



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 362 OF 2015**

**[FORMERLY KISUMU HCCC NO. 85 OF 2005]**

**MAXWELL OTIENO ODONGO.....PLAINTIFF**

**VERSUS**

**PHILIP JUMA OKOTH.....DEFENDANT**

**JOHN MURWA MUSEMATE**

**MAUREEN CHACHA**

**JOHN MUSYOKI.....1<sup>ST</sup> PARTY**

**THE ATTORNEY GENERAL, REPUBLIC OF KENYA.....2<sup>ND</sup> PARTY**

**JUDGMENT**

1. **Maxwell Otieno Odongo**, the Plaintiff, commenced this suit against Phillip Okoth, the Defendant, through the plaint dated 11<sup>th</sup> July, 2005 seeking for an order of permanent injunction prohibiting the Defendant or his agents from interfering, trespassing and encroaching into his plot **Kisumu Municipality/Block 11/134**, the suit land; order for the Defendant to demolish the structures unlawfully erected on the plot, and reinstating the suit land to the status it was before and costs. The Plaintiff avers that sometimes in June 2005, the Defendant through his agents, employees and or workers moved onto the suit land, which was at all material times registered in his name and commenced constructions thereon without his consent and hence this suit.

2. The Defendant filed his defence and counterclaim dated the 18<sup>th</sup> July, 2005 in which he gave his name as Phillip Juma Akoth t/a Ziwani Enterprises. He denied the Plaintiff's claim and averred that he had acquired ownership of the said land through a sale agreement from Henry Murwa Musemate, John Mwangangi Musyoki and Maureen Chacha before taking possession and erecting the structures the Plaintiff has complained of. That the said suit land was still in the names of the three named Vendors at the time and that the Plaintiff's title was irregular, fraudulently obtained and a nullity in law. The Defendant has listed the particulars of fraud, nullity and irregularity under paragraph 7 to include failure to pay statutory stand premium to the government, registering the lease without consent of Commissioner of Lands and without a corresponding register. The Defendant therefore prays for the Plaintiff's suit against him to be dismissed with costs and judgment be entered for him in terms of the counterclaim.

3. By order of 5<sup>th</sup> October, 2005, the Defendant was allowed to issue and serve Third Party notices. The Defendant then filed their claim against the 3<sup>rd</sup> parties dated 20<sup>th</sup> September, 2005. The 3<sup>rd</sup> Parties are named **John Murwa Musemate, Maureen Chacha and John Musyoki** and are hereinafter referred to as the 1<sup>st</sup> Third Parties. The Defendant claim against the third parties was to be indemnified against the Plaintiff's claim if found liable and to recover from the third parties Kshs.3,000,000 or damages for breach of contract and costs for presenting themselves as the registered proprietors of the leasehold interest over the suit land, selling and transferring it to him for Kshs.1,850,000. That in breach of terms, conditions and warranty in the sale agreement, the Defendant's residential house under construction on the suit land is under threat of demolition and will result to loss, and damages to him. The Defendant therefore prays against the three third parties for loss and damages, refund of purchase price, costs of the suit by the Plaintiff and the Third-Party proceedings.

4. The three Third Parties filed their defence dated 10<sup>th</sup> November, 2005. They denied the Defendant's claim averring that their representations were based on the documents issued by the government of Kenya through the Commissioner of Lands over the ownership of the suit land. That the Defendant's claim should be against the Government of Kenya and prays for the claim against them to be dismissed with costs.

5. That through the application allowed on the 28<sup>th</sup> March 2006, the Third Parties filed their claim against the Attorney General dated the

29<sup>th</sup> March, 2006 for any judgment or liability and costs that shall be adjudged against them to be paid, settled, liquidated and borne by the Ministry of Lands and Settlement.

6. The Attorney General filed the 2<sup>nd</sup> Third Party defence dated the 22<sup>nd</sup> April, 2008 denying the Third Parties' claim and praying for their claim to be dismissed with costs.

7. The Plaintiff's case commenced on the 1<sup>st</sup> December, 2010 when he testified as PW1. It is his case that the lease and Certificate of Lease dated the 6<sup>th</sup> April, 1993 are in his name. That in 2005, he noted the Defendant was interfering with the land after breaking down the fence and gate. That he contacted the Commissioner of Lands and learnt that there existed two titles over the suit land. The Plaintiff testified that he had bought the suit land from Kobia, Muthurania and George Onyiro in 1990. That the Vendors signed the transfer and gave him the letter of allotment and he engaged a surveyor in 1993 who completed the exercise and the Plot was registered as Block 11/134. That the Commissioner of Lands had determined that the title document held by the Third Parties was invalid. PW1 stated during cross examination that he made payment required under the allotment letter on 5<sup>th</sup> October, 1993. That only one G. O. A. Onyiro signed the transfer form out of the three Vendors. That the Search conducted in October, 2008 confirmed that he was still the registered proprietor of the suit land. The Plaintiff then called George Gichumu Gacheche, the District Land Registrar, Kisumu who testified as PW2 on 7<sup>th</sup> March, 2012. He produced a copy of the white card (register) for Kisumu Municipality/Block 11/134 as exhibit confirming that it was leased to the Plaintiff on 6<sup>th</sup> April, 1993 and that the said title has not been recalled.

8. The Defendant testified as DW1 on the 18<sup>th</sup> February, 2019. He told the court that he bought the suit land from the three Third Parties, who are referred as the 1<sup>st</sup> Third Parties, on the 26<sup>th</sup> April, 2005 at Kshs.1,850,000. That he constructed a family home on the land at Kshs.6,000,000 from April, 2005 and completed in 2006. That he did not have any knowledge of any defect in the title held by the 1<sup>st</sup> Third Parties. He pointed out among others that the payment of Shs.32,943.35 made for the unsurveyed plot on 8<sup>th</sup> October, 1993 was made outside the 30 days given in the letter of allotment. He prayed for the Plaintiff's suit to be dismissed with costs. During cross examination, DW1 stated that he was aware the three persons who sold the suit land to him [1<sup>st</sup> Third Parties] had been asked in writing to surrender the lease back to the Commissioner of Lands but does not know whether they complied.

9. The 1<sup>st</sup> and 2<sup>nd</sup> Third Parties did not call any witnesses.

10. The learned Counsel for the Plaintiff, M/s Rachuonyo & Rachuonyo Advocates filed their submissions dated the 19<sup>th</sup> September, 2019 while M/s Moses J. A. Orenge Advocate for the Defendant filed theirs dated 30<sup>th</sup> September, 2019. The learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties did not file any submissions.

11. The following are the issues for the Court's determinations;

**(a) Who between the Plaintiff and the 1<sup>st</sup> Third Parties is registered as proprietor(s) of the suit land?**

**(b) If the answer to (a) above is in the Plaintiff, whether he is entitled to the prayers sought against the Defendant, and further whether the Defendant is entitled to the prayers sought against the 1<sup>st</sup> Third Parties, and further still, whether the 1<sup>st</sup> Third Parties are entitled to prayers sought against the 2<sup>nd</sup> Third Party.**

**(c) That if the answer to (a) above is in favour of the 1<sup>st</sup> Third Parties, whether the Defendant is entitled to the prayers sought in his counterclaim against the Plaintiff.**

**(d) Who pays the costs?**

12. The court has after considering the pleadings by all the parties, oral and documentary evidence presented by PW1, PW2 and DW1, the written submissions by the learned Counsel for the Plaintiff and Defendant plus the superior courts' decisions cited therein, and come to the following conclusions;

(a) That the Plaintiff's claim to the suit property is based on the letter of allotment dated the 25<sup>th</sup> May, 1990 in favour of J. K. Kobia, J. M. Muthurania and G. O. A. Onyiro, over Kisumu Municipality – UNS RESIDENTIAL PLOT measuring approximately 0.33 hectares, that was shown on an attached Plan No. 30973 XL/12A. The Plaintiff's case is that he bought the said un-surveyed plot from the three allottees vide the sale agreement dated the 24<sup>th</sup> October, 1990 and after surveying the Plot was registered in his name as Kisumu Municipality/Block 11/134 measuring 0.3402 hectares.

(b) That the Defendant's claim to the suit property is through the sale agreement dated 26.4.2005 between him as the purchaser, under the name Ziwani Investment, and Henry Murwa Musemate, a holder of power of attorney dated 3<sup>rd</sup> February, 2005 on behalf of John Mwangangi Musyoki and Maureen Chacha for Kshs.1,850,000. The Defendant also attached to the list of documents a copy of letter of allotment dated 16<sup>th</sup> June, 1999 for Residential Plot – Block 11/134 – Kisumu Municipality measuring 0.3402 hectares, copy of lease, and Certificate of Lease dated 20<sup>th</sup> November, 2001 in the names of Henry Murwa Musemate, John Mwangangi Musyoki and Maureen Chacha.

(c) That the court has noted that the fees demanded under the Plaintiff's letter of allotment dated 25<sup>th</sup> May, 1990 was paid on the 8<sup>th</sup> October, 1993, while that demanded in the Defendant's letter of allotment dated the 16<sup>th</sup> June, 1999 was paid on the 20<sup>th</sup> September, 2001. That the foregoing shows clearly that both payments were made outside the 30 days given by the first paragraph of page 2 of the said letters of allotments.

(d) That the Land Registrar's office that is the custodian of documents relating to proprietorship of Lands among others was a party in this suit through The Attorney General, the 2<sup>nd</sup> Third Party, on application of the 1<sup>st</sup> Third Parties. That the holder of that office testified as PW2 and confirmed that as of 7<sup>th</sup> March, 2012 when he testified, the Plaintiff was still the registered proprietor of the suit land. That testimony confirmed the position of the Commissioner of Lands vide the letter dated 26<sup>th</sup> August, 2008 addressed to the 1<sup>st</sup> Third Parties and copied to the Plaintiff, and another that directed as follows;

***“You are requested to voluntarily surrender the title for the above plot which was registered in your names on the 20<sup>th</sup> November, 2001.***

***This is because another title had been registered and issued to Maxwell Otieno Odongo way back on 6<sup>th</sup> April, 1993.”***

The Defendant confirmed during cross examination that he was aware of the Commissioner of Lands' directions to the 1<sup>st</sup> Third Parties to surrender the title for the suit land, but added that he did not know whether they had complied.

(e) That in view of the finding in (d) above, and considering that the 1<sup>st</sup> Third Parties did not testify in court in support of their pleadings, and further noting that the Defendant has not exhibited any title document to show that the suit land had been lawfully, regularly and procedurally transferred to his name, the Plaintiff's claim of ownership of the suit land succeeds. That in any case, the court is obligated by **Section 26(1) of the Land Registration Act No. 3 of 2012** to take the Plaintiff as the absolute and indefeasible owner of the suit land subject to the encumbrances, easements, restrictions, and conditions contained or endorsed in the Certificate of Title issued by the Land Registrar.

(f) That the Plaintiff's title could only have been challenged on grounds of fraud or misrepresentation, which he is proved to have been a party or by showing that the Certificate was acquired illegally, unprocedurally or through a corrupt scheme. The responsibility to present such evidence lay on the Defendant who challenged the title. That though the Defendant had set out the particulars of fraud, nullity and irregularity of the Plaintiff's title at paragraph 7 of his defence and counterclaim, he failed to discharge the onerous task of providing evidence in proof as required by **Section 107 of the Evidence Act Chapter 80 of Laws of Kenya** to the standard required of above balance of probabilities. That the Defendant's task was made harder by the position taken by the 2<sup>nd</sup> Third-Party of denouncing in their pleadings the title documents upon which the 1<sup>st</sup> Third Parties claimed the suit land, that they attempted to sell to him, and the evidence by PW2 that remains unrebutted that the Plaintiff is the registered proprietor of the suit land.

(g) That the 1<sup>st</sup> Third Parties did not dispute the Defendant's claim that he had paid them Kshs.1,850,000 as purchase price. They also did not dispute the Defendant's claim at paragraph 2 that ***“in the event of his being found liable to the Plaintiff, the Defendant claims to be identified by the Third Parties and each one of them against the Plaintiff's claim and to recover from them the sum of Three Million as money had, and received or alternatively as damages for breach of contract as well as his costs in defending this action and the costs of Third Party proceedings...”***. That the 1<sup>st</sup> Third Parties only sought indemnity from the 2<sup>nd</sup> Third Party. That the Defendant is therefore entitled to be compensated by the 1<sup>st</sup> Third Parties at Kshs.3,000,000 and costs.

(h) That the 1<sup>st</sup> Third Parties claim against the 2<sup>nd</sup> Third Party for indemnity fails as they did not tender evidence in support of their claim.

13. That flowing from the foregoing, the Court finds, and orders as follows;

(i) That the Plaintiff has proved his claim against the Defendant to the standard required of balance of probabilities and judgment is hereby entered in his favour and against the Defendant in terms of prayers (a), (b) and (c) of the Plaint dated and filed on the 11<sup>th</sup> July, 2005.

(ii) That the Defendant has failed to prove his counterclaim to the standard required of balance of probabilities against the Plaintiff and the counterclaim is hereby dismissed with costs.

(iii) That the Defendant has established his claim against the 1<sup>st</sup> Third Parties for payment of Kshs.3,000,000 (Three Million), costs of the Plaintiff's suit and the Third-Party proceedings.

(iv) That the 1<sup>st</sup> Third Parties have failed to prove their claim against the 2<sup>nd</sup> Third Party and the same is dismissed with costs.

Orders accordingly.

**Dated and signed at Eldoret this 3<sup>rd</sup> day of February, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**Delivered and signed this 6<sup>th</sup> day of March, 2020.**

**A. OMBWAYO**

**JUDGE**

Judgment read in open court in the presence of:

M/s Onsongo for Plaintiff.

No appearance for Defendant.

Court Assistant: Joanne