



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 275 OF 2015

BENARD OMBOKE AGOT PLAINTIFF

VERSUS

PAUL ODHIAMBO ABONYO 1ST DEFENDANT

SIAYA COUNTY GOVERNMENT 2ND DEFENDANT

JUDGMENT

1. Benard Omboke Agot, the Plaintiff, sued Paul Odhiambo Abonyo and the Siaya County Government, the 1st and 2nd Defendant respectively, through the plaint dated 13th October 2015, seeking for declaration that the Plaintiff is the lawful owner of plot No. 6, Bondo; order for the County Planner and Secretary, Siaya County, to register and issue the Plaintiff with a letter of allotment for plot No. 6 and costs. The Plaintiff avers that his late brother Okech Agot and himself surrendered their plot to the defunct County Council of Bondo in 1993 for construction of a bus park. That on the 7th July 1992, the Bondo Urban Commission resolved to compensate all the people who had given up their land to the local authority by way of allocating them alternative parcels. That his late brother and himself were allocated plot No. 6. That the Plaintiff's brother died before they could be issued with an allotment letter for the plot and his efforts to get it issued has not been successful. That in 2014, the Plaintiff discovered that plot No. 6 has been registered with the 1st Defendant.

2. The 1st Defendant opposed the Plaintiff's claim through his undated statement of defence filed on the 22nd January 2016. He avers that he only owns one plot in Bondo being plot No. 2 and has no ownership claim over plot No. 6.

3. The second Defendant denied the Plaintiff's claim averring that the Plaintiff did not surrender his plot for the bus park and was therefore not considered for alternative allocation. That the Plaintiff is in possession of his plots being South Sakwa/Bakwino/3861, 3862 and 3269 which he has since developed.

4. That the hearing commenced on the 8th November 2017 when the Plaintiff testified as PW1. He testified that in July 1992, the Bondo Urban Council had a meeting with him and seven others over the plots they had bought, which the Council wanted for a bus park. That the Council had with them documents of alternative plots that the eight would be given as compensation. That the Plaintiff and his brother Joseph Okech, were to be allocated plot No. 6 but have to date not received the letter of allotment. That as some of the other persons had been given allotment letters for their promised plots, the Plaintiff filed this suit. During cross-examination, PW1 agreed that though he had attended the 1992 meeting, he only wrote demand letters on the matter in 2014 which was after the Council had become defunct. He agreed that though the names of those in attendance of the July 1992 meeting were taken, his name does not appear in the copy of the minutes. That he surrendered plot no. 3268 to the Council for the bus park in exchange for plot No. 6 but agreed that he had no documentary evidence to support it.

5. The 1st Defendant testified as DW1. He told the Court that he applied for a commercial plot in 1997 and was allocated unsurveyed plot no. 2/Bondo. That in 2015, the Plaintiff sued him over that plot without basis. He testified that the plot he was allocated was vacant and that he did not know of anybody's interest over it.

6. The 2nd Defendant called Zablon G. Chana, the County Director in charge of Lands, who testified as DW2. He confirmed that in the period of 1991/1992, the then Urban Council of Bondo wanted land to erect a bus park. That the Council approached one Anjulu who owned a suitable parcel for the purpose. That Anjulu informed the Council that he had already sold the land to various individuals who included the Plaintiff herein. That the Council approached the buyers of the plots and requested that they surrender them to the Council and in return they would be compensated with alternative leasehold plots in the town. That those buyers who surrendered their plots were allocated alternative ones. That the Plaintiff did not surrender his plot and was therefore not allocated a leasehold plot. That the plots the Plaintiff had bought from Anjulu were registered as South Sakwa/Barkowino/3861, 3862 and 3269 in the name of Aboke Family Company which is owned by the Plaintiff's family. He produced copies of the certificates of official searches for the plots as exhibits. He also produced photographs of the buildings developed on the plot numbers 3861, 3861 and 3269 by the Plaintiff's family. The witness testified that the minutes of 1992 that the Plaintiff relies on were mere recommendations which was actualized for those that surrendered their plots. During cross-examination, DW2 confirmed that the bus park proposed in the 1992 minutes was constructed. That the Plaintiff's claim that he surrendered plot no. 3268

to the Council has not been confirmed through documents.

7. The Counsel for the Plaintiff, 1st and 2nd Defendants filed their submissions on the 18th April 2018, 6th December 2017 and 15th July 2018 respectively.

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

a) Whether plot No. 6/Bondo, claimed by the Plaintiff is also known as unsurveyed commercial Plot No. 2/Bondo that was allocated to the 1st defendant, and if so, whether the plot has ever been allocated to the Plaintiff.

b) Who pays the costs of this suit.

9. The court has after considering carefully the pleadings filed, oral and documentary evidence tendered by PW1, DW1 and DW2 plus the written submissions by the learned counsel for the parties come to the following determinations;

a) That the main basis of the Plaintiff's claim to plot No. 6/Bondo is the contents of the copy of the minutes of the Works, Town Planning, Housing, Education & Social Services Committee meeting of 7th July 1992. That in minute 3, the County Clerk is reported to have told the Committee that he had already discussed the matter of allocating the people who had given up their plots for the bus park alternative plots "with the District Commissioner and promised the following;

1. Jakinda S. Obala to be allocated plot No. 1.

2. Siffanus Agina to be allocated plot No. 13.

3. Raila Alogo to be allocated plot No. 14.

4. Nyakondo Group to be allocated plot No. 7.

5. Okech Agot and Bernard Omboke do No. 6.

The County Clerk told members he was waiting for the District Commissioner's authority to allocate those plots. After discussion, it was RECOMMENDED:

That;

(i) County Clerk be given time to finalize the matter with the District Commissioner to effect allocation of land to those who gave up their land to the commission for the building of Bondo Bus Park as follows;

Mr. Jakinda Obala to be allocated Plot No. 12, Mr. Silfanus Agina to be allocated Plot No. 13, Raila Alogo to be allocated Plot No. 14, Nyakondo Group to be allocated Plot No. 7, Mr. Okech Agot and Bernard Omboke to be allocated Plot No. 6

(ii)"

b) That the Plaintiff's evidence that he had surrendered his plot to the Commission for the bus park was challenged or rebutted by the 2nd Defendant through DW2 who produced copies of certificates of official searches for Siaya/Barkowino/3861, 3862 and 3269, dated 23rd May 2016, showing that they were registered on the 15th January 1999 in the name of Omboke Family Company Limited, which is the Plaintiff's family Company. That the witness further produced copies of photographs of the developments erected on the said plots by the Plaintiff's family and testified that the Plaintiff declined to surrender the promised plot to the Commission and therefore could not be allocated an alternative one.

c) That having considered the testimonies tendered by PW1 and DW2, and remembering that the Plaintiff was the one with the legal burden to prove that he is entitled to be declared the owner of Plot No. 6/Bondo, and noting that the Plaintiff has not tendered any documentary evidence of the plot he alleges he owned and which he surrendered to the Council, the Court finds that he has failed to discharge the burden placed upon him by **Section 107 of the Evidence Act Chapter 80 of Laws for Kenya.**

d) That further to (c) above, the Plaintiff did not dispute the testimony of DW2 that the three described plots that he was to surrender for the bus park are developed and still owned by his family company todate. That it therefore follows that he could not have been allocated an alternative plot like those others who surrendered theirs.

e) That the Plaintiff has also failed to establish the connection between Plot no. 6/Bondo that he claimed and unsurveyed Commercial Plot No. 2/Bondo that was allocated to the 1st Defendant through letter of allotment dated 20th May 1997, under reference 70760/11/117. That the Plaintiff has also failed to prove any fraud on the part of the defendants in relation to the allocation of unsurveyed Commercial Plot no. 2/Bondo.

10. That from the foregoing, the Court finds that the Plaintiff has failed to proof his case against both Defendants to the standard required. That the Plaintiff's case is therefore dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26th DAY OF September 2018

In the presence of:

Plaintiff Absent

Defendants 1st Defendant present

Counsel Mr. Yogo for the Plaintiff

Mr. Anyul for Wasuna for 2nd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE