



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION
ELC NO. 180 OF 2014

COLOMBUS OPIO ADETI PLAINTIFF

VERSUS

ALEXANDER OYIOLO ODONGO

T/A ALEMA SERVICE STATION DEFENDANT

J U D G E M E N T

1. The Plaintiff – **COLOMBUS OPIO ADETI** – filed this suit here on 19/9/2014 vide a plaint dated 2/9/2014. The suit is against the Defendant – **ALEXANDER OYIOLO ODONGO** – who is said to trade as **ALEMA SERVICE STATION**. The Plaintiff owns land Parcel No. **SAMIA/LUCHULULO-BUKHULUNGU/995** and has alleged that the Defendant has constructed a petrol station – **ALEMA SERVICE STATION** – on it. He feels aggrieved first, because that was done illegally and/or without his permission and second, because that frustrated his own plans to construct rental premises on the property.
2. The Plaintiff is praying for an order of eviction and demolition of structures on the land. He also wants an order of permanent injunction restraining the Defendant, his agents, servants, employees or anyone claiming through him from trespassing into, taking possession or occupation of, constructing any structures on or in any way interfering with the Plaintiff's use, occupation and possession of the property. Additionally, mesne profits, cost of the suit and interests are also asked for.
3. The plaint contains a historical perspective. The Defendant, it was pleaded, entered the land on 1/8/2004 and constructed a concrete wall and a service station. The Plaintiff complained to the Land Registrar but no action was taken. This impelled him to resort to court action to compel the Registrar to act. The court action took the form of a judicial review seeking an order of mandamus to compel action on the part of the registrar. Ultimately, the court issued the order and in compliance with it, the Land Registrar visited the land on 27/9/2013 to fix the boundary. It appears clear that the matter was reported to the Registrar as a boundary dispute.
4. It is clear too that the Defendant owned a neighbouring land Parcel – **SAMIA/LUCHULULO-BUKHULUNGU/1050** and the alleged boundary problem related to the Plaintiff's land and the Defendant's land. According to the Plaintiff, the Land Registrar established that the Defendant's service station was on his land. But the Defendant was not willing to vacate, hence this suit.
5. The Plaintiff's pleading is also clear that prior to Defendant's encroachment the Plaintiff had prepared plans to develop the property to earn an income. The Defendant's alleged action frustrated these plans.

The Plaintiff is claiming as mesne profits the possible income that would arise from such development. The income is put at 400,000/= per month from 1/8/2004 up to the time the Plaintiff regains possession.

6. The Defendant filed his defence on 5/11/2014. According to him, his service station is on his land Parcel No. **SAMIA/LUCHULULO-BUKHULUNGU/1050**. It is not true, he pleaded, that it is on land Parcel No. **SAMIA/LUCHULULO-BUKHULUNGU/995** owned by the Plaintiff. He pleaded too that the Plaintiff acquired Parcel No. 995 illegally or that the Plaintiff intended to develop where the service station stands.

7. The court heard the matter on 20/6/2016, 3/12/2016, 8/3/2017 and 9/10/2017. In all, seven (7) witnesses testified, two – PW1 and PW2 – on the Plaintiff's side and five (5) – DW1, DW2, DW3, DW4 and DW5 – on the Defendant's side. The Plaintiff himself testified as PW1. He said, *inter alia*, that he purchased Parcel No. 995 from one HENRY OLUOCH NGIRA. But that is not the only land Parcel he bought. He also purchased Parcel No. 994 from the same person. The two Parcels were resultant subdivisions from the original Parcel No. 962. After the purchase, the necessary legal processes were followed and the Plaintiff ultimately obtained title deeds.

8. According to the Plaintiff the Defendant owns Parcel No. 1050 which borders his own Parcel No. 995. The Defendant then went ahead and constructed a petrol station on the Plaintiff's land. The Plaintiff's attempt to report the matter to police hit a dead end allegedly because the Defendant wielded undue influence over the police at the time. Then the Plaintiff decided to sue and instituted Case No. 352/2004 here in Busia. The case however did not go far. The parties were referred to Land Registrar. The Land Registrar was slow to act and it took another round of court action to force the registrar to act. And when the registrar acted, it was found that the Defendant had constructed on the Plaintiff's land.

9. The Plaintiff also testified that he had plans to develop the land. The plans were for construction of rental premises but everything stalled because of Defendant's alleged illegal occupation of the land. The Plaintiff expected to finish construction in year 2006. He is claiming compensation for loss of expected income. The cross-examination done by counsel for the Defendant mainly aimed at finding fault with the process of registration of the Plaintiff as owner of his Parcels of land. The defence wanted to show that ownership was acquired fraudulently but the Plaintiff denied all this.

10. The Plaintiff's witness (PW2) was Johnstone Wandera Oluoch. Johnstone is son to the owner of the original larger Parcel of land – Henry Oluoch Ngira. Land Parcel No. 995 was Johnstone's share of land from his father – Henry Oluoch Ngira – and he sold the land to the Plaintiff while it was still in his father's name. Another brother to Johnstone – Alois Adongo – also sold his share to the Plaintiff. That is the share that later on became Parcel No. 994. It appears clear that Johnstone and the Plaintiff are related through marriage.

11. During cross-examination by defence counsel, attention of Johnstone was drawn to the fact that the sale agreement showing sale of land to the Plaintiff showed land Parcel numbers that were different from the numbers currently showing on Plaintiff's ownership documents. He explained that these numbers applied at the time of sale but later changed to the current numbers.

12. The Defendant testified as DW4. He said, *inter alia*, that he bought land Parcel No. 1050 from DW3 – Benjamin Amondi. He followed due process and was ultimately registered as owner. Later on, he subdivided the land into two Parcels – SAMIA/LUCHULULO-BUKHULUNGU/1594 and SAMIA/LUCHULULO-BUKHULUNGU/1595. He retained land Parcel No. 1595 and gifted the other to the government. He said that when he bought the land, the boundary was clearly marked with sisal and barbed wire and there was no third party laying claim to it. He then started developing the land. The Plaintiff then came with police. The Defendant said that he owns the land and expressed doubts as to the legality of the Plaintiff's ownership of land Parcels No. 994 and 995.

13. The Defendant further averred that the Plaintiff's alleged plans to develop the land lack the relevant approval. He further said that the land registrar visited the site and did not find that there was encroachment into the Plaintiff's land by him. Cross-examination by the Plaintiff's counsel shows the

Defendant saying he has no claim to Parcel No.995 but could have if it is shown to be part of his land Parcel No. 1050. He said too that his land has a concrete wall and an electric fence to mark the boundary. The Plaintiff denied using land Parcel No.995. During re-examination by his counsel, the Defendant is shown saying that land Parcel No. 1050 had ceased to exist by the time this case was filed. It ceased to exist in the year 2005 when it was sub-divided.

14. While the Defendant testified as DW4, his first witness to testify (DW1) was Paschal Ngira. Paschal was a son of the original owner of the land – Henry Oluoch Ngira - and land Parcel No. 1050 was his share which he sold to one John Okwaro in 1992. The size of the land he sold was 10 acres. And John Okwaro testified as DW2 confirming that he bought the land and owned it for six (6) years before selling it to DW3 – Benjamin Nobala. And Benjamin Nobala himself also testified saying, *inter alia*, that he is the one who sold the land to the Defendant. Both DW2 and DW3 said they know the land and the Defendant has made development on it as they know it. It was their averment further that when they owned the land, nobody, including the Plaintiff, laid a claim on it.

15. The final witness on the defence side was DW5 – TOM CHEPKWESI. Tom is the area land Registrar and visited the site pursuant to a court order. Subsequent to his visit, he compiled a report. The report was availed here as exhibit (PEX No. 12). The report contains some background, history and antecedents surrounding its compilation. From the report, it is clear that the ownership dispute revolves around Parcel Nos SAMIA/LUCHULULO-BUKHULUNGU/995 and the then SAMIA/LUCHULULO-BUKHULUNGU/1050. At the time of DW5's visit, it is clear that Parcel No. 1050 had ceased to exist, its factual and legal status having morphed or mutated into Parcels Nos. SAMIA/LUCHULULO-BUKHULUNGU/1594 and SAMIA/LUCHULULO-BUKHULUNGU/1595.

16. The last part of the report talks of the “existing boundaries” being confirmed by the surveyor to be correctly placed. Beacons were said to have been marked “within the existing wall and on the area after the main Funyula-Port Victoria road and next to the air strip” while “access road between SAMIA/LUCHULULO-BUKHULUNGU/995 and 1050” was marked on the ground.

17. During DW5's evidence in chief, the defence counsel pointed out to him some shortcomings in the document used in the process of acquisition and transfer of ownership of land by the PW1. Some of the shortcomings had to do with serial numbers on the consent forms, the entries made on the forms, use of the same form for two different transactions, and use of a supposedly unauthorized form or document in the transaction. Cross-examination by the Plaintiff's counsel however saw DW5 admitting that sometimes, documents can be improvised when there is shortage; that the documents were accepted by the lands office; and that it was curious that one form was used for two different transactions involving the Plaintiff.

18. Both sides filed written submissions. The Plaintiff filed his submissions on 30/10/2017. In the submissions an overview of the evidence given appears. It is an overview that is both descriptive and analytical. And premised on the overview, various factual deductions and legal expositions were made. It was asserted, for instance, that the Plaintiff had demonstrated his ownership of Parcel No. 995 and that the Defendant had annexed and constructed a fence around it. It was further submitted that the report of DW5 filed pursuant to a court order demonstrates such annexation and/or construction of fence.

19. The Plaintiff further faulted the Defendant's allegations of illegal or irregular acquisition of ownership. According to the Plaintiff, the Defendant's allegations are misplaced as the Defendant lacks the necessary standing to question the process of acquisition and transfer of the properties to himself. It was averred that there was no connection between the process by which the properties – Parcels No. 994 and 995 – were acquired and the Defendant's trespass and annexation of Parcel No. 995. As a further argument, it was submitted that the Defendant is not claiming ownership of the properties and the defence he filed has not raised and particularized the issue of fraud that he seems to be raising in his allegations.

20. The Plaintiff's case was said to be proved on a balance of probabilities and the Defendant was said not to have offered any good reason for occupation and use of the Plaintiff's land.

21. The Defendant's submissions were filed on 3/11/2017. In a fashion that is not much different from that of the Plaintiff, an overview of both sides of the case was given. The Defendant then delved into details of shortcomings found in various documents of acquisition and transfer of Parcel No. 994 and 995 to the Plaintiff. The thrust of the Defendant arguments is that with all such anomalies and shortcomings, the plaintiff's ownership of the properties is questionable and cannot therefore form a legal basis to lay claim of eviction and/or mesne profits.

22. Another argument by the Defendant is that Parcel No.1050 owned by the Defendant ceased to exist long before this case and the judicial review case preceding it were filed. It had been subdivided and new Parcels – Land Parcels Nos 1594 and 1595 – had been created. And of the new land Parcels created, one – No. 1594 – was not owned by the Defendant; it had a different owner. The Defendant further submitted that DW1, DW2, and DW3 all of whom were previous owners of Parcel No.1050 were clear that he owned the land. And as regards the evidence of Land Registrar (DW5), it was observed that it was not conclusive as the witness himself admitted that there were parallel claims of ownership which needed investigation.

23. Ultimately, the position taken by the Defendant is that he is on land legally owned by him and proven through evidence to have been legally acquired. The Plaintiff's suit was stated to be "a clear gambling game" instituted by the Plaintiff "in a bid to profit from where he did not sow". The court was urged to dismiss it with costs.

24. I have considered the pleadings as filed, the evidence adduced by both sides, and the rival submissions. The defence sought to question the Plaintiff's titles to Parcel No.994 and 995 on the ground that they were obtained through a process that was flawed or fraudulent. The Plaintiff countered that by questioning the Defendant's capacity to question the titles bearing in mind that he is not the administrator of the estate of the late seller and further taking into account that there is no connection between the transactions that led to transfers of the said Parcels of land to Plaintiff and the trespass that the Plaintiff is alleging against the Defendant.

25. The Plaintiff pointed out further that the Defendant is not claiming the titles and the irregularities he alleges are not meant to confer title to him. I think the Plaintiff is right. I agree with the Plaintiff. It is crucial to appreciate that the Defendant is not seeking to defeat the Plaintiff's titles. Nobody representing the seller is questioning the titles. And if those who sold the land are not complaining, and the Defendant is not seeking to defeat the Plaintiff's titles, then it is a misplaced endeavor to raise the issue of fraud or flaws. It is important to appreciate that the Plaintiff owns the Parcels of land and nobody is seeking to defeat the ownership. If this was the only issue raised in the Defence, then the Defendant would fail but there are other issues.

26. And one of the other issues is about the existence of Parcel No. 1050 prior to and during the filing of this case. It is important to realise that the Plaintiff's pleadings talk about Parcel No.1050. There is no mention at all that it may have mutated or morphed into other Parcels. The Defendants position is that whether one is talking of the time of judicial review proceedings that preceded this case or the time of filing this case itself, Parcel No. 1050 had ceased to exist. In its place were Parcels numbers 1594 and 1595, with the Defendant only owning Parcel No. 1595. The point made here, I think, is that both the factual status on the ground and legal status of the land in the lands office had changed. There was also the entry or emergence of a new owner – The Government of Kenya.

27. The fact of the matter is that when the status changed, one could not talk of Parcel No. 1050 without including or bringing on board the new owner. And this is so because change of factual and legal ownership brings with it new and different legal considerations. In my view, the Plaintiff was duty bound to make it clear in his pleadings that he was claiming a portion of the former Parcel No. 1050 and clarify further whether that Parcel was falling on Parcel No. 1594 or 1595. This was not done and the Plaintiff proceeded on the wrong or mistaken basis that Parcel No. 1050 was still a factual and legal entity.

28. But there are still other legitimate concerns on the issue. From the documents availed, Parcel No. 1050 is much larger than Parcel No. 995. From the evidence given, it would be reasonable to surmise that

Parcel No.995 owned by the Plaintiff is now on Parcel No. 1595 owned by the Defendant. While the size of Parcel No.995 is known, the size of Parcel No. 1595 was not given. Some un-answered questions arise: Did the Plaintiff allegedly annex the whole of Parcel No.995 or only part of it? If the whole of it, is it what one would call Parcel No. 1595? Put differently, is the actual area of Parcel No. 995 the same area as that of Parcel No. 1595? If the Plaintiff annexed only part of it, how much was annexed and how much remained outside? Alternatively how much of Parcel No. 995 is in Parcel No.1595? All these questions remain unanswered.

29. I would need to further observe this: The Plaintiff's case is premised on the findings of the Land Registrar made pursuant to a court order that directed him to visit the site. The registrar visited the site and his report dated 27/9/2013 is in the court file. The report gives some history and background. It is clear that Parcel No.994 owned by the Plaintiff has no dispute. Concerning Parcel No.995, the report says the Plaintiff bought it but the Defendant took it over and constructed a petrol station. This however is not a finding. It is included as an allegation or claim made by the Plaintiff. Then there is Parcel No.1050 which the report states to be 4.01Ha and has been subdivided into two land Parcels: SAMIA/LUCHULULO-BUKHULUNGU/1594 and 1595. The size of the two resultant Parcels is not given.

30. Then there is the concluding part of the report. It talks of fixing **"the existing boundaries"**. In simple language, the report states as follows:

"The existing boundaries have therefore been confirmed by the surveyor to be correctly placed. Beacons have been marked within the existing wall and on the area after the main Funyula-Port Victoria road next to the air-strip. Access road and road between SAMIA/LUCHULULO-BUKHULUNGU/995 and 1050 marked on the ground".

31. I have set out the concluding part verbatim because I find it intriguing and unsatisfactory. And also because of how the Plaintiff professed to understand it. According to the Plaintiff, the report shows that the Defendant had trespassed or encroached onto his land. I need to explain why I find the report intriguing and unsatisfactory. The Plaintiff's initial complaint was about boundary. He desired to have the boundaries between Parcels No. 994, 995 and 1050 fixed. He went to the lands office and was denied this service. This impelled him to file a judicial review matter for a command order – MANDAMUS – to be accorded the service. He got the order vide a judgement delivered on 13/6/2011 in Judicial Review case MISC. APPL NO. 14 of 2008, High Court, Busia.

32. The order was clear. The Land Registrar was to visit the site and **"ascertain, determine, and fix the boundary"** within four months from 13/6/2011. The dilatory behavior of the officials involved and their lackadaisical attitude towards the Plaintiff is clearly shown in the amount of time taken to comply with the order and the report complied after the site was ultimately visited. To the lands office, four months meant nothing. Instead, the site visit seems to have been made over two (2) years down the line (the order having been made on 13/6/2011 while the site visit was done sometimes in September 2013).

33. More significantly however is this: the Plaintiff wanted the boundaries fixed. What this means is that the Plaintiff was not satisfied with the existing boundaries. Such dissatisfaction obviously arose from actual or perceived trespass or encroachment. Any report arising from a site visit needed to address the issue of trespass or encroachment giving dimensions and measurements if found to exist or making a finding of no encroachment or trespassing if none is found. The report filed however talks of confirming the existing boundaries, which were said to be **"correctly placed"**.

34. I honestly do not know how the Plaintiff comes to read trespass or encroachment in the report. The fact of the matter is that a plain reading of the report makes no mention of trespass or encroachment. And I find the report intriguing first, because the surveyor's mission was not to confirm existing boundaries and second, because of failure to confirm whether or not there was encroachment or trespass. Infact, the report is totally unhelpful in this regard.

35. The land registrar testified as DW5. In his evidence, he did not tell us whether the portion claimed by

the Plaintiff is in Parcel No. 1594 or 1595. And if, as presumably seems to be the case, the claimed portion is 1595, how much of it was inside and/or how much was outside of it? Infact, the registrar did not even know the size of the Parcel No. 1595. The overall position noticeable in both the report and evidence given by the Land Registrar is that no trespass or encroachment is confirmed. His report is short on details and his evidence did not fill the gaps.

36. I need now to say something about the evidence availed. The Plaintiff testified as PW 1 and called one witness – JOHNSTONE WANDERA OLUOCH (PW2). The thrust of the evidence is that the Defendant has annexed his land Parcel No. 995 and put up a petrol station on it. The evidence of his witness however was aimed at showing that the sale of the Parcels of the land to the Plaintiff was legitimate and legal.

37. The Defendant on the other hand called evidence from DW1, DW2, and DW3 who are all previous owners. These owners apparently enjoyed their ownership without the Plaintiff or anybody else laying a claim to it. DW2 and DW3 in particular were purchasers just like the Defendant and were clear that the Defendant is on the land he purchased. And the land we are talking about here is Parcel No.1050 and they owned it when the Plaintiff in this case was still the owner of Parcel Nos 994 and 995. Yet the Plaintiff never claimed ownership from them.

38. Faced with this evidence from the defence, it becomes difficult to make a finding that the Plaintiff has made a satisfactory case of trespass, encroachment or occupation. I am therefore constrained to make finding that he has not.

39. The weakness of the Plaintiff's case is to be found in the way it was filed or formulated in the pleadings, the unsatisfactory state of the report and evidence of Land Registrar, and in the kind of evidence given by his side as compared to that given by the defence.

40. I realise that the Plaintiff also wanted compensation or mesne profits arising from intended developments which failed to materialize because of the Defendant's alleged actions. He also wanted eviction orders. I need not make findings on this bearing in mind that allegations of trespass, encroachment or occupation are not well demonstrated. The upshot is that I find the Plaintiff's claim not proved on a balance of probabilities and I hereby dismiss it with costs.

Dated, signed and delivered at Busia this 21st day of February, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: