



REPUBLIC OF KENYA



KENYA LAW
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**Oduory v Obuya & 2 others (Environment & Land Case 60 of 2018)
[2024] KEELC 183 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 183 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 60 OF 2018**

E ASATI, J

JANUARY 25, 2024

BETWEEN

BRUNO AGONGA ODUORY PLAINTIFF

AND

MATHEWS OBUYA 1ST DEFENDANT

PETER AURA OLIECH 2ND DEFENDANT

FRANCIS OKELLO OLIECH 3RD DEFENDANT

JUDGMENT

1. This suit was first filed in the High Court at Kisumu as Kisumu HCCC No.60 of 2010, commenced vide the plaint dated 4th May, 2010. The suit was later transferred to the Environment & Land Court Kisumu for hearing and disposal. The plaint was later amended and replaced with the amended plaint dated 3rd March, 2022 vide which the Plaintiff, Bruno Agonga Oduory, seeks for the following relief against the Defendants jointly and severally: -
 - a. An order of permanent injunction restraining the Defendants by themselves, their agents, employees or anyone acting under their direction from entering, remaining and/or in any way interfering in parcel NO. WEST KISUMU/OJOLA/4155 belonging to the Plaintiff.
 - b. An order for demolition and eviction under the protection of the local police station.
 - c. Damages for loss of use of the land of Kshs.780,000/=.
 - d. Costs of this suit and interest thereon.
2. Vide the Further Amended Statement of Defence and Counter-claim dated 11th April, 2022, the Defendants denied the Plaintiff's claim and sought that judgement be entered against the Plaintiff in their favour for;



- a. A declaration that the Plaintiff herein hold land parcel NO. KISUMU/OJOLA/4155 in true trust for the Defendants and that the record be rectified to read the name of the Defendants.
- b. The title deed in relation to the land parcel number KISUMU/OJOLA/4155 be cancelled and registered in the names of the Defendants.
- c. Cost of the suit and interest.

The Plaintiff's Case

3. The Plaintiff's case is that he is registered as the absolute proprietor of L.R. No. West Kisumu/Ojola/4155 the suit land herein. That on or about 25th May, 2009 when the Plaintiff entered the suit land with a view to fence the same, the Defendant threatened him and warned him never to step on the suit land. That the Defendants have been entering and leaving the Plaintiff's land such that the Plaintiff is not able to exclusively use the land which is vacant. The plaintiff testified and produced exhibits in support of his case and called one witness.

Defence Case

4. The Defence case is that the suit land was a sub-division from land parcel number Kisumu/Ojola/958 which was registered in the name of the Defendants' grandfather one William Opiyo Oliech. That upon the death of William Opiyo Oliech, the Defendants' father succeeded the estate of William Opiyo Oliech and subsequently without permission of the Defendants and other family members caused land parcel number Kisumu/Ojola/958 to be sub-divided so as to create the suit land herein and parcel numbers Kisumu/Ojola/4154 and 4156. That the Defendants' father proceeded to sell a portion thereof.
5. The Defendants aver that the suit land is family land on which they and other family members are settled and have been cultivating for generations without dispute. That they have therefore obtained ownership of the land through adverse possession or by prescription.

The Defendant pleaded in the alternative that the Plaintiff obtained the land fraudulently. The Defendant therefore sought that the Plaintiff's claim be dismissed and judgement be entered in their favour as prayed in the counter-claim.

The 1st Defendant testified, produced exhibits and called 2 witnesses in support of the defence case.

Submissions

6. At the close of the hearing, parties filed written submissions in support of their respective cases. Written submissions dated 3rd August, 2023 were filed on behalf of the Plaintiff by the firm of J.V. Juma & Company Advocates. Written submissions dated 29th August, 2023 were filed on behalf of the Defendants by the firm of Amos O. Oyuko & Company Advocates.

Issues for Determination

7. From the pleadings filed, the evidence adduced and submissions made, the issues that emerge for determination are;
 - a. whether or not the Defendants unlawfully entered the suit land.
 - b. whether or not the Plaintiff is entitled to the relief sought.
 - c. whether or not the Plaintiff obtained registration of the suit land in his name by fraud.



- d. whether or not the Defendants should be declared owners of the suit land by adverse possession
- e. whether the Defendants are entitled to the prayers sought in the counter-claim.
- f. Costs.

Analysis and Determination

8. The law in Order 21 Rule 4 of the Civil Procedure Rules, 2010 requires this court to ensure that its judgements in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue. Guided accordingly, I proceed to determine the issues herein.
9. The first issue for determination is whether or not the Defendants unlawfully entered the suit land.
The Plaintiff testified that he is the registered owner of the suit land which he bought from Mzee Andrew Oliech Opiyo. That the Defendants invaded the suit land and deliberately put up some structures so that they could lay claim to the land. That in early the year 2009, the Defendants chased his workers who were fencing the land. That consequently, the Defendants were arrested and charged with criminal offences in Maseno PMC CR. Case No.1360 of 2009. That the 1st Defendant was later committed to jail for contempt of court.
10. The Plaintiff testified that a Surveyor confirmed that there was a structure on the suit land and that it belonged to Mathews Obuya; the first Defendant.
11. The Plaintiff produced as exhibit title deed certificate of official search and green card in respect of suit property. The title deed dated 29th November 1996 shows that the suit land is registered in the name of the Plaintiff. The same position is confirmed by the certificate of official search dated 26th May, 2009. The copy of register (green card) shows that the register in respect of the suit land was opened on 13th August, 1996.
That the suit land measuring 0.46Ha was first registered in the name of Andrew Oliech Opiyo on 13th August, 1996 and transferred to the Plaintiff on 29th November, 1996 and title deed issued to him on the same date.
12. The Plaintiff also produced copy of charge sheet in respect of Maseno Criminal Case No.1360 of 2009 showing that the 1st Defendant and another were charged with the offences of creating a disturbance in a manner likely to cause a breach of the peace and trespass with intent to annoy contrary to Section 11 of the *Trespass Act*. The particulars of the charge were, inter alia, that they had trespassed onto the suit land; and that they had threatened to cut the Plaintiff with pangas. The Plaintiff also produced a Surveyor's report dated 25th April, 2012 and photographs. The findings of the surveyor as per the survey's report produced as exhibit were that the plot was positively identified both on the map and on the ground, that there was a structure on the land which was said to belong to the 1st Defendant and that the entire land was under maize cultivation save for the area occupied by the structure.
13. The photographs show the activities on and status of the suit land.
14. On cross-examination, the Plaintiff stated that he used to plant tree on the suit land but Mathews, cut the trees.
15. PW2 testified that he is a brother of the Defendants and that he knew that his family had resolved that the land be sold to the Plaintiff. On cross-examination, he stated that there was a family meeting where



it was agreed that the sale agreement be resolved and the Plaintiff be refunded the money. That he did not know whether his father revoked the agreement. That the suit land is currently occupied by the 1st Defendant who has his homestead thereon where he resides with his family. That the Plaintiff used to farm the land before the 1st Defendant entered thereon. That since the Plaintiff had the title deed, he is the owner of the suit land.

16. It was submitted on behalf of the Plaintiff that it has been acknowledged by the family of the 1st Defendant that the Plaintiff bought the land. That though the 1st Defendant testified that it was resolved that the Plaintiff should be refunded his money, 23 years down the line, no attempt has been made by the family to do the refund.

17. The Defence does not deny that the Plaintiff bought land from one Andrew Oliech. The contention of the defence is that the sale and subsequent transfer and registration in the name of the Plaintiff was fraudulent.

The Defendant pleaded that they have had possession of the suit land for a long time. The 1st Defendant who testified as DW1 stated that the land was given to him by his mother who had gotten it from his father.

On cross-examination, he stated that the meeting resolved that the Plaintiff be refunded his money. He stated that he stays on the suit land together with his family.

18. It was submitted on behalf of the Defendants that the suit land was family land and that consent of the entire family was not sought before sale.

19. From the evidence adduced, it is not in dispute that the suit land is registered in the name of the Plaintiff but currently occupied by the 1st Defendant. As a registered owner, the Plaintiff is entitled to quiet possession and enjoyment of the suit land. While the Plaintiff's evidence is that the date of entry of the Defendant onto the suit land was 25th May, 2009 or thereabouts, the Defendants claimed to have occupied the land for generations. The Defendants did not produce any evidence to support this allegation. I find that the 1st Defendants' entry onto the suit land was unlawful as the land was registered in the Plaintiff's name. PW.2's evidence supported the Plaintiff's evidence that the Plaintiff had been cultivating the land before entry by the 1st Defendant.

20. The second issue is whether or not the Plaintiff's title to the suit land was obtained by fraud.

In paragraph 8 of the Further Amended Statement of Defence and counter-claim, the Defendants pleaded that registration of the suit land in the name of the Plaintiff was obtained by fraud. They pleaded the particulars of fraud to include;

- a. The plaintiff conspired with the Defendant's father to have the suit land registered in his name when he knew quite well that the suit land was family land.
- b. The Plaintiff caused the suit land to be registered in his name when he knew quite well that the Defendants and other members of the family had not given any consent to their father to sell the suit land to him.

21. The evidence of the 1st Defendant was that the suit land was given to his mother by his (1st Defendant) grandfather but that his father decided to sell the same to the Plaintiff without their consent hence the dispute. He stated further that his father Andrew Oliech Opiyo gave the suit land to his mother who in turn gave it to him (1st Defendant).

He claimed on cross-examination that it was a different parcel of land belonging to the 1st wife of his father that was sold to the plaintiff and not the suit land.



22. DW.2, the 1st Defendant's mother, testified that the land was given to her by her father in law and mother in law. That the land was registered in the name of her late husband but that she did not know how it was changed and that she did not know that her late husband had sold the land to Bruno. DW3 testified that the land belonged to William Opiyo who gave it to his son by the name of Andrew Oliech.
23. The Plaintiff on the other hand testified that he bought the land lawfully and had the same registered in his name in the year 1996.
24. The Defence evidence on the basis of the 1st Defendant's claim to the land is inconsistent. It is not clear from the defence evidence whether the suit land was given to the 1st Defendant by his mother or his father. DW.1 testified that the land was given to him by his mother to whom it had been given by his father.

DW.2, the Defendants' mother claimed that the land was given to her by her father-in-law and mother-in-law and she in turn gave it to 1st Defendant. There was no evidence as to the date when this happened.

25. I have considered the evidence. It is trite law that the standard of proof of the tort of fraud is higher than proof on a balance of probabilities. No evidence of fraud has been placed before court. There is no evidence that the suit land was given to 1st Defendant's mother who in turn gave it to the 1st Defendant. I find that fraud has not been proved.
26. The third issue for determination is whether or not the Defendants should be declared as owners of the suit land by adverse possession.

First, it is agreed that it is only the 1st Defendant who is on the suit land. This precludes the 2nd and 3rd Defendants from a claim based on adverse possession. Secondly, though the Defendants alleged that they had been on the suit land for generations, Pw.2, a brother of the Defendants testified that the Plaintiff used to till the land before the 1st Defendant entered thereon. Thirdly, the time of the Defendants' entry onto the suit land is not indicated in the counter-claim. According to the Plaintiff, the Defendant's entry onto the suit land was on 25th May, 2009. The suit was filed in the year 2010. Given the evidence produced and the charge sheet in the criminal case at Maseno, the Plaintiff's version as to the date of the Defendants' entry onto the suit land is more believable.

The photographs produced of the structure on the suit land reveal a relatively recently constructed structure. The burden of proof lay with the Defendants to prove that they had had open continuous peaceful and uninterrupted adverse possession of the suit land for a period in excess of 12 years. This burden has not been discharged.

I find that the ingredients of adverse possession have not been proved.

27. The next issue for determination is whether or not the Plaintiff is entitled to the relief sought.
- The Plaintiff has proved that he is the registered owner of the suit land and that the Defendants unlawfully entered and the 1st Defendant remained on the suit land.

I find that the Plaintiff is entitled to the relief sought. The Plaintiff's rights are protected under article 40 of *the Constitution* of Kenya 2010 and section 24, 25 and 26 of the *Land Registration Act*. No evidence was produced on the damages for loss of user of Kshs.780,000/. The claim for loss of user was therefore not proved.

The Defendants who acknowledge that the Plaintiff bought the land, albeit, according to them, without the consent of the family, are unwilling to refund the Plaintiff's money.



28. The next issue is whether or not the Defendants are entitled to the relief sought in the counter-claim. On the basis of the findings on the above discussed issues and particularly that fraud and adverse possession have not been proved, I find that the Defendants are not entitled to the relief sought in the counter-claim.
29. As to who pays the costs, under section 27 of the Civil Procedure Act, costs of any action, cause or matter follow the event.

Conclusion

30. On the basis of the findings herein namely that the Defendants unlawfully entered onto the suit land, that fraud and adverse possession have not been proved and that the Plaintiff is entitled to the relief sought, the court finds that the Plaintiff has proved his case on a balance of probabilities and that the counter-claim has not been proved and makes the following orders:-
- a. Judgement is hereby entered against the Defendants and in favour of the Plaintiff in the suit for;
 - i. An order of permanent injunction restraining the Defendants by themselves, their agents, employees or anyone acting under their direction from entering, remaining on or in any way interfering with the Plaintiff's land parcel known as No. West Kisumu/Ojola/4155.
 - ii. The Defendants to vacate and hand over vacant possession of the suit land to the plaintiff within 60 days hereof failing which an order for the eviction of the Defendants from land parcel No West Kisumu/Ojola/4155 to issue.
 - b. The counterclaim is hereby dismissed.
 - c. Costs of the suit are awarded to the Plaintiff.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 25TH DAY OF JANUARY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

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E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

No appearance for the Plaintiff.

No appearance for the Defendants.

