old permanent houses and a fully developed Church sanctuary. There is no explanation how all these developments could be effected on land parcel 1734 if indeed the same had been set part as a public plot. The only viable explanation could only be that the 1st plaintiff's family set out to develop this land as it formed part of their land parcel 405. In the circumstances I accept the 1st plaintiff's evidence that land parcel 1734 constituted part of his land parcel 405 that was adjudicated in his favour in 1968. I am satisfied that indeed Land parcel **Bassi/Bonyanya/1734** does not exist on the ground. The land parcel 1734 appears to have been hived out of land parcel 405 merely on paper and that was without the consent and/or approval of the 1st plaintiff who was the registered owner of land parcel **Bassi/Bondonya/405**. The creation of land parcel **Bassi/Bondonya/1734** was unlawful and illegal. The occupation of the Land parcel **Bassi/Bondonya /1734** by the 1st plaintiff and the SDA Church does not give rise to any trust in favour of the defendants. Their occupation is as of right as the rightful owners.

19. In the premises and taking into account the totality of the evidence, I am satisfied that the plaintiffs case is proved on a balance of probabilities. The 2nd defendant's counterclaim against the plaintiffs is unproven to the required standard and is hereby dismissed.

20. As I have held that Land parcel **Bassi/Bondanya/1734** was unlawfully and illegally created and super imposed on land parcel **Bassi/Bondonya/405**. I order that the same be cancelled and deleted from the register of titles. I accordingly make the following final orders:

(a) The Land Registrar, Kisii is hereby ordered to cancel title number Bassi/Bondanya/1734 for having been unlawfully and illegally issued for nonexistent land.

(b) That the plaintiffs are entitled to the exclusive occupation and use of L.R Bassi/Bondonya/405 and/or any resultant subdivisions there from without any hindrance from the defendants.

(c) Each party to bear their own costs of the suit and counterclaim.

Judgment dated and signed at Nakuru this 21ST day of FEBRUARY 2020.

JOHN M MUTUNGI

JUDGE

Judgment delivered at Kisii this 5th day of March 2020

J ONYANGO

JUDGE