



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 100 OF 2017

ASHON SIKOLIA WANYONYI.....1ST PLAINTIFF

LUKA MAKOKHA WANYONYI.....2ND PLAINTIFF

VERSUS

ALPESH M. PATEL.....DEFENDANT

CONSOLIDATED WITH

LAND AND ENVIRONMENT CASE NO. 101 OF 2017

ALPESH M. PATEL.....PLAINTIFF

VERSUS

ASHON SIKOLIA WANYONYI1ST DEFENDANT

LUKA MAKOKHA WANYONYI.....2ND DEFENDANT

J U D G M E N T

By a consent order recorded on 11th July 2019 in **BUNGOMA ELC CASE NO 101 of 2017**, it was agreed as follows: -

- 1. That this case and BUNGOMA ELC CASE No 101 of 2017 be consolidated for hearing.**
- 2. That the plaint in this case would be the plaint and the plaint in BUNGOMA ELC CASE No 101 of 2017 would be the defence and Counter – Claim.**

By an amended plaint dated 10th July 2019, **ASHON SIKOLIA WANYONYI** and **LUKA MAKOKHA WANYONYI** (1st and 2nd plaintiffs respectively) filed this suit against **ALPESH M. PATEL** (the defendant) seeking the main prayer that the defendant be evicted from the land parcel **NO NDIVISI/MUCHI/6920** measuring 2.37 Ha. They also sought an order for costs and interest thereon.

The basis of the plaintiffs' claim is that they are the registered proprietors of the land parcel **NO NDIVISI/MUCHI/6920** (the suit property) which was originally part of the land parcel **NO NDIVISI/MUCHI/1401** which had been sub – divided to create parcels **NO NDIVISI/MUCHI/1401** had been the subject of proceedings in **BUNGOMA H.C.C No 100 of 1998** involving the **NATIONAL CEREALS AND PRODUCE BOARD**. During the pendency of those proceedings, third parties including the defendant encroached onto the suit land. This necessitated the filing of **BUNGOMA ELC CASE No 59 of 2014** where orders were issued to evict the said third parties. However, the defendant herein was not a party to those proceedings. During the eviction process, the defendant alleged that he is the owner of the suit property known as **UNSW – 30** and that he had been un – lawfully subjected to the eviction process. It is the plaintiff's case that the property referred to by the defendant as **UNSW – 30** is non – existent and cannot be super imposed on the plaintiffs' property which is a freehold title. The plaintiffs further pleaded that the lease or allotment letter, if any, given to the defendant and referred to as plot **UNSW – 30** was fraudulent, phony, irregular and unlawful. The particulars of fraud were pleaded in paragraph 9 of the amended plaint as follows: -

- i. Registering, allotting or causing to be issued a fake and or phony lease certificate superimposed on an existing freehold land.**
- ii. Transferring without consent, permission, let and/or approval of the plaintiffs, the said illegal documents to other innocent**

parties.

iii. Procuring un – procedurally documents of title or lease.

iv. Creating unknown registration numbers of un – surveyed or unknown parcel or location.

That the issue of the ownership having been determined in **BUNGOMA ELC CASE No 59 of 2014**, the defendant ought to be evicted from the suit property but attempts to do so have been ignored hence this suit.

Together with the amended plaint, the plaintiffs filed the statement of **ASHON SIKOLIA WANYONYI** (the 1st plaintiff and who was the only witness who testified in support of the plaintiff's case) as well as their list of documents also dated 10th July 2019.

In the said statement, the 1st plaintiff states that he and the 2nd plaintiff are sons of the late **REUBEN WANYONYI SIKOLIA** whose properties included the land parcel **NO NDIVISI/MUCHI/1401** a portion of which measuring 3.2 Hectares had been allocated by the Government to the **NATIONAL CEREALS AND PRODUCE BOARD** which had been sued in this case as a 2nd defendant but the suit against it was withdrawn on 9th March 2020. That left the plaintiffs with a portion measuring 2.6 Hectares which they sub – divided to create the suit property and another parcel being **NDIVISI/MUCHI/6921** which they sold to one **JAMES NDIRANGU NGANGA**. The suit property had been encroached upon by other parties and this necessitated the filing of **BUNGOMA ELC CASE No 59 of 2014** where eviction orders were issued. The defendant however resisted the said eviction hence this suit wherein the plaintiffs pray that the eviction orders issued in the previous suit be adopted.

