



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 108 OF 2013

MOSES OGUTU ODONGO.....PLAINTIFF

-VERSUS-

JOHNSTONE OTIENO OLONDO.....1ST DEFENDANT

RONALD OMOLLO OLONDO.....2ND DEFENDANT

LOICE AKINYI ONYANGO.....3RD DEFENDANT

DESTINY RECONCILIATION CHURCH.....4TH DEFENDANT

JUDGMENT

Moses Ogutu Odongo (hereinafter referred to as the Plaintiff) came to this Court by way of a Plaint dated 25/04/2013 and filed on 10/05/2013 against **Johnstone Otiemo Olondo, Ronald Omollo Olondo, Loice Akinyi Onyango and Destiny Reconciliation Church** (hereinafter referred to as the Defendants). The Plaintiff claims that he is the registered owner of all that parcel of land known as **PLOT NO. 7130-KAKOLA ADJUDICATION SECTION** having purchased the same from James Otiemo Olondo in the year 2008 and that the transaction was done in the presence of the Chief of Kakola Location on 25/5/2008.

On or about the year 2011, the 1st and 2nd defendants unlawfully trespassed on the plaintiff's parcel of land and forcefully buried one Dominic Onyango Olondo on the said parcel in utter disregard of the Plaintiff's rights as the owner thereof. That the 3rd and 4th defendants have put up structures on the plaintiff's land and continue to occupy the same on the basis that they have been authorized to occupy the land by the 1st and 2nd defendants and as such, the defendants are outright trespassers on his land.

That by reason of the defendant's unlawful actions, the Plaintiff has been deprived of his right to have quiet possession and enjoyment of his property and has therefore suffered great loss and damages. The plaintiff has further stated that the only proceedings between the plaintiffs and the defendants over the same subject matter was **NYANDO PMCC NO.121 OF 2011** which was struck out for lack of consent of the Land Adjudication Officer and lack of jurisdiction without delving on its merits.

The Plaintiff prays for judgement against the defendants jointly and severally for:

- a) A permanent injunction be issued directed at the defendants and restraining the defendants jointly and severally by themselves, agents, servants, representatives or any person claiming or deriving title under them, from selling, alienating, disposing, interfering with the plaintiff's interests or in any other way parting with the possession or title of plot of land belonging to the plaintiff known as **PLOT NO. 7130-KAKOLA ADJUDICATION SECTION** situate within the locality of Ahero in the Republic of Kenya.
- b) An order compelling the 1st and 2nd defendant to exhume the remains of their deceased brother buried illegally on the plaintiff's **PLOT NO. 7130-KAKOLA ADJUDICATION SECTION**.
- c) General damages for trespass with interest thereon at court rates.
- d) Any other remedy or order that this Honourable Court may deem just and expedient to grant.
- e) Costs of the suit be provided for with interest thereon at court rates.

The 1st, 2nd and 3rd Defendants filed their defence on 13/06/2013 through the firm of Odongo, Awino & Company Advocates. The defendants have denied that the plaintiff is the registered owner of PLOT NO. 7130-KAKOLA ADJUDICATION SECTION. They have further denied any trespass and in particular that Dominic Onyango Olondo was buried on the plaintiff's property and that the 3rd defendant has put up structures and continues to occupy the Plaintiff's land, that the plaintiff has been deprived his right to quiet possession and enjoyment or that the plaintiff has suffered any great loss and or damage and the plaintiff has been called to strict proof of those averments. The 1st and 2nd defendants have further stated that the orders sought for exhumation of their late brother's remains are without basis as the deceased was never buried on the suit land. That Nyando PMCC NO. 121 of 2011 is still pending and as such the present suit is an abuse of the court process. The defendants also maintain that that the plaintiff procured registration of the suit land in his name by way of fraud. Jurisdiction of the Court has been denied by dint of Practice Direction on Proceedings relating to Environment and the use and occupation of, and title to Land Gazette Notice No. 16268 dated 9th November 2012.

The Plaintiff filed a reply to defence on 26/06/2013 in which he reiterated the contents of the plaint and denied the allegations in the defendants' statement of defence and put them to strict proof thereof.

There is no affidavit of service on record to confirm whether the 4th Defendant has ever been served with the summons to enter appearance to date though the proceedings of 8/12/2014 indicates that it has been served and has not entered appearance.

PROCEEDINGS AND HEARING

I have noted from the Court record that the matter was referred to mediation on 21/11/2019 but which failed largely due to non-attendance by the defendants. The file was referred back to the registry on 7/10/2020. When the matter came up for hearing on 17/12/20, the 1st, 2nd and 3rd defendants and their advocate on record were absent in Court despite being served as per the affidavit of service sworn on 16/12/2020. As at the date of the hearing, the Plaintiff was acting in person. On the said date (17/12/20), the plaintiff's witness statement dated 25/04/13 filed together with the plaint on 10/05/2013 was adapted as evidence in chief. The Plaintiff's bundle of documents dated 25/04/2013 and filed on 10/05/2013 were adapted and marked as plaintiff exhibits 1-18. I have also noted from the record that the plaintiff filed a further list of documents on 28/08/2019. The documents thereof were however not adapted as plaintiff's exhibits.

ANALYSIS AND DETERMINATION

Since both parties have admitted that there is/was a suit between the same parties on the same subject matter being **NYANDO PMCC NO.121 OF 2011**, I think it is important for the Court to make a finding as to whether or not this suit is *sub judice* before delving into the merits of the suit.

Whereas the defendant has stated that the suit is still pending, the plaintiff has stated that the same was struck out for lack of consent of the Land Adjudication Officer and lack of jurisdiction without delving on its merits.

I have looked at the hand written proceedings in respect of **NYANDO PMCC NO.121 OF 2011** produced by the plaintiff as PEXH-18. From the proceedings, I have noted that on 14/09/2011, the 1st, 2nd and 3rd Defendant's advocate raised a preliminary objection on the basis that the plaintiff did not seek the consent of the land adjudication officer to institute the suit in accordance with section 30(1) of the Land Adjudication Act, Cap 284. In a ruling delivered on 5/10/2011, the Court struck out the Plaintiff's suit on the basis that it was bad in law as the provisions of section 30(1) of the Land Adjudication Act were not complied with. The Court however ordered that the defendants proceed with the hearing of their counterclaim. The Court has not had the opportunity to look at the counterclaim to enable it make a finding as to whether the issues therein are the same issue raised in the present suit. The defendants have also not appeared before Court to prove their claim that the Counterclaim in Nyando Court is ongoing. On the above basis, the Court finds that this suit is not *sub judice* and will proceed to give its judgement on the same.

The defendants have also averred that this Court lacks jurisdiction to hear this matter by dint of **Practice Direction on Proceedings relating to Environment and the use and occupation of, and title to Land Gazette Notice No. 16268 dated 9th November 2012**. I have looked at the said gazette notice and find nothing thereon that precludes this Court from hearing and determining this matter. The present suit was filed in 2013, and having found that it is not *subjudice*, paragraph 12 of the gazette notice gives this Court the jurisdiction to hear and determine the matter. Further, the defendant did not come to Court to state which paragraph of the gazette notice they were relying on to state that this Court lacks jurisdiction.

I have considered the evidence on record and do find that the Plaintiff has established that he is the owner of the suit property being **PLOT NO. 7130-KAKOLA ADJUDICATION SECTION**. The plaintiff has produced the sale agreement dated 25/01/2008 between himself and James Otieno Olondo in respect of the suit property (PEXH-14). The letter dated 14/01/2008 by the land adjudication department (PEXH-7) confirms that James Otieno Olondo was the proprietor of the land at that time. The letter dated 16/3/2012 by the land adjudication officer, Nyando Division (PEXH-4) further confirms that the suit parcel was initially registered to James Otieno Olondo but transferred to Moses Ogutu Odongo, who is the plaintiff herein vide objection number 1068/2000.

Further, the various letters by the land adjudication department and in particular the letters dated 21/08/2008 (PEXH-2), 30/12/2010 (PEXH-5) and 1/3/2012 (PEXH-6) confirm that the suit parcel is registered in the name of the Plaintiff. Though not produced as evidence, I have also noted that the plaintiff has included in his further list of documents filed on 28/08/2019 the title deed for land parcel number **NYANDO/KAKOLA/7130** in his name and issued on 26/02/2016 probably after the adjudication process.

I have noted that the defendants have alleged that the plaintiff procured registration of the suit land by way of fraud in that the sale agreement was void, failure to seek and obtain consent from the land control board and the district land adjudication office and failure to inform the larger family about the transfer.

It is my view that the defendants having alleged fraud, they were duty bound to prove the same. In *John Mbugua Gitau v Simon Parkoyiet Mokare & 6 others [2014] eKLR*, the Court held that;

‘The petitioner having alleged fraud and irregularities on the part of the 2nd and 3rd Respondents was duty bound to provide proof to the required standard. The burden of proof rests with whoever alleges. ...

The burden of proof on the person who alleges fraud is on a standard higher than on a balance of probabilities adopted in ordinarily civil cases but lower than proof beyond a reasonable as in criminal cases. It is somewhere in between.’

The defendants did not attend Court during hearing to substantiate their allegations. The Court therefore finds that the defendants have not proved fraud on the part of the plaintiff.

As regards the plaintiff’s claims of trespass as against the defendants, the plaintiff stated in his witness statement that on the basis of a family meeting chaired by the 2nd defendant, it was proposed by the 2nd defendant and seconded by the 1st defendant that their brother, Dominic Onyango Olondo be buried on the suit property despite protest from other relatives as the property had already been sold to the plaintiff. That the 3rd and 4th defendants on the other hand have put up structures on the suit property which they have been occupying since 2011 and August 2012 respectively and have refused to vacate despite demands by the plaintiff.

With respect to the 1st and 2nd defendants, the plaintiff has prayed for an order for exhumation of the remains of the 1st and 2nd defendants brother who was apparently buried on the suit property which belongs to the plaintiff. From the plaintiff’s witness statement, the burial must have taken place on or around the year 2011. By this time, the plaintiff had already been registered as the owner of the property as evidenced by the letter dated 21/08/2008 (PEXH-2) by the land adjudication officer. Having found that the plaintiff is the registered owner of the suit, the Court finds that the 1st and 2nd defendants were wrong in interring the body of Dominic Onyango Olondo in a land for which they had no interest in. Their actions were wrongful and amounted to trespass.

Though the plaintiff gave sworn evidence, the documentary evidence was biased towards proving ownership of the property as opposed to trespass. This does not however change the fact that the plaintiff’s evidence as per the witness statement remain uncontroverted and unchallenged and the Court has no option but to take the same as fact and truth of the matter in line with the holding of the Court in *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR (Quoted in in Gateway Insurance Co Ltd v Jamila Suleiman & another [2018] eKLR, Mombasa Civil Appeal No. 227 of 2017)* where the Court stated:

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”

Whereas the 4th defendant did not enter appearance, the 1st, 2nd and 3rd defendants filed their statement of defence on 13/06/2013 denying that there was any trespass as alleged by the Plaintiff. The defendants did not however attend Court to adduce evidence and the Court finds that the averments in the defence remained as mere allegations with no proof. On this the Court is guided by the finding in the case of *Shaneebal Limited v County Government of Machakos [2018] eKLR*, where **Odunga J** while quoting with approval various Court decisions held as follows in relation to failure to tender evidence in support of averments in a defence:

‘... According to *Edward Muriga through Stanley Muriga v Nathaniel D. Shulter Civil Appeal No. 23 of 1997*, where a defendant does not adduce evidence, the plaintiff’s evidence is to be believed as allegations by the defence is not evidence. In *CMC Aviation Ltd v Cruisar Ltd (No.1) [1978] KLR 103; [1976-80] 1KLR 835*, Madan J (as he then was) expressed himself as hereunder:

Pleadings contains the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. ...’

Similarly, and on the basis that the plaintiff’s evidence remains unchallenged and uncontroverted, the Court finds that the plaintiff herein proved his case on a balance of probabilities and is entitled to succeed.

As regards computation on damages for trespass, the Court in *Phillip Aluchio -vs- Crispinus Ngayo [2014] eKLR* held: -

“...The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less...

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass.....”

The court proceeded to award a nominal figure of Kshs. 100,000/= as damages for trespass.

However, in as much as the plaintiff in the instant suit did not lead any evidence nor attach any documentation to establish the exact value of the suit property before and after the trespass and/or how much damage was occasioned on the suit property by the actions of the defendants, he is still entitled to receive by way of damages such sum as would reasonably recompense him for being deprived of his right to have a quiet possession and enjoyment of his property. The Court is also alive to the fact that it is now around eleven (11) years since the 1st and 2nd defendant’s deceased brother was buried on the suit property. For this reason, the Court awards the plaintiff damages in the amount of Kshs.

200,000/= on account of nominal general damages for trespass together with interest at court rates from the date of this judgment until payment in full.

The upshot is that this Court enters judgement for the plaintiff against the defendants jointly and severally in the following terms;

a) The Court grants a permanent injunction restraining the defendants jointly and severally howsoever acting from trespassing or continuing to trespass upon, erecting or continuing to erect any fixtures or structures upon or continuing to encroach upon or accessing or continuing to access or in any other manner interfere with the Plaintiff's right of user and/or occupation of **PLOT NO. 7130-KAKOLA ADJUDICATION SECTION** (now registered as **NYANDO/KAKOLA/7130**) as the registered owner thereof.

b) The 1st and 2nd defendants are hereby ordered to exhume the remains of their deceased brother buried illegally on the plaintiff's **PLOT NO. 7130-KAKOLA ADJUDICATION SECTION** (now registered as **NYANDO/KAKOLA/7130**) and have the same interred in any cemetery at the cost of the 1st and 2nd defendants.

c) **The plaintiff is awarded Kshs. 200,000/= general damages for trespass together with interest at court rates from the date of judgment until payment in full.**

d) The plaintiff to have the costs of this suit.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JULY, 2021

ANTONY OMBWAYO

JUDGE

This Judgment 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