



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 856 OF 2015

MAURICE ODAWO ONDURO.....PLAINTIFF

VERSUS

KISUMU MUNICIPAL COUNCIL.....DEFENDANT

JUDGMENT

By his plaint dated 25th October 2011 and filed herein on 26th October 2011, the plaintiff (**MAURICE ODAWO ONDURO**) trading as **MONAO EDUCATION CENTRE** filed this suit against the defendant (**KISUMU MUNICIPAL COUNCIL**) seeking Judgment in the following terms:-

(a) A declaration that the plaintiff is the absolute owner of the un-surveyed plot at Kibos Town Number 9/2006/3.

(b) A permanent injunction restraining the defendant their agents, servants from sub-dividing, transferring or in any way interfering with the said plot No. 9/2006/3.

(c) Costs of this suit.

It is important at this stage to clarify that since the filing of this suit, the plaintiff has now been issued with a certificate for of No. IR 176752 dated 27th May 2016 in respect to the said plot hereinafter referred to as the suit plot.

The basis of the plaintiff's suit is that he is the manager of **MONAO EDUCATION CENTRE** which was allocated the suit plot by the Commissioner of Lands for purposes of developing a college. However, on or about 18th October 2011 the defendant, through its agents, employees or representatives embarked on sub-dividing the said plot and erected beacons thereon for purposes of selling it. The plaintiff therefore wrote a letter of objection to the defendant with regard to the illegal activities being carried out by their agents employees or representatives but received no response. The defendant's activities on the suit plot amount to fraud particulars of which have been itemized in paragraph 8(a) to (f) of the plaint and despite demand and notice to sue, the defendant has refused to comply hence this suit.

As part of his evidence, the plaintiff filed a list of documents (1) to (11) also dated 25th October 2011.

The defendant filed a defence denying all the plaintiff's averments and putting him to strict proof thereof. It denied that the plaintiff is the manager of **MONAO EDUCATION CENTRE** or that the same is registered under the Ministry of Education. It denied that the plaintiff was allocated the suit plot by the Commissioner of Land and that it's agents or employees had sub-divided it and therefore encroached on the same without justification. It also denied all the particulars of fraud and added in the alternative and without prejudice that if the plaintiff owns the suit plot, which was denied, the defendant has a valid title and interest therein. The defendant therefore sought the dismissal of the suit with costs.

This suit was placed before me for hearing on 5th November 2018 during the service week at Kisumu ELC and only the plaintiff testified in support of his claim. The defendant did not call any witness.

The plaintiff adopted as his evidence in chief his witness statement dated 25th October 2011 as well as his list of documents of the same date. He relied further on an additional list of documents dated 5th November 2018 which is the certificate of title in respect of the suit plot issued on 27th May 2016 and the Gazette Notice dated 17th July 2017. He added that subsequent to the filing of this suit, the defendant has moved out of the suit plot.

According to his statement, one **MR. AMIMO** of the defendant had moved onto the suit plot on 18th October 2011 together with other persons for purposes of sub-dividing and selling it. He wrote to the defendant on 19th October 2011 but received no response and his attempts to see the defendant's Town Clerk were in vain. He therefore moved to this Court.

At the end of the trial, both **MR. MWAMU ADVOCATE** for the plaintiff and **MR. ONYANGO ADVOCATE** for the defendant filed their respective submissions.

I have considered the evidence by the plaintiff and the submissions by counsel.

As indicated above, only the plaintiff testified in this case and his evidence is therefore not controverted. **MR. MWAMU** has therefore submitted, relying on **TRUST BANK LTD V PARAMOUNT UNIVERSAL BANK AND OTHERS NBI HCCC NO. 1243 OF 2001**, that since the defendant did not adduce any evidence, its defence is a mere statement and the plaintiff's case is not challenged. Counsel also cited **AUTAR SINGH BAHRA V RASU GOVINDJI HCCC NO. 548 OF 1998**.

MR. ONYANGO however was of the view that the plaintiff did not discharge the burden cast upon him by section 107 and 108 of the Evidence Act to show that **MR. AMIMO** is an agent or employee of the defendant. That the plaintiff's case revolved around innuendo and suspicious which cannot prove a case.

MR. ONYANGO is of course correct when he submits that section 107 and 108 of the Evidence Act places the burden on the party that asserts the existence of a fact to prove it. The burden of proof is on the party who will fail if no evidence is given by either side. It was therefore the duty of the plaintiff to prove the following facts:-

1. That he is the proprietor of the suit plot.

2. That the defendant through its agents or servants trespassed onto the suit plot in an attempt to sub-divide it into several plots.

That the suit plot is the plaintiff's property is not in doubt. He has produced as part of his documentary evidence the certificate of Title dated 27th May 2016 whose authenticity has not been challenged. Section 26(1) of the Land Registration Act provides as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefensible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.

There is nothing to suggest that the plaintiff's title to the suit plot was acquired fraudulently, through misrepresentation, illegally, un-procedurally or through a corrupt scheme. Indeed his title is conceded by the defendant's counsel who has submitted as follows:-

“All that the plaintiff herein has been able to prove is that he owns the suit property, and the defendant is not denying that”.

Counsel has submitted, however, that the plaintiff has failed to prove that it is the defendant which interfered with his land or sought to take it away. As already indicated above. **MR. ONYANGO** has relied on **sections 107 and 108 of the Evidence Act** which provide as follows:-

107 (i) **“whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist”**

(ii) **“When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.**

108 (i) **“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

That is the law. What **MR. ONYANGO** did not allude to however is that in Civil cases the standard of proof is on a balance of probability and nothing more. LORD DENING said a follows about the standard of proof in civil cases:-

“The standard of proof is well settled. It must carry a reasonable degree of probability if the evidence is such that the tribunal can say ‘we think it more probable than not’, the burden is discharged but if the probabilities are equal. It is not”. – MILLER V MINISTER OF PENSIONS 1947 2 ALL E.R 372.

Sections 107 and 108 of the Evidence Act as correctly submitted by **MR. ONYANGO**, places the legal burden on the plaintiff to prove that he owns the suit plot which the defendant's agents have been interfering with. However, once the plaintiff gave evidence placing the defendant's agents at the core of his grievances, the evidential burden shifted to the defendant to rebut it. This was considered by the Court of Appeal in the case of **MBUTHIA MACHARIA V ANNAH MUTUA NDWIGA AND ANOTHER C.A CIVIL APPEAL NO. 297 OF 2015 (2017 eKLR)** in the following terms:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the

Appellant, the evidential burden may shift in the course of trial. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence”.

It must also be remembered that **section 112 of the Evidence Act** states that:-

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

What then is the evidence that the plaintiff placed before this court to link the defendant and **MR. AMIMO** to the interference on the suit plot? Of Course the plaintiff is not an employee of the defendant and therefore would not have access to the defendant’s records to show if **MR. AMIMO** was their employee. He conceded as much when cross-examined by **MR. ONYANGO**. However, it is on record that before filing this suit, he wrote to the defendants on 19th October 2011 and in paragraph four complained as follows in respect to the suit plot:-

“In April 2010, the Centre contacted a surveyor M/S Arch Surveys, to survey the plot to enable the Centre pursue the lease deed with the Commissioner and Embark on immediate development for the college. To our surprise, however, we have learnt that a MR. AMIMO from your council has moved to the plot site and is busy sub-dividing it for allotment. We are requesting you to urgently and immediately stop MR. AMIMO from doing anything on the plot and restrain any of your other officers from doing the same. You urgent and immediate co-operation on the matter shall be very much appreciated”.

For reasons best known to the defendant, it did not respond to that letter yet the easiest thing to have done in the circumstances was to deny any relationship with **MR. AMIMO** or his activities on the suit plot. From the plaintiff’s oral evidence, he knew **MR. AMIMO** as a person *“notorious for sub-dividing land in the area.”* This is what he said when cross – examined by **MR. ONYANGO**:-

“I believe that MR. AMIMO was an employee of the Kisumu Municipal Council. When I went to the land on 18th October 2011 and protested, MR. AMIMO left.”

And when he was re-examined by **MR. MWAMU**, he said:-

“In the letter dated 19th October 2011, I complained to the defendant that MR. AMIMO was sub-dividing the land. MR AMIMO was notorious for sub-dividing land in the area.”

Clearly, **MR. AMIMO** is not the creation of the plaintiff. He was well known to him because he met him on the suit plot. The defendant never denied that the said **MR. AMIMO** was their employee when the plaintiff wrote to them complaining about his activities. The defence herein is a mere denial and in my view, in the absence of evidence from the defendant, it is more probable than not that **MR. AMIMO** was on the suit land carrying out the sub-division on behalf of the defendant. I do not consider the plaintiff’s evidence to be mere *“innuendos”* or *“suspicions”* as submitted by **MR. ONYANGO**. It is cogent evidence which has not been controverted by the defendant. In my view, from the evidence on record, I am satisfied that the plaintiff has sufficiently discharged the burden cast on him as required in law. He has proved, on a balance of probability, that the defendants through its servants or agents have been encroaching onto his property and ought to be permanently enjoined from doing so.

On the issue of costs, counsel for the defendant seeks that the same be awarded to the defendant and that the plaintiff’s suit be dismissed. As it must now be clear, the plaintiff is entitled to the orders sought and since costs follow the event, I see no reason to deny the plaintiff costs of this suit.

The up-shot of the above is that the plaintiff’s suit is allowed and there shall be judgment in his favour as against the defendant in the following terms:-

1. A declaration that the plaintiff is the absolute owner of the parcel of land described in the Certificate of Title as IR NO. 176752.
2. A permanent injunction is granted restraining the defendant, its agents servants or any other person from sub-dividing, transferring or in any other way whatsoever interfering with the said parcel of land.
3. The plaintiff shall have costs of this suit.

B. N. Olao.

JUDGE

21st March, 2019.

Judgment dated, delivered and signed in open Court this 21st day of March 2019 at Kisumu.

Mr. Mwamu for plaintiff – present

Mr. Olel for defendant – present

Plaintiff - present

Defendant – absent

Boaz. N. Olao.

JUDGE

21st March 2019.