



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 819 OF 2015 (FORMERLY KISUMU H.C.C.C. NO. 178 OF 2011)

LYSTON PAUL NGOYA MUSUMBA.....PLAINTIFF

VERSUS

THE CHAIRMAN OF THE COMMITTEE

MASENO SCHOOL FOR THE DEAF.....1ST DEFENDANT

THE SECRETARY OF THE COMMITTEE

MASENO SCHOOL FOR THE DEAF.....2ND DEFENDANT

JUDGMENT

1. Lyston Paul Ngoya Musumba, the Plaintiff, commenced this suit through the plaint dated 18th October 2011 against the Chairman of the Committee Maseno School for the deaf and The Secretary of the Committee Maseno School for the deaf, the 1st and 2nd Defendants respectively, seeking for permanent injunction in respect of Maseno Block 2/2017, also known as L.R. NO. 9341/114, Maseno Township and costs. The Plaintiff avers that he is the registered owner of Maseno Block 2/217, also known as L.R. NO. 9341/114, Maseno Township measuring 0.1571 Hectares, the suit land. That on or about 2003, the Defendants started rearing livestock on the said land and that he wrote to them on the 2nd November 2005 to vacate so as to allow him start his developments. That on the 9th September 2011 he went to the suit land with his workers and building materials but the 2nd Defendant denied them access and had them arrested and taken to Maseno Police Station. That the police released him after he produced the suit land's documents. That despite demands the Defendants have continued trespassing onto the land and using it and hence this suit.

2. The Defendants denies the claim through the statements of defence dated 13th August 2012. They aver that the suit land belongs to the institution and that they have had peaceful, exclusive and uninterrupted occupation of the said land. They pray for the Plaintiff's case to be dismissed with costs.

3. The Plaintiff testified as PW1. He testified that the suit land is adjacent to Maseno School for the Deaf and was allocated to him in 1982 by the Commissioner of Lands through the letter of allotment dated 9th July 1982 which he produced as exhibit. The Plaintiff said he took possession of the land upon allocation and started farming on it. That he has been paying rates and rent. He produced a bundle of receipts and a copy of a letter dated 22nd January 2003 from the County Council Kisumu confirming that fact. He told the Court that in 2003, Maseno School for the Deaf encroached into his plot by rearing livestock there without his consent. That he raised a complaint with the school's headmaster but the trespass did not stop. On the 3rd November 2005, he wrote to the Bishop of Maseno who is the sponsor of the school, but he did not get a reply. That on the 9th September 2011, he went to the suit land with building materials and workers but the school's headmaster called the police who arrested them. That when he showed the O.C.S the documents over the ownership of the suit land, they were released. He then instructed an advocate who did a demand notice dated 12th September 2011 to the Defendant after which he filed this suit. He disputed the Defendants claim that the school was given the suit land in 1975 by the Government as they have not produced documentary evidence. He also denied that he has sued the wrong party saying that he has sued the Managers of the School. The Plaintiff informed the Court during cross-examination that he had erected a barbed wire fence around the suit land. That the fence separating the suit land and that of the school had a barbed wire fence and trees planted by the school. That the school had cut his barbed wire fence when erecting a cow shelter and that it started grazing livestock on the suit land in 2003 and not before. That he called a surveyor to reconfirm the boundary in 2003 but the then Lady Principal of the school declined to participate. That the surveyor confirmed that the beacons separating the school from the suit plot were still intact. That about two months before the date the Plaintiff testified in Court, the Defendants had removed the livestock from the suit land and replaced the fence separating it from the school but the fence was not placed exactly where it should be.

4. Barack Agunda Odhiambo, testified as DW1 on behalf of the Defendants. He told the Court that he is the Head teacher to Maseno School for the Deaf from September 2015 and that between 2008 to 2011, he was a teacher in the school. He testified that he is the Secretary to the Board of Management of the school which was previously Board of Governors. That he has been sued as the Secretary to the Committee

which does not exist. He informed the Court that he is aware that the school has had a dispute over land parcel 9341/114, where one of the cowsheds, one goal post and the grazing area are. That the Plaintiff had in 2005 written to the school claiming ownership of that plot and after the school conducted some investigations, they found out that the plot was indeed registered with Nyaguti Adoyo. That they did a letter dated 25th November 2005 to the Clerk Kisumu County Council seeking for assistance over the Plaintiff's eviction threats in respect of the suit property among other issues, but indicated that no solution has been found. He acknowledged receipt of the demand notice dated 12th September 2011. He denied that the school has vacated from the suit land. During cross-examination, DW1 agreed that the Board of Management was introduced through the Education Act which was enacted in 2015. He admitted that the suit land has never been allocated to the school.

5. The Learned Counsel for the Plaintiff and the Defendants filed the written submissions dated 2nd August 2017 and 13th December 2017 respectively.

6. The following are the issues for the Court's determination;

- a) Who between the Plaintiff and Defendants is the legal allottee and owner of the suit land.**
- b) Who between the Plaintiff and the Defendants is in possession of the suit land and from when.**
- c) Whether the party (ies) in possession of the suit land has acquired the ownership through prescription.**
- d) Whether the Plaintiff has established a reasonable basis for issuing of permanent injunction order.**
- e) Who pays the costs of this suit.**

7. The Court has carefully considered the parties pleadings, oral and documentary evidence availed by both sides, the written submissions filed by Counsel and come to the following determinations;

a) That the receipts for rates and rents payments dated 15th March 1984, 9th April 1986, 26th March 1990, 13th April, 1993, 24th June 1994, 23rd March 1988, 23rd March 1987, 15th March 1984, 18th February 1997 and 15th October 2009 among those produced by the Plaintiff as exhibits are in respect of plot described as Maseno No. 9341/114 or plot No. 114 Maseno. That the Plaintiff also produced an allotment letter from the Commissioner of Lands dated 9th July 1982 offering the Plaintiff "L.R. 9341/114 (Maseno Town)" measuring 0.1571 hectares for a period of 99 years from 1st August 1982. That the foregoing documents would support the Plaintiff's claim of ownership of the said plot as they are in the name of either Lyston P. Ngoya Musumba, Lyston Paul Ngoya or Nyangoya Musumba which the Court takes to refer to the Plaintiff herein.

b) That receipt dated 27th April 1994 is for the payment of the monies set out in the letter of allotment among others, dated 9th July 1982 and is in the name of Paul N. Musumba who the Court again takes to be the Plaintiff.

c) That the Director of survey's Letter dated 20th May 2003 addressed to the Commissioner of Lands and produced by the Plaintiff as exhibit is referenced "conversion of L.R. NO. 9341/114 from R.T.A to R.L.A- Maseno Township Block 2/217." That the registration of the conversion was done through the receipt dated 9th June 2003 issued to Paul Ngoya Musumba, the Plaintiff. The Court notes that when the Plaintiff wrote to the Bishop of Maseno Dioceses the letter dated 2nd November 2005, he indicated that he was the absolute owner of the plot which was referenced as "PLOT NO. MASENO TOWNSHIP 2/217 (93441/114)". The letter from the Clerk to Kisumu County Council dated 22nd January 2003 had described the plot in the same way and confirmed the owner as Paul Ngoye Musumba, who the Court takes to be the Plaintiff.

d) That the suit land has never been allocated to Maseno School for the Deaf as confirmed by DW1. That however, the school administration had variously engaged some Government and Council Offices with a request to be allocated the suit land among other plots. The letters dated 7th August 1981 to Provincial Physical Planning Officer, and 1st September 2011 to the Clerk, Kisumu County Council, which DW1 produced as exhibits confirms that position. That however, when the school conducted searches at the Land Registry on the 29th November 2005 over several plots, the certificate of official search produced as exhibit for Kisumu/Karateng/114 whose size is shown as 0.14 hectares, was found to be in the name of Nyaguti Adoyo. Though the Defendant alleged that the certificate refers to the plot the Plaintiff has been claiming as his, that cannot be confirmed by the Court in view of the difference in parcel description, size of the plot, name of the registered proprietor and date of first registration.

e) That in view of the foregoing findings, it is clear that the Defendants' school's efforts to be allocated the plot claimed by the Plaintiff herein has never born fruits and therefore they do not have legal ownership of the suit land. That further the evidence adduced by the Plaintiff that he school only entered onto the plot and started using it in 2003 has not been controverted by the Defendants. That as this suit was filed in 2011, the Defendants occupation and possession of the suit land was only for about eight (8) years and that period is insufficient to extinguish the registered owner's title.

f) That though the Plaintiff claimed in his testimony that the Defendants had partially moved from the suit land a few weeks to the hearing date, the Defendants witness disputed the claim and said they are still in occupation of the whole land. That as the Plaintiff has established that he is the legal owner of the land, it is only fair that he be allowed to enjoy the rights and privileges of a registered proprietor in accordance with Section 24 of Land Registration Act No. 3 of 2012 which he cannot enjoy until after the defendants give him vacant possession.

8. That following from the foregoing, the Court finds the Plaintiff has proved his case against the Defendants and Judgment is entered for

him in the following terms:

- a) That the parties are directed to engage the County Land Registrar and Surveyor to confirm the ground boundary between the Plaintiff's land Parcel Maseno Township/Block 2/217 (L.R. 9341/114) and Maseno School of the Deaf Land Parcel 9341/109 Maseno Township registered in the name of The Church Commissioners of Kenya.
- b) That upon the boundary being confirmed as directed in (a) above and pointed out to the parties, the Defendants do vacate from the Plaintiff's land or any portion of that land that they may be found occupying within ninety (90) days in default eviction order to issue.
- c) That upon the Defendants vacating or being evicted from the Plaintiff's land (suit land), they be and are hereby restrained through a permanent injunction as in prayer (a) of the plaint.
- d) That the Defendants do pay the Plaintiff the costs of this suit.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 16TH DAY OF MAY 2018

In the presence of:

Plaintiff Present

Defendants Absent

Counsel Mr. Baganda for Plaintiff

M/s Mwavo for Staussi for Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE