



REPUBLIC OF KENYA

IN The ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 889 OF 2015

MARIAM KADZO MWALIMU AND MUSA OTIENO OGONJI

(Suing as Legal Representatives and administrators of the estate of

GEORGE OGONJI AGUMBA (Deceased).....PLAINTIFFS

VERSUS

ENOCK AUMA AOL.....DEFENDANT

JUDGEMENT

Mariam Kadzo Mwalimu and Musa Otiemo Ogonji suing as legal representatives and administrators of the Estate of George Ogonji Agumba (deceased) (hereinafter referred to as Plaintiffs) have come to this court against Enock Auma Aol (hereinafter referred to as the Defendant) claiming that at all material times the deceased Plaintiff has been the Adjudicated owner of Plot No. 531 Kawino Adjudication Section. On or about 17.09.06 the defendant unlawfully and without the deceased Plaintiff's consent or authority as adjudicated owner encroached upon the deceased Plaintiff's aforesaid parcel of land and commenced construction thereon and is busy dumping various materials thereon thereby interfering with the deceased plaintiff's right of user of his parcel of land as a result of which the deceased plaintiff has suffered and continues to suffer irreparable loss and damage.

The deceased Plaintiff's claim against the defendant therefore is for a permanent injunction restraining the defendant howsoever acting from trespassing or continuing to trespass upon, erecting or continuing to erect any fixtures or structures upon or dumping or continuing to dump material upon, encroaching or continuing to encroach upon or accessing or continuing to access or in any other manner interfere with the deceased plaintiff's rights as owner of Plot No. 531 Kawino Adjudication Section.

The deceased plaintiff's further claim against the defendant is for a mandatory injunction compelling the defendant to forthwith remove all the illegally fixtures, and/or structures, building materials illegally erected onto or dumped upon the deceased Plaintiff's parcel of land known as Plot No. 531 Kawino Adjudication Section. The deceased Plaintiff also claims general damages for trespass together with costs of this suit and interest thereon.

Despite demand being made and notice of intention to sue in default thereof being made the Defendant has continued with his illegal and tortious actions and omissions unabated. The deceased Plaintiff avers that prior to the institution of this suit he sought and obtained the consent of the Land adjudication and Settlement Officer to so proceed pursuant to the provisions of Section 30 of the Land Adjudication Act Cap 284.

The Defendant filed a statement of defence denying in its entirety the contents of paragraphs 3 of the plaint and specifically that the plaintiff is the adjudicated owner of the plot of land known as Plot No. 531 Kawino Adjudication Section being the suit property. He further denied that he has unlawfully encroached on the suit parcel and avers that his presence on the suit land is lawful. The Defendant avers that the Orders sought should not be granted because the Defendant is a bonafide purchaser of the suit property and the one legally entitled to the same. The Defendant avers that no demand or notice of intention to sue has been issued by the plaintiff and in any event if any would have been issued it would have been of no consequence as the plaintiff has no claim against the defendant.

When the matter came up for hearing PW1, George Ogonji Agumba, a medical doctor residing in Kisumu testified that he had sued Defendant over land parcel 531 which is still under adjudication and that the defendant has trespassed on it. He claimed that he bought the land from Lentina Akungu Ombongo and produced the sale agreement dated 11.08.2005. The purchase price was Sh. 80,000/= consisting of Sh. 60,000/= for the land and Sh. 20,000 for the trees on the land. On 12.8.2005 he went to the land adjudication officer and obtained the copies of the proceedings they had had with the seller. He produced the proceedings before the land adjudication officer. The adjudication officer issued the later dated 1.9.2006 confirming that the deceased plaintiff was the registered proprietor of Plot No. 531 Kawino Adjudication Section after the original owners transferred the same to him. He was yet to take possession of the land he bought from Lentina

because on 14.1.2006 he received information from his father, that the Defendant had fenced off land Plot No. 531 Kawino Adjudication Section. He went to the land and confirmed the report as true and contacted Lentina who had sold him the land and who on 18.1.2006 sent her son Zachary to verify the deceased plaintiff's complaint. They then went to the Land adjudication office and lodged a complaint. They were told to reduce the complaint in writing which they did and the same was dated 18.01.2006 and produced as exhibit 5.

On 28.3.2006 the Land adjudication officer did a letter to Zacharia giving their position on the complaint. The Defendant did not vacate from the land and on 17.9.2006 the deceased plaintiff learnt from his father that Defendant had erected a structure on the land and visited the parcel of land and confirmed the report. He took photographs showing the fence, iron sheet houses, building materials, trees on the land and a permanent latrine and semi-permanent structure. Then in October 2006 two photographs were taken showing a semi-permanent house being constructed. In November 2011 two photographs were taken showing the Semi-permanent house fully constructed and a kitchen under construction. He contacted his advocate who wrote a demand letter dated 18.9.2006 to the Defendant.

He then filed this suit and on 4.10.06 obtained an order of injunction which was served on the Defendant on 18.10.2006. He also obtained other orders dated 25.11.2008 which were served on 8.01.2009 and another court order dated 27.1.09 which was served on 1.2.2009. The defendant did not comply with the three court orders to date.

Before coming to court he obtained consent of the District Land Adjudication Officer Kisumu after his advocate wrote a letter dated 18.9.2006. He is still unable to access the land as the Defendant is still in occupation. He prays that the court issues orders to Defendant to vacate the suit land and should pay damages and the structures he has put on the land to be removed. He further prays for costs of this suit. On cross examination he states that when he bought the land, it was uninhabited and it cannot be true for Defendant to say he had been on that land for over 30 years.

PW2, Lentina Akungu Ombogo gave evidence that she is the widow to the late Simeon Mbogo. Before going to Ndiwa they were residing at Kamgat sublocation Kowit village. The plaintiff is like her grandchild whilst the defendant is a son to her brother in law. She states that she initially sold land to defendant through the elders. She had sent her son known as Zacharia to Naphtali and Caleb to sell the land to enable her get money to buy another land at Ndiwa. The defendant went to the elders and told them that he wanted to buy the land. The elders confirmed the purchase price as KSh. 60,000/=. The Defendant paid a deposit of sh. 10,000/= to the elders who gave it to Zacharia. The Defendant promised to pay the balance later but failed to do so as agreed. Later elders sent Zacharia to Defendant to collect the balance but Defendant said he did not have any other money and what he had paid was enough for the land. The elders called Defendant and he insisted he would not pay any more money for the land. The elders took Defendant to the Chief to compel him to pay the balance or for an order to refund the deposit. The Chief summoned her and the other children and told the defendant to meet their expenses. The defendant declined to meet the costs.

She went to the chief's office with the elders as well as Defendant but the defendant refused to pay the balance saying he had no more money. They left and she later asked elders to resolve the matter. The elders decided to look for another buyer. She attempted to refund the 10,000/= to defendant but he declined.

Then one Caleb the father to the plaintiff promised to contact the plaintiff who was willing to buy the land, they negotiated and she agreed to sell him the land at sh. 60,000/= and sh. 20,000/= for the trees on it making a total of sh. 80,000/=. They entered into an agreement and then went to the lands office where they were paid the sh. 80,000/=. Ultimately, they transferred the land to the plaintiff and then went back to Ndiwa. According to PW2, the Defendant should vacate the land to allow the plaintiff take possession. The Defendant moved onto the land after she had sold it to the plaintiff. She is ready and willing to refund the Kshs. 10,000/= to defendant. Defendant had not used or lived on the land before she sold it to the plaintiff. On cross examination by M/s Kyamaziwa she states that the purchase price was Sh. 80,000/= inclusive of sh. 20,000/= for the trees. It is true Defendant was to pay only Sh. 60,000/= for the land while Plaintiff agreed to pay more by adding sh. 20,000/= for the trees over and above the sh. 60,000/= for the land. The plaintiff knew that Defendant had paid a deposit of Sh. 10,000/= for the same land before agreement to pay sh. 80,000/= for the same land. She offered to refund the sh. 10,000/= deposit to Defendant but he denied. The Chief and elders are aware that Defendant declined to receive the refund.

