



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 807 OF 2015

JOASH WINYO ONGAYO.....PLAINTIFF

VERSUS

MARY ADHIAMBO ONG'IDI & 2 OTHERS.....DEFENDANTS

JUDGEMENT

Joash Winyo Ongayo (hereinafter referred to as the Plaintiff) has come to court against Mary Adhiambo Ong'idi and Fredrick Omondi Ongidi and Erick Ochieng Ongidi alias Boxi/Mugabe claiming that he is the legal and registered owner of parcel of land known as SOUTH NYAKACH/W.KOGUTA/1074. Sometimes on or about the February, 2009 the Defendants herein without any color of right of lawful authority or cause unlawfully entered into the plaintiff's suit land and commenced developments by planting maize, groundnuts and vegetables thereon. As a result of the Defendants' aforesaid, the Plaintiffs have been denied the right to use his aforesaid parcel of land for purposes of farming and income from such use of the same.

The Plaintiff's claim against the Defendant is a permanent order of injunction restraining the Defendant either by himself, agents and/or servants from remaining on and/or entering the Plaintiff parcel of land.

The Defendants filed a joint statement of defence denying the allegation in the plaint and averred that they have been in possession of the said parcel of land since the year 1975 by virtue of a sale of land agreement signed between the late SAMSON ONYANGO (the Plaintiff's father) and the late WILSON ONGIDI ONDIEGI (the Defendants father) and the Defendants shall crave for leave of the Court to rely on the said sale of land agreement for its full purport and intent.

The Plaintiff has never approached the Defendants with any claim of ownership or otherwise over the suit property and further avers that they cannot deny the Plaintiff what does not belong to him and puts the Plaintiff to strict proof of any allegations to the contrary.

In reply to paragraph 6 of the Plaint, the Defendants aver that the Plaintiff does not deserve an order of injunction by virtue of an alleged title documents which was otherwise fraudulently acquired.

The Particulars of Fraud are as follows: -

- a) Failing to disclose that the said parcel of land had been disposed off by his late father to the Defendants.
- b) Disregarding the advice and agreement reached before the area chief and elders in the community.
- c) Causing the Land Registry to lift the restriction registered on the said parcel of land till the dispute is resolved.
- d) Acquiring the alleged title documents without consent from the other members of the family.
- e) Otherwise acquiring the alleged title documents without full disclosure of material fact.

In his evidence in chief the Plaintiff states that he is the owner of parcel No. SOUTH NYAKACH/W.KOGUTA/1074. It belonged to the Plaintiff's father Samson Ongayo who died in 1993. After death the Plaintiff caused the property to be transferred into his name by transmission. In 1991 the Defendants destroyed the boundary between the Plaintiff's land and 1073 belonging to the Defendants. That upon complaint by the Plaintiff, to the Ass. Chief, they went to the land with the Plaintiff and restored the boundary as the village elder. The Defendants never cultivated the land before until in 2009 when they entered the land and started cultivating.

In re-examination he states that he was not registered as the proprietor of the land fraudulently. He did succession cause no. 229/2006 and followed procedure. The grant given to him was confirmed on 25/4/2008. That there has never been any sale agreement between his father and 1st Defendant's husband. That he had filed a case in the lower court which he withdrew. That defendants had been using their land until

2009 when they invaded his land.

PW2, Omolo Were states that the Plaintiff owns the piece of land which belonged to his father. That in 1991 he was a village elder working with the ass-chief Benson Oalo.nts. He heard the dispute between the two. The 1st defendant's husband admitted encroaching onto the Plaintiff's land as he had put up a kiosk there. They made a fresh boundary. He also removed the kiosk. That the 1st defendant's husband had land that bordered the Plaintiff's land. It was the late father of the plaintiff who was cultivating the land with his two wives. When the Plaintiff's father died it is the plaintiff's mother who took over the land.

In cross examination he states that he just went to rectify the boundary. He did not hold any meeting. He was with the plaintiff and the late husband of 1st defendant. In 1991, the Plaintiff's father was still alive. It is the plaintiff who had reported the matter to the area ass-chief. It is the plaintiff who gave his father to buy that land and that is why the plaintiff was concerned and he reported the matter. May be that is why the plaintiff's other brothers were not claiming that land.

In re-examination he states that he was not present when the land was purchased by the plaintiff's father.

PW3 Paul Kibet Ragot states that he is the District Surveyor Nyando/Nyakach/Muhoroni. That his duties include surveying plots and lands in his area of jurisdiction upon request. That he knew the report dated 27.11.2006. He visited SOUTH NYAKACH/W.KOGUTA/1074 together with his colleague NICHOLAS OGWAE on 22.11.2006 to identify and indicate the extent of the said parcel leading to map sheet No. 10. They placed five beacons for the parcel registered in the names Joash W.D. Ongae and measures 0.41 hectares which is equal to one acre. The immediate parcel numbers are 1073 and 1077. Parcel 1073 is registered with Wilson Ongili and measures 4 hectares (about 10 acres) while 1077 is in the names of James Ayuko and measures 1.6 hectares (about 4 acres). The land in question 1074, 1073 and 1077 are in Nyakach sub county. Parcel 1074 is along Katitu/Homabay highway.

They prepared and signed their report dated 27.11.2006 which has been marked as MFI (P3) and produced as exhibit P3 together with certificates of official searches and map sheet No. 10 MFI (4) AND (5) AND PRODUCED AS EXHIBITS 4 (a) (b) and (c) and exhibit 5 respectively. All the parties were satisfied with the exercise as nobody filed any objection.

The Defence called Robert Ochieng as their only witness who states that his father and the father to the plaintiff were friends. They stayed a distance from each other. Mr. Ongayo was the owner of the land. He sold the land to his father and wrote an agreement in 1975. They paid Kshs. 1,200/=. That after 40 years, his son Joash Wanyo Ongayo came and complained that he sent the money to buy the land when he was working. He knew the land was belonged to the defendants as they were staying on the land. That is how his mother knew that the parcel was theirs.

The law is clear on the rights of a registered proprietor of land.

Section 24 of the Land Registration act provides that:

“(a) 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; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

Section 25 provides:

“25. (1) 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—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

Section 26 provides:

“26. (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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

In this case the Plaintiff has demonstrated that he is the registered proprietor of the property and conversely, the defendants have not proved that he obtained the property fraudulently or un-procedurally. I do grant prayers number

a) A permanent order of injunction restraining the Defendant by himself, agents and/or servant or any other person claiming through him from remaining on, entering, invading and/or in any other manner whatsoever interfering with the parcel of land known as SOUTH NYAKACH/W.KOGUTA/1074.

Costs of the suit to the Plaintiff. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JULY, 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