



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 48 OF 2017

(FORMERLY H. C. C. C. NO. 110 OF 2005)

LUCAS A. O. N. OCHIENG.....1ST PLAINTIFF

VERSUS

JUDITH ATIENO OWITI.....DEFENDANT

KISUMU MUNICIPAL COUNCIL.....THIRD PARTY

JUDGEMENT

1. Lucas A.O.N Ochieng, the Plaintiff, commenced this proceedings against Judith Atieno Awiti the Defendant, through the plaint and amended plaint dated 31st August 2005 and 30th November 2006 respectively, seeking for permanent and mandatory injunctions and or eviction over land parcel Kisumu/Municipality L.R. No. 25793, the suit property, general damages for trespass, costs and interests. The Plaintiff among others avers that the Defendant encroached onto the suit property on or about 20th March 2004 without his consent and commenced constructing thereon, thereby interfering with the Plaintiff right of user. That the Plaintiff and the Defendant had a previous suit over the same land being Kisumu C.M.C.C No. 237 of 2004 which was on 10th August 2004 dismissed with costs for want of jurisdiction.

2. The Defendant opposed the Plaintiff's claim through the statement of defence dated 24th October 2005, and amended defence and counterclaim dated 20th November 2006, in which she among others denies encroaching onto the Plaintiff's land. She avers that she is constructing on plot No. Migosi Phase 1 No. 323 and is in occupation. That the Plaintiff obtained registration of the suit property through fraud; that the court is without jurisdiction. In the counterclaim, the Defendant prays for a declaration that she is the beneficial owner of the suit property, that the register be rectified to have the said land in her name, costs and interest.

3. That in reply to the Defendant's defence and defence to the counterclaim dated 11th November 2005, and 29th November 2006 respectively, the Plaintiff averred that Plot No. Migosi phase 1 No. 323 was converted to Kisumu Municipality L.R. No. 25793 after registration and granted to him. That upon registration the Defendant's developments thereon constitute trespass and her occupation is illegal. That he did not obtain the suit property through fraud. That the Defendant has constructed a permanent house on the suit property, but denied that the plot had been repossessed by Kisumu Municipal Council and therefore the prayers sought by the Defendant are incapable of being granted.

4. The Kisumu Municipal Council, Third Party, filed their statement of defence dated 13th July 2009 in response to the Defendant's Third Party notice dated 29th October 2007. The Third Party denies that L.R. No. 25793 and plot No. 323 Migosi Phase 1 constitutes one and the same plot as alleged by the Defendant. They also denied allotting the plot described as plot No. 323 Migosi Phase 1 to Patrice Obiji Owuor and knowledge that the said Patrice sold it to the Defendant. The Third Party further averred that the Third Party notice taken out by the Defendant is a nullity in law and prayed that the Defendant's claim against it be dismissed with costs.

5. The Plaintiff testified on the 15th July 2009 as PW1. He testified that Kisumu Municipality L.R. 25793 was granted to him on 3rd October 2002. That on 20th March 2004, the Defendant trespassed onto the said plot. That in the company of his wife they went to the plot and found the defendant and her husband and he showed them his title documents for the plot. The Defendant informed them that she had been allocated the plot by the Third Party (Kisumu Municipal Council). That he contacted the Director of Housing who asked the Defendant to stop the construction but she did not. He then instructed an advocate who issued the Defendant with demand notice before filing this suit. The Plaintiff testified that he was allotted the plot No. 323 on recommendation of Kisumu Municipal Council, and complied with the conditions on the letter of allotment, after which the grant was subsequently issued to him after survey. That rent for the house the Defendant has erected on the suit property fetches about Kshs. 10,000/= in the area. During cross examination, PW1 stated that his letter of allotment is dated 2ND July 1997 and that he effected payment on the 8th June 2001, while the letter of allotment in the name of one Patrick Obigi, which the Defendant showed him was dated 20th October 2003. That by the time the Third Party's advertisement of 29th May 2003 was carried, Plot No. 323 Migosi Phase 1 did not exist as it had been surveyed and registered in his favour as L.R. 25793 and was therefore not available for allocation. The Plaintiff then called Pilbert Caleb Nadebu, a process server, who testified as PW2, and told the court how he served a

demand notice and other court processes to the Defendant. The Plaintiff also called John Kiprono Kiboi, a Land Surveyor and director housing with the Third Party from 1990 to 2005, who testified as PW3. He confirmed writing the letter dated 28th June 1997 (exhibit P 9(a)) recommending to the Commissioner of Lands that the Plaintiff be issued with plot No. 323 Migosi and after that the allotment letter dated 2nd July 1997 was issued. That in March 2004, the Plaintiff informed him that the Defendant was constructing on the plot. That he visited the suit property and asked that the construction be stopped. During cross examination PW3 testified that he was not aware of the suit property being repossessed by the Third Party. That he was not aware of any development plans for the construction carried out by the Defendant on the suit property having been approved or submitted for approval.

