



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.51 OF 2015**

**[FORMERLY WINAN S.R.M. C.C. NO.107 OF 2008]**

**ALFRED OYOKO OLUNJE.....PLAINTIFF**

**VERSUS**

**BONFACE MBAJA OPIYO.....1<sup>ST</sup> DEFENDANT**

**THOMAS MASEKO OPIYO.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. **Alfred Oyoko Olunje**, the Plaintiff, commenced his claim against **Boniface Mbaja Opiyo and Thomas Maseko Opiyo**, the Defendants, through the plaint dated 21<sup>st</sup> April 2008 and filed in Winam S.R.M. CC No. 107 of 2008 on the 22<sup>nd</sup> April 2008. The Plaintiff avers that he is the registered proprietor of land parcel **Kisumu/Kasule/3270** since his registration on the 3<sup>rd</sup> April 1995 That the Defendants encroached onto the land and purported to use it as by right without the Plaintiff's authority thereby interfering with his quiet use and occupation and causing him loss and damages The Plaintiff seeks for the following orders against the Defendants.

“ 1. An order for permanent injunction restraining the defendants either of themselves, agents, employees and or servants from trespassing onto the plaintiff's parcel of land designated as Kisumu /Kasule/3270 or in any other way interfering with the plaintiff's quiet use and occupation of the said land

2. Costs of the suit”

2. The Plaintiff's claim is opposed by the Defendants through their statement of defence dated 8<sup>th</sup> October 2010 and filed vide receipt No.3767645, dated 13<sup>th</sup> January 2011, following the court's ruling of 2<sup>nd</sup> December 2010, on the Defendants application dated 8<sup>th</sup> October 2010 The Defendants avers that the Plaintiff has fraudulently subdivided their land parcel **Kisumu/Kasule/1512** into parcels **Kisumu/Kasule/3270 and 3271** The Defendants prays for the Plaintiffs suit to be dismissed with costs.

3. That the Defendants moved this court vide Kisumu ELC 199 of 2013, through the application dated 17<sup>th</sup> October 2013 and obtained an order on 3<sup>rd</sup> February 2014 transferring Winam SRMCC No.107 of 2008 to this court for hearing and determination.

4. Mr. Ouma and Adiso, learned counsel, appeared for the Plaintiff and the Defendants respectively The Plaintiff testified as PW1 while the 1<sup>st</sup> Defendant testified as DW1 Thereafter directions on filing of

written submissions were given. The counsel for the Defendants filed their undated submissions on 20<sup>th</sup> April 2017 wrongly headed “PLAINTIFF’S SUBMISSIONS.”

5. The following are the issues for the court’s determinations;

- a) Whether land parcel Kisumu/ Kasule/3270 is a subdivision from Kisumu/Kasule/1572.
- b) Who the registered proprietor of land parcel Kisumu/Kasule/3270 is.
- c) Whether the Defendants are in occupation of the land parcel Kisumu/Kasule/3270, and if so, whether they have any legally recognized rights over that land.
- d) Whether the Defendants are trespassers on the said land.
- e) Whether the order of permanent injunction should issue against the Defendants.
- f) Who pays the costs.

6. The court has carefully considered the oral and documentary evidence tendered by the parties, submissions by counsel for the Defendant, the pleadings by the parties and come to the following findings;

- a) That even though the evidence adduced by the Defendants traces the dispute over what later became registered after adjudication as Kisumu/Kasule/1572 to the 1950, the documentary evidence availed by both sides confirms that, the land was first registered on the 8<sup>th</sup> November 1988 in the name of Okoth Maseko. That after a change of name on the same date, a title in the name of Lazaro Opiyo Maseko was issued.
- b) That both the Plaintiff and Defendants agrees that there has been several cases involving that land during the adjudication process ending with an appeal to the Minister whose decision of 13<sup>th</sup> December 1986 was in favour of the Plaintiff. That the 1<sup>st</sup> Defendant then filed Kisumu H.C Misc. App.No.73 of 1997 against the Plaintiff but lost as shown in the ruling of the 6<sup>th</sup> June 2002. The 1<sup>st</sup> Defendant then filed a claim before the Land Disputes Tribunal case No.38 of 2003 who ruled in his favour. That the Plaintiff appealed to the Provincial Appeals Committee who ruled in his favour by overturning the Land Disputes Tribunal award.
- c) That the documentary evidence in form of green card shows that the Plaintiff was registered as proprietor of the suit land on the 18<sup>th</sup> June 1991 after the restriction placed against the title, then in the name of Lazaro Opiyo Maseko awaiting the Minister’s appeal was lifted. That the Plaintiff’s title over land parcel Kisumu/Kasule/1572 has never been successfully challenged since registration. That the court finds that the plaintiff has been the legally and procedurally registered proprietor of that land from which the suit land, Kisumu/Kasule/3270, was subdivided and registered in his name on the 31<sup>st</sup> March 1995.
- d) That the evidence availed shows that the 1<sup>st</sup> Defendant moved onto the land in 2002, while the 2<sup>nd</sup> Defendant entered onto the land in 2007. That the Plaintiff obtained eviction order against the Defendants in Winam SRM CC No.107 of 2008 vide the order issued on 30<sup>th</sup> September 2010. That in view of the various litigations culminating in this suit filed in 2008, the Defendants use, possession and occupation of the suit land has not been peaceful and uninterrupted for a period of over 12 (twelve) years. That the eviction order has never been lifted, set aside and or vacated.
- c) That this court is required under **Section 26 of the Land Registration Act No.3 of 2012** to take the Plaintiff as the absolute and indefeasible owner of Kisumu/ Kasule/3270 who is therefore

entitled to all the rights and privileges of a registered proprietor as set out in **Section 24 and 25** of the said Act That accordingly the Plaintiff is entitled to the order of permanent injunction sought against the Defendants and costs as per the plaint.

7. That the court finds that the Plaintiff has proved his case against the Defendants on a balance of probabilities and enters judgment for him against the Defendants in terms of prayers 1 and 2 of the plaint dated 21<sup>st</sup> April 2008 as reproduced in paragraph 1 of judgment.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF FEBRUARY 2018**

In presence of;

Plaintiff Present

Defendants 2<sup>ND</sup> Present

Counsel Mr. Ouma for the Plaintiff

M/S Ongila for Adiso for Defendants

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**7/2/2018**

7/2/2018

S.M. Kibunja Judge

Oyugi/Joane court assistant

2<sup>nd</sup> Defendant present

Mr. Ouma for the Plaintiff

M/S Ongila for Adios for Defendant.

Court: The judgment dated and delivered in open court in the presence of the Plaintiff and his counsel Mr. Ouma and the 2<sup>nd</sup> Defendant and M/S Ongila for Adiso for Defendants.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**7/2/2018**