The Defendant declined to pay the balance of the purchase price and claimed the Sh. 10,000/= he had paid was enough.

PW3, Caleb Agumba Ochanjo of West Kano, Kadibo Division, a farmer and an elder in the location states that PW1 is his first born son and that, PW2 is the wife to his uncle and therefore she is like his mother. The defendant was buying land belonging to PW2. Later the agreement was broken and PW1 approached PW2 to buy that land through the elders and bought it.

He had been involved as an elder when Defendant and PW2 entered into a sale agreement. Defendant was to buy the land at Sh. 60,000/=. He was present during the negotiations. Naphtali Oganda and Joshua Odanga were the elders leading the negotiations. PW2 was not there but had sent her son called Zacharia. He saw Defendant pay Sh. 10,000/= as deposit and was to pay the balance of sh. 50,000/= after one week.

The Defendant failed to pay the balance and claimed he had no more money to pay. PW2 then tried to refund to the Defendant the deposit of sh. 10,000/= but he declined. PW2 left the money with the elders. The matter was taken to the chief. The chief asked PW2 to keep the sh. 10,000/= and leave the land to the Defendant but PW2 declined demanding that Defendant pays the balance. Then PW2 told the elders and her sons to look for another buyer for the land. He contacted his children and PW1 agreed to buy the land at sh. 60,000/= and sh. 20,000/= for the trees. The Plaintiff paid a total of Kshs. 80,000/= in cash to PW2 and a land sale agreement was made and signed at the lands office. PW3 was a witness in the agreement. By the time Plaintiff bought the land, it was vacant as it was being taken care of by Petro Ochanja who later died. Later Defendant entered onto the land and is in possession. Defendant moved onto that land in year 2006 after Plaintiff had bought it from PW2 in 2005. The Defendant has put up structures on that land. He has built houses, kitchen and toilet and has planted some trees.

By the time defendant moved onto the land, the plaintiff was out of the country.

PW4- , Zacharia Aguko Ombogo states that he sold that land to Dr. George Ogoji who is the deceased Plaintiff. The land is being occupied

by the Defendant. He had not allowed the defendant to occupy the land.

PW5- Alfred Angira Ombogo from Kabwoch village in West Kachung location Ndhiwa District knew Lentina Ombogo as his mother and PW4 as his elder brother. He knows the Plaintiff as they sold him the suit land. He had witnessed the sale agreement between his mother and Plaintiff. The purchase price was agreed at Kshs. 80,000/= inclusive of the land and trees. The Defendant wanted to buy the land and had paid a deposit of Sh. 10,000/=. The purchase price was sh. 60,000/= for the land exclusive of trees. The defendant was to pay the balance in 14 days when a formal sale agreement was to be made.

The Defendant declined to pay the balance and the family resolved to refund the Ksh. 10,000/= to him. The Defendant declined to receive Kshs. 10,000/= claiming Kshs. 30,000/= instead. They looked for another buyer and got the plaintiff and sold him the land at Sh. 80,000/=.

In 2006 the Plaintiff told them that the defendant had interfered with the land. They asked the defendant to stop interfering with the land as they had sold it to the Plaintiff. The Defendant declined and plaintiff filed this suit. They had not allowed the Defendant to enter onto the land when he did so in 2006.

On the close of the plaintiffs case the defendant testified that he is a resident of South West Kano, a driver by profession and that he entered into agreement with Simeon Ombogo Omedo in respect of parcel number 531 at Kawino upper Buanda sublocaton Buanda location Kadijo division Kisumu District. The value of the land was Kshs. 60,000/=. He paid Kshs. 10,000/=. The balance was Kshs. 50,000. When he kept on paying Omedo chased him away. He paid the balance of Kshs. 50,000 to the chief. The agreement was done at the chief's office. He produced the agreement as Dex1. He is not aware that the plaintiff bought the land. He lives on the land. Dr. Ojanji has never lived on the land.

The suit herein was filed before the completion of the process of adjudication however the same is properly before court as the requisite consent was obtained. Consent for the filing of the suit was granted to the plaintiff as provided for by Section 30 of the Land Adjudication Act which provides:

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”

I have considered the evidence on record and submissions filed by the defendant and in the absence of the plaintiff's submissions and do find that the property in dispute belonged to one Simeon Ombongo Omedo who died before the process of adjudication was commenced. During adjudication, the same was awarded to the said Simeon Ombongo Omedo. According to the Adjudication record, the deceased Dr. George Ogonji Agumba and the widow to the late Simeon Ombongo Omedo Lentina Akungu Ombogo in the presence of Zacharia Aguko Ombongo, Alfred Angina Ombogo and Peterlis Ouro Ombongo appeared before the Land adjudication officer on the 24/4/2006 wherein the plaintiff's husband stated that he bought the parcel of land from the said Lentina Akungu Ombongo at Kshs. 95,000.

The land was being bought by Caleb Agumba Odongo for his son George Ogonji Agumba, the latter being the husband and father to the current plaintiffs respectively.

The Land Adjudication Officer found that the case involved the willing seller and willing buyer. The head of the selling family had died but the wife was alive and was selling the land to Caleb Agumba Odongo for his son George Ogonji Agumba. The objection was allowed and the name of Simeon Ombongo Omedo was cancelled and the name of Dr. George Ogonji Agumba was entered as the owner of the parcels number 531 and 687. This court finds that upon the entry of the names of Dr George Ogonji Agumba as the owner of the suitland after the determination of the objection he became the rightful owner of the property.

This court further finds that the agreement between the Defendant and Simeon Ombogo Omedo is not dated and neither signed by the widow to late Simeon Ombogo Omedo. However, the plaintiff's witnesses agreed that there was an agreement between Lentina and the defendant and the defendant paid a deposit of ksh 10000 leaving a balance of ksh 50,000. The defendant admitted that he did not pay the whole purchase price but only paid Kshs. 10,000/= to the widow to the late Simeon Ombogo Omedo and the balance was paid to the chief. The chief was not called to demonstrate that he was paid the Kshs. 50,000 and that remitted the same to the Plaintiff's husband.

I do find that though the land was still under adjudication, the agreement between the deceased Plaintiff and the widow to the deceased Simeon Ombogo Omedo was valid as it went through the adjudication process as an objection and that the deceased plaintiff paid full purchase price to the PW2 as opposed to the defendant who paid ksh 10000 and failed to pay the balance of kshs 50,000.

This court declares that the plaintiff obtained registration properly and therefore the parcel of land belongs to the plaintiff.

I do grant a permanent injunction restraining the defendant howsoever acting from trespassing or continuing to trespass upon, erecting or continuing to erect any fixtures or structures upon or dumping or continuing to dump building material upon, encroaching or continuing to encroach upon or accessing or continuing to access or in any other manner interfere with the deceased Plaintiff's right of user and/or occupation of PLOT NO. 531 KAWINO ADJUDICATION SECTION as owner.

Moreover, I do grant a mandatory injunction compelling the defendant to forthwith remove all illegal fixtures, and/or structures, building materials illegally erected onto or damped upon the plaintiff's parcel of land known as Plot No. 531 Kawino Adjudication Section. Last but not least, I do grant the defendant is given 60 days to vacate the property failure of which he be evicted. I do decline to grant General damages for trespass to Plot No. 531 Kawino Adjudication Section as the same were not proved. Each party to bear own costs as this is a family dispute.

DATED AT KISUMU THIS 10th DAY OF MAY, 2021

ANTONY OMBWAYO

JUDGE

This Judgement 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 2019.

ANTONY OMBWAYO

JUDGE