The plaintiffs also filed their list of documents dated 10th July 2019 being: -

- 1. Certificate of Confirmation of Grant in P & A case No 68 of 1997 issued in respect of the Estate of REUBEN WANYONYI.**
- 2. Certificate of Search in respect of parcel NO NDIVISI/MUCHI/6920.**
- 3. Photographs**
- 4. Copy of the title deed to the land parcel NO NDIVISI/MUCHI/6920.**
- 5. Letter from the NATIONAL CEREALS AND PRODUCE BOARD dated 17th December 1998.**
- 6. Copy of Judgment in BUNGOMA ELC CASE No 59 of 2014 and Decree.**
- 7. Consent order recorded in BUNGOMA H.C.C.C No 100 of 1998.**

The defendant resisted the claim through his amended defence dated 16th December 2019 in which he pleaded, inter alia, that he is not aware about **BUNGOMA H.C.C.C No 100 of 1998** or any Judgment thereof. He added that he has all along been in occupation of the parcel **NO UNSW – 30** and his lease thereof is not fraudulent phony or irregular. He denied all the allegations of fraud and added that the plaintiffs' claim is un – sustainable. The defendant pleaded further that his lease has never been the subject of any litigation between him and the plaintiffs.

More fundamentally, in the defendant's plaint in **BUNGOMA ELC CASE No 101 of 2017** which is now the defence and Counter – Claim following the consolidation of these proceedings, the plaintiff pleaded that at all material times, he has been the owner of the parcel of land known as **UNSW – 30** situated in **WEBUYE TOWNSHIP**. That the plaintiffs illegally invaded the said property while executing the decree of the Court in **BUNGOMA ELC CASE No 59 of 2014** and in the process demolished his perimeter wall. Particulars of that illegality are pleaded in paragraph 5 of the defence and Counter – Claim as follows: -

i. Invading the defendant parcel of land without permission.

ii. Demolishing the defendant's perimeter wall whilst knowing that the defendant was neither a party to the suit nor condemned to be evicted in the suit.

iii. Flattening the defendant's perimeter wall and threatening to flatten the house whilst well aware that the defendant was neither an agent or servant of the defendants in BUNGOMA ELC CASE No 59 of 2014 and neither is the defendant claiming under them.

The defendant pleaded that had it not been for the intervention of the Police and the locals, the plaintiffs would have even demolished his house. That pleas to have the plaintiffs refrain from their illegal acts have been futile and the plaintiffs have constantly threatened to flatten the defendant's house on land parcel **NO UNSW. 30**.

The defendant therefore Counter – Claimed for the following orders: -

a. A declaration that the plaintiffs act of demolishing his perimeter wall was not only illegal and made in bad faith but also an abuse of the Court order in BUNGOMA ELC CASE No 59 of 2014.

b. An order of permanent injunction restraining the plaintiffs, their servants and/or agents from interfering with the defendant's use and occupation of that parcel of land known as UNSW – 30.

c. Costs of the Counter – Claim.

d. Any other relief that the Honourable Court may deem fit and just to grant.

Together with the defence and Counter – Claim, the defendant filed his statement and list of documents dated 2nd August 2017.

In the said statement, the defendant stated that he is a resident of **WEBUYE TOWNSHIP** and is the owner of the land parcel **NO UNSW – 30** where he lives.

That on 29th June 2017, the plaintiffs herein in execution of the decree issued in **BUNGOMA ELC CASE No 59 of 2014** illegally and without any colour of right, permission or justification invaded the said parcel of land and demolished the perimeter wall with the intention of flattening his house. That that action was an abuse of the Court process as he was neither a party to the said **BUNGOMA ELC CASE No 59 of 2014** nor an agent or servant of the defendant in that case. That were it not for the intervention of the Police and the locals, the plaintiffs would have flattened his house. The plaintiffs have continued to threaten him that they will demolish his house and therefore he seeks the protection of this Court.

The defendant filed the following list of documents in support of his Counter – Claim: -

1. Land sale agreement for parcel NO UNSW. 30.

2. Land Rates receipt.

3. Pleadings in BUNGOMA ELC CASE No 59 of 2014.

4. Decree in (3) above.

5. Photographs.

6. Demand letter.

7. Any other document with the leave of the Court.

I must add however that I did not see any land sale agreement in respect of the property known as **UNSW – 30**. There was however a consent dated 8th November 2016 in **BUNGOMA H.C.C.C No 9 of 2016 HOHN MWEYI NGOME .V. ALPESH M. PATEL**.

The plenary hearing commenced on 9th March 2020 and the 1st plaintiff and the defendant were the only witnesses who testified in support of their respective cases. They adopted as their evidence their statements and also produced their list of documents. I have already summarized the contents of those statements and also referred to their list of documents.

Submissions have been filed both by **MR SICHANGI** instructed by the firm of **J. W. SICHANGI & CO ADVOCATES** for the plaintiffs and by **MR OCHARO** (now Justice **OCHARO**) instructed by the firm of **OCHARO KEBIRA & CO ADVOCATES** for the defendant.

I have considered the evidence by both parties as well as the submissions by Counsel.

It is not in dispute that the plaintiffs are the registered proprietors of the suit property. They have produced as part of their documentary evidence, the title deed thereto issued to them on 25th July 2008 under the Registered Land Act (now repealed). As the registered proprietors of the suit property, the plaintiffs are entitled to all the rights and privileges belonging or appurtenant thereto. This is provided for under **Section 27** of the **repealed Act** under which the title to the suit property was issued, and also **Section 24** of the **new Land Registration Act**. Those rights and privileges include the right to eject any trespassers from the suit property. That is the main remedy that the plaintiffs seek from this Court with respect to the defendant. I have not heard the defendant try to impeach the plaintiffs' title to the suit property. In any event, he would not succeed in doing so because the ownership of the suit property has been settled by the Court of Appeal. In **BUNGOMA ELC CASE No 59 of 2014 ASHON SIKOLIA WANYONYI & LUKA MAKOKHA WANYONYI .V. ALFRED WAFULA KHAEMBA, WILBERFORCE MUTENGE & KANUDHA MENUBHA VAGHELA, MUKUNYA J** addressed that issue in paragraph 5 of his Judgment as follows: -

“This Court has made a Judgment the land parcel NO NDIVISI/MUCHI/6920 belongs to the plaintiffs after tracing the history of the suit land in CIVI APPEAL No 110 of 2011 JAMES NDIRANGU NGANGA .V. KANUBHA MENUBHA VANGELA. A copy of that Judgment had previously been given to the defendant who were given a chance to read the same before the hearing. On the hearing day of the case, the plaintiff attended the Court, the case was allocated at 12 noon. The defendant walked out of the Court never to come again. It would appear that they saw and understood the futility of pursuing their defence.”

The defendant has pleaded, and rightly so in my view, that since he was not a party in **BUNGOMA ELC CASE No 59 of 2014**, the orders issued in the Judgment delivered on 29th November 2016 directing the defendants therein to vacate from the suit property within 45 days or be evicted by the plaintiffs did not affect him. Clearly, therefore, if the plaintiffs suit was primarily premised on the Judgment in

BUNGOMA ELC CASE No 59 of 2014, then it is unlikely to succeed. I think that is what Counsel for the defendant had in mind when at paragraph 35 of his submissions, he stated thus: -

“My Lord, the Judgment in BGM 59 OF 2014 was made the defendant’s exhibit for two reasons, first to demonstrate that the plaintiffs have been buoyed this Judgment to chance to get pieces of land from people who are staying outside the boundaries of their title. They tried this on the 3rd defendant in the matter but they had to quickly withdraw their claim against him when they realized the futility of proceeding against him as the (sic) he had an allotted piece that was outside their title.”

In my view, and as correctly pointed out by Counsel for the defendant in paragraph 21 of his submissions: -

“Looking at the contents of the plaint filed in this pilot file, the statement of defence filed in regard thereto, the plaint filed in cause No 101 of 2017, the Counter – Claim and the statement of defence filed in reaction thereto, plus the positions that were taken by the combatants in this proceeding in their respective evidence, it is not difficult to conclude that at the center of the dispute is whether the portion occupied by the defendant lies within or without the perimeters of that title NO NDIVISI/MUCHI/6920.”

I entirely agree with that. Put another way, does the land parcel **NO NDIVISI /MUCHI/6920** registered in the names of the plaintiffs and the property **NO UNSW – 30** which the defendant claims ownership of refer to one and the same parcel of land and if so, is the defendant a trespasser on the suit property.

The defendant’s case is that he purchased the property **NO UNSW – 30** from one **JOHN M. NGOME** who transferred it to him. However, he had no sale agreement to show for it. He also said during the trial that he has a lease. No such lease was exhibited. This is what he said on being cross – examined by **MR SICHANGI**: -

“The property is a leasehold that is why I am paying rates. The lease is in the names of JOHN NGOME but he has transferred it to me that is why I am paying rates. The records at the County Government of Bungoma show that the plot in dispute is in my names. I have the allotment letter of the plot.”

The demand notes and receipts for payment of rates were all in the names of one **JOHN MWEYI NGOME**. The defendant did not produce any letter of allotment in respect of the property **UNSW – 30**. Counsel for the defendant has submitted at paragraphs 38 and 39 of his submissions that the plaintiffs have not proved fraud in the manner in which the defendant acquired ownership of the property **NO UNSW – 30**. Counsel then cites the consent order in **BUNGOMA ELC CASE No 9 of 2016 JOHN MWEYI NGOME .V. ALPESH M. PATEL** where one of the consent orders was that the un – surveyed plot **NO 30** be transferred to the plaintiff. However, in the absence of any such transfer, this Court can only conclude that no transfer could be executed because the plaintiffs already held a title deed for the same property. The claim by the plaintiffs’ that the defendant’s lease or letter of allotment, if any, in respect to plot **NO UNSW – 30** as pleaded in paragraph 9 of the amended plaint, as being *“fraudulent, phony, irregular and unlawful”* is well founded in my view. Fraud has been established to the required standard as set out in **R. G. PATEL .V. LALJI MAKANJI 1957 E.A 314**.

It is of course correct that the plaintiffs could not use any orders issued in **BUNGOMA ELC CASE No 59 of 2014** to evict the defendant or demolish his property as he was not a party to that suit. And that is precisely why the Court issued an order on 2nd August 2017 restraining the plaintiffs from doing so. Subsequently, a consent order was signed on 11th October 2017 maintaining the status quo until **BUNGOMA ELC CASE No 101 of 2017** was heard and determined. But that is now water under the bridge because the plaintiffs also filed **BUNGOMA ELC CASE No 100 of 2017** in which they now seek specific orders for the eviction of the defendant from the suit property. It cannot therefore be correct to argue that the plaintiffs are relying on the orders issued in **BUNGOMA ELC CASE No 59 of 2014** to support their claim. They have conceded in paragraph 6(a) of their amended plaint that the defendant was not a party to that suit but has also encroached on the suit land and that is why they have filed this suit against him.

It is also clear to me from the totality of the evidence herein that the property which the defendant refers to as plot **NO UNSW – 30** is in fact the suit property registered in the names of the plaintiffs. There is un – controverted evidence that the suit property was among two resultant sub – divisions from the land parcel **NO NDIVISI/MUCHI/1401** and which was registered in the names of the then **BUNGOMA COUNTY COUNCIL** between 1970 to 2006. It was later reclaimed by the plaintiffs’ late father **REUBEN WANYONYI SIKOLIA** but the **NATIONAL CEREALS & PRODUCE BOARD** acquired 3.2 Hectares thereof and relinquished a portion measuring 2.6 Hectares to the plaintiffs who sub – divided it into two portions and retained the suit property and sold the other portion to one **JAMES NDIRANGU NG’ANG’A**. The defendant, by his evidence, traces his ownership of the property referred to as plot **UNSW – 30** to the sale agreement between him and one **JOHN NGOME**. Among the documents annexed to the 1st plaintiff’s replying affidavit dated 2nd October 2017 in response to the defendant’s application for injunction dated 2nd August 2017 is an order issued by **G. P. MBITO J** on 17th December 1998 in **BUNGOMA H.C.C.C No 100 of 1998 – LUKA MAKOKHA WANYONYI & ASHON SIKOLIA .V. BUNGOMA COUNTY COUNCIL, WEBUYE MUNICIPAL COUNCIL, NATIONAL CEREALS & PRODUCE BOARD & MINISTRY OF RESEARCH & TECHNICAL TRAINING**. The relevant part of that order for purposes of this Judgment reads: -

“That the 2nd defendant, it’s agents, servants it’s allottees including JOHN NGOME & PATRICK KISAKA or any person claiming title under it’s authority be and is hereby restrained by way of temporary injunction from developing, alienating or in any other manner dealing in the suit land parcel NO NDIVISI/MUCHI/1401 pending the hearing and determination of this suit.”

The import of the above is that whatever property the said **JOHN NGOME** purported to transfer to the defendant, notwithstanding that no sale agreement was produced, could only have been be part of the original land parcel **NO NDIVISI/MUCHI/1401** and specifically the suit property. Counsel for the defendant has submitted at paragraph 43 of his submissions that the defendant’s rights over the property **NO UNSW – 30** *“were conclusively determined in BUNGOMA HIGH COURT ELC CASE No 9 of 2016 – JOHN MWEYI NGOME .V.*

ALPESH PATEL.” Counsel then refers to the consent recorded therein on 16th November 2016 which reads: -

- a. “That it is hereby declared and ordered that the subject property herein UNSN SANGO belongs to and is rightfully owned by the defendant.**
- b. That that property commonly known as un – surveyed plot NO 30 shall be transferred to the defendant by the plaintiff. The plaintiff to execute all the necessary transfer documents and hand they over to defendant.**
- c. Each party to bear its own cost.”**

MR OCHARO (now Justice **OCHARO**) Counsel for the defendant goes on to submit that this Court cannot now assail the above consent recorded before the late **MUKUNYA J.** It is of course correct that this Court cannot sit on appeal on a decision by another Court of concurrent jurisdiction. But it is worth noting that the above consent was not a decision by the late Judge. It was a decision by the parties themselves. Most significantly, it is strange that some 4½ years after that consent was filed by the parties in that case, the defendant has nothing to show this Court in the form of any transfer documents. Again, the conclusion is inevitable and that is that the said consent was clearly a ploy in which **JOHN MWEYI NGOME** was purporting to transfer to the defendant herein a property belonging to the plaintiffs herein. Both parties knew that the said plot **NO 30** referred to in that consent was infact the suit property herein and which the plaintiffs hold the title thereto since 25th July 2008. Therefore, no registration of any interest in the suit property was capable of being registered in favour of the defendant, or indeed any other party, for as long as the title thereto was held by the plaintiffs.

It is also instructive to note that the defendant confirmed during the plenary hearing that the plot **NO 30** is next to the Cereals Board. This is what he said: -

“The plot is next to the Cereals Board. It is plot NO WEBUYE/UNSW – 30. I have lived there since 1995 when I was a tenant to the said JOHN MWEYI NGOME.”

There is un – controverted evidence that the suit property was initially known as **NDIVISI/MUCHI/1401** before the Cereals Board acquired one portion thereof leaving the other portion to the plaintiffs. The only conclusion that this Court can arrive at given those facts is that the un – surveyed plot **NO UNSW – 30** which the defendant seeks to injunct the plaintiffs from interfering with is infact the suit property which has been registered in the names of the plaintiffs since 2008. The defendant is therefore essentially a trespasser on the said property and cannot be entitled to any remedy as claimed in his Counter – Claim. On the other hand, the plaintiffs, by virtue of being the registered proprietors of the suit land are entitled to all the rights and privileges belonging or appurtenant thereto including the right to evict the defendant therefrom.

Ultimately therefore and having considered the evidence by both parties, there shall be Judgment in the following terms: -

- 1. The defendant’s Counter – Claim is dismissed.**
- 2. Judgment is entered for the plaintiffs as against the defendant as follows: -**
 - a. The defendant shall vacate the land parcel NO NDIVISI/MUCHI/6920 within three (3) months from the date of this Judgment.**
 - b. In default of (a) above, the defendant shall be evicted from the land parcel NO NDIVISI/MUCHI/6920.**
 - c. The defendant shall meet the costs of plaintiffs’ suit and the dismissed Counter – Claim.**

Boaz N. Olao.

J U D G E

30th June 2021.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JUNE 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

Right of Appeal explained.

BOAZ N. OLAO.

J U D G E

30TH JUNE 2021.