



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 283 OF 2016 (FORMELY HCCC NO. 190 OF 2009)

ENOCK ISRAEL OWITI.....PLAINTIFF

VERSUS

JALARAM ACADEMY TRUSTEES REGISTERED.....1ST DEFENDANT

ERICK OUMA OKEYO.....2ND DEFENDANT

THE KISUMU DISTRICT LANDS REGISTRAR.....3RD DEFENDANT

JUDGEMENT

1. Enock Israel Owiti, the Plaintiff, commenced this proceeding against Jalaram Academy Trustees Registered, Erick Ouma Okeyo and The Kisumu District Lands Registrar, the 1st to 3rd Defendants respectively, vide the plaint dated the 8th December 2009 seeking for the following;

- a) **A permanent injunction restraining the Defendants by themselves or agents from disposing of, advertising for sale, selling, alienating, dealing and or interfering with the Plaintiff's Land Parcel Kisumu Municipality Block 10/568.**
- b) **An order directing the 3rd Defendant to rectify the said land's register by striking out the names of the 1st and 2nd Defendants and replacing them with that of the Plaintiff as the registered proprietor.**
- c) **Costs and interest.**
- d) **Any other relief the court may deem appropriate and just.**

The Plaintiff avers as follows among others;

- **That he purchased the suit land from Joshua Obegih Orinah sometime on the 7th December 2001 and has therefore been the registered proprietor at all material times.**
- **That as he is a resident of the United States of America, he has been conducting searches on the title whenever he was in the country with the Lands Department and has over nine (9) years obtained searches reflecting that he was the registered proprietor.**
- **That when conducting a search in July 2009, as it had become routine when in the Country, he discovered that the 1st Defendant had become the registered proprietor of the suit land on the 31st July 2009.**
- **That he complained to one Mr. Nyaanyi, the then Kisumu Land Registrar and the Kisumu District Criminal Investigations Officer but despite the promises, no action was taken.**
- **That upon contacting the Kisumu Municipal Council offices, he learnt that the Defendants had attempted unsuccessfully to have the Plaintiff's name removed from the roll of rate payers for the plot.**
- **That the cancellation of the Plaintiff's name from the Lands register and subsequently replacing it with that of 2nd Defendant and the transfer to the 1st Defendant was illegal, wrongful, unlawful and fraudulent actions by the Defendants.**
- **That the Plaintiff has been in possession of the suit land from 2001 when he purchased it. That he had erected a makeshift**

structure to house his security guards and was in the process of securing funds to construct his home to settle in after his tour of duty abroad comes to an end.

2. The Plaintiff's claim is opposed by the 1st Defendant through their statement of defence and counterclaim dated the 7th January 2010 in which they among others aver as follows;

- That they dispute that the Plaintiff was the registered proprietor of the suit land at the material time and that he had bought it from Joshua Obegih Orinah on the 7th December 2001.
- That in the alternative, the Plaintiff's certificate of lease is fraudulent as Joshua Obegih Orinah had not been registered as the proprietor, and the Commissioner of Lands had not allotted the land to any person in 2001.
- That the Plaintiff could not have taken possession of the suit land in 2001 as it did not exist then until 2009.
- That further in the alternative, that the suit property was on the 18th June 2009 allotted by the Commissioner of Lands to the 2nd Defendant who sold it to the 1st Defendant who owns another plot near it on which is situated an academy.
- **That the 1st Defendant was issued with the title document on the 31st July 2009 and the Plaintiff has therefore no claim over the plot against the 1st Defendant.**
- **That subsequent to being registered with the suit property, the 1st Defendant physically and constructively took possession of the plot.**
- **That on or about the 17th September 2009, the Plaintiff and or his employees wrongfully, unlawfully, illegally and without colour of right entered and trespassed upon the suit property and erected a fence and has continued to be in trespass since.**
- **That the Plaintiff's trespass onto the property has deprived the 1st Defendant the use and enjoyment of the plot including the earmarked constructions of facilities for the academy.**
- **That the 1st Defendant served the Plaintiff with notice to stop the trespass and demolish and or remove the fence but the Plaintiff has ignored and refused to comply and has persisted in his wrongful and illegal occupation of the property.**
- **That the 1st Defendant has suffered loss and damage for which they claim against the Plaintiff.**

The 1st Defendant claims for the following against the Plaintiff in the counterclaim;

- a) **A declaration that the 1st Defendant is the sole and registered owner of Kisumu Municipality Block 10/568.**
- b) **A declaration that the Plaintiff either by himself or agents is wrongfully in occupation of the said property and hence a trespasser.**
- c) **A declaration that the Plaintiff by himself or agents is not entitled to remain on the suit property.**
- d) **Permanent injunction be issued restraining the Plaintiff by himself or agents howsoever from remaining on or continuing in occupation of the suit property.**
- e) **Vacant possession of the suit property.**
- f) **Eviction of the Plaintiff and demolition of any structures erected by him on the suit property at his expense.**
- g) **General damages for trespass.**
- h) **Mesne profits from the time the Plaintiff illegally and wrongfully occupied the suit property till the date of vacating and or eviction.**
- i) **Costs and interests.**
- j) **Any other relief the court deems appropriate.**

The Plaintiff denied the 1st Defendant's counterclaim through his defence dated the 28th July 2010, among others averring that the counterclaim as drafted violates the mandatory provisions of the Civil Procedure Rules and would be raising a preliminary objection on a pure point of law.

3. The Plaintiff's claim is also denied by the 2nd Defendant through his statement of defence dated the 6th July 2011 in which he avers as

follows;

- **That the particulars of fraud particularized by the Plaintiff are not correct and that the Plaintiff is not entitled to the orders sought as he has never been the lawful proprietor of the suit property.**
- **That the jurisdiction of this court over the suit is denied.**
- **That the Plaintiff's suit be dismissed with costs.**

4. The 3rd Defendant disputed the Plaintiff's claim through their statement of defence dated the 25th January 2010 averring as follows;

- **That any action taken by the Land Registrar regarding the suit property was lawful, procedural, and free from any irregularities.**
- **That no notice of intention to sue was served and hence the suit was filed prematurely and does not lie in terms of Section 13A of the Government Proceedings Act Chapter 40 of Laws of Kenya.**

5. The Plaintiff testified as PW1, and called Peter Simion Kayila, an I.C.T Officer from the County Government of Kisumu, who testified as PW2. The Plaintiff told the court how he acquired the suit property and produced several documents as exhibits including certificate of lease, sale agreement, certificate of official searches, receipts for the transactions at the lands office and rates payments to the Municipal Council of Kisumu and several correspondence. That upon getting the certificate of official search of 11th August 2009 that showed the 1st Defendant as the registered proprietor of the suit land, he visited the Municipal Council offices and confirmed that he was still registered as the rate payer in respect of the plot. That he then visited the Land Office and met Mr. Ngaanyi the then land Registrar, and lodged his complaints initially verbally and later in writing. That he also reported to the D.C.I.O and the Ethics & Anti-corruption Authority before filing this suit after failing to get a solution. PW2 told the court that according to the County Government of Kisumu roll of rate payers, he is the one registered with the suit property. That in 2009 there was a request to the County Government to have the name of the 2nd Defendant entered as the rate payer but it was not done as there was no consent from the Plaintiff. That the Land Registrar Kisumu, Mr. Ngaanyi, had written to the Town Clerk, Kisumu Municipal Council seeking to have the 2nd Defendant substituted as the rate payer for the suit property in place of the Plaintiff. That the witness, PW2, did a memo to his supervisors on the matter and a decision was made to decline the change.

6. The testimony in support of the 1st Defendant's defence and counterclaim was given by Mitchell Menezes, an advocate who handled the acquisition transactions of the suit land for the 1st Defendant, and Ashok Khetshi Shah, a trustee with the 1st Defendant, who testified as DW1 and DW2 respectively. DW1 took the court through the process and due diligence he took to verify the title of the land the 1st Defendant wanted to buy, and the registration of the same in the name of the 1st Defendant. He informed the court that he did not contact the Municipal Council of Kisumu for rates clearance as none had been paid in view of the fact that the plot was a new allocation and the Land Registrar had given the consent to transfer. DW2 told the court that the suit property was adjacent to the 1st Defendant's school and that they had bought it from the 2nd Defendant in July 2009. That after buying the plot, the 1st Defendant started taking possession and developing but the Plaintiff came forward and claimed to be the owner.

7. That in support of the 3rd Defendant's case, Gordon Ochieng, a Senior Assistant Director Land Administration, testified as DW3. He confirmed that the suit property was allotted to Eric Okeyo, the 2nd Defendant, vide the letter dated 18th June 2009 for 99 years from 1st July 2009. That the lease document was prepared and forwarded to the Land Registrar Kisumu to register vide letter dated 6th July 2009. That the suit property was subsequently transferred to the 1st Defendant. DW3 disputed the certificate of lease that showed that the Plaintiff was the registered proprietor and another reportedly in the name of Joshua Obima on the basis that there were no lease documents upon which those certificates of lease could have been issued. That according to DW3, the only lease document in existence over the suit property was the one issued in favour of the 2nd Defendant and later transferred to the 1st Defendant.

8. That at the close of the oral evidence, the Counsel for the Plaintiff, 1st and 3rd Defendants filed their submissions dated 10th August 2018, 5th October 2018 and 12th October 2018 respectively.

9. The following are the issues for the court's determinations;

- a) **Who between the Plaintiff and the 1st Defendant is the lawfully, procedurally and regularly registered proprietor of the leasehold interest in Kisumu municipality/Block 10/568**
- b) **Who between the Plaintiff and 1st Defendant is entitled to possession of the suit property.**
- c) **Whether permanent injunction order should be issued and against which party.**
- d) **What orders to issue.**
- e) **Who pays the costs.**

10. The Court has carefully considered the pleadings filed, oral and documentary evidence tendered by PW1, PW2, DW1, DW2 and DW3, the written submission by the three Counsel, the decided cases cited therein and come to the following findings;

a) That both the Plaintiff and 1st Defendant claim to be the registered proprietor of the leasehold interest in Kisumu Municipality/Block 10/568, the suit land. That the origin of the titles held by both the Plaintiff and the 1st Defendant is traced to some sale transaction. That for the Plaintiff, he has availed documents, including a sale agreement to show that he bought the land from Joshua Obegih Orinah in December 2001. That the 1st Defendant also availed documentary evidence, also including sale agreement, that they bought the plot from Erick Ouma Okeyo, the 2nd Defendant. That both Joshua Obegih Orinah and Erick Ouma Okeyo did not testify before this court.

b) That whereas DW3 was a witness called by the 3rd Defendant, he presented the position of the Lands Office as far as the allocation of the suit property is concerned. That the witness vouched for the title documents in favour of the 2nd Defendant. That even though the 2nd defendant did not adduce evidence in court, and therefore his pleadings in his defence are without evidence in support, the documents in his favour over the ownership of the suit property, having been confirmed by DW3, are hereby taken by the court as properly proved. That as under the provision of **Section 26 (1) of the Land Registration Act No. 3 of 2012**, the Court is obligated to take the person named in the certificate of title issued by the Registrar as the absolute and indefeasible owner of such land, then the title document of the party that was lawfully, procedurally and regularly procured will carry the day as between the Plaintiff and the 1st defendant.

c) That the documentary and oral evidence adduced by, and for, the Plaintiff, 1st and 3rd Defendants confirms that unlike the Plaintiff who does not have the lease document upon which the certificate of lease in his favour could have been based, the 1st Defendant has both the lease document and certificate of lease. That the contention by DW3 that the certificate of lease in favour of the Plaintiff could not have been lawfully, procedurally and regularly procured is therefore without any challenge. That though the 2nd Defendant did not testify, the testimony of DW3 on which person was lawfully and procedurally allotted the suit property suffices. DW3 has further confirmed the authenticity and genuineness of the title document in favour of the 1st Defendant as far as the Land Administration office is concerned.

d) That had any lease over the suit property had been issued in favour of Joshua Obegih Orinah in 2001 as alleged, then the Plaintiff would have obtained a copy when he bought the land as the basis of the certificate of lease he got registered in his favour. That the fact that he did not avail one to challenge or defend the counterclaim of the 1st Defendant that there was none issued before July 2009, leads the court to conclude that the certificate of lease the Plaintiff obtained in his favour was not procured procedurally, lawfully and regularly and his title is therefore impugned. That the Plaintiff may consider taking his claim with the said Joshua Obegih Orinah in appropriate proceedings in accordance with the law.

e) That the finding in (d) above shows that the Plaintiff had no reasonable basis of stopping the 1st Defendant from taking possession of the suit property in 2009. That however, as he may have been under the mistaken believe that his title would carry the day, the court finds that this is a case where the losing party may not be ordered to pay damages and mesne profits. That eviction orders should nevertheless be issued in case the Plaintiff fails to give vacant possession. The 1st, 2nd and 3rd Defendants are also entitled to costs from the Plaintiff as he should have known from the position taken by the Land Registrar in 2009, that his certificate of lease was suspect.

11. That flowing from the foregoing, the court finds and holds that the Plaintiff has failed to prove his case against the Defendants. The court further holds and finds that the 1st Defendant has proved their counterclaim against the Plaintiff to the standard required. The court therefore orders as follows;

a) That the plaintiff's case against the Defendants is hereby dismissed with costs.

b) That the court enters judgment for the 1st Defendant against the Plaintiff in the counterclaim and the following prayers are granted;

(i) Prayers (a), (b), (c) and (e).

(ii) That the Plaintiff do give vacant possession of the suit property to the 1st Defendant in ninety (90) days and in default eviction and demolition orders to issue.

(iii) The Plaintiff do pay the 1st Defendant's costs of the counterclaim and interests at courts rates.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel M/s Imbayi for the Plaintiff, Mr. Ngala for 1st Defendant, Mr. Aoko for Otieno for 2nd Defendant and
M/s Aliongo for the 3rd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE