



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE 213 OF 2017

(FORMELY KISII ELC CASE NO. 488 OF 2015)

ALEX ACHOLA OWINO.....PLAINTIFF

VERSUS

MOSES OBURA.....1ST DEFENDANT

OSUMBA ATITO.....2ND DEFENDANT

POLYCAP OLOO AMOLO.....3RD DEFENDANT

ONYANGO AKEYO.....4TH DEFENDANT

JIM ATITO.....5TH DEFENDANT

JUDGMENT

1. The plaintiff namely ALEX ACHOLA OWINO filed this suit by way of a plaint dated 14th September 2015 (fast track) against the defendants namely **MOSES OBURA, OSUMBA ATITO, POLYCAP OLOO AMOLO, ONYANGO AKEYO, and JIM ATITO**. He is seeking the following orders

a. A declaration that he is the lawful and legitimate owner of plot Kanyamwa/Kabonyo/Kwandiku/1070 (hereinafter referred to as the suit land)

b. A permanent injunction restraining the defendants by themselves, their agents, servants or employees from trespassing and continuing to trespass or remain on, further construction, cultivating, transferring, alienation and/or in any other manner whatsoever from interfering with his quiet user, occupation and/or enjoyment of his plot known as Kanyamwa/Kabonyo/Kwandiku/1070 (the suit land)

c. A mandatory injunction against the defendant ordering them to forthwith demolish, remove and/or pull down the structures that they have illegally erected on his property.

d. The costs of this suit

e. Any other relief that this Honourable court may deem fit to grant.

2. The plaintiff appears in person. Oumo and Co. Advocates are on record for the defendants.

3. Briefly the plaintiff's case is he is the registered proprietor of the suit land as per title deed issued to him on 10/8/2011 (P.Exhibit 3.), having bought it from one JONAS MAGOLO at Kshs. 10,000/=in 1974. In or about year 2013, he was informed that some people were cultivating his land and were in the process of subdividing it for purposes of sale. He had marked his boundaries to the suit land with sisal plants. The plaintiff had lost land sale agreement between Jones Magolo and himself and obtained a police abstract dated 4/7/2014 (P Exhibit 1) and an affidavit on 7/7/2014 (P.Exhibit 2) to the fact of loss. He also obtained a certificate of Official Search dated 8/6/2015 thereof (P. Exhibit 4). The Plaintiff found the defendants on the suit land and they remained in its possession with no justification and or lawful claim. He then filed the instant suit.

4. In their statement of defence dated 16/2/2016, the defendants denied the plaintiff's claim and sought its dismissal with costs. They claim that the defendants are all purchasers for value having bought the suit land sometimes on 10/7/1994 from one Jones Magolo Owanga. They further claimed that they occupied and lived on the suit land since then. They pleaded particulars of fraud on the part of the plaintiff.

5. The plaintiff filed his submissions dated 23rd January, 2018 in which he highlighted two (2) issues for determination. The issues are;

i. Whether the 1st Defendant had capacity to enter into an agreement with the 3rd defendant to sell/subdivide the parcel of land also known as KANYAMWA/KABONYO KWANDIKU/1070.

ii. Whether the 3rd defendant's actions of actually entering and building on the suit land amounts to trespassing and consequence of not moving until this Honourable court issue an order(s) to that effect.

6. He submitted majorly on the two (2) issues for determination and the three (3) conditions for grant of injunctive relief as laid down in the case of Giella-vs-Cassman Brown company Ltd (19730 EA 358. The plaintiff also cited Kamau Mucuha-vs-The Ripples Ltd (1990-1994) EA 388, Halsbury's Laws of England 3rd Edition, Vol.21 paragraph 739, page 366 and Njenga-vs-Njenga (1991) KLR 401.

7. The defendant's counsel was duly served on 12th December, 2017 as proved by an affidavit of service sworn on 22nd January, 2018 by Vitalis Onyange Akuku, an authorized process server. On 23rd January, 2018, he failed to turn up for hearing without any reason. I instantly heard the testimony of the Plaintiff/PW1 in the matter.

8. I have carefully studied the plaintiff's case, the defendant's statement of defence and submissions including case law cited by the plaintiff. The issues for determination in a suit generally from the pleadings or are framed by the parties; see Great Lakes Transport Co. (U) Ltd – vs- Kenya Revenue Authority (2009) KLR 720. As already noted, the plaintiff framed two (2) issues for determination in his submissions. I therefore find the following issues flowing from the pleadings for determination;-

- a. Is the Plaintiff the lawful and legitimate owner of the suit land?
- b. Have the defendants trespassed into the suit land?
- c. Are the reliefs sought by the plaintiff in the plaint available to him?

9. On the issue of ownership of the suit land, PW1 testified that the land is registered in his name. He stated, inter alia;

“ The land was registered in my name. Title deed issued on 10/8/2011 (PExhibit 3). I obtained a certificate of official search dated 8/6/2015 (P. Exhibit 4).” (Emphasis Supplied)

10. The testimony of PW1 was fortified by PW2, who referred to minutes dated 23/1/2013, (P. Exhibit 5b and a letter (P.Exhibit 5a). This witness testified that the boundaries of the suit land in which the defendants were in occupation, were clearly marked. He told the court that PW1 was the sole proprietor of the suit land and that he acquired P. Exhibit 3 for the suit land. I find Sections 24, 25, and 26 Land Registration Act, 2012, relevant.

11. In regard to the issue of trespass, PW1 stated that the defendants were tilling his land without permission. He did report to PW2 who convened a meeting whereby P Exhibit 5 b was done and PW2 prepared P Exhibit 5a. His testimony was confirmed by PW2 who relied on P. Exhibit 3, 5a & 5b in his evidence in support of the claim.

12. On the reliefs available to the plaintiff, I consider the orders sought in the plaint. PW1 stated that;-

“ The defendants still on the land. I pray for orders (a) to (d) in my plaint against the defendant's. The plaint is dated 14/9/2015.”

13. I take into account the statement of defence whereby the defendants pleaded particulars of fraud on the part of the plaintiff/PW1. The particulars are;

- a. Dealing in the suit land while he knew the owner was there.**
- b. Misrepresenting himself with a view to having himself, registered as the owner of the land when he knew and or ought to have known that such dealings was illegal.**
- c. Misleading the Land Registry to make entries while knowing the same were fraudulent.**
- d. Fraudulently obtaining the Title Deed in his name after the original owner had died.**

14. In Koinange and 13 others-vs-Koinange (2008) 1 KLR (G & F) 698, it was held that the burden of proving and discharging the burden regarding allegations of fraud, lay with the party who alleges it. Fraud should be strictly proved and above the balance of probability. The allegations of fraud in the statement of defence fell short of the required standard of proof as the defendants failed to give evidence to prove the same yet they were duly served as observed hereinabove. Clearly the evidence of PW1 and PW2 remain unchallenged.

15. By the way, land is an extremely important aspect of lives in society as judicially noted in orbiters in the case of **Mwangi & Anor –v- Mwangi 1980 (KLR) 328**. The plaintiff is entitled to protection of right to property and in the instant case, the suit land, as enshrined at **Article 40 of the Constitution of Kenya 2010**.

16. In the final analysis, I find that the plaintiff's claim is built on a firm foundation. The plaintiff has proved the claim on a balance of probability against the defendants jointly and severally.

17. I accordingly enter judgment for the plaintiff against the defendants jointly and severally for orders (a) to (d) sought in the plaint dated 14th September, 2015.

DELIVERED, SIGNED and DATED in open court at MIGORI this 7th day of **February, 2018**.

G. M. A. ONGONDO

JUDGE

In the presence of:

Plaintiff in person

Tom Maurice, court assistant