



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC. CASE NO. 806 OF 2015**

**(FORMERLY HCCC NO. 103 OF 2011)**

**SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA)**

**LTD VICTORY CHURCH.....PLAINTIFF**

**VERSUS**

**CALEB OUM.....1<sup>ST</sup> DEFENDANT**

**JOHN MUGA.....2<sup>ND</sup> DEFENDANT**

**SAM OTIENO.....3<sup>RD</sup> DEFENDANT**

**RICHARD OLUOCH.....4<sup>TH</sup> DEFENDANT**

**BARRACK WERE.....5<sup>TH</sup> DEFENDANT**

**ABAS WAHEB.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this proceedings through the plaint dated 7<sup>th</sup> July 2011 against Caleb Ouma, John Muga, Sam Otieno, Richard Oluoch, Barrack Were and Abas Waheb, the 1<sup>st</sup> 6<sup>th</sup> Defendants respectively, seeking for an order of permanent and mandatory injunction in respect of Kisumu/Municipality/Block 5/40 and costs. They aver that they were issued with the said land on the 24<sup>th</sup> December 2010 and are therefore the registered owner. That their building plans for a Church/Sanctuary were approved by the Municipal Council of Kisumu but have been unable to develop the plot because the Defendants have declined to vacate, even after being asked to. That their attempts to fence off the plot have been violently resisted by the Defendants by taking away the building materials put on the suit land. That the Defendants are unlawfully on the suit land and unless ordered to vacate, the Plaintiff will be unable to take possession and enjoy the plot.

2. The 5<sup>th</sup> Defendant's defence dated 30<sup>th</sup> August 2011 was filed through M/s Kopot & Company Advocates and M/s Mwamu & Co. Advocates filed the statement of defence for 1<sup>st</sup> to 6<sup>th</sup> Defendants on the 11<sup>th</sup> March 2015. That the Memo of Appearance dated 21<sup>st</sup> September 2011 by M/s Mwamu & Co. Advocates appears to be for only 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants, while the Notice of Appointment of Advocates dated 29<sup>th</sup> March 2013 by the same firm of Advocates leaves no doubt that they represent the 1<sup>st</sup> to 6<sup>th</sup> Defendants. The Defendants aver that the suit land was registered in the name of Municipal Council of Kisumu who had allegedly informed them that any other title issued over the suit land must have been fraudulently obtained. That the Defendants have been in possession of the suit land with the consent of the Municipal Council of Kisumu. That they have been carrying out various businesses on the suit land for periods between 10 to 20 years on the strength of the temporary letters of allotments and business permits issued to them by the Municipal Council of Kisumu. That the Plaintiff's suit should be dismissed with costs.

3. That in support of the Plaintiff's case, Pastor Otumo Alfayo of the Seventh Day Adventist Church, Siaya testified as PW1. He told the Court that in 2010, he was stationed at the Victory S.D.A Church Kisumu which is situated along Ondiek Highway near Star Hospital. That as the church was located on a road reserve, the committee resolved to look for a plot. They discovered that the adjacent plot, Kisumu Municipality/Block 5/40 was free and PW1 applied for allocation from the Commissioner of Lands on the 27<sup>th</sup> April 2010. That the land was offered to the church through the letter of allotment dated 2<sup>nd</sup> August 2010. The church paid the amount of Kshs. 5,922/= as required to have the title documents processed. That as for the accumulated rates of Kshs. 1,073,792/=, they wrote to the Municipality of Kisumu for exemption through the letter dated 8<sup>th</sup> January 2011. The lease document was prepared and forwarded to the church. It was then registered and a certificate of lease issued dated 24<sup>th</sup> December 2010. The Church then applied to the Municipal Council for authority to develop the

plot and after making the required payment the approval to fence was granted through the letter dated 6<sup>th</sup> December 2010. That when they went to fence, they found some people on the plot on temporary licenses who resisted. Those people are the Defendants in this suit and had temporary structures on the plot. The Plaintiff then wrote to the Municipal Council the letter dated 6<sup>th</sup> December 2010 and a reminder dated 24<sup>th</sup> December 2010 seeking for assistance to have the Defendants vacate from the suit land. The Municipal Council wrote a letter dated 24<sup>th</sup> January 2011 and gave the Defendants 14 days to vacate but they did not. That when the church went with the materials to fence, the Defendants took the materials and stopped the fencing. That the church had demand letters sent to each of the Defendants but only the 5<sup>th</sup> Defendant left the plot. This suit was then filed. During cross examination, PW1 stated that the plot had earlier belonged to Associated Sugar whose lease had expired and not renewed by the time the church applied for it.

4. For the Defendants, Caleb Ouma, John Muga and Samwel Otieno testified as DW1, DW2 and DW3 respectively. DW1 told the Court that the people who operate various businesses on Kisumu Municipality/Block 5/40 are organized into a group called Star Jua Kali Self Help Group for which he is the Chairman. That he operates a carpentry business there since 2006 under a license from Municipal Council of Kisumu. That when the Plaintiff issued him with a notice to vacate, he lodged a complaint with the Council and was advised not to vacate. He told the Court that he does not know how the Plaintiff was allocated the plot when the Municipal Council of Kisumu, which allowed them to operate from there had not removed them. During cross examination, DW1 stated that he has never been issued with documents of ownership of the plot and that he has never applied to be allocated the plot. He admitted that he had no document to confirm extension of the temporary occupation license of 2009. He admitted that the documents he had produced as exhibit had not made reference to the suit land. He also agreed that he did not have documentary evidence to confirm that Kisumu Municipality had allowed him to conduct his business on the suit land. That they only learnt that the plot they operate on had been acquired by the Plaintiff in 2011 when the church issued them with notices to vacate. That before that, he believed the plot belonged to the Kisumu Municipal Council, who had authorized them to trade on it. DW2 told the Court that he operates a charcoal business on the suit land for the last 30 years under license of the Municipal Council of Kisumu, through the enforcement Officer called Onyango. That when the Plaintiff asked him to vacate, he informed them that he could do so only if asked by the Council. He then lodged a complaint with the Council and the personnel there promised to visit the land and establish how the Plaintiff acquired ownership documents but they did not. DW2 told the Court that the Plaintiff should blame the Kisumu Municipal Council for allocating them the plot that they had already allowed the Defendants to operate on. Answering questions in cross-examination, DW2 denied knowing that the Plaintiff had been registered as the owner of the suit land. He informed the Court that he has never applied to be allocated the plot he conducts his business on. That he will only vacate from the plot if asked to do so by the Municipal Council. He agreed that the documents he had produced to the Court did not make reference to the suit land.

5. That the Learned Counsel for the Plaintiff and Defendants filed their written submissions dated 19<sup>th</sup> January 2017 and 21<sup>st</sup> February 2018 respectively.

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

**a) Who between the Plaintiff and Defendants is the legal owner of the suit land.**

**b) Whether the documents of ownership of the suit land were regularly and procedurally applied for and obtained.**

**c) Whether the Defendants have any legal rights to remain on the suit land.**

**d) Who pays the costs of the suit.**

7. The Court has carefully considered the pleadings filed by both sides, the oral and documentary evidence presented by PW1, DW1 to DW3, the written submissions by Counsel and the authorities cited therein and come to the following conclusions;

a) That though the 5<sup>th</sup> Defendant had filed his individual or separate statement of defence indicating that he had already vacated from the suit land, the subsequent statement of defence contradicted the earlier position taken by him. That however the suit against the said 5<sup>th</sup> Defendant was on the 20<sup>th</sup> June 2013 withdrawn by consent. That the reference to the term the Defendants will hereinafter therefore refer to only the 1<sup>st</sup> to 4<sup>th</sup> and 6<sup>th</sup> Defendants.

b) That from the evidence availed by DW1 to DW3 who are the 1<sup>st</sup> to 3<sup>rd</sup> Defendants respectively, and their pleadings, the Defendants claim of entitlement to use and operate from their respective portions on the suit land was the temporary occupation licenses of the year 2008 and or 2009 issued by the then Municipal council of Kisumu. That only the 3<sup>rd</sup> Defendant (DW3) produced a letter dated 15<sup>th</sup> July 2008 authorizing him to renew the Temporary Occupation Licence along Ramogi Rise upon meeting the three listed conditions. That the other two Defendants, that is DW1 and DW2, had only copies of invoices and business permits issued by the Municipal Council but none of all those documents indicated that the Defendants or any of them had been licensed or authorized to operate their businesses from Kisumu Municipality/Block 5/40, the suit land.

c) That as opposed to the Defendants, the Plaintiff has through PW1 explained how they identified the suit property as free for alienation as the previous leasehold's term had expired. They applied for the plot through their letter to the Commissioner of Land dated 27<sup>th</sup> April 2010 and received the letter of allotment dated 2<sup>nd</sup> August 2010 under reference 41768/152 allocating the Church Kisumu Municipality/Block 5/40, measuring about 0.2 hectares. That they made the payments required to the Commissioner of Lands and vide their letter dated 8<sup>th</sup> January 2011 addressed to the Town Clerk Kisumu Municipality applied for waiver of the rates arrears totaling Kshs. 1,073,793/=. That thereafter the Municipal Council issued the occupants of the suit land a 14 days' notice to vacate vide their letter dated 24<sup>th</sup> January 2011. The Plaintiff's lease for Kisumu Municipality/Block 5/40 measuring 0.4189, dated and registered on the 20<sup>th</sup> September 2010 is annexed to the Plaintiff's supporting affidavit to the notice of motion dated 7<sup>th</sup> July 2011 that was filed with the plaint. That also annexed is the certificate of lease issued on the 24<sup>th</sup> December 2010. That though the Defendants alleged in their defence that the Plaintiff's title documents to the suit land was fraudulently obtained and or that they did not know how they were obtained, the evidence adduced by the PW1 relating to how the church applied for the plot, got the letter of

allotment, had the lease processed and registered and certificate of lease issued has not been challenged by the Defendants. That the Defendants have not availed any evidence to support their claim that the Plaintiff obtained the allocation of the plot, and the title documents thereof, through fraudulent means.

d) That as the Defendants authority to occupy portions of the suit land had allegedly emanated from the Municipal Council of Kisumu and was on temporary basis, it is important to note that there is no evidence adduced to suggest that the Council was the registered proprietor of the suit land by the time the Defendants started operating their business on it. That in any case, the temporary occupation licence the Defendants had allegedly got had not been renewed as of the year 2010, and were not over the suit land as no documentary evidence to support such a claim has been availed. That even if the temporary occupation license allegedly given to the Defendants were over the suit land, the same was taken to have been terminated through the Town Clerk's to the Council notice dated 24<sup>th</sup> January 2011 in which the occupants of Block 5/40 were notified as follows:

“It has been noted of your occupation on the above parcel of land whose owner has since submitted plans for development. Please note, the Council has approved the plan and is thus awaiting your movement and relocation to have the owner occupy the same land for his use.

Be advised that you are required to vacate the same plot within 14 days of this notice to enable the said owner to commence development as per Council approval conditions.”

That though the Defendants alleged that the Council personnel advised them to stay put and not to vacate unless asked to do so by the Council, there is no documentary evidence availed to counter the contents of the notice set out above which was itself from the Council and wanted the Defendants to vacate in 14 days.

e) That in view of the finding (d) above, the Court finds that the Defendants lost the temporary license they may have had from the Municipal Council of Kisumu to operate from the suit land on the expiry of 14 days from the date of the notice dated 24<sup>th</sup> January 2011. That the Defendants continued to stay on the suit land was as trespassers who had no legal right to be on the land in view of the Plaintiff's requests and demand notice to vacate.

8. That following from the foregoing, the Court finds that the Plaintiff has established its case against the Defendants on a balance of probabilities. The Court therefore enters judgment for the Plaintiff against the Defendants in the following terms;

**a) That Mandatory injunction in terms of prayer (b) of the plaint is granted. That should the Defendants or any of them fail to comply within ninety (90) days from the date hereof, eviction order to issue.**

**b) That upon the Defendants giving the Plaintiff vacant possession or being evicted, they be and are hereby restrained through permanent injunction as per prayer (a) of the plaint.**

**c) That the Defendants do pay the Plaintiff the costs of this suit.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF MAY 2018**

**In the presence of:**

Plaintiff      Absent

Defendants      Absent

Counsel      Mr. Baganda for Odongo for Plaintiff

M/s Mwaro for Maube for the Plaintiff

Mr. Mwaro for Omondi for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 6<sup>th</sup>

Defendants

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**