



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU
ELC CASE NO 18 OF 2013

CHARLES ODHIAMBO KANDEGE.....PLAINTIFF

VERSUS

THE DISTRICT OFFICER-NYAKACH.....1ST DEFENDANT

CHIEF THURDIBUORO LOCATION.....2ND DEFENDANT

TERRAZO ENTERPRISES LIMITED.....3RD DEFENDANT

JUDGEMENT

1. By a Plaint filed on 25th January 2013 as amended on 23rd October 2015, Charles Odhiambo Kandege, the Plaintiff herein prays for Judgment against the Defendants jointly and severally for:-

1. A permanent injunction to issue restraining the Defendant by themselves, their agents, servants and/or employees or otherwise jointly and severally from trespassing , encroaching, developing, building on, alienating and/or in any other way whatsoever dealing with or interfering on land parcel number Kisumu/Koguta West/611;

2. A determination that Vitalis Ndege, deceased, is the proprietor and/or owner of the land parcel number Kisumu/Koguta West/611;

3. Mesne profits for unlawful occupation and development of land parcel number Kisumu/Koguta West/611;

4. Costs of this suit and interest;

5. Any other or further relief that this Honourable Court may deem fit to grant in the circumstances.

2. The said prayers are premised on the Plaintiff's assertion in the Plaint that he is the beneficial owner of the said parcel of land by virtue of him being the son of the late Vitalis Ndege who was the registered proprietor thereof. It is the Plaintiff's case that upon his father's death o 16th July 2006, he moved to the High Court at Kisumu vide Succession Cause No. 398 of 2012 whereupon he was issued with letters of administration for the estate.

3. It is further the Plaintiff's case that sometime in 2011, the Defendants illegally entered into the

suitland and began constructing offices and other structures. Despite demand made and/or notice of intention to sue, the Defendant continued with their said illegal developments on the suitland thereby necessitating the filing of this suit.

4. Having initially failed to enter appearance and/or file a defence herein for a period of four years, the Office of the Honourable the Attorney General moved to Court on or about 22nd May 2017 whereupon they filed a Statement of Defence. While the Notice signed by S.O. Nyauma, Litigation Counsel on behalf of the Honourable the Attorney General ostensibly refers to the 2nd and 3rd Defendants, it is apparent that the same is filed in error as the 3rd Defendant-Terrazzo Enterprises Ltd is a private limited liability company that did not enter appearance herein.

5. This Court accordingly presumed that the Statement of Defence filed by the Honourable the Attorney General was on behalf of the District Officer Nyakach as well as the Chief Thurdibuoro Location who are public officers and are sued herein as the 1st and 2nd Defendants. In the said Statement of Defence the Defendants generally deny all the averments contained in the Plaintiff and have put the Plaintiff to strict proof of the same.

6. As it were, when this matter came up for hearing before me, the Plaintiff called one witness-the Plaintiff himself while the Attorney General's representative (properly introducing themselves as acting for the 1st and 2nd Defendants) never called any witness.

7. Testifying as PW1, the Plaintiff told the Court that he is a businessman based in Mombasa County. His father Vitalis Ndege Lando was the registered proprietor of all that parcel of land known as Kisumu/Koguta West/611. Following his father's death, PW1 took out Letters of Administration for the Estate which was granted to him on 18th September 2012.

8. PW1 testified that sometime in December 2012, he was informed that the 1st and 2nd Defendants were carrying on some construction on their land. By a letter dated 20th December 2012, PW1's Advocate then Messrs Godfrey Mutubia & Company wrote to the 2nd Defendant warning him to stop the construction. The Defendants however went on with the construction.

9. PW1 further told the Court that earlier in 2010, he had conducted a search on the land from which he established that the same was registered in his late father's name. He proceeded to register a caution thereon on 24th October 2010. Thereafter it was his evidence that the property has never been transferred to any other party. He did another search on 6th July 2015 to confirm this position.

10. It was PW1's testimony that after he filed the case, the 1st and 2nd Defendants produced a Memorandum of Agreement in Court indicating the property belonged to the 3rd Defendant. This forced him to go back to the Land Office from where he got a copy of the property's Green Card. The said card shows the land is in his father's Name. Finally, PW1 told the Court that his father always consulted the family and he never told them about selling the property to anyone.

11. I have considered the Plaintiff's testimony and the evidence placed before me. I have equally considered the written submissions filed herein by Counsel for the Plaintiff. The Attorney General's office did not file any submissions herein.

12. From the material placed before me, it is evident that LR NO. Kisumu/Koguta West/611 measuring approximately 0.9 hectares was registered in the name of Vitalis Ndege the Plaintiff's father on 13th August 1975. (PEX 6). From the Certificate of Grant issued by the High Court at Kisumu in Succession Cause No. 398 of 2012 (Pexh 1), the said proprietor, named therein as Pitalis Ndege Lando, passed away on 16th June 2006 and the Grant of Letters of Administration Intestate to his estate were issued to the Plaintiff on 18th September 2012.

13. According to PW1 a few months after being issued with the Grant of Letters of Administration, he was informed that some people had commenced construction on his father's land. Consequently, by a letter dated 20th December 2012 written by the Plaintiff's then Advocates(PEX 2), and addressed to the 2nd Defendant, the Plaintiff wrote in the relevant part as follows:-

“RE; ILLEGAL ENTRY AND TRESPASS ON PLOT NOS KISUMU/KOGUTA 599 AND 611

We act for Charles Odhiambo Kandege the Administrator of the Estate of Vitalis Ndege and Barnabas Owiti under whose instructions we have to write and demand as follows:-

That you have illegally commenced plans to construct Government Offices on the above Plots which belong to our clients without their permission or consent.

Our instructions are that you have no power or right to illegally alienate or enter upon our client's private properties to develop or carry out any constructions as intended.

Our further instructions are to demand that you immediately stop any further trespass on our client's properties and remove all or any construction materials deposited thereon.

TAKE NOTICE that unless you comply with our demand aforesaid within TEN (10) DAYS from the date hereof, we have mandatory instructions to commence appropriate legal proceedings against you and the Government at your own risk as the costs and all allied consequences.”

14. The said letter is copied to the Divisional Officer, Nyakach, the CDF Office Nyakach, the District Commissioner Nyando and the Attorney General's Office Kisumu. It is apparent that there was no immediate cessation of the construction and on 25th January 2013, the Plaintiff proceeded to file the suit herein.

15. It was the Plaintiff's case that he is in possession of the original title deed (produced as Pexh 6) and that he was in the process of transferring the land to himself only to be surprised that the Defendants have trespassed into the property. He avers that no consent or permission has been granted to the defendants either by themselves or their agents to enter into or carry on any developments on the suitland.

16. I have taken a keen consideration of the evidence placed before me by the Plaintiff. This case was initially filed against the 1st and 2nd Defendants before the Plaint was amended on 23rd October 2015 to include the 3rd Defendant. From the record, it is apparent that contemporaneous with the Plaint, the Plaintiff through its then Advocates had filed a Notice of Motion application also dated 25th June 2013 as the Plaint, seeking orders of injunction to issue against the initial two Defendants.

17. Responding to the application, the Defendants through the then area Assistant County Commissioner Anderson Otucho Ayuku filed a Replying Affidavit sworn and filed herein on 3rd June 2015 in which they disputed that the two Government Officers had trespassed into the land in dispute. The deponent explains in the said Affidavit that the subject parcel of land is part of some 7.2752 Acres of land donated by an organization known as Terrazzo Enterprises Limited (now the 3rd Defendant herein) to West Nyakach Divisional Committee to put up offices vide a Memorandum of Understanding dated 14th March 2011, a copy whereof is annexed to the said Replying Affidavit.

18. The 1st and 2nd Defendants further aver in the said Affidavit that the suitland was acquired by the said Terrazzo Enterprises Ltd from the Plaintiff's deceased father Pitalis Ndege Lando through a Sale Agreement also annexed to the Affidavit.

19. I have considered the Memorandum of Agreement and the Sale Agreement referred to. While the Attorney General appearing for the two Defendants failed, unfortunately, to cross-examine the Plaintiff thereon at the trial hereof, it is evident that they form the basis of the Defendants' entry into the suitland.

20. A perusal of the two documents reveals that Terrazzo Enterprises Ltd, later enjoined herein as the 3rd Defendant, was engaged in the process of acquiring various parcels of land for purposes of construction of an office block for the headquarters for the then newly created administrative division known as West Nyakach. By a Sale Agreement dated 21st December 2004 between the said Terrazzo and Pitalis Ndege Lando (the Plaintiff's father) the company bought a portion of the land measuring 1.2239 acres from the said Pitalis Ndege Lando for a sum of Kshs 429,428/-. The said sum of money was apparently paid to the deceased through a cheque No. 126192 (attached to the Sale Agreement) drawn on Citi Bank Nairobi Branch dated the same day.

21. In *Clerk and Lindsell on Torts (17th Edition) paragraph 17-01*, the Learned Authors define trespass as:-

“An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass.”

22. As it were, having taken all the circumstances of this case into consideration there was evidence that the entry of the 1st and 2nd Defendant's was justifiable on the basis that the land had been bought from the Plaintiff's father by the said Terrazzo Enterprises Ltd which then donated the same to them.

23. Indeed, it is on the strength of the said Replying Affidavit sworn by the 1st and 2nd Defendants that the Plaintiff applied and was allowed to join the 3rd Defendant to this suit. The said 3rd Defendant did not however enter appearance herein.

24. From a perusal of the documents filed by the Plaintiff herein, it is easy to see why the 3rd Defendant failed to enter appearance. While the Sale Agreement aforesaid between the Company and the Plaintiff's father correctly named the company as Terrazzo Enterprises Ltd as they are sued herein, the search done at the Registrar of Companies (attached to the Further Affidavit filed herein on 17th June 2016) sought particulars of Terrazzo Company Ltd. In the absence of any evidence that the 3rd Defendant is also known as Terrazzo Company Ltd it would be correct to conclude that the 3rd Defendant were not served at all with the suit papers herein.

25. Whatever the case, I am not persuaded that the Defendants were unjustifiably found on the Plaintiff's land and that they had no right to carry out the construction that they had begun.

26. In the circumstances the Plaintiff's suit has no merit and is hereby dismissed. I make no order as to costs.

Dated and signed at MALINDI thisday of July, 2018.

J.O. OLOLA

JUDGE

Dated, delivered and Signed at KISUMU this 5th day of September, 2018.

S.M KIBUNJA

JUDGE