



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC NO. 567 OF 2015**

**(formerly HCC. No. 16 of 2012)**

**LUCY OUMA ODHIAMBO.....PLAINTIFF**

**VERSUS**

**WILSON TUE.....1<sup>ST</sup> DEFENDANT**

**JOHN CHEMGRAU.....2<sup>ND</sup> DEFENDANT**

**ESTHER CHECUGOI.....<sup>RD</sup> DEFENDANT**

**JAMES KAMAU.....4<sup>TH</sup> DEFENDANT**

**WILLIAM MBUJI WANJALO.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By plaint dated 3<sup>rd</sup> February 2011, the plaintiff herein sued the defendants jointly and severally seeking the following orders:

a) Possession of the property

b) An order of injunction permanently restraining the defendants, their employees, servants and/ or agents from entering upon, taking possession of, carrying out any construction, ploughing, planting or other farming activities or any other activity whatsoever on the trespassed land or any part thereof, alienating or interfering by any means howsoever, with the property known as KSM/FORT TERNAN/ 450 or with part thereof.

c) An order compelling the defendants to immediately demolish and remove at their own cost all and any structures, buildings constructed on the property or crops planted thereon, failing which the demolition and removal of structures and crops effected by the Plaintiff with the assistance of a court bailiff and law enforcement officers at the expense of the defendants.

d) Costs of this suit

e) Any other relief that this Honourable Court deems fit to grant.

**PLAINTIFF'S CASE**

PW1 gave evidence and stated that she is the registered proprietor of land parcel known as KISUMU/FORT TERNAN/ 450 which she purchased from one Lilian Okwiri Midi through her donee William Jeffery Okwiri on 19<sup>th</sup> November 2008.

That at the time of the purchase, PW1 was aware that the defendants occupied the adjoining parcels of land, though not as registered owners. Further that when the initial owner of the property moved out of the suit property, the defendants took advantage and started cultivating subsistence crops on the suit parcel of land

It was PW1's testimony that when she asked the defendants to vacate they requested her to allow them to use the land until sometimes in July 2011, by which time they would, have harvested their crops, a request PW1 agreed to.

PW1 stated that the defendants instead of moving out as promised intensified the cultivation and had put up some illegal structures on the

suit land. That the defendants chased away a hired tractor that the PW1 had engaged to till the land in preparation for planting, necessitating her to visit the office of the local administrators for assistance to no avail.

PW1 stated that the defendants have absolutely no right to the suit land and only took advantage of the change of ownership to attempt to possess the land. PW1 produced a copy of a sale agreement dated 19<sup>th</sup> November 2008, a copy of the official search showing that she is the registered proprietor of the suit property and a copy of the title deed. She also produced a copy of a demand letter dated 21<sup>st</sup> November 2011, from her advocates to the defendants. PW1 therefore urged the court to grant the orders as prayed in the plaint.

### **DEFENDANTS' CASE**

The defendants entered appearance on 23<sup>rd</sup> May 2012, and filed a statement of defence dated 6<sup>th</sup> June 2012, in which they denied the contents of the plaint.

The defendants never tendered any evidence to controvert the plaintiff's claim even though they were served with a hearing notice.

### **ANALYSIS AND DETERMINATION**

The issues for determination is whether the plaintiff is the rightful owner of plot No Kisumu/Fortenan/450 and whether she is entitled to the orders sought.

On the first issue whether the plaintiff is the rightful owner of the suit land, it is not in dispute that the plaintiff has a title to the suit land registered in her name having been registered as such on 11<sup>th</sup> January 2011. The plaintiff also produced a sale agreement dated 19<sup>th</sup> November 2008 between her and one Lilian Okwiri Midi for the suit land and an official search confirming that the suit land is registered in her name.

The defendant never tendered any evidence hence it follows that the plaintiff's suit is uncontroverted therefore it is a formal proof.

Section 24 of the Land Registration Act No 3 of 2012 states that 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.

Section 25 of the said Act provides that 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—to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act.

Finally Section 26 of the Land Registration Act, 2012 provides;

**(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

It is trite that a title document is prima facie evidence of ownership to land and can only be challenged on the grounds stipulated above. The plaintiff has established that she is the registered owner of the suit land and the same has not been challenged as per section 26 of the Land Registration Act.

Nothing has been presented by the defendants to prove that the plaintiff's title is unlawful or it was fraudulently acquired.

The court held in the case of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR** stated as follows:

*“Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part.*

Having found that the plaintiff is the rightful owner of the suit land and that no evidence to the contrary has been adduced, it follows that the plaintiff is entitled to the orders sought in the plaint. The plaintiff is entitled to a peaceful enjoyment of her property hence the defendants must allow her to exercise that right on her property.

I have considered the pleadings, the evidence adduced and the relevant judicial authorities and find that the plaintiff is entitled to the following orders:

a) A permanent injunction is hereby issued restraining the defendants, their employees, servants and/ or agents from entering upon, taking possession of, carrying out any construction, ploughing, planting or other farming activities or in any manner interfering with the parcel of land known as KISUMU/FORT TERNAN/ 450.

b) That the defendants by themselves, employees, agents and whomsoever claiming under them are hereby ordered to give vacant possession to the suit land KISUMU/FORT TERNAN/450 and demolish and remove the illegal structures within the next 30 days and in default eviction to issue in accordance with the provisions of the law with the assistance of enforcement officers.

c) The costs of the suit to be met by the defendants.

**DATED AND DELIVERED AT ELDORET THIS 5TH OF MAY, 2021**

***M. A. ODENY***

***JUDGE***