



**REPUBLIC OF KENYA**

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

**AT KISUMU**

**E & L CASE NO. 825 OF 2015**

**NYANZA ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**JOSHUA O. ORINA.....1<sup>ST</sup> DEFENDANT**

**HASS PETROLEUM (K) LIMITED....2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**1. Nyanza Enterprises Limited**, the Plaintiff, filed this suit against **Joshua Obegih Orina**, **Hass Petroleum (K) Ltd**, and **Commissioner for Lands**, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants respectively, seeking for the following prayers through the plaint dated the 19<sup>th</sup> October, 2006 and filed on the 23<sup>rd</sup> October, 2006:

“(a) A declaration that the plaintiff is the legal owner of a leasehold interest over Kisumu Municipality Block 6/461.

(b) A declaration that the allotment and creation of a leasehold interest over the same property, Kisumu Municipality Block 6/551 and its subsequent registration as Kisumu Municipality Block 6/461 is invalid, illegal, unprocedural, null and void, and of no legal consequence.

(c) An order declaring parcel number Kisumu Municipality Block 6/551 to be a nullity, void, non-existent and of no legal consequence.

(d) An order cancelling title number Kisumu Municipality Block 6/551 and the cancelling of Joshua Obegih Orina and Hass Petroleum (K) Limited present proprietors thereto.

(e) An order cancelling the inclusion of the suit premises in all maps for Kisumu Municipality Block 6 and parcel 551.

(f) An order directing the inclusion, insertion and showing parcel number 461 in all maps of Kisumu Municipality Block 6.

(g) An order of permanent injunction restraining Joshua Orina, Hass Petroleum (K) Limited, their successors, assigns, agents or otherwise howsoever from entering, erecting structures, alienating, disposing of, staying upon or in any other manner howsoever, interfering with the plaintiff's possession and ownership of the leasehold over the suit premises namely Kisumu Municipality Block 6/461.

(h) Costs of the suit.

(i) Any other or further order as the court may deem just and fit to grant.”

2. The Plaintiff avers that it bought the unsurveyed residential plot under letter of allotment No. 30973/XXII of 14<sup>th</sup> March, 1996 from C. M. Osir, and three others on or about the 22<sup>nd</sup> March, 1996. That the 3<sup>rd</sup> Defendant subsequently issued the Plaintiff with the lease over the said plot that was after surveying registered as Kisumu Municipality Block 6/461, the suit property, on 23<sup>rd</sup> May, 1996. That a certificate of lease was also issued. That the suit property measures 0.17 hectares and is situated at the junction of Mosque Road/Sailors Close and opposite both Mamba and Vunduba Hotel. That the plaintiff's title to the suit property has previously been challenged in ***Kisumu Hccc Nos. 219 of***

1996 and 58 of 1999 and Court of Appeal Civil Appeal No. 311 of 1998 by other parties and the Courts ruled in the Plaintiff's favour. That on or about 24<sup>th</sup> September, 2002 the Plaintiff learnt that the 2<sup>nd</sup> Defendant was fencing the suit property claiming it was Kisumu Municipality Block 6/551 that it had bought from the 1<sup>st</sup> Defendant after he had obtained lease over it from the 3<sup>rd</sup> Defendant on the 1<sup>st</sup> September, 1997. That the suit land having been registered with the Plaintiff in 1996, was not available to be allocated to the 1<sup>st</sup> Defendant in 1997 under a different reference. The Plaintiff set out the particulars of fraud and negligence attributed to the 3<sup>rd</sup> Defendant under paragraph 16 of the plaint.

3. The 2<sup>nd</sup> Defendant filed their defence dated the 16<sup>th</sup> January 2007 denying among others that the Plaintiff is the registered proprietor of the suit property; and that the findings in the previous suits are not material to the present action. The 2<sup>nd</sup> Defendant admitted that it had bought the suit property claimed by the Plaintiff, but registered as Kisumu Municipality/Block 6/551 from the 1<sup>st</sup> Defendant, who had been granted a lease over it by the 3<sup>rd</sup> Defendant on the 1<sup>st</sup> September, 1997. The 2<sup>nd</sup> Defendant averred that the Plaintiff acted fraudulently and set out the particulars at paragraph 23 of their defence and prays for the Plaintiff's suit to be dismissed with costs.

4. The Plaintiff withdrew the suit against the 1<sup>st</sup> Defendant on the 30<sup>th</sup> October, 2006. That the 3<sup>rd</sup> Defendant did not file any defence or participate in the proceedings.

5. That in support of the Plaintiff's case, Satish Narandas Bhayani, a Director, and Mbok Geoffrey Okongo, a Government Surveyor testified as PW1 and PW2 respectively, while Abdi Rashid, the Legal Manager testified as DW1 for the 2<sup>nd</sup> Defendant.

6. The learned Counsel for the Plaintiff, M/s Chris Maganga Advocate and that of the 2<sup>nd</sup> Defendant, M/s Owiti Otieno & Ragot Advocates filed the written submissions dated the 23<sup>rd</sup> July, 2019, and 27<sup>th</sup> August 2019 respectively.

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

**(a) Whether the Plaintiff and the 2<sup>nd</sup> Defendant are registered proprietors of land parcels Kisumu Municipality/Block 6/461 and 551 respectively.**

**(b) Whether the two parcels are situated on the same ground positions or different sites.**

**(c) That if the answer to (b) is that the two described plots are on the same ground position, which of the two plots' reference was allocated and registered first?**

**(d) Whether any of the two referenced plots was allocated and registered fraudulently.**

**(e) The legal effect of the previous suits over Kisumu Municipality/Block 6/461 to this suit.**

**(f) Whether the Plaintiff is entitled to any of the prayers sought.**

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

8. The court has carefully considered the pleadings by both parties participating in the proceedings, the oral and documentary evidence by PW1, PW2 and DW1, the learned Counsel's written submissions, the cited superior courts' decisions therein, and come to the following determinations;

(a) That the Plaintiff is the registered proprietor of Kisumu Municipality/Block 6/461 measuring 0.7100 hectares by virtue of lease issued by the 3<sup>rd</sup> Defendant on the 23<sup>rd</sup> May, 1996 and registered on the 23<sup>rd</sup> May, 1996 and certificate of lease issued on the same date. The 3<sup>rd</sup> Defendant has not denounced the said document of title nor rebutted or challenged the Plaintiff's evidence that it acquired the registration in accordance with the law. The Plaintiff evidence is that the said parcel was so referenced and registered after survey of the Plot allotted to C. M. Osir, George Odidi, E. Biegon and Beatrice Mumo vide the letter of allotment reference No. 30973/XXII dated 14<sup>th</sup> March, 1996. That the parcel's acreage was then described as approximately 0.678 hectares that the Plaintiff bought vide the sale agreement dated the 22<sup>nd</sup> March, 1996.

(b) The 2<sup>nd</sup> Defendant claim of ownership of Kisumu Municipality/Block 6/551 is traced to the certificate of lease issued to one Joshua Obegih Orinah on the 9<sup>th</sup> August, 2002 for the said plot measuring 0.7232 hectares. That the said Joshua Obegih Orinah sold the said plot to the 2<sup>nd</sup> Defendant who were issued with the Certificate of Lease on the 20<sup>th</sup> August, 2002 after being registered as proprietor on the 10<sup>th</sup> August, 2002.

(c) That the finding in (a) above shows that the four initial allottees sold their interests on the letter of allotment dated 14<sup>th</sup> March, 1996 to the Plaintiff on the 22<sup>nd</sup> March, 1996 which was after about eight (8) days from the date of allotment. The finding in (b) above shows that the said Joshua Obegih Orinah sold his interest to the 2<sup>nd</sup> Defendant only after one day from the date he became registered as proprietor. That the four allottees from whom the Plaintiff acquired its interests and Joshua Obegih Orina, from whom the 2<sup>nd</sup> Defendant acquired their plot from were not availed as witnesses to confirm among others, whether they had obtained consents to transfer. The 3<sup>rd</sup> Defendant though obviously the office where the letters of allotment, leases and Certificate of Leases emanates from or are processed though opted not to participate in the proceedings. That was despite being actively involved in the

matter through the correspondence the parties referred to in their pleadings and testimonies. That the failure by the 3<sup>rd</sup> Defendant to actively participate in the proceedings means they missed the opportunity to help in resolving the dispute between the parties that was greatly caused to them. That the 3<sup>rd</sup> Defendant is indeed the source of the dispute is clearly shown by their action of issuing a lease dated 5<sup>th</sup> October, 2012 in favour KICOMI (1993) Limited over plot described as Kisumu Municipality/Block 6/461 that was forwarded to District Land Registrar, Kisumu vide letter dated 7<sup>th</sup> December, 2012 for registration, while this suit over a similarly described plot was pending in this court. That lease appears to have been recalled vide the District Land Registrars Kisumu East & West letter dated 9<sup>th</sup> May, 2013.

(d) That weighing the evidence on the title documents and history given by the Plaintiff against that given by the 2<sup>nd</sup> Defendant, it appear to lead to the conclusion that the plot described as Kisumu Municipality/Block 6/461 measuring 0.7100 hectares, and Kisumu Municipality/Block 6/551 measuring 0.7232 hectares are on the same ground position. That is buttressed by the various correspondences by the Commissioner of Land and the Land Registrar office dated 24<sup>th</sup> April, 2003, 30<sup>th</sup> September, 2003 and 29<sup>th</sup> April, 2004. That however, the evidence of PW2 from Nyanza Provincial Surveyors Office, the Provincial Surveyor's letter dated 25<sup>th</sup> April, 2013, and the Land Registrar's Kisumu East & West dated 25<sup>th</sup> December, 2012, and 9<sup>th</sup> May, 2013 leads to the second or alternative conclusion that Kisumu Municipality/Block 6/461 and 551 are on separate ground positions. That evidence points to the fact that the Kisumu Municipality/Block 6/551 emanated from Kisumu Municipality/Block 6/92, which was subdivided into parcels 551 to 553, and is located near the Jua Kali area, while Kisumu Municipality/Block 6/461 is above Otieno Oyoo Street. [See the District Land Registrar's letter dated 25<sup>th</sup> December, 2012].

(e) That though some of the correspondences referred to above were only marked for identification when PW1 testified but not produced as exhibits, they are from public offices, and their authenticity has not been challenged. That the dispute herein being over the ground position of the plots described as Kisumu Municipality/Block 6/461 and 551, the court finds the contents of these correspondences are important and useful as neither the Plaintiff nor the 2<sup>nd</sup> Defendant called their authors or their representatives to address the court and be cross-examined on them.

(f) That from the testimonies presented by the Plaintiff and the 2<sup>nd</sup> Defendant, none of the two has ever approached the District Land Registrar's or Surveyor's office to be shown the ground position of the Plot each claimed. That as PW2 testified in court, the plots as described cannot be far from the other, and it is important that the parties be given the opportunity to be shown the ground positions of their plots.

(g) That further to the findings in (a) and (b) above, only the Plaintiff has produced a copy of the lease which was issued and thereafter registered for the certificate of lease to be issued. That the Plaintiff has therefore proved that their title to the suit land, Kisumu Municipality/Block 6/461 was regularly, legally and procedurally acquired. The 2<sup>nd</sup> Defendant only produced the certificate of lease that had been issued to Joshua Obegih Orina, and the one issued to them after transfer. That the court is therefore unable to establish the history of the plot and how it came to be registered with Joshua Obegih Orina without the letter of allotment and lease being produced in court.

9. That in view of the foregoing, the court finds and order as follows;

(a) That the County Land Registrar and Surveyor do call a meeting with the duly authorized representatives of the Plaintiff, and 2<sup>nd</sup> Defendant within ninety (90) days, and point to them the ground position, and boundaries of their plots described in the documents of title as Kisumu Municipality/Block 6/461 and 551.

(b) That should the exercise in (a) above show that the 2<sup>nd</sup> Defendant is occupying or in possession of Kisumu Municipality/Block 6/461 or any part of it, they should remove themselves, and any of their structures thereon, and give vacant possession to the Plaintiff in thirty (30) days after such determination, and shall thereafter remain permanently enjoined in terms of prayer (g) of the plaint.

(c) That due to the nature of the dispute and the central role prayed by the 3<sup>rd</sup> Defendant who did not participate in the proceedings, the Plaintiff and the 2<sup>nd</sup> Defendant will each bear their own costs.

(d) That the Plaintiff and 2<sup>nd</sup> Defendant to equally meet the County Land Registrar's, and Surveyor's fees if any, for the exercise in (a) above.

(e) That all the other prayers are not granted.

(f) That the matter be fixed for mention for the court to receive compliance reports on orders (a) and (b).

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:

Mirembe for Plaintiff.

No appearance for 2<sup>nd</sup> Defendant.

No appearance for 3<sup>rd</sup> Defendant.

Court Assistant: Joanne