



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 430 OF 2015

(FORMERLY H. C. C. C. NO. 52 OF 2010)

ARCHBISHOP HABAKUK ONYANGO ABOGNO...1ST PLAINTIFF

EDWIN OGOLA OTIENO.....2ND PLAINTIFF

BENSON OGOT OKETO.....3RD PLAINTIFF

(On behalf of themselves and on behalf of all other members of the Church of Christ in Africa)

CHURCH OF CHRIST IN AFRICA.....4TH PLAINTIFF

VERSUS

HUMFREY OGOT.....1ST DEFENDANT

JAMES WERE AWUONDA.....2ND DEFENDANT

MUNICIPAL COUNCIL OF KISUMU.....3RD DEFENDANT

JUDGEMENT

1. That vide the plaint dated 15th April 2010, Archbishop Habakuk Onyango Abongno, Edwin Ogola Otieno and Benson Ogot Okeyo, on behalf of themselves and on behalf of all other members of the Church of Christ in Africa, and Church of Christ in Africa, the Plaintiffs, sued Humphrey Ogot, James Were Awuonda and Municipal Council of Kisumu, the Defendants, seeking for the following prayers;

a. “General damages.

b. An order that the 1st and 2nd Defendants do vacate all portions of the said Infill Plot No. 2-403, 2-4044, 2-405 and 2-406 Migosi Site & Service Scheme forthwith or be evicted therefrom, and a permanent order of injunction restraining the 1st and 2nd Defendants by themselves, or their agents or servants or proxies or any of them from entering, remaining on, developing, occupying or using any portion of Infill Plot No. 2-403, 2-4044, 2-405 and 2-406 Migosi Site & Service Scheme or doing anything else which may restrict, curtail, diminish or interfere with the Plaintiffs’ quiet possession, use and enjoyment of the said Infill Plot No. 2-403, 2-4044, 2-405 and 2-406 Migosi Site & Service Scheme.

c. An order that the respective sites of Infill Plot No. 2-403, 2-4044, 2-405 and 2-406 Migosi Site & Service Scheme on the one hand, and land parcel No. Kisumu/Manyatta “A”/3593 (now land parcel Nos. Kisumu/Manyatta “A” /4804, 4805, 4806 and 4807) on the other hand, be determined before the 1st or the 2nd Defendants may proceed with any developments on land parcel No. Kisumu/Manyatta “A”/4804 or 4805 or 4806 or 4807.

d. Costs of this suit plus interest thereon.”

The Plaintiffs aver that Migosi Site & Service Scheme Infills plots Nos. 403 to 406 were created by the 3rd Defendant from the Land that had been compulsorily acquired by the Government of Kenya on its behalf, upon compensating the freehold proprietors and allocated to the 4th Plaintiff. That the 4th Plaintiff made all the required payments to the 3rd Defendant and took possession of the plots. That in January 2010, the 1st and 2nd Defendants encroached onto the said plots, cut down the Plaintiffs’ trees, destroyed the fence and commenced preparations to develop the same despite the Plaintiffs’ protests, insisting that the plots are part of 1st Defendant’s parcel Kisumu/Manyatta “A”/3593. That

the 3rd Defendant has maintained that the Infill Plot Nos. 2-403 to 406 Migosi Site and Service Scheme, falls on the same ground Site as Kisumu/Manyatta "A"/3593, which has since been subdivided into parcels 4806 to 4807 and parcel 4806 registered with 2nd Defendant. That the registration of the land where Migosi Site & service Scheme plot Nos. 2-403 to 406 are situated into Kisumu/Manyatta "A"/3593 in the name of 1st Defendant was done irregularly, fraudulently, and secretly without notice to the Plaintiffs thereby depriving them of their Constitutional right to property. That the 3rd Defendant has been in breach of its undertaking and assurances to the Plaintiffs causing them loss and damages. The Plaintiffs have set out the particulars of fraud attributed to the Defendants at paragraph 11 of the plaint.

2. The 1st and 2nd Defendants denied the Plaintiffs' claim through their statement of defence dated 13th May 2010. They aver that they are lawfully the owners of Kisumu/Manyatta "A"/3593 which has been subdivided into Kisumu/Manyatta "A"/4804 to 4807 and denies the existence of Migosi Site & Service Scheme Infill plots Nos. 2-403 to 406. That there exists Kisumu SRMCC No. 566 of 1996 between the parties, and therefore this suit is sub-judice and should be dismissed with costs.

3. The 3rd Defendant also denied the Plaintiffs' claim vide their statement of defence dated 18th May 2010. The Defendant conceded allocating and/or offering for sale to the 4th Plaintiff the four plots Infill Nos. 2-403 to 406 Migosi Site & Service , but denied registering them in the 4th Plaintiff's name. That the plots were over allocated and the offer to the 4th Plaintiff did not crystalize nor did it point the plots to the said Plaintiff on the ground as they are positioned on the Kisumu/Manyatta "A"/3593 belonging to the 1st Defendant. That it notified the Plaintiffs that the plots existence had not been determined on the ground. That the Plaintiffs have no *locus standi* in this matter and that the suit is time barred and should be dismissed with costs.

4. The hearing commenced on the 29th March 2017 when the 1st Plaintiff testified as PW1 and was cross-examined and re-examined. That then on the 3rd May 2018, Gideon Ogot testified as DW1 in support of the 1st and 2nd Defendants defence. The 3rd Defendant called Anord Omondi Nguya, Acting Director Housing Department, County Government of Kisumu, who testified as DW2. PW1 told the court how the 4th Plaintiff acquired Migosi Site & Service Scheme Infill Plot Nos. 2-403 to 406, which neighbours the Church at Migosi from the 3rd Defendant. That they then fenced the said plots into the Church compound and included them in their developments. That while following upon the leases they learnt that the ground on which the said four Infill plots were sited fell within Kisumu/Manyatta "A"/3593 belonging to the 1st Defendant. That their efforts to have the 3rd Defendant resolve the matter did not bear fruits and hence this suit. That they have never been issued with any other ownership documents for the four (4) plots except the letters of offer dated 20th June 1986 and that all the plots have since been fully developed by other people. DW1 for the 1st and 2nd Defendants defence told the court how he acquired the land in dispute from one Joanes Oganyo from West Kano in 1967. That the land was then known as No. 13 and during Land Adjudication he had it subdivided into three. That parcel No. 13 remained in his name while he registered the other two parcels Numbers 3592 and 3593 in the names of his sons Erick Ogot and Humphrey Ogot [1st Defendant]. That at one time the Municipal Council of Kisumu had indicated that parcel 13 and 3593 would be compulsorily acquired for parking, road and sewer lines upon compensation, but that idea was later dropped and title deeds issued in their names. That the 4th Plaintiff sued him in Winam SRMCC No. 566 of 1996 over the same matter and after showing them his ownership documents they filed the current suit. That parcel 3593 has since been subdivided into four parcels and sold to three persons named Milka Atieno, James Anunda and Emily Ochieng. DW1 denied that the 4th Plaintiff had ever taken possession of parcel 3593 or knowledge of any relationships between his parcels and Infill plot Nos. 2-403 to 406. That though the parking, road and sewer line are still on parts of his land, he has not been compensated to date by the 3rd Defendant or the County Government of Kisumu. That the 4th Plaintiff's land is distinct and has always been to the South of his plots which are to the North. DW2 told the court that the 1st Defendant's land Kisumu/Manyatta "A"/3593 had not been affected in the compulsory acquisition done under G. N. No. 3400 of 1976 by the Central Government. That when the road and sewer lines were done, they however interfered with the lands. That the 3rd Defendant created the Infill plots and the Plaintiffs and other people applied for them. That the 4th Plaintiff was offered Infill plot Nos. 2-403 to 406 but after considering the 1st Defendant's complaint that the said Infill fell on his land, they offered the 4th Plaintiff alternative plot but it declined.

5. That at the conclusion of oral evidence, the learned Counsel for the Plaintiffs, 1st and 2nd defendants and the 3rd defendant filed their written submissions dated 22nd May 2018, 22nd February 2019 and 8th June 2018 respectively.

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

- a) **Whether the Plaintiffs have the *locus standi* to file and prosecute this case.**
- b) **Whether the suit is statute time barred.**
- c) **Whether the letters of offer conferred upon the Plaintiffs' rights and interests over the plots described therein.**
- d) **Whether the Plaintiffs are entitled to general damages.**
- e) **Who pays the costs of the suit**

7. The Court has considered the pleadings by all the parties, oral and documentary evidence by PW1, DW1 and DW2, the written submissions and the superior Courts decisions cited therein by the learned Counsel for the parties and come to the following determinations;

- a) That the issue of whether or not the Plaintiffs are with *locus standi* [capacity] to file and prosecute this suit had been raised by the 1st & 2nd Defendants and the 3rd Defendant through their Notices of preliminary objection dated the 13th May 2010 and 6th July 2010 respectively, which were heard and dismissed with costs vide the Court's ruling of 8th October 2010. That issue having been settled, and as the ruling has not been successfully challenged or at all on appeal, the court need not say more on it.

b) That on the evidence tendered by both the Plaintiffs and the 3rd Defendant through PW1 and DW2, the balloting for the Infill plots, and issuing the letters of offer for plot Nos. 2-403 to 406 took place in 1986. That it follows that by the time this suit for the plots was filed in 2010, about twenty four (24) years had lapsed which confirms the 3rd Defendant's position that the suit is statutory time barred. That suits for recovery of land are required under **Section 7 of the Limitation of Actions Act Chapter 22 of Laws of Kenya** to be filed within twelve (12) years.

c) That the 1st and 2nd Defendants had also submitted that this suit is *resjudicata* and or subjudice in view of the Winam SRMCC No. 566 of 1996. That the Court has perused the chamber summons application dated the 21st May 1996, supporting affidavit by Bishop Mathews Ajuoga of 22nd May 1996 and supplementary affidavit by Moses J. A. Orengo also of 22nd May 1996 produced by DW1 as exhibits. The documents confirms that Church of Christ In Africa and Nyanza Christian College had filed a suit against Gideon Ogot over **"Plot numbers 3-359 or 2-403, 2-404, 2-405 and 2-406 Migosi Site & Service Scheme"**. That they were through the said chamber summons seeking for temporary order of injunction pending the final determination of the suit. The plaint, defence, proceedings and judgment, or final order if any had been issued, were not availed to the court. That while the 1st Plaintiff in that suit is obviously the 4th Plaintiff herein and that the Defendant is the father to the 1st Defendant in this case and he testified herein as DW1, the other parties appear different on the face of it. That the plots Nos. 2-403 to 406 in dispute in the Winam suit are the same subject matter in the current suit. That it is therefore strange that the Plaintiffs, at paragraph 19 of their plaint, and paragraph 4 of the verifying affidavit filed with the plaint, claimed that there is no other suit pending and no previous proceedings in any court between the Plaintiffs and Defendants over the same subject matter when they must have been aware of the Winam Court suit, in which they were represented by the same Counsel appearing for them in this suit, M/s Moses J. A. Orengo Advocate. That if the Winam Suit was still pending when this one was filed, then the Plaintiffs contravened **Section 6 of the Civil Procedure Act Chapter 22 of Laws of Kenya**. That had the existence of that other suit been disclosed, the court would have given directions on which suit would be stayed pending the hearing and determination of the other.

d) That further to the finding in (c) above, the court is unable to make a determination as to whether this suit is *res judicata* in view of Winam SRMCC No. 566 of 1996 as there is no evidence availed by any of the parties on the final determination of the issues raised in that suit. That a certified copy of the judgment and or extracted order would have enabled the court to discern what issues and between which parties and over what subject matter had been decided, if at all.

e) That the position of the Plaintiffs that the land on which the Infill plot Nos. 2-403 to 406, which were offered to the 4th Plaintiff by the 3rd Defendant had previously been compulsorily acquired for the 3rd Defendant by the Government of Kenya vide G.N. No. 3400 of 1976 has been disputed by the Defendants, including DW2. That further, the alleged Gazette Notice and the schedule thereof which would contain the parcels included in the acquisition have not been produced in evidence by the Plaintiffs or the Defendants. That the Plaintiffs had the legal and evidential duty under **Section 107 of the Evidence Act Chapter 80 of Laws of Kenya** to tender proof that the land on which they claim their Infill plots were sited had been compulsorily acquired, and that the 3rd defendant had the power and authority to allocate it to the 4th Plaintiff, but failed to do so. That the 3rd Defendant's pleadings and evidence of DW2, that the ground on which the four Infill plots offered to the 4th Plaintiff by the 3rd Defendant, fell on private land that belonged and was registered with DW1. That the 3rd Defendant through the testimony of DW2 conceded that the purported creation of the four Infill plots on land belonging to DW1 was a mistake and that when that was discovered, the 3rd Defendant could not proceed to process the allocation but instead wrote to the Church in 1997 communicating the position and offered to provide alternative plots. That the owner(s) of Kisumu/Manyatta "A"/3593, or the subdivisions thereof, cannot be blamed for the circus the 3rd Defendant created of offering to allocate the 4th Plaintiff non-existent plots. That the 1st and 2nd Defendants' title to their land, which the Plaintiffs have failed to prove existence of fraud in their acquisition, are protected under **Article 40 of the Constitution 2010 and Section 26 (1) of the Land Registration Act No. 3 of 2012**. [See **Urimilla W/o Mahendra Shah vs Barclays Bank International Limited & Another (1976-1980) ICLR and Kinyanjui Kamau vs George Kamau Njoroge [2015] eCLR**], on the level of proof required to establish fraud allegation, which the Plaintiffs have failed to establish.

f) That the availed evidence by both the Plaintiffs and 3rd Defendant show that the only documentary evidence the 4th Plaintiff has in support of its claim of title or ownership to Infill plot Nos. 2-403 to 406 Migosi Site & Service Scheme are the four letters of offer, all dated 20th June 1986, setting out the payments to be made and acceptance in writing in 30 days, among others, and the eight (8) copies of the receipts issued by the 3rd Defendant to the 4th Plaintiff dated 3rd June 1986, 6th June 1986 and 13th June 1986. That it is obvious all those receipts bearing dates of between 3rd to 13th June 1986 were of before the letters of offer dated the 20th June 1986, and the payments made under them may not have been the payments required under the letters of offer. That the Plaintiffs' witness, PW1, indicated that he could not confirm whether the written acceptance were ever made within the time required. That in view of the testimony of DW2 that the 4th Plaintiff never followed with their office after the letters of offer to be recommended to the Commissioner for Lands for issuance of Letter of Allotment, the court finds that the Plaintiffs have failed to prove that the 4th Plaintiff acquired any rights and interests over the plots described in the four letters of offer dated 20th June 1986 that were capable of being registered in law and or in equity.

g) That the 4th Plaintiff ought to have taken up the 3rd Defendant offer for alternative plot(s) upon finding that the plots 3rd Defendant had purported to offer to them did not exist. That to insist in getting the plots in the letters of offer would result to an injustice and illegality upon the legally and validly registered proprietors. The court being a court of law and equity would not sanction such a move.

h) That Plaintiffs did not seek for alternative plots in the plaint, and the court cannot pronounce itself on such a matter as parties are bound by their pleadings. That on the prayer for general damages, which the learned Counsel has proposed for Kshs. 10,000,000/= by way of damages, as a fair and reasonable award, the Plaintiffs have failed to confirm to the court that they had accepted the offers dated 20th June 1986 in 30 days and complied with the other listed conditions thereon, including the requisite payments. The Plaintiffs therefore never acquired proprietary interest and rights over the four Infill plots, which in any case were no-existent. The Plaintiffs cannot therefore claim to have suffered loss and damages over what they never owned and no general damages can be

awarded to them under the circumstances. That what the Plaintiffs may possibly seek is refund of the monies they had paid to the 3rd Defendant in the balloting process of the plots, but as that has not been specifically sought in the plaint then the court cannot pronounce itself on it.

i) That the 1st and 2nd Defendants were never involved in the transactions over the Infill plots between the 3rd Defendant and the 4th Plaintiff. Yet the Plaintiffs brought them to court. They have incurred expenses defending the suit and are entitled to costs from the Plaintiffs. That however, the court is of the view that the 3rd Defendant should bear its own costs in view of the role it played in the murky transactions over non-existent plots.

8. That flowing from above, the court finds that the Plaintiffs have failed to prove their case against all Defendants and their claim is dismissed with costs to the 1st and 2nd Defendants only.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26TH DAY OF JULY 2019

In the presence of:

Plaintiffs Absent

Defendants Absent

Counsel Mr. Orengo for the Plaintiffs

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE