



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 240 OF 2015

SHAJANAND HOLDINGS LTD.....PLAINTIFF

VERSUS

MICHAEL KIPTORUS.....1ST DEFENDANT

COUNTY GOVERNMENT OF KISUMU.....2ND DEFENDANT

DISTRICT LAND REGISTRAR – KISUMU.....1ST INTERESTED PARTY

NATIONAL LAND COMMISSION.....2ND INTERESTED PARTY

J U D G M E N T

The plaintiff filed this suit originally against the 1st defendant only seeking Judgment in the following terms: -

- 1. An order for the eviction of the 1st defendant from the plaintiff's land parcel NO KISUMU MUNICIPALITY/BLOCK 4/154 by the OCS CENTRAL POLICE STATION KISUMU.**
- 2. Costs of the suit.**
- 3. An such other or further relief as this Honourable Court may deem appropriate.**

The basis of the plaintiff's claim is that whereas he is the bona fide registered proprietor of the parcel of land known as **KISUMU MUNICIPALITY/ BLOCK/ 4/154** (the suit property) the 1st defendant has, without any iota of right authority and/or sanction from the plaintiff, trespassed into the same and is residing therein to the total exclusion of the plaintiff thereby denying him the use of the same. And despite demand made and notice of intention to sue, the 1st defendant has refused to comply.

The 1st defendant filed a defence denying that the plaintiff is the bona fide registered proprietor of the suit property and put the plaintiff to strict proof thereof. The 1st defendant further denied having trespassed onto the suit property adding that he is in occupation of the land parcel **NO KISUMU/MUNICIPALITY/4/ 155A** to which he is a tenant of the **MUNICIPAL COUNCIL OF KISUMU** and this suit is misconceived, bad in law and an abuse of the process of this Court which has no jurisdiction to hear the same.

Subsequently and upon the application of the 1st defendant, the **COUNTY GOVERNMENT OF KISUMU** was enjoined in these proceedings as the 2nd defendant and the **DISTRICT LAND REGISTRAR KISUMU** and the **NATIONAL LAND COMMISSION** were also enjoined as the 1st and 2nd interested parties following an order issued on 20th June 2016. The 2nd defendant filed a defence and counter – claim to the suit. The 1st and 2nd interested parties did not file any pleadings in response to the plaintiff's claim.

In it's defence and counter – claim, the 2nd defendant pleaded that the 1st defendant is it's employee and occupies property **NO KISUMU/ MUNICIPALITY/BLOCK 4/155** which was previously owned by the defunct **KISUMU MUNICIPAL COUNCIL** but ownership thereof has now been transferred to the 2nd defendant which also owns the suit property in trust for the people of **KISUMU MUNICIPALITY**. Further, that if the plaintiff owns any title to the suit property, the same was obtained fraudulently and cannot have any protection of law pursuant to **Article 40(6) of the Constitution**.

In it's counter – claim, the 2nd defendant averred that the suit property is vested in it to hold in trust on behalf of the people of Kisumu and the lease was issued on 27th April 1999 in the name of the then **MUNICIPAL COUNCIL OF KISUMU** and contrary to the plaintiff's claims, the suit property is registered in the rateable location in **ZONE 4 (TOM MBOYA AREA)** and not **ZONE 1 (KISUMU AIRPORT**

AREA). That during the transition to the devolved structures of Governance, there was rampant illegal transfer and loss of Government assets which explains why the suit property was transferred to the plaintiff on 23rd January 2013 about a month to the General Election that culminated into the devolved system of Governance. That the said transfer was done without the consent of the 2nd defendant and a visit to the District Land Office in Kisumu did not bear much fruits as the 2nd defendant's Officers were informed that the suit property has two files kept under lock and key and the classification of the suit property under **ZONE 1 (AIRPORT AREA)** is prima facie evidence of fraud to enable the plaintiff find a way into the 2nd defendant's system and be able to pay rates. The 2nd defendant pleaded the particulars of fraud on the part of the plaintiff in paragraph 12 of its defence as follows: -

a) Purporting to transfer the suit property in the plaintiff's names without the consent or/otherwise authority of the 2nd defendant which is the registered owner.

b) Purporting to acquire the suit property from the defunct MUNICIPAL COUNCIL OF KISUMU without a council resolution supporting the transaction and the invitation of bids from other prospective buyers.

c) Falsifying the zoning of the suit property from TOM MBAYA AREA (ZONE 4) to AIRPORT AREA (ZONE 1) so as clandestinely enable the plaintiff appear as the voteable owner thereof.

d) Purporting to sue the 1st defendant notwithstanding the fact that he is not in occupation and deliberately avoiding the 2nd defendant who is both the registered owner and has always been in occupation of the suit property.

The 2nd defendant therefore sought for Judgment against the plaintiff in the following terms: -

1. An order of cancellation of the certificate of lease issued to the plaintiff on 23rd October 2013.

2. Costs of the suit and interest at Court rates.

In a reply to the 2nd defendant's defence and defence to the counter – claim, the plaintiff joined issues with the 2nd defendant claiming it to be a mere denial and a sham.

The plaintiff denied the 2nd defendant's counter – claim and put it to strict proof thereof. It also denied the allegations of fraud levelled against it and sought the dismissal of the counter – claim and Judgment as prayed in the plaint.

The suit was placed before me for hearing on 5th November 2018 during the service week at the Environment and Land Court Kisumu. Only the plaintiff, the 1st defendant and a representative of the 2nd defendant testified. As already indicated above, the two interested parties did not file any pleadings in response to the plaintiff's claim. They therefore did not take part in the trial.

On behalf of the plaintiff, its Director **CHANDRUKANT CHABADIA** (PW 1) relied on his statement and list of documents filed on 22nd September 2015 and a further list of documents filed on 5th October 2017. He told the Court that the suit property belongs to the plaintiff having purchased the same from one **PAUL MAINA** who had a title to the same. He said the suit property did not belong to the 2nd defendant at the time of the transaction and asked that the 2nd defendant's counter – claim be dismissed.

The 1st defendant (**MICHAEL KIPTORUS**) also adopted as his evidence the witness statement dated 18th May 2016 and filed on 19th May 2016 in which he stated that he is an Engineer employed by the 2nd defendant and occupies the land parcel **NO KISUMU MUNICIPALITY BLOCK 4/155** pursuant to a tenancy agreement dated 2nd July 2012. He denied being in occupation of the suit property adding that it is not therefore possible that he can be evicted therefrom. He filed as his list of documents the tenancy agreement dated 2nd July 2012.

This 2nd defendant called as its witness **ARNOLD OMONDI GUYA (DW 2)** who is its Director of Housing. He adopted as his evidence the witness statement and list of documents dated 18th May 2016. In the said statement, he has stated that the suit property was vested in the defunct **MUNICIPAL COUNCIL OF KISUMU** and now the **COUNTY GOVERNMENT OF KISUMU** with a certificate of lease issued on 27th April 1999 in the names of the defunct council. That the suit property is public land vested in the 2nd defendant which holds the same in trust. That during the transition to the devolved Government, there was rampant and illegal transfer of public assets and the plaintiff secured the transfer of the suit property in his names without the authority of the then **MUNICIPAL COUNCIL OF KISUMU** or a resolution sanctioning the transaction. That the suit property is actually located at **ZONE 4** and not **ZONE 1** and the plaintiff is talking of a different property from what he alleges to own. That there is prima facie evidence of fraud in the zoning of the suit property to appear as if the plaintiff is the rateable owner. That the 1st defendant is an employee of the 2nd defendant and it is on that basis that he occupies the land parcel **NO KISUMU MUNICIPALITY/BLOCK 4/155** and not the suit property.

When the trial ended on 28th November 2018, it was agreed both by **MR ODENY**, **MR AMONDI** and **MS LANGAT** Counsels for the plaintiff, the 1st and 2nd defendant and the 1st interested party respectively that the plaintiff files and serves his submissions within 14 days after which the other parties will have 14 days within which to respond. The file would then be mentioned before **KIBUNJA J** on 21st January 2018 to confirm compliance and make further orders. However, by the time the file was forwarded to me in **BUNGOMA** for purposes of drafting the Judgment, only the plaintiff's counsel had filed submissions.

I have considered the evidence by the parties and the submissions filed by counsel for the plaintiff **MR ODENY** which are the only ones on record.

The following issues call for my determination: -

- 1: who between the plaintiff and the 2nd defendant is the legitimate owner of the suit property.
- 2: whether the plaintiff obtained the lease to the suit property fraudulently or illegally and if the same should be cancelled.
- 3: whether the 1st defendant should be evicted from the suit property.
- 4: whether the 2nd defendant has proved it's counter – claim.
- 5: who should meet the costs.

From the documents filed herein, it is common ground that the Government of Kenya is the lessor of the suit property. According to the documents produced by the 2nd defendant, the leasehold interest for 99 years was issued to one **CHANAN SINGH S/O SANTA SINGH** from 1st March 1959. A certificate of lease was issued in the names of the defunct **MUNICIPAL COUNCIL OF KISUMU** on 27th April 1999. The plaintiff has on his part also produced a certificate of lease dated 23rd January 2013 in respect to the suit property registered in it's names and also a certificate of lease dated 23rd March 2003 in the names of one **PAUL MANWA MAINA**. There is also an agreement for sale dated 7th January 2013 between the plaintiff (as purchaser) and the said **PAUL MANWA MAINA** (as vendor) over the suit property at a consideration of Kshs. 16,000,000/=. There is also a certificate of title dated 6th March 2015 under the repealed registered Land Act granting **PAUL MAINA** a 99-year lease from 1st June 1999 in respect to title **NO I.R 165416** though it is not clear if this refers to the suit property or another property.

There is no doubt that the plaintiff obtained title to the suit property having purchased the same from one **PAUL MANWA MAINA** by an agreement dated 7th January 2013. The said **PAUL MANWA MAINA** was at that time the registered proprietor of the suit land holding a 99-year lease from the Government from 1st June 1999. When he testified in Court, the plaintiff's Director stated that the suit property was vacant at the time of purchase and the plaintiff took possession and left a guard to take care of it. Meanwhile the plaintiff's Director took his father to India for treatment but upon return, he found that the guard he had left to take care of the suit property had been chased away and the 1st defendant had taken possession of the same. In his oral evidence in Court however, the 1st defendant denied being in occupation of the suit property and said that he is in occupation of another property **NO KISUMU MUNICIPALITY/BLOCK 4/155**. On the other hand, the 2nd defendant's representative **ARNOLD OMONDI GUYA (DW 2)** was emphatic that the 1st defendant occupies the suit property. This is what he said in his evidence in chief: -

*“I can say that **MICHAEL KIPTARUS** does not know where he stays. What I can say is that 1st defendant **MICHAEL KIPTARUS** stays on block 4/154 and he pays rent for it. There is also the valuation roll showing all the property of the 2nd defendant. The suit property is one of them. There is a tenancy agreement in the names of the 1st defendant dated 2nd July 2012.”*

The tenancy agreement between the 1st and 2nd defendants dated 2nd July 2012 was among the documents produced by the 2nd defendant and this is how it describes the house occupied by the 1st defendant: -

*“This agreement made on the 2nd day of July 2012 between the **MUNICIPAL COUNCIL OF KISUMU**, a body duly constituted under the Local Government Act CAP 265 of Post Office Box No. 105 – 40100 KISUMU (hereinafter referred to as the Council on one part) and **MICHAEL K. KIPTARUS** of Post Office Box No. 105 KISUMU (hereafter referred to as the Tenant on the other part). Whereas the Council has agreed to grant, the Tenant has accepted the Tenancy of Institutional House Block NO KSM/4/155A (hereinafter referred to as the Premises) subject to the following conditions:”*

There is therefore a contradiction between the 1st and 2nd defendants as to which property the 1st defendant actually occupies. I resolve that contradiction in favour of the plaintiff because, when the 1st defendant was seeking the setting aside of the interlocutory Judgment entered against him, he averred in his supporting affidavit dated 28th April 2016 at paragraph 4 as follows: -

4: “That I know of my own knowledge that I only came to realise of this suit when herein (sic) upon being served with an application for summary Judgment which application was dropped at my door on 5th February 2016 at 6:00 Hrs.”

At paragraph 8 of the same affidavit, he states that he occupies the house on parcel **NO KISUMU MUNICIPALITY BLOCK 4/155A**. Clearly, the plaintiff could only have served the 1st defendant at the suit property because the plaintiff's representative knew it. Indeed, the affidavit of service by the process server **NADEBU P. CALEB** dated 9th October 2015 indicates at paragraph 3 that the 1st defendant was served personally at the compound of the house where he was residing.

The plaintiff also produced as part of it's evidence a letter dated 10th April 2007 from one **RASHID H. MWAKIWIWI** the Town Clerk to the defunct **MUNICIPAL COUNCIL OF KISUMU** and addressed to **PAUL MAINA** in reference to the suit property. The letter is brief and I shall reproduce it:-

“PAUL MAINA

P.O. BOX 1603 – 40100

KISUMU

Dear Sir/Madam

RE: YOUR PLOT BLOCK 4/154

This is in reference to your letter dated 14th March 2007 in which you asked for true ownership position of the above plot.

According to the records held in this council, the council is not the owner of the said plot and it is registered to the name PAUL MAINA M of P.O. BOX 1603 – 4000 KISUMU.

Kindly pay your rates accordingly.

Thank you.

RASHID H. MWAKIWIWI

TOWN CLERK.”

In his evidence in chief, **ARNOLD GUYA (DW 2)** confirmed that indeed the said **MR RASHID H. MWAKIWIWI** was the Town Clerk to the then **MUNICIPAL COUNCIL OF KISUMU** but he could not confirm whether or not the said **MR RASHID H. MWAKIWIWI** signed the letter dated 10th April 2007. The authenticity of that letter is not in doubt and as the Clerk to the said **MUNICIPAL COUNCIL OF KISUMU**, **MR RASHID H. MWAKIWIWI** would be expected to be the custodian of the council's assets and therefore in a position to confirm whether or not the suit property was part of the Council's assets. It is also instructive to note that to-date, the title of **PAUL MAINA**, from whom the plaintiff obtained his title, has not been challenged. In view of the contents of the letter by **MR RASHID H. MWAKIWIWI** dated 10th April 2007 as read together with the title held by **PAUL MAINA**, the allegations by **MR ARNOLD GUYA (DW 2)** that the suit property was not properly transferred to the plaintiff does not hold. By the time the plaintiff purchased the suit property, the leasehold interest therein was in the names of **PAUL MAINA**. The 1st and 2nd interested parties herein i.e. the **LAND REGISTRAR KISUMU** and the **NATIONAL LANDS COMMISSION** did not lead any evidence to challenge either the plaintiff's or **PAUL MAINA'S** right to the suit property yet those are the two institutions best placed to do so. I am satisfied that the plaintiff has established it's right to the suit property.

As to whether the plaintiff obtained the suit property fraudulently or illegally so as to deprive it of the protection accorded by **Article 40 of the Constitution**, the 2nd defendant in its defence and counter – claim has alleged fraud on the part of the plaintiff in paragraph 12(c) to (d) of the counter – claim. Allegations of fraud are serious issues which must be proved to the required standard. In **R. G. PATEL V LALJI MAKANJI 1957 E.A 314**, the Court of Appeal stated that: -

“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.”

And in **KOINANGE & OTHERS V KOINANGE 1968 KLR 23**, it is stated as follows: -

“It is a well established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud in this case the plaintiffs had the burden of proving it and they had to discharge that burden.”

In **BULLEN & LEAKE PRECEDENTS OF PLEADINGS 13TH EDITION** at page 427, the following passage which was affirmed by the Court of Appeal in **ARTHI HIGHWAY DEVELOPERS LTD V WEST END BUTCHERY LTD C.A CIVIL APPEAL NO 246 OF 2013 (NBI)** is found: -

“It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly proved. General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.”

In an attempt to prove that the plaintiff's title was obtained fraudulently, **ARNOLD GUYA** on behalf of the 2nd defendant said he doubted the plaintiff's title and also said that there were forgeries which led to some officers being suspended. He even referred to **PAUL MAINA** as **“a ghost.”** However, no evidence was led to show which officers forged which documents and were suspended or how the Land Registrar issued a title to a ghost called **PAUL MAINA**. Again the 1st interested party which was represented by **MS LANGAT** and was in a better position to adduce evidence to prove that no title was issued to **PAUL MAINA** did not adduce any such evidence. And **ARNOLD GUYA (DW 2)** did not help the situation and instead contradicted himself about the suit property. In his evidence in chief, he was emphatic that the 1st defendant is the occupant of the suit property. Later when cross – examined by **MR ODENY**, he said: -

“It is me who lives on 4/154. We have 4/155 and 4/155 and 4/155A. I don't have any documents permitting me to live in 4/154. I got into the house in 2014 December.”

In his statement dated 18th May 2016 and which he adopted as his evidence, **ARNOLD GUYA (DW 2)** states in paragraph 8 that there were “**Shenanigans**” and “**rampant illegal transfer and loss of public assets**” which made it possible for the plaintiff to transfer the suit property into his names without the consent of the **MUNICIPAL COUNCIL OF KISUMU**. But as is now clear from the evidence on record, the Town Clerk to the said **COUNCIL** had already stated that it had no interest in the suit property whose title was in the name of one **PAUL MAINA**. There is no evidence connecting the plaintiff to any “**Shenanigans**” and illegal actions in the manner in which the title to the suit property was acquired. **ARNOLD GUYA (DW 2)** himself conceded in his evidence that records could not be traced in the land’s office. In the circumstances, fraud cannot be imputed on the part of the plaintiff when **PAUL MAINA** showed them the title to the suit property signed by the Land Registrar. The plaintiff, in my view was really an innocent purchaser for value and as **OUKO J.A** held recently in the case of **ELIZABETH WAMBUI GITHINJI & OTHERS V KENYA URBAN ROADS AUTHORITY C.A CIVIL APPEAL NO 156 OF 2013**: -

“The law has never intended to punish the innocent as to punish the innocent would break down all the trust and respect for the law and legal system.”

In the absence of evidence of any fraud on the part of the plaintiff in the manner in which it acquired the suit property and bearing in mind that **PAUL MAINA** had a valid title which has not been challenged and for which the plaintiff paid valuable consideration in good faith, there would be no basis upon which to cancel the plaintiff’s title to the suit property.

Having found that the plaintiff obtained a good title to the suit property, there would be no reason to cancel it as sought by the 2nd defendant in its counter – claim. The plaintiff’s evidence is that following the purchase of the suit property from **PAUL MAINA**, it took possession and placed a guard on site but when the plaintiff’s Director returned from India where he had taken his father for treatment, he found that the 1st defendant had chased away the guard and taken possession. The totality of the evidence herein does not disclose any fraud or mistake on the part of the plaintiff that would warrant this Court to invoke the provisions of **section 80 of the Land Registration Act** to cancel the plaintiff’s title. The counter – claim by the 2nd defendant must therefore be dismissed. It must be remembered that the plaintiff’s assertion that it is the “bona fide registered proprietor” of the suit land has not been controverted by the 1st and 2nd interested parties who, as I have already stated above, would be the parties best suited to vouch for the bona fides of that title. By failing to call any evidence, this Court can only conclude that the said interested parties confirm the plaintiff’s claim and any evidence they may have adduced would have supported that claim.

Ultimately therefore and having considered the evidence by all the parties herein, Judgment is entered for the plaintiff against the defendants and the interested parties in the following terms: -

- 1. An order for the eviction of the 1st defendant from the land parcel NO KISUMU MUNICIPALITY/BLOCK 4/154.**
- 2. The said eviction to be conducted by a Court Bailiff/Auctioneer in accordance with the relevant provision of Section 152 of the Land Act.**
- 3. The 2nd defendant’s Counter – Claim is dismissed with costs.**
- 4. The 1st and 2nd defendants shall meet the plaintiff’s costs.**

Boaz N. Olao.

J U D G E

31st October 2019

Judgment dated and signed at Bungoma this 31st day of October 2019.

To be delivered at Kisumu on 15th November 2019.

Notices to issue.

Boaz N. Olao.

J U D G E

31st October 2019