REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 348 OF 2016

ODOYO THADDEUS ODOYO..PLAINTIFF

VERSUS

HENRY OYANGO OJWANG...DEFENDANT

J U D G M E N T

This is yet another of those sad land disputes where parties are litigating over the same property each having documents issued by Government agencies. More of that later.

ODOYO THADDEUS ODOYO (the plaintiff) moved this Court by his plaint dated 16th December 2016 seeking Judgment against **HENRY ONYANGO OJWANG** (the defendant) in the following terms: -

(a) An order of mandatory injunction compelling the defendant to pull down the illegal building erected on the plaintiff's property being land reference number 16609 (I.R NO 179265) situate within Mambo Leo Estate within KISUMU COUNTY and restore it to it's original state.

(b) An eviction order directed at the defendant to vacate the plaintiff's property being land reference number 16609 (I.R NO 179265) situate within Mambo Leo Estate within KISUMU COUNTY.

(c) Costs of this suit.

(d) Interest on (c) above at Court's rate.

(e) Any other relief this Honourable Court may deem fit to grant.

The suit is predicated upon the claim that at all material times, the plaintiff is the registered proprietor of all that property known as land reference number 16609 (I.R NO 179265) measuring approximately 0.28 Ha (hereinafter the suit property) having bought it in vacant possession from the initial allottee one **BETTY WASULWA ADUWO** sometime in 2011 after conducting due diligence and establishing that it was not encumbered nor did it overlap into neighbouring plots. Having identified the beacons and received the documents from the original allottee, the suit property was transferred to him after paying the requisite statutory charges and he fenced it. However, sometime in July 2016, he visited the suit property and found that the defendant had, without any colour of right, trespassed thereon and put up an apartment with the intention of renting out the units to un – suspecting members of the public. He therefore instructed his advocate to write to the defendant to stop the illegal construction on his property and on 5th August 2016, it was agreed that the defendant stops further construction until a solution is reached. However, the defendant disregarded the agreement and has put up finishing touches and rented out two units thus necessitating this suit.

Together with the plaint, the plaintiff filed his list of documents and his statements.

The defendant by his defence dated 18th January 2017 denied that the plaintiff is the registered proprietor of the suit property or that he bought it as alleged after due diligence. He further denied having trespassed thereon or that there was a meeting held on 5th August 2016 where it was agreed that he stops further construction on the suit property.

He added that by a resolution of the Planning Committee of the **MUNICIPAL COUNCIL OF KISUMU (THE COUNCIL)** held on 4th July 2007, a resolution was passed to repossess all undeveloped plots which included the suit property. In a further meeting held on 9th November 2010, fresh applications were received for the repossessed plots which included the suit property which was sub – divided into four plots being **SG 92, 93, 78** and **77 Mamboleo**. The defendant was allocated plot **NO SG – 92** by a letter of offer dated 19th November 2010. The defendant accepted the offer by paying all the rents and rates due and submitted his building plan to the council and the same was

approved. He then commenced construction on plot **NO SG 92** on 20th January 2011 and has since completed a two storey apartment block part of which is already leased out to tenants. That on 20th July 2011 when the plaintiff purports to have bought the suit property, it had already been sub – divided into four plots and re – allotted to other people including the defendant and he therefore pleaded that the suit be dismissed with costs.

The defendant also filed his list of documents and witnesses together with their statements.

The case was placed before me on 26th November 2018 during the service week at the **ELC KISUMU** when all the parties and their witnesses testified and closed their cases. The file was then dispatched to **BUNGOMA** on 20th February 2019 for purposes of writing the Judgment.

The plaintiff adopted as his evidence his witness statement dated 16th December 2016 as well as his list of documents dated the same day and a further supplementary list of documents dated 6th July 2016.

In the said statement, he repeated the averments in his plaint that he is the registered proprietor of the suit property and referred to his certificate of title and the sale agreement between him and the original allottee one **BETTY WASULWA ADUWO** dated 20th July 2011 and the letter of allotment dated 29th November 2010. He added that he conducted due diligence before the purchase to establish that the suit property was not encumbered and did not overlap into the neighbouring plots. He obtained all the documents and fenced it and has been paying the land rates to the **COUNTY GOVERNMENT OF KISUMU** and the suit property was eventually transferred to him and a lease issued on 14th June 2016. However, sometime in July 2016 he was surprised to find that the defendant has trespassed thereon and put up an apartment so he instructed his advocate to write to him to demand that the construction stops. A meeting was held on 5th August 2016 where the defendant was remorseful and requested to be sold the portion that he had developed and to stop further construction until a solution is reached. However, the defendant disregarded that agreement and has gone ahead to rent out two units. That the defendant's actions are illegal and amount to impunity as he has not proprietory interest in the suit property to justify his actions.

The plaintiff called as his witness **PATRICK OPIYO ADERO (PW 2)** who is a licenced Land Surveyor holding licence **NO 174**. He told the Court that the plaintiff asked him to confirm if the building that was put up on the suit property was within it's boundary. He prepared his report dated 26th June 2018 in which he found that the building occupies a portion measuring 13 metres by 24 metres and is within the boundary of the suit property. He produced his report as part of the evidence herein.

The defendant similarly asked the Court to adopt as his evidence his witness statement and list of documents.

In the statement dated 18th January 2017, he states that he is the allottee of plot **NO SG – 92** situated at Mamboleo in **KISUMU COUNTY** which is a sub – division of the suit property and which was allocated to him on 19th November 2010 after the suit property had been repossessed and sub – divided into plots. That he met all the conditions set out in the allotment letter, paid the land rates and rent and submitted his building plans which were approved by the council. That had the plaintiff carried out due diligence, he would have found that by the time the suit property was allocated to **BETTY WASULWA** by the Commissioner of Lands, the same had already been repossessed and sub – divided by the council and **PLOT NO SG – 92**, allocated to the defendant. That the allocation was done legally unlike the plaintiff who did not comply with the conditions. That the plaintiff therefore has no claim against the defendant in trespass and his recourse, if any, lies against the Commissioner of Lands or the purported allottee **BETTY WASULWA**. That the plaintiff's suit is frivolous and vexatious and should be dismissed and the allotment to **BETTY WASULWA** and the plaintiff be revoked.

Submissions were thereafter filed both by the firm of **KIPKENDA & COMPANY ADVOCATES** for the plaintiff and **KIMANGA & COMPANY ADVOCATES** for the defendant.

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

It is common ground that the plaintiff holds the Certificate of Title in respect to the suit property transferred to him on 17th November 2016 by one **BETTY WASULWA ADUWO** who was the original owner. It is a 99-year lease from 1st May 2010. It is also not in dispute that by a letter of offer dated 19th November 2010, the council offered to the defendant **PLOT NO SG – 92 Mamboleo** which is a sub – division of the suit property and that the defendant has developed it having met all the conditions set out in the said letter of offer. The only issue that I need to resolve is who between the plaintiff and the defendant holds a better title to the suit property.

Counsel for the plaintiff has submitted, citing the provisions of **Sections 24(b), 25(1) and 26(1) of the Land Registration Act**, that the plaintiff has absolute proprietorship over the suit property by virtue of the Certificate of Title registered in his names. It cannot be disputed that the above provisions confer upon the registered proprietor of land all absolute rights subject only to the encumbrances permitted by the law. **Section 24(b) of the Land Registration Act** provides as follows: -

> ***24(b) "the registration of a person as the proprietor of a lease shall rest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto subject to all implied or expressed agreements, liabilities or incidents of the lease."***

Section 25(1) of the same Act provides as follows: -

> ***25(1) "The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an***

order of the Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interest and claims whatsoever, but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register;

and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register"

Finally, **Section 26(1)** of the same Act is worded in the following terms: -

26(1) "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 <u>absolute and indefeasible owner</u>, 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 <u>fraud</u> or <u>misrepresentation</u> in which the person is proved to be a party; or

(b) where the Certificate of Title has been acquired <u>illegally, unprocedurally or through a corrupt scheme</u>." Emphasis added.

Therefore, as the registered proprietor of the suit property having obtained a Certificate of Title to the same, the plaintiff is the absolute and indefeasible owner of the same. It can however be impeached if it was obtained through fraud, misrepresentation, illegally un – procedurally or through a corrupt scheme.

In an attempt to impeach the plaintiff's title, counsel for the defendant has made lengthy submissions from paragraphs 29 to 54 headed ***"<u>WHETHER THE TITLE TO THE PLAINTIFF WAS OBTAINED FRAUDULENTLY</u>."*** In those paragraphs, the defendant's counsel cites various provisions of the law and the constitution and traces the history of the original allotment of the suit property to **BETTY WASULWA ADUWO** and transfer thereafter to the plaintiff and submits that all this was done fraudulently. He then states as follows in paragraph 49: -

49 "The plaintiff in the year 20/7/2011 bought an allotment paper for parcel NO L.R NO/16609 MAMBOLEO (the suit land) from one BETTY WASULWA wife of Chief Land Administration Officer Commissioner of Lands who had acquired the land through fraud. The plaintiff claim had no knowledge how the land was acquired. The procedure of acquiring government land is well documented in the National Land Act. The plaintiff was equally unable to produce the green card or copy of the land adjudication register to prove his case or ground inspection report to prove that by the time he bought the land had no construction"

What I understand the defendant's counsel to be saying is that the original allottee **BETTY WASULWA ADUWO**, with the help of her husband a senior officer in the Lands Office, fraudulently colluded to transfer the suit property to the plaintiff and therefore his title can be impeached. That may be so. However nowhere in his defence did the defendant plead any allegations of fraud against the plaintiff nor any Counter – Claim. In his oral testimony during re – examination by his counsel **MR KIMANGA**, the defendant was emphatic that: -

"That plaintiff's title is fraudulent because my house was on the land before the plaintiff obtained the title."

The law is that allegations of fraud must be specifically pleaded and proved. In **VIJAY MORIARIA .V. NANSINGH MADHUSING DARBAR & ANOTHER 2000 eKLR** the Court of Appeal held as follows: -

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also 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."

Therefore, even assuming that indeed the plaintiff acquired the suit property through fraud or any other illegal processes with the connivance of **BETTY WASULWA ADUWO** and officers in the Land Registry led by her husband, that needed to be pleaded. It was not pleaded.

Secondly, notwithstanding the very eloquent and lengthy submissions by counsel for the defendant on the issue of fraud on the part of the plaintiff in the acquisition of the Certificate of Title to the suit property, such submissions cannot take the place of pleadings and evidence required to prove a claim. Cases are determined on the basis of the parties pleadings, the evidence adduced and the applicable law. Submissions, no matter how weighty and persuasive can only aid to bolster a case and not to prove it. In **DANIEL TOROITICH ARAP MOI .V. MWANGI STEPHEN MURIITHI & ANOTHER 2014 eKLR**, the Court of Appeal stated thus: -

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the Court that it's case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing

submissions but based only on evidence presented."

That is why this Court must uphold the submissions by plaintiff's counsel where he states at paragraph 26 that: -

> ***"Your Lordship, the defendant attempted to attribute fraud on the part of the plaintiff in having the property registered in his name during hearing. The plaintiff submits that the defendant never pleaded fraud, illegality and/or misrepresentation on the part of the plaintiff to acquire title to the suit property hence the attempted introduction of such accusations during hearing or at any stage after close of pleadings must be rejected. A party is bound by his own pleadings and he needs to stick to what is pleaded."***

Further, it is important to note that whereas the plaintiff holds a Certificate of Title to the suit property, all that the defendant holds is a letter of offer. A letter of offer does not confer any proprietory rights to land. It is simply an offer to accept land on the terms set out therein. The party may take the offer or decline it but such acceptance in itself is not enough to confer title. In **WRECK MOTORS ENTERPRISES .V. THE COMMISSIONER OF LANDS & OTHERS C.A CIVIL APPEAL NO 71 OF 1997**, the Court held that: -

> ***"Title to landed property normally comes into existence after issuance of a letter of allotment meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions held."***

See also **JOSEPH ARAP NG'OK .V. JUSTICE MOIJO OLE KEIWUA C.A CIVIL APPLICATION NO 60 OF 1997**. Therefore, between the plaintiff's Certificate of Title which has not been proved to have been acquired fraudulently, and the defendant's letter of allotment, this Court, on the basis of the evidence herein and the law, must up hold the plaintiff's Certificate of Title rather than the defendant's letter of allotment.

There is also evidence that infact the allocations of land done by the then **KISUMU MUNICIPAL COUNCIL** between 2009 and 2010 were revoked through Gazette Notice **NO 4258** dated 17th July 2017. A copy of the said Gazette Notice was among the documents produced by the plaintiff and under serial NO 40 is the name of the defendant and against plot **NO SG 344 B** Mamboleo are the following remarks: -

> ***"Revoked illegal allocation by the council over land already allocated to the Commissioner of Lands."***

When he was cross – examined by **MR ODOYO** counsel for the plaintiff, the defendant said the following with regard to that Gazette Notice:

> ***"I am aware that the parcel NO SG – 92 was hived from plot NO 16609. I have only one plot in Mamboleo. It was allocated to me by the Municipal Council of Kisumu. I am aware that the National Land Commission revoked my title but I was not notified. I am aware that all the allocations done by the Municipal Council of Kisumu were revoked by the National Land Commission. I can see the name of HENRY ONYANGO OJWANG in the Gazette Notice but the plot is not SG – 92. It is true that I have only one plot at Mamboleo."***

Although the Gazette Notice **NO 4258** which revoked the allocation by the Council in **KANYAKWAR**, **MAMBOLEO** and others shows that the defendant's plot is **NO SG – 344 B**, given the defendant's own admission that he has only one plot at Mamboleo, this Court can safely conclude that plot **NO Sg – 344 B** and **SG – 92** refer to one and the same plot. In any event, the report by **PATRICK OPIYO ADERO (PW 2)** dated 26th June 2018 and which was part of the plaintiff's documents reads as follows on page 2: -

> ***"As per the Kenya Gazette Notice of Special issue of 17.7.2017 (attached), the National Land Commission revoked the title number Sg 344 B/MAMBOLEO which is shown as SG – 92 as per the allocation plan attached measuring 0.065 Ha belonging to MR HENRY ONYANGO OJWANG. An extract of the Notice is attached. The County Council illegally sub-divided L.R 16609 to give Sg 77, 78, 92 and 93 as per the allocation PART DEVELOPMENT PLAN (PDP) copy attached all which have since been revoked."***

Given the above un – disputed facts, it would be a travesty of justice for this Court to give recognition to the defendant's letter of allotment when the process leading thereto was revoked. The Gazette Notice revoked all the allocation done between 2009 and 2010 which would therefore affect the letter of allotment issued to the defendant on 9th November 2010.

Has the defendant trespassed onto the plaintiff's property to warrant the orders of mandatory injunction and eviction sought against him? The answer is **YES**. In his report referred to above, **MR PATRICK OPIYO ADERO (PW 2)** makes the following finding of fact in his conclusion: -

> ***"The building is illegally built on parcel number LR 16609, parcel number Sg 344 B also known as Sg 92 was revoked and does not exist as the owner has only the offer letter which is not a prove (sic) land ownership."***

Clearly therefore, the defendant's storey building was constructed on the suit property belonging to the plaintiff. The submissions by **MR KIMANGA** therefore that the defendant is not a trespasser on suit property because he has presented minutes of the council meeting, his letter of allotment and the approved building plans cannot aid his client the fate of the said allocation through the Gazette Notice **NO 4258**, having been put to rest.

In my view, the plaintiff has proved his case as required in law and is entitled to the orders sought in paragraphs (a) and (b) of the plaint.

I have however, agonized over the issue of costs. The general rule as to costs is provided for in **Section 27 of the Civil Procedure Act** as follows: -

> ***"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or Judge and the Court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***
>
> ***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge for good reason otherwise order."*** Emphasis added.

In determining the issue of costs, the Court is entitled to look at, inter alia, the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings etc. – **R .V. KENYA AIRPORTS AUTHORITY EX – PARTE TRANSGLOBAL CARGO CENTRE LIMITED & OTHERS 2015 eKLR**. The Court has absolute discretion with regard to costs and such discretion is to be determined on the facts of each case and whereas costs follow the event, the Court may, for good reasons decide otherwise.

At the commencement of this Judgment, I described this litigation as a sad case. It must be clear by now that the defendant, like any other person, applied for a plot after the council advertised the same for allocation. He paid the necessary fees and his building plans were approved after which he put up a building for rental purposes. He would not have found himself in the predicament in which he is now were it not for the actions of the council. Given the above circumstances, I am persuaded that the interests of justice will best be served if I make no orders as to costs. The defendant's recourse is as against the council's successors.

There shall be Judgment for the plaintiff against the defendant in the following terms: -

> **(a) An order of mandatory injunction compelling the defendant to pull down the illegal building erected on the plaintiff's property being land reference number 16609 (I.R NO 179265) situate within Mamboleo Estate KISUMU COUNTY and restore it to it's original state.**
>
> **(b) An eviction order directed at the defendant to vacate the plaintiff's property being land reference number 16609 (I.R NO 179265) situate within Mamboleo Estate KISUMU COUNTY.**
>
> **(c) Prayers (a) and b) to be complied with within six (6) months from the date of this Judgment failure to which the defendant shall be evicted in accordance with the relevant provisions of Section 152 of the Land Act.**
>
> **(d) Each party to meet their own costs.**

Boaz N. Olao.

J U D G E

4th November 2019.

Judgment dated and signed at **BUNGOMA ELC** this 4th day of November 2019.

To be delivered at **KISUMU ELC** on 15th November 2019.

Notices to issue accordingly.

Boaz N. Olao.

J U D G E

4th November 2019.