6. The Defendant testified on the 26th November 2010 as DW1. She told the court that in December 2003 she told a friend that she was looking for a plot to buy. Then on 27th January 2004, she entered into a sale agreement with one Patrick over plot No. 323 Migosi Kisumu for Kshs. 185, 000/=, which she paid in installments. That the letter of offer which had alterations was handed over to her. She then submitted her buildings plans for approval and paid for the same and commenced development. The building plans were approved. That when she received the Plaintiff's complaint, she consulted the Third Party who told her that the plot had been repossessed before being allocated after the advertisement, and was told to continue with construction. That by the time she was served with the court order in Kisumu CMCC No. 237 of 2004 to stop the construction, she had reached Lintal level of construction. That the suit was later dismissed and she completed the construction in February/March 2006. That the plot and development has been valued at Kshs. 2,760,000/=. The Defendant denied seeing PW3 at the suit property. During cross examination, DW1 testified that she bought the plot from Patrick Obije whose name in the sale agreement appears as Patrice. She disclosed that she receives Kshs. 10,000/= from each of the tenants in the two units she developed on the suit property. That the plot was allotted to Patrick who then sold it to her. That she did not pay any fees to the Third Party for the allotment of the plot or do any acceptance letter for the allotment. That the Third Party did not give her a letter of offer (allotment) for the suit property. The Defendant called Patrice Obiji Odoyo Ogo, a teacher, who testified as DW2. He confirmed entering into the sale agreement dated 27th January 2004 over the plot with the Defendant and was paid the purchase price in installments. That he had been given the letter of offer dated 20th October 2003 with the cancellations already existing by PW3 (Mibei). That he did the acceptance letter to the offer and paid Kshs. 25,000/= fees demanded, but the receipt got lost. That he was shown the plot which was empty and then sold it to the Defendant with the approval of one Madiere. During cross-examination DW2 stated that he cannot explain how he sold the plot to the Defendant on 27th January 2004, while the Defendant had a letter of allotment over the same plot dated 21st April 2003. That apart from signing the sale agreement with the Defendant, he did not sign any other document, including a transfer in her favour. That he was not aware that the payment he made of Kshs. 25,000/= under the receipt that got lost is not traceable by the Third Party. The Defendant also called Onino Mukobe, the Land Administrator, who testified as DW3, but his attempt to produce as exhibit the letter dated the 16th September 2011 was overruled upon objection being raised. The next witness was Nicholas Nyagoit Mochoge, a Lands Administrator, who testified as DW4 and produced as exhibit D15 the letter dated the 16th September 2011, which he wrote confirming that un-surveyed Residential Plot No. 323 Migosi Site and Service Kisumu, belonged to the Defendant. During cross examination, DW4 informed the court that he wrote the said letter while in charge of the Nyanza Lands Office and must have based it on the letter of allotment dated 21st April 2003 in favour of the Defendant. That he could not tell whether the Defendant did a letter accepting the offer. That he could not tell whether the Third Party had written a recommendation for Defendant before the letter of allotment was issued to her over the suit property. That he had not seen the Third Party's letter recommending the Plaintiff for allocation of the suit property and the letter of allotment in his favour when he did the letter dated 16th September 2011 to the effect that the plot belongs to defendant. That had he seen them, he would have taken the Plaintiff as the genuine owner of the suit property who had title. That the certificate of official search for parcel L.R. 25793 shows it belongs to Lucas Nyadondo Ochieng, the Plaintiff.

7. That the Third Party did not call any witness. That the Counsel for the parties agreed on timelines to file and exchange written submissions. The learned Counsel for the Plaintiff, Defendant and Third Party then filed the written submissions dated 16th July 2019, 15th July 2019 and 16th July 2019 respectively.

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

- a) Whether plot No. 323 Migosi Phase 1 Kisumu and Kisumu Municipality L. R. No. 25793 refers to one and the same plot.**
- b) Who between the Plaintiff and Defendant was registered with the suit property regularly, legally and procedurally.**
- c) Whether the Defendant's occupation of the suit land amounts to actionable trespass.**
- d) Who between the Plaintiff and Defendant is entitled to the prayers sought.**
- e) Whether the Third Party was procedurally enjoined in the proceedings, and whether the Defendant is entitled to any relief from the Third Party.**
- f) Who pays the costs of the suit and counterclaim.**

9. The Court has after carefully considering the pleadings; oral and documentary evidence by PW1 to PW3, DW1 to DW4, learned Counsel's submissions, come to the following conclusions;

- a) That the Plaintiff availed copies of the letter of allotment Ref. No. 149089/ iv/ 181 dated 2nd July 1997 in respect of Un-surveyed Residential plot No. 323 – Migosi Site and Service Scheme, confirming that the plot measuring approximately 0.0212 hectares had been allocated to him. The letter of allotment contains several conditions including acceptance and payment of specified amounts which the Plaintiff confirmed he complied with in 2001 as shown in the letter dated 6th June 2001, addressed to the Commissioner of Lands. The Plaintiff also produced a copy of the letter dated 28th June 1997 by PW3 recommending him for allocation of the plot, and copy of Grant No. I.R. 90151 under which the plot was after surveying registered with him as L.R. No. 25793 for a term of 99 years from 1st August 1995 dated 15th March 2002.

b) That Defendant traces her claim to the suit property to her sale agreement with DW2 (Patrick Obiji Owuor) of 27th January 2004, the letter of offer PW3 handed to her dated 20th October 2003, and the letter of allotment dated the 21st April 2003 under reference No. 149089/VIII for un-surveyed Residential Plot No. 323 – Migosi Site and service Scheme – Kisumu Municipality. The Defendant testified that she has complied with the conditions thereof including accepting the offer, paying Kshs. 25,000/= fees required and developing. That however the copies of the letter of acceptance and receipt for the payment of Kshs. 25,000/= fees made got lost and that she reported to the police.

c) That the court has after considering the oral and documentary evidence tendered by the Plaintiff, Defendant and their respective witnesses, including PW3 and DW4, found that while the Plaintiff has in his possession a title document in form of the grant issued under the **Registration of Titles Act Chapter 281 of Laws of Kenya**, now repealed, the Defendant has only two letters of allotment and sale agreement to back her claim to the suit property. That as DW4 stated during cross-examination, the Plaintiff's title documents to the suit property having been issued years before that of the Defendant, then the Plaintiff has a better title to the suit land than the Defendant. The court finds favour with that position and agrees that had DW4 been shown the Plaintiff's title documents, he would not have done the letter he did on 16th September 2011 to the effect that the plot belonged to the Defendant.

d) That further to the finding in (c) above, the testimony given by the Plaintiff, Defendant, PW3 and DW4 leaves no doubt that the plot described in the letters of allotment as Un-surveyed Residential Plot No. 323 Migosi Site and Service Scheme Kisumu, is the same one that after surveying and registration became L. R. 25793 and registered with the Plaintiff.

e) That though the Plaintiff appears to have complied with the conditions relating to acceptance and payment outside the period given in the letter of allotment, the Commissioner of Lands and its successor in title, the National Land Commission, do not appear to have taken any legal steps to repossess the plot. That instead, the Commissioner of Lands went ahead to issue the Plaintiff with the title document in March 2002 by way of the grant. That it follows that after that date of that grant, whose legality has not been challenged by the issuing authority to date, the plot hitherto described as Un-surveyed Residential Plot No. 323 Migosi Site and service Scheme Kisumu, and now registered as L. R. No. 25793, was not available to be allocated to the Defendant and or Patrick Obiji Owuor in 2003. That any letters of offer over the said plot made after the date of the grant by the Third Party are null and void ab initio.

f) That the letter of offer dated 20th October 2003 in favour of Patrick Obiji Owuor, signed by Mrs. M. M. Jobita, Town Clerk, Kisumu Municipal Council shows clearly that it was meant for "**Plot No. 307 Migosi Phase 1**" before the "**307**" was cancelled with a pen and replaced with "**323**". The acreage remained unchanged at 0.018 hectares and a fee of Kshs. 25,000/= was required to be made. That amount and the letter of acceptance must be what DW2 referred to in his evidence when he said the acceptance letter and receipt for Kshs. 25,000/= went missing. That finding would then mean that the Defendant has to date not made any payment and or accepted the offer as requested under the letter of allotment issued to her dated 21st April 2003. That as such the offer may have since lapsed, despite the contents of the letter dated 16th September 2011 to the contrary. That the Defendant appeared to have had no knowledge of the said letter of allotment, and based her entire claim to the suit land on the sale agreement.

g) That it is strange that the Defendant entered into a sale agreement with Patrick Obiji Owuor over Plot No. 323 Migosi Phase 1 Kisumu on the 27th January 2004, while she already had the letter of allotment dated the 21st April 2003 over the same plot. That would be absurd as it would mean she was buying the plot that already belonged to her, unless she knew the letter of allotment had not been procured regularly and procedurally. That there was no recommendation from the Third Party to the Commissioner of Lands in favour of the Defendant and or DW2 for allocation of the plot, leads the court to conclude that the allocations which have already been held above to have been null and void in view of the existing grant, were procured without obtaining the Third Party's recommendation. That had that procedure of obtaining the Council's recommendation been followed, probably the Defendant would have been told that a recommendation in favour of the Plaintiff over the same plot had been made years earlier, and that the plot was not available for alienation.

h) That it is also doubtful how Patrick Obiji Owuor sold the suit plot to the Defendant without obtaining the written consent from the Third Party and or executing a transfer in her favour in one form or the other. That finding is based on what Patrick Obiji Owuor (DW2) informed the court that he did not attend the council committee hearing or sign any other document in favour of the Defendant, apart from the sale agreement. That no wonder then that according to PW3, that transaction was not known by the Third Party (Council).

i) That this suit was filed as Kisumu High Court as HCCC suit No. 110 of 2005 as the court then with jurisdiction. That upon the establishment of this court under **Article 162 (2) (b) of the Constitution** and operationalized under the **Environment and Land Court Act No. 19 of 2011** in 2012, the suit was transmitted to this court and registered as **Kisumu ELC No. 48 of 2017**. That this then is the court with jurisdiction to hear and determine the issues raised in the main suit and counterclaim, which deals with among others the title to, and use of the suit property.

j) That even though the Third Party did not call oral evidence in defence of the Third Party proceedings initiated by the Defendant, the court finds that the Defendant did not discharge her duty under **Section 107 of the Evidence Act, Chapter 80 of Laws of Kenya** to establish that she was entitled to be indemnified by the Third Party if she was found liable in the Plaintiff case. That the Defendant is therefore liable to pay the Third Party's costs of the suit as she is the one who enjoined them in these proceedings.

k) That the Plaintiff had prayed for general damages. That in his evidence he prayed for Kshs. 10,000/= as the rent payable in the area. That he did not however indicate whether the Kshs. 10,000/= was per month or per year or other period. The Defendant on her part indicated that she was getting Kshs. 10,000/= from each of her two tenants. That she did not indicate whether the Kshs. 10,000/= was per month, year or other period. That as the Plaintiff has not provided approved building plans, and had not obviously started construction, the court is unable to know the nature of the development he intended to put up, and how much he would have earned per month or year. That notwithstanding, it is obvious that the Plaintiff has been unable to use the suit land since 20th March 2004 due to the Defendant's action and is therefore entitled to damages. That accordingly, the court considers an award of Kshs.

200,000/= (Two hundred thousand) as general damages as adequate.

l) That the Plaintiff having succeeded in this claim against the Defendant is entitled to costs as costs follow the events under **Section 27 of Civil Procedure Act Chapter 21 of Laws of Kenya.**

10. That flowing from foregoing, the court finds in favour of the Plaintiff in both the main suit and the counter-claim. That judgment is therefore entered for the Plaintiff against the Defendant and the following orders issued.

1. a) That a mandatory injunction is hereby issued compelling the Defendant to forthwith remove all the fixtures, and or structures, building materials illegally erected and placed upon the Plaintiff's parcel of land known as Kisumu Municipality L. R. No. 25793 within ninety (90) days, and in default eviction and demolition orders to issue.

b) That the Defendant do pay the Plaintiff Kshs. 200,000/= (Two hundred thousand) as general damages for trespass.

c) The Defendant to pay Plaintiff costs.

2. The Defendant's Counter claim is dismissed with costs to the plaintiff.

3. The Defendant do pay the Third Party costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 15TH DAY OF SEPTEMBER 2019

In the presence of:

Plaintiff Absent

Defendant Absent

Third Party Absent

Counsel Mr. Orengo for Mwamu for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE