



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
LAND CASE NO.343 OF 2014

SAMSON OBILO ONOKA.....PLAINTIFF

VERSUS

JUSTUS OKUNA ORAWO.....DEFENDANT

J U D G M E N T

1. The plaintiff **Samson Obilo Onoka**, through the plaint dated 1st December 2014, filed this suit against the Defendant, **Justus Okuna Orawa** praying for damages for interfering with his constitutional right to property, damages for trespass, permanent injunction from interfering with land parcel **Kisumu/Marera/890** and costs. The plaintiff avers that he is the registered proprietor of land parcel **Kisumu/Marera/890** and that Defendant trespassed onto it in January 2014 and commenced cultivating on it without his permission.

2. The Defendant filed a document headed "Objection on case filed No.343 in the High Court" dated 25th January 2015 which the court takes to be his defence. The Defendant averred that the suit land was originally registered in the names of **Oluoch Oluoch Group** after the family consolidated ten smaller parcels to do Commercial farming. That one **Nyangweso** laid claim on the land and filed a suit in court. That the land owners chose the plaintiff to defend the case and after succeeding the plaintiff transferred the land to his names. That after **Nyangweso** was defeated in the court case, the family members (Land owners) returned to farm on the land but the plaintiff stopped them claiming that he owned the land. The land owners then picked on the Defendant to claim the land back from the plaintiff and he lodged a claim before the Tribunal which ruled in his favour.

3. This case came up for hearing on the 26th October 2015 when the plaintiff testified as PW1 and the Defendant as DW1.

4. SUMMARY OF PLAINTIFF'S EVIDENCE

(a) That the plaintiff got registered as the proprietor of **Kisumu/Marera/890** in 1986. He produced a copy of the title deed issued on 12th February 1986 and copy of Certificate of Official Search dated 26th February 2014 confirming that he is the registered proprietor of the said land. The Certificate of Official Search also shows that one **Joseph Nyangau Amasaka** had filed a caution on the register on 21st July 1995 claiming purchaser interest. It also shows that the title was charged on 14th October 1986 to Kenya commercial Bank Limited for a loan of Kshs40,000/=

(b) That the plaintiff sued the Defendant because he took possession of the land without permission and started cultivating on it and leasing it out. That the Defendant only stopped his use of the land after being served with the court order issued in this case.

(c) That the land was given to the plaintiff by his father **Onoka Oluoch** and that it never belonged to any group of people.

5. SUMMARY OF DEFENDANT'S EVIDENCE

(a) That the suit land came from smaller parcels which were consolidated in 1963 and registered in the group name **Oluoch Oluoch**. That the owners were cultivating cabbages and tomatoes and had opened a Post Office Account.

(b) That the group then stopped farming on the land. Then one **Joseph Nyangau** lodged a claim on the land in 1986. The owners appointed the plaintiff to defend their interest after which he transferred the land to his names.

(c) That after plaintiff defeated **Joseph Nyangau** he started leasing the land to those who wanted to use it. The owners were not happy with this turn of events and they picked the defendant to sue the plaintiff.

(d) That the Defendant sued plaintiff before the Kisumu Land Disputes Tribunal and the award was read in the Magistrates Court on April 2002 in their (group) favour. The Defendant produced a copy of the Tribunal proceedings in case number 15 of 2001 showing that on 13th December 2001, the Tribunal had ruled that "*the tile deed held by the Defendant (Samson Olalo Onoka) should be withdrawn from him and the same returned to Oluoch Oluch Family for subdivision as they so do wish.*"

(e) That following the Tribunal's award, the members took over their portions of the land, and the Defendant said he was surprised to be the only one sued by plaintiff instead of suing all the family members.

(f) That the **Oluoch Oluoch** Group had consolidated their parcels into the suit land before the land adjudication and consolidation exercise. That the plaintiff was registered with the suit land after the adjudication process and there was no documents of ownership of that land in the names of **Oluoch Oluoch**.

6. The court has considered the pleadings filed, evidence tendered by both parties and the following are the main issues for determination

(a) Whether the plaintiff was registered with the suit land as the absolute owner or trustee.

(b) Whether the Defendant has legal basis to use the suit land without the plaintiff's consent.

7. DETERMINATION

(a) That from the testimony given by the plaintiff and confirmed by Defendant during cross-examination, the plaintiff get registered as the proprietor of the suit land after the land adjudication process. Though the Defendant claim that the land belonged to **Oluoch Olucho Group** and that it was the group that transferred it to the plaintiff, to wade off the claim by **Joseph Nyangau**, there was no time that the land was ever registered in the names of the group. The Defendant admitted as such during cross-examination. There is therefore no way the group could have transferred the land to the plaintiff's names while it was not the registered proprietor of the land.

(b) That if the **Oluoch Oluoch Group** had any interest over the suit land, they should have pursued it in accordance with Section 26 of the Land Adjudication Act Chapter 284 of the Laws of

Kenya by filing objection proceedings or an appeal to the Minister under Section 29 of the said Act on learning that the plaintiff had been registered as the owner in the adjudication register.

(c) That the plaintiff, as the registered proprietor of the suit land is entitled to the rights and privileges set out in Section 24 and 25 of the Land Registration Act No.3 of 2012. This court is obligated under Section 26 of the said Act to take the plaintiff as the owner of the suit land by virtue of the Certificate of title issued in his favour by the Land Registrar as it has not been successfully challenged.

(d) That though the Kisumu Land District Tribunal had awarded the suit land to Oluoch Oluoch in their award of 13th December 2001 in case No.15 of 2001, the tribunal had no jurisdiction to determine the issue of ownership or title to the suit land as it was registered land. The order was beyond the powers set out under Section 3(1) of the repealed Land Disputes Tribunal Act and therefore null and void ab initial.

This court cannot confirm whether the award was forwarded to the lower court for reading, adoption and execution as no lower court proceedings were availed.

(e) That the Defendant admitted that he had been using the land from the time the Tribunal award was made. The tribunal award has been declared null and void for being ultra vires the powers of the tribunal and therefore the Defendant had no legal basis to enter into the suit land. The Defendant had sought for justice in a forum that had no jurisdiction to grant him enforceable orders.

(f) That as the Defendant stopped using the land upon being served with the temporary injunction order issued by this court, and considering the chequered history of the disputes surrounding this suit land, the court find this is not an appropriate case to award damages for trespass. The court also find there is no evidence of infringement of the plaintiff's constitutional rights to property and therefore no damages will be awarded under that heading. The court however find that the plaintiff has established his case on a balance of probability that the Defendant had taken possession of the suit land without his permission. The plaintiff is entitled to an order of permanent injunction to keep the Defendant out of the suit land. The plaintiff is also entitled to costs.

8. That flowing from the foregoing the court enters judgment for plaintiff against the Defendant as follows:

(a) That an order of permanent injunction is hereby issued restraining the Defendant by himself, servants and agents from entering or trespassing upon or interfering with the plaintiff's use and enjoyment of land parcel **Kisumu/Marera/890**.

(b) That the Defendant will pay plaintiff's costs of this suit.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this **9th day of February 2016**

In presence of;

PLAINTIFF Present

DEFENDANT Present

COUNSEL

Mr Indimuli for Yogo for Plaintiff

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/2/2016

9/2/2016

S.M. Kibunja J.

Oyugi court Assistant

Parties present

Mr Indimuli for Yogo for plaintiff.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/2/2016

Court: Judgment delivered in open court in presence of both plaintiff, defendant and Mr Indimuli for Yogo for plaintiff.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/2/2016