



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU

E & L CASE NO. 1 OF 2012

DALMAS OWINO ANYANGO.....PLAINTIFF

VERSUS

DOMNIC OCHIENG JAGONGO.....DEFENDANT

JUDGMENT

1. **Dalmas Owino Anyango**, the Plaintiff, sued **Dominic Ochieng Jagongo**, the Defendant, through the Plaint dated 30th March, 2012 and filed on the 5th April, 2012 seeking for the following prayers:

- (a) Permanent injunction restraining the Defendant from remaining on or continuing in occupation of the suit land, **Kisumu/Kombewa/1695**.
- (b) An order of eviction of the Defendant from the suit land.
- (c) General damages for trespass.
- (d) Costs of the suit and interest.
- (e) Any other relief the court may deem appropriate.

The Plaintiff avers that he has been the registered owner of the suit land at all material times and therefore entitled to possession and occupation. That the Defendant wrongfully entered onto the suit land on or about 3rd March, 2012 and started cutting down trees, clearing bushes and put up a semi-permanent house thereon. That the Defendant's action has resulted to damaging, wasting, destruction, polluting and or degradation of the suit land in addition to denying him quiet use and enjoyment of his land. The Plaintiff has set out the particulars of loss and damage at paragraph 11 of the said plaint that includes;

- (i) *Being deprived of the use and quiet enjoyment of the land.*
- (ii) *Misuse of the land by erecting the house.*
- (iii) *Defacing and devaluing the land.*

2. The claim is opposed by the Defendant through his statement of defence and counterclaim dated and filed on the 21st May, 2012. The Defendant pleads that he took possession and occupation of the suit land after acquiring proprietary rights through purchase and hence was not a trespasser. That the Plaintiff's claim is bad in law and discloses no cause of action. That in the counterclaim, the Defendant avers that the Plaintiff's title to the suit land was acquired fraudulently. That he bought the land on the 18th June, 2009 from Vincent Omondi Oindo, step son to Alex Otiato Olilo, who held it in trust and who unlawfully sold it to the Plaintiff herein. The Defendant set out the particulars of fraud at paragraph 11 which includes;

- (a) *acquiring the suit land without the knowledge and authority of the family members.*
- (b) *acquiring the said land unlawfully and irregularly while knowing it had already been sold to the Defendant.*
- (c) *registering the suit land into his name.*
- (d) *transferring the land unlawfully and without complying with the procedural and statutory requirements.*

The Defendant prays for the following orders against the Plaintiff;

- (i) The Plaintiff's suit be dismissed with costs.*
- (ii) Declaration that the suit land belongs to the defendant.*
- (iii) The cancellation of the title to the suit land held by the Plaintiff.*
- (iv) Costs of the counterclaim.*

3. The Plaintiff denied the Defendant's counterclaim through the defence to the counterclaim dated and filed on 31st May, 2012. The Plaintiff pleaded that the counterclaim offends "**Order 7 Rule 8**" of the **Civil Procedure Rules**. That the sale agreement of 18th June, 2009 under which the Defendant allegedly bought the land was null and void for failure to comply with **Land Control Act**. That the Defendant's claim in the counterclaim should be against Vincent Omondi Oindo. That the counterclaim discloses no cause of action against him.

4. In support of his case, the Plaintiff testified as PW1 and called Alex Otiato and George Nyangweso, the Land Registrar, who testified as PW2 and PW3, respectively. The plaintiff's case is that the suit land was registered initially in the name of Otiato Olilo on 13th March, 1988. That Otiato Olilo changed his name to Alex Otiato Olilo on the 23rd December, 2010 and subsequently sold and transferred the land to the Plaintiff who was registered as proprietor on the 8th June, 2011. The Land Registrar, PW3, confirmed the said transactions as procedural.

5. The Defendant testified as DW1 and called Vincent Omondi Oindo and Manasse Okanda, the Senior Assistant Chief, who testified as DW2 and DW3 respectively. The defendant's case is that the suit land belonged to the family of PW2 and DW2. That PW2 had given the and to DW2 who then entered into a sale agreement with the Defendant (DW1) on the 18th June, 2009. That PW2 and DW3 was among the witnesses to the sale agreement. That the defendant had been told to wait for the Succession Cause to be processed over the land but later learnt the suit land had all along been in the name of PW2 who later sold and transferred it to the Plaintiff.

6. The court gave directions on filing and exchanging written submissions on the 4th April, 2019 but only the learned Counsel for the Plaintiff has filed theirs dated the 17th May, 2019.

7. The following are the issues for the court's determination;

- (a) Who between the Plaintiff and Defendant has legal title to the suit land and whether it was procedurally acquired?***
- (b) Who is entitled to possession and occupation of the suit land?***
- (c) Whether eviction and permanent injunction orders should issue.***
- (d) Whether general damages are payable and if so, how much?***
- (e) Who pays the costs in the suit and counterclaim?***

8. The court has carefully considered the pleadings by both parties, oral and documentary evidence tendered, the plaintiff's written submissions and come to the following conclusions;

(a) That from the copy of the register, (green card), for land parcel Kisumu/Kombewa/1695, suit land, produced as exhibit by the Land Registrar (PW3), the land was first registered on 13th March, 1988 in the name of Otiato Olilo alias Alex Otiato Olilo who testified as PW2. That the person who had authority in law to sell and or transfer the said land to either the Plaintiff or the Defendant or any other person was PW2.

(b) That PW2 has confirmed to the court that he sold and transferred the suit land to the Plaintiff. That upon finding that the Defendant had filed a Caution, he complained to the Land Registrar and the Caution was lifted enabling the transfer document in favour of the Plaintiff to be registered. That PW3 informed the court that the Caution was regularly lifted after the Defendant failed to file an objection within the time given. That considering that the Defendant do not appear to have challenged the lifting of the Caution by for example, enjoining the Land Registrar through the Attorney General, in his counterclaim, the court finds that the transaction between PW1 and PW2 over the suit land cannot be faulted.

(c) That the Plaintiff exhibited a copy of the consent obtained from the Land Control Board pursuant to an application dated the 29th December, 2010. That both PW1 and PW2 confirmed attending the Land Control Board and obtaining the consent, in view of the evidence of PW3, the court finds that the Plaintiff obtained registration as proprietor of the suit land regularly, lawfully and procedurally.

(d) That Vincent Omondi Oindo, (DW2), from whom the Defendant reportedly bought the land from has never been registered as proprietor of the suit land. That further, his late father reportedly named Augustine Oindo Olilo, was never a registered proprietor of the suit land. That accordingly, DW2 had no legal title over the suit land that was capable of being transferred to the Defendant by the time their sale agreement dated the 18th June, 2009 or any other time thereafter was made. The legal title was with PW2 and the fact that he was a witness to the sale agreement did not divest him of the title or confer the title upon DW2.

(e) That in any case from the evidence tendered and conceded to by both Defendant and DW2, their sale agreement of 18th June, 2009 never received the blessings of the Land Control Board as no application for consent has ever been made or consent obtained. That accordingly, the sale agreement of 18th June, 2009 became void after expiry of six months without Land Control Board consent being applied for or obtained. That agreement cannot be the basis of the Defendant's claim over the suit land while the legal title vests with the Plaintiff.

(f) That the Plaintiff has proved that the Defendant has continued to remain or occupy the suit land from March, 2012 while knowing well that the land belongs to the Plaintiff and without his consent or authority. That the Defendant is therefore a trespasser into the suit land. That as the rights and interest of the registered proprietor of the suit land vests with the Plaintiff, he is therefore entitled to possession and occupation of the said land. That to do so, the Defendant must give vacant possession or be evicted and thereafter be permanently restrained from interfering with the Plaintiff's use of the land.

(g) That though the Plaintiff prays for general damages for trespass, the available evidence shows that he has never used the land. He informed the court that he had intended to erect rental houses on it but did not disclose to the court whether the architectural drawings had been done and appropriate authorizations received or when the constructions were to start. That does not however mean that he did not suffer damages for being unable to use or access the suit land from March, 2012. The court is of the view that an award of Kshs.100,000 as general damages for trespass is adequate under the circumstances.

(h) That having found for the Plaintiff, the Defendant's claim in the counterclaim fails in total.

8. That from the foregoing, the Plaintiff has proved his claim against the Defendant to the standard required of balance of probabilities. That the court therefore orders as follows;

(a) (i) *That the Defendant do give the Plaintiff vacant possession of the suit land in ninety (90) days from today and in default, eviction order to issue.*

(ii) *That upon the Defendant giving vacant possession of the suit land or being evicted, he remains permanently restrained by himself, servants, agents or otherwise from interfering with the Plaintiff's use and enjoyment of the said land.*

(iii) *That the Defendant to pay Plaintiff Ksh.100,000 (one hundred thousands) as general damages for trespass.*

(iv) *The Defendant to pay the Plaintiff costs and interests at court's rate.*

(b) *That the Defendant has failed to prove his claim on the counterclaim to the standard required. That the counterclaim is therefore dismissed with costs.*

Orders accordingly.

Dated and signed at Eldoret this 3rd day of February, 2020.

S. M. KIBUNJA

JUDGE

Delivered and signed this 6th day of March, 2020.

A. OMBWAYO

JUDGE