



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 85 OF 2015

MODE OF PROCEEDINGS FIRST TRACK

BENJAMIN KIMELI TANUI.....PLAINTIFF

VERSUS

OMARI SALIM NASIB1ST DEFENDANT

JAMKA SAID alias JAMILA SAID.....2ND DEFENDANT

J U D G M E N T

As will become clear in this Judgment, this is a very sad case compounded by the illegal activities of some Officers in the Lands Office and the then Municipal Council of Bungoma. The central issue in my view, however, is whether the Land Registrar Bungoma or the then Municipal Council of Bungoma had the jurisdiction to cancel a Certificate of Lease in respect to land parcel **NO BUNGOMA/MUNICIPALITY/515** (the suit property) registered in the names of one **JOHN OLWIKA** (the deceased).

By his amended Plaintiff dated 29th July 2015 **BENJAMIN KIMELI TANUI** (the plaintiff) filed this suit against **OMARI SALIM NASIB** (1st defendant) and **JAMKA SAID** alias **JAMILA SAID** (2nd defendant) seeking the following reliefs:-

- (i) A declaration that the plaintiff is the sole registered owner of land reference NO BUNGOMA/TOWNSHIP/515.**
- (ii) The defendants have no legally enforceable claim on land reference NO BUNGOMA/TOWNSHIP/515 and they are thereon as trespassers and they ought to be evicted therefrom.**
- (iii) Mesne profits.**
- (iv) Costs of the suit.**

The basis of the plaintiff's claim was that he has since 16th June 2015 been the registered proprietor of the suit property. However, the defendants have without any colour of right trespassed onto the suit property and carried out developments thereon yet the plaintiff is entitled to exclusive enjoyment thereof. On being confronted, the defendants alleged that they are the registered proprietors of the suit property. It is the plaintiff's case that if the defendants are in possession of any Certificate of Lease, then the same is illegal and the defendants are therefore trespassers on the suit property.

By an amended defence and counter-claim, the defendants pleaded that they are the registered owners of the suit property having been issued with the Certificate of Lease on 5th September 2006. They denied being trespassers on the suit property or being in illegal possession thereof adding that they have duly constructed a permanent business premises by the suit property and the plaintiff's lease was illegally and fraudulently obtained particulars of which were pleaded in paragraph 14 of their defence to include:-

- (a) Obtaining the Certificate of Lease to the suit property using fraudulent documents.**
- (b) Making documents without authority.**
- (c) Obtaining and securing credit from Imperial Bank using a forged Certificate of Lease.**

The defendants therefore counter-claimed for the following reliefs:-

(a) A declaration that they are the joint owners of the suit property.

(b) An order directing the Permanent Secretary Ministry of Land and the Chief Land Registrar that the Certificate of Lease in the plaintiff's names and the subsequent charge to Imperial Bank be re-called, cancelled annulled or revoked.

(c) A permanent injunction restraining the plaintiff by himself, his agents and or servants from intermeddling, re-registering, transferring, offering for sale or forcefully entering, remaining or interfering with the defendants' quiet and peaceful ownership, possession and occupation of the parcel NO BUNGOMA/MUNICIPALITY/515.

(d) Any other relief this Honourable Court may deem fit and just to grant.

(e) Costs and interest of the suit.

The plaintiff filed a reply to the amended defence and defence to the counter-claim denying the defendants' averments that they hold a valid lease to the suit property or that they are not trespassers thereon. The plaintiff denied the allegations of fraud leveled against him including all the averments in the amended defence and sought the dismissal of the defendants' counter-claim.

From the record, the plaintiff filed an application dated 11th May 2016 seeking leave to issue and serve a third party notice on the Permanent Secretary Ministry of Lands, Housing and Urban Development, the County Government of Bungoma, the National Land Commission and the Attorney General. It is not clear if that application was ever canvassed and if so, with what results. What is clear however is that when the parties appeared before **MUKUNYA J** on 12th May 2016, **MR AREBA** then holding brief for counsel for the plaintiff **MR MOMANYI** told the Court that they were not opposing that application. There is no record to show that the application was granted and the said notice was issued and served and certainly when the matter came before me for hearing on 20th November 2018, no mention was made of the said third-party notice. This Court can only conclude that the defendants abandoned any intentions to issue such notices to the parties named therein.

The parties were the only witnesses to their respective cases.

The plaintiff relied on his witness statement together with his list of documents as his evidence. He has stated in the said statement that he is the registered proprietor of the suit property and the defendants are trespassers thereon and ought to vacate and pay him mesne profits or be evicted. He adds that the defendants have illegally obtained a Certificate of Lease over the suit property which ought to be cancelled.

The 2nd defendant **JAMKA SAID** alias **JAMILA SAID** also adopted as her evidence her statement dated 5th November 2015 and the list of documents filed on the same day. She asked the Court to allow the defendant's counter-claim.

In the said statement, she has narrated how her husband **OMAR SALIM NASIB** (1st defendant who was substituted with his son **SALEH MOHAMED OMAR**) was allocated the suit property in 2004 and later obtained a lease for 66 years from 1st January 1998. The deceased then filed a suit against them being **BUNGOMA CMCC NO 419 OF 2016** but it was dismissed and the **MUNICIPAL COUNCIL OF BUNGOMA** revoked the title of the deceased and allocated the suit property to the defendants. The defendants thereafter developed the suit property after the **MUNICIPAL COUNCIL OF BUNGOMA** approved their plans. The defendants also paid all the accumulated rates and used the title to secure a loan of Kshs. 500,000/= from the Co-operative Bank.

However, when the defendants visited the Land Office in 2013, the Land Registrar one **GEORGE ONGUTU** denied them an official search on the basis that the title was fraudulently obtained. Then in 2015 they received a letter from **MOMANYI ADVOCATES** to vacate the suit property since it belonged to **CONRAD WANYONYI, MAURICE WANYONYI and PATRICK WANYONYI**. The defendants reported the matter to the Criminal Investigations Department (**CID**) for investigations and were shocked to learn that the plaintiff had been issued with a title to the suit property and had even charged it. The defendants could not understand how the Director of Public Prosecution in his letter dated 23rd July 2017 stated that the deceased had sold the suit property to **SEGMENT DISTRIBUTORS LTD** yet his lease had been nullified by the **BUNGOMA MUNICIPAL COUNCIL**. The defendants therefore wondered where the plaintiff was all the time when the defendants were developing the property and further, why the deceased who died in 2011 did not transfer the suit property prior to his death. Therefore, the plaintiff's title is illegal and was not obtained procedurally and should be cancelled and the plaintiff made to repay the loan of Kshs. 500,000/= and any interest to Imperial Bank obtained using the title to the suit property.

SALEH MOHAMED OMAR (DW 2) who had obtained a Power of Attorney to represent his ailing father also adopted as his evidence the statement by his father which is in the same terms as that of the 2nd defendant.

At the end of the trial, submissions were filed both by **MR MOMANYI** instructed by **ANASSI MOMANYI & COMPANY ADVOCATES** for the plaintiff and **MS P.L NATWATI** instructed by **P.L NATWATI & COMPANY ADVOCATES**.

I have considered the evidence by both parties and the submissions by counsel.

It is clear from the documents herein that as far back as 13th September 1980, the deceased was the holder of the Certificate of Lease in respect to the suit property issued by the Land Registrar. The Lessor was the then County Council of Bungoma and the lease was for a term of 99 years from 1st June 1979. That lease is part of the documents filed by the plaintiff and was granted subsequent to a letter of allotment dated 31st May 1979 issued to the deceased. The lease was issued under the **repealed Registered Land Act**.

When the plaintiff was cross-examined during the trial, he said that he purchased the suit property from the deceased in 2008 but had to wait until the succession process to obtain the title to the same. Among his documents is a Certificate of Lease dated 16th June 2015 in

respect of the suit property showing his leasehold interest as 99 years from 1st June 1979. The defendants have on their part also produced as part of their documents a Certificate of Lease in respect to the same property in their joint names issued on 5th September 2006 for a term of 66 years from 1st January 1998. We therefore have three Certificates of Leases in respect to the suit property all issued by the Bungoma Land Registry but to different parties. These are:-

1. **Certificate of Lease dated 13th September 1980 issued to the deceased.**
2. **Certificate of Lease dated 16th June 2015 issued to the plaintiff.**
3. **Certificate of Lease dated 5th September 2006 issued to the defendants.**

Section 27(b) of the repealed law under which the above titles were issued provided that:-

“the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

Under **Section 143 of the repealed law**, the power to cancel any registration is reposed in the Court and no other person. Similar provisions are found in **Section 24(b) and 80** respectively of the new **Land Registration Act 2012**. The powers of the Registrar were limited by **Section 142(1) of the repealed law** as follows:-

“The Registrar may rectify the register or any instrument presented for registration in the following cases:-

(a) In formal matters and in case of errors or omissions not materially affecting the interest of any proprietor;

(b) In any case and at any time with the consent of all persons interested;

(c) Where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.”

Similar provisions are found in **Section 79** of the new **Land Registration Act 2012**. It is now well settled that the Land Registrar cannot cancel a title as that is the prerogative of the Court – See for example **KURIA GREENS LTD .V. REGISTRAR OF TITLES & ANOTHER 2011 eKLR**. And the Court can only cancel a title that is proved to have been obtained through fraud or other illegal means.

Counsel for the defendants **MS NATWATI** has submitted that since the plaintiff did not produce any sale agreement between himself and the deceased over the suit property nor call a family member of the deceased to confirm such purchase, then the plaintiff did not acquire a good title. In my view however, that argument would only hold if the deceased who is alleged to have transferred the suit property to the plaintiff or his Estate were to complain about the legality of that transaction. Unfortunately, that is not the case here. Neither the deceased nor his Estate challenged the plaintiff’s title to the suit property.

MS NATWATI has also submitted that the deceased had no title that he could have transferred to the plaintiff in 2006 because the defendants were by then already registered as the owners of the suit property and that in any event, the deceased’s title had already been cancelled. The fact however is that until and unless his title was cancelled by the Court, the deceased remained the lawful holder of the lease to the suit property. **MS NATWATI** has submitted further that the deceased’s lease was cancelled by the Municipal Council of Bungoma for failure to adhere to the condition of the lease and therefore the deceased had no interest to transfer to the plaintiff. I have looked at the copy of the lease and indeed at paragraph 2 thereof, there is a condition that the Lessee shall construct buildings thereon within a period of months (the period is not legible) otherwise the Council would be entitled to re – enter and the lease term would cease. It is also clear from the record herein that by a letter dated 25th November 2004, the Municipal Council of Bungoma wrote to the deceased expressing its intention to repossess the suit property because he had failed to develop it within 24 months. A letter of allotment dated 15th May 1998 was then issued in the names of the defendants and thereafter a lease dated 5th September 2006. However, the Municipal Council of Bungoma had no authority to cancel the deceased’s lease and it is not clear how the said lease was cancelled from the names of the deceased into the names of the defendants. Even assuming that the cancellation was pursuant to the provisions of **Section 64(1) of the repealed law**, that cancellation could not be done without involving the deceased. This is because **Section 64(2) of the repealed law** provided that:-

“An application under this Section shall be supported by such evidence of the matters giving rise to the determination and the recovery of possession by the Lessor or the Registrar may require, and the Registrar on being satisfied of the matters set forth in the application shall cancel the registration of the lease.”

Therefore, even if the Municipal Council decided to re-enter the suit property and determine the deceased’s lease as mandated by **Section 64(1) of the repealed law** for failure by the lessee to develop it within the specified period, an application had to be made supported by evidence before the registration of the lease was cancelled. There is no evidence that such an application was made and evidence sought. That can only mean that the deceased’s rights to property as protected under **Section 75 of the repealed Constitution** was infringed without even giving him a hearing.

It is common knowledge that in an attempt to protect his interest in the suit property, the deceased filed **BUNGOMA SENIOR PRINCIPAL MAGISTRATE’S COURT CIVIL CASE NO 419 OF 2006** against the **MUNICIPAL COUNCIL** and the defendants. What has been availed is a ruling by **HON. G. SOGOMO – RESIDENT MAGISTRATE** dismissing the deceased’s application for an

order of injunction. In so doing, the Magistrate was of the view that he could not injunct the Government. He was nonetheless concerned about the propriety of cancellation of the deceased's lease and said:-

“I ask myself whether the procedure adopted by the 1st Respondent in re-calling or cancelling the lease was proper.”

It is clear to me that the cancellation of the deceased's lease was unlawful. Similarly no lease could be properly issued to the defendants while the lease to the deceased was subsisting. I would therefore agree with the submissions by **MR MOMANYI** that the process of repossession and cancellation of the deceased's lease was null and void.

The other issue that Counsel have submitted on is whether or not the plaintiff's lease was obtained procedurally. **MS NATWATI** has submitted that in the absence of a sale agreement and the succession proceedings through which the plaintiff purchased the suit property from the deceased, no due process was followed. **MR MOMANYI** has submitted however that there was no evidence from the Land Office to question the genuineness of the plaintiff's lease nor evidence of forgery in the manner in which the plaintiff's lease was obtained. In seeking to impugn the plaintiff's lease, the defendants pleaded fraud in the manner in which the lease was obtained. The particulars of fraud are in paragraph 14 of the defendant's defence and counter – claim which I have already referred to in this Judgment. However, no evidence of fraud was adduced by the defendants. When she was cross – examined by Counsel for the plaintiff, the 1st defendant had this to say:-

“The title held by the plaintiff is fraudulent. I don't have any evidence of fraud as of now. If a witness is required from the Lands Office, I can call them.”

On his Part, the 2nd defendant said:-

“I have no evidence that the title of JOHN OLWIKA is a forgery or that it did not originate from the Land Registry.”

Since the defendants' alleged fraud in the manner in which the plaintiff acquired his lease to the suit property, the onus was on them to prove that fact – **KOINANGE & OTHERS .V. KOINANGE 1968 KLR 23.**

Further, as was held in **R.G PATEL .V. LALJI MAKANJI 1957 E.A 314:-**

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

A mere allegation of fraud is not sufficient to infer liability. In **VIJAY MORJARIA .V. NANSINGH MADHUSING DARBAR & ANOTHER 2000 eKLR TUNOI J A** (as he then was) stated that:-

“It is settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

It is clear from the defendants' own evidence that they could not establish fraud on the part of the plaintiff in the manner in which he acquired the lease to the suit property. All they did was plead fraud which is not sufficient.

More significantly, however, the dispute as to who between the plaintiff and defendants holds the proper lease to the suit property was referred to the Office of the Director of Public Prosecution (**ODPP**) in July 2015 by the County Director of Criminal Investigations Bungoma. By his report dated 28th July 2015 and which is part of the documents herein, one **ONYANGO OIMBO** a **SENIOR PROSECUTING COUNSEL** writing on behalf of the **DIRECTOR OF PUBLIC PROSECUTIONS** made the following pronouncements having considered the history of the suit property:-

“Lastly, the Chief Officer Lands, Urban and Physical Planning in his letter to the DCIO BUNGOMA SOUTH dated 8th July 2015 has stated briefly but very precisely the sequence of events in so far as the transfer of the said piece of land is concerned thus concluded that the piece of land was legally and procedurally transferred from the late JOHN OLWIKA to BENJAMIN KIMELI TANUI thus making the latter the legitimate owner of the said piece of land, this is reflected in exhibit marked D5.

With all the above in mind I have no doubt in my mind that the title in the hands of OMAR SALIM and JAMILA SAID was irregularly acquired thus making the said title illegitimate and the one in the hands of BENJAMIN KIMELI TANUI regularly acquired thus making it legitimate in the eyes of the law; now direct that the file be closed without any further Police action because there is no crime known to law that has been committed by BENJAMIN KIMELI TANUI.”

In my view, considering the above report together with the evidence of the defendants themselves, it is difficult to up-hold the claim that the plaintiff obtained the lease to the suit property fraudulently. The Government agency best suited to investigate cases of fraud has exonerated the plaintiff from any wrong doing in the manner in which he acquired the lease to the suit property. The same agency also made a finding that the defendants lease is **“illegitimate.”** As I had already stated earlier, in the absence of any evidence from the deceased as the original proprietor, his Estate or the Lands Registry challenging the transfer of the suit property to the plaintiff, the issue as to whether or not there was any sale agreement would be superfluous. **MS NATWATI** has rightly submitted citing **DAVID KIPTUGEN .V. COMMISSIONER OF LANDS NB & OTHERS 2015 eKLR** that where an issue arises as to the validity of a lease, it is not enough for a party to simply wave the lease and say it was properly acquired. That is correct. But in the **DAVID KIPTUGEN** case (supra), the plaintiff's title was challenged by all the defendants including the Land Registrar and Commissioner of Lands who are the agencies best suited to vouch on the authenticity of all documents emanating from their offices. That is not the position herein and that case is therefore distinguishable.

It is clear therefore that the defendants have no valid claim to the suit property. The cancellation of the deceased's lease was improper and so no interest in the suit property could pass to the defendants. Any decision to cancel the deceased's lease on account of non- payment of rates had to be made in accordance with the law. That was not done. In the meantime, the plaintiff had acquired an interest in the suit property which was therefore not available for allocation to the defendants or any other person. I must therefore up-hold the plaintiff's claim and dismiss the defendants' counter – claim.

Part of the plaintiff's claim is for mesne profits. Mesne profits are a special damages claim which needs to be specifically pleaded and proved – **PETER MWANGI MBUTHIA .V. SAMOW EDIN OSMAN 2014 eKLR**. Apart from pleading mesne profits, the plaintiff made no effort to quantify it or even lead any evidence in proof of that claim. It is not available to him.

Ultimately therefore and having considered the evidence by both parties herein, I enter Judgment for the plaintiff as against the defendants in the following terms:-

- 1. The defendants' counter-claim is dismissed.**
- 2. A declaration is issued that the plaintiff is the registered proprietor of the leasehold property in BUNGOMA TOWNSHIP/515.**
- 3. The defendants have no legally enforceable claim in land parcel NO BUNGOMA/TOWNSHIP/515 and are trespassers thereon.**
- 4. The defendants to vacate from the land parcel NO BUNGOMA/ TOWNSHIP/515 within six (6) months from to-day or be evicted in accordance with the law.**
- 5. The claim for mesne profits is dismissed.**
- 6. In the circumstances of this case, I order that each party meets their own costs.**

Boaz N. Olao.

J U D G E

30th May 2019.

Judgment dated, delivered and signed in Open Court at Bungoma this 30th day of May 2019.

Mr Momanyi for plaintiff – absent

Ms Natwati for defendant – present

Plaintiff present

1st defendant present

Right of Appeal explained.

Boaz N. Olao.

J U D G E

30th May 2019.