



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 198 OF 2015

PAULINE KERUBO ORINA PLAINTIFF

VERSUS

JAMES ONCHIEKU..... DEFENDANT

J U D G M E N T

1. In the present suit both the plaintiff and the defendant claim ownership of land parcel **Kisii Municipality/Block I/794** (hereinafter referred to as (“**the suit property**”). It is a classical case where each of the parties is staking claim of ownership to the suit property on the basis of ownership documents purportedly lawfully issued to each of them by the lands office. The plaintiff claims as the original allottee of the suit property while the defendant claims to have lawfully and validly purchased the suit property from the previous registered owner.

2. The plaintiff commenced the suit by way of a plaint dated 27th May 2015 filed in court on 3rd June 2015. The plaintiff’s claim was that she was the registered proprietor of land parcel Kisii **Municipality/Block I/794** and that the defendant had without any justification trespassed onto her property and was laying claim over the same. The plaintiff averred that the defendant had on or about 25th March 2015 entered onto the suit property and had demolished her latrine, destroyed her barbed fence, shed and some construction materials. The plaintiff further averred that efforts to have the land registrar, Kisii resolve the dispute were futile.

3. The plaintiff prays for judgment against the defendant for:-

a. A permanent injunction restraining the defendant, his agents, servants or employees from trespassing into and/or in anyway interfering with the plaintiff’s occupation, possession and use of the leasehold property Kisii Municipality/Block I/794.

b. An eviction order be issued evicting the defendant, his agents, servants or employees from the property designated Kisii Municipality/Block I/794.

c. Costs.

d. Interest on (a), (b) and (c) above.

4. The defendant filed a statement of defence and counterclaim dated 13th July 2015 filed in court on 14th July 2015. The defendant denied the plaintiff’s claim of ownership of the suit property and instead averred that the suit property belonged to him and that the same was registered in his name and he was the legitimate and lawful proprietor of the said property. The defendant averred that the plaintiff must have procured registration as owner fraudulently and that the documents in her possession evidencing ownership were obtained fraudulently. The defendant by way of counterclaim averred that he purchased the suit property from one Mary Kemunto Angoi and was registered as proprietor thereof on 12th March 2015. The defendant counterclaim contended that the certificate of lease issued to the plaintiff on 3rd June 2002 was fraudulent, irregular and invalid and set out the particulars of fraud under paragraph 22 of the defence and counterclaim. The defendant prayed for the dismissal of the plaintiff’s suit and for judgment on the counterclaim against the plaintiff for:-

a. An order for cancellation and/or nullification of the certificate of lease issued to and in favour of the plaintiff herein over and in respect of LR No. Kisii Municipality/Block I/794 together with the register containing the name of the plaintiff.

b. Permanent injunction restraining the plaintiff either by himself, agents, servants and/or anyone claiming under the plaintiff from entering upon, trespassing onto, re-entering, building on, alienating, selling, transferring and/or otherwise interfering with LR No. Kisii Municipality/Block I/794 whatsoever and/or howsoever.

c. General damages for trespass, together with interest thereon at court rates (14%) from the date of judgment.

d. Costs of the cross suit be borne by the plaintiff.

e. Such further and/or other relief as the honourable court may deem fit and expedient.

5. The plaintiff filed a reply to defence and defence to counterclaim on 27th July 2015. The plaintiff reiterated that she was validly registered as the owner of the suit property and by way of defence to the counterclaim denied all the allegations of fraud attributed to her.

6. The plaintiff testified through her husband, Geoffrey Bosire Maronga, to whom she had donated a Power of Attorney dated 28th April 2015 (“**PEX.1**”). The plaintiff’s husband testified as PW1 and his evidence was to the effect that his wife was allocated the parcel of land the subject of the suit vide a letter of allotment dated 15th July 1993 produced as “**PEX.2**” and was later issued with a lease and a certificate of lease after satisfying all the terms and conditions of the allotment. The witness explained that after they had acquired the plot he carried out some developments thereon. He stated he had fenced the property, constructed some structures, a shed and a pit latrine and had deposited some construction materials and had also connected water to the property. The witness stated that sometime in February/March 2015 some people invaded the property claiming it belonged to them.

7. PW1 stated further that he had been paying rates for the property to the Municipal Council and that his wife as per Municipal Council’s valuation roll of 2005 was shown to be rateable owner of the property (“**PEX.8**”). The witness testified that up to 2015 they had enjoyed quiet possession and occupation of the suit property and he tendered in evidence the various documents the plaintiff held to support her ownership as per the list of documents dated 10th November 2015 filed in court on 3rd December 2015. The witness stated that he had carried official searches on the property at various times as per the copies of official searches annexed to the bundle of documents as document (1) on the list produced as (“**PEX.6 “a-d**”). The searches carried out on 25th November 2015, 20th April 2015, 8th June 2010 and 7th January 2009 all showed that the plaintiff was the registered owner of the suit property and was so registered on 23rd April 2002 and issued with a certificate of lease on 3rd June 2002. The searches showed no encumbrances on the property.

8. PW1 stated the defendants documents relied upon to claim ownership had anomalies and he therefore doubted they were authentic. He observed the letter of allotment dated 8th July 1985 did not have the particulars of the plot being allocated and further it was allotting a plot whose term was to commence nearly 7 years later on 1st July 1992. He further observed that the payment receipt for the allotment exhibited by the defendant neither had a date and/or reference for the plot the payment related to and that the letter forwarding the lease quoted a different receipt number than the one on the receipt. The witness also observed the lease in the defendant’s bundle of documents does not indicate any fee was paid for the same and further though signed does not give the name of the land registrar who attested the same.

9. In cross examination by Mr. Ochwangi advocate for the defendant, PW1 stated he fenced the property after the surveyor had shown him the beacons. PW1 further stated he had obtained approval from Municipal Council for the building he was constructing on the plot. He stated he had built the house he was putting up on the plot upto the 1st floor when the intruders came onto the plot. He maintained he was the one who was in possession of the suit property.

10. PW2, Steve Mokaya was the land registrar Kisii County. The land registrar Kisii testified that as per the records held in the lands office in respect of land parcel **Kisii Municipality/Block I/794**, a lease was issued to Pauline Kerubo Orina and she was issued a certificate of lease on 3rd June 2002. He stated that there was no record of the certificate of lease issued in favour of the defendant in March 2015 in their records. The witness stated he did not get a copy of the letter of allotment in their records but shown the letter of allotment issued to the plaintiff (“**PEX.2**”) on 15th July 1993 and the copy of allotment letter to one, Thomas Nyagaka Angoi dated 8th July 1985 the land registrar observed as follows:-

i. Allotment letter dated 15th July 1993.

This allotment was to Pauline Kerubo Orina. The Ref is UNS Res. PLOT A17 KISII MUNICIPALITY. The allotment was for a term of 99 years from 1st July 1993.

ii. Allotment letter dated 8th July 1985.

This allotment was to Thomas Nyagaka Angoi. There is no specific plot the subject of the allocation. The allotment shows the term was for 99 years from 1st July 1992. The term ordinarily would run from the date when the allotment was made.

11. The land registrar further stated Pauline Kerubo was issued a receipt dated 28th February 1994 but indicated the receipt allegedly issued to Thomas Nyagaka had no date. He further stated the lease issued to Pauline Kerubo had a receipt number recorded at the top No. C838195 which matches the receipt that was issued to her upon payment for the allotment. He stated the lease issued to Thomas Nyagaka was not endorsed with the receipt number and it was normal practice for the lease to show the number of the receipt payment. The land registrar further observed that the copy of the transfer exhibited by the defendant had deficiencies as it did not contain the ID Nos. of the signatories and the transferee’s PIN number. The witness affirmed that as per the records held by the lands office the registered owner of the suit property was Pauline Kerubo Orina.

12. The defendant, James Onchieku testified as DW1 and his evidence was to the effect that he purchased the suit property from one, Mary Kemunto Angoi. He stated that before entering into the purchase agreement he carried out a search at the lands office and also verified the details of the property at the offices of the County Government. The defendant stated that the seller handed over to him the various documents evidencing her ownership the bulk of which are exhibited in the defendant’s bundle of documents as per the list dated 13th July 2015 attached to the statement of defence and counterclaim. The defendant stated he entered into an agreement of sale with the seller dated 6th March 2015 exhibited as document No. 8 in the bundle of documents and after paying the purchase price in full was issued with a

certificate of lease after registration of the transfer in his favour. The copy of transfer and copy of the certificate of lease are exhibited as documents Nos. 10 and 11 in the bundle of documents. The defendant stated that Mary Kemunto Angoi had been paying rates to the council as evidenced by the rates demand (Document 13) issued to her by the Kisii County offices.

13. The defendant stated that having satisfied himself the seller, Mary Kemunto Angoi was the rightful owner of the suit property, he agreed to purchase the property and he took possession of the same after payment of the purchase price. He stated that he deposited some building materials on the plot, constructed a site house and septic tank. He stated further that the site house and the fence were destroyed by persons he did not know and that it was after he made a complaint at the police station that the husband of the plaintiff (PW1) appeared after persons who were working at the site were arrested.

14. The defendant stated the police declined to handle the matter as both the plaintiff's husband and myself were claiming ownership of the property and each of us had documents of ownership. The police indicated it was only the court that could determine who the owner was. The defendant denied he was trespassing on the plaintiff's plot and asserted that he was the true owner of the property placing reliance on the ownership documents he had exhibited showing he purchased the property from Mary Kemunto Angoi.

15. DW2 David Dunya Omol testified that he was the land registrar, Kisii from July 2013 upto October 2016. He stated that in the cause of his duties as such land registrar, he dealt with the subject property in dispute. He stated that on 12th March 2015 a transfer was presented for registration and that the same was accompanied with a clearance certificate and a certificate of lease that was for surrendering. The transfer was from one Mary Kemunto Angoi to James Onchieku, the defendant herein. He stated that he registered the transfer and cancelled the certificate of lease issued to Mary Kemunto Angoi on 7th June 2000 and issued a certificate of lease to the defendant. Mr. Dunya testified that after he had registered the transfer in favour of the defendant another person came to the office claiming to have another title in her name for the same property. He said this prompted him to summon the parties in writing to his office to avail any documents they had to support their claims of ownership.

16. He however stated that before he could give the parties a hearing and make a determination the plaintiff filed the present suit. According to the witness the documents contained in the defendant's bundle of documents were in the parcel file while the plaintiff later also availed the documents she has included in her bundle of documents. The witness stated that a land a registrar in effecting any transaction relies on the documents contained in the parcel file and in the present matter he stated that he relied on the documents that were available in the parcel file.

17. The witness in cross examination affirmed that he was the one who wrote the letter to the plaintiff dated 29th June 2015 where he confirmed she was the rightful proprietor of the suit property. The witness further acknowledged that he was the one who certified the plaintiff's copy of the lease as a true copy of the original stating that he did so on the basis of what he had seen.

18. The plaintiff's and the defendant's counsel filed their respective final written submissions after closure of the trial. On perusal of the pleadings, the evidence and consideration of the parties written submissions the issues that present themselves for determination are as follows:-

i. Whether on the basis of the documents tendered as evidence by both parties it was the plaintiff and/or one Thomas Nyagaka Angoi who was allocated the suit property?

ii. Whether it is the plaintiff and/or the defendant who has trespassed onto land parcel Kisii Municipality/Block I/794?

iii. What orders should the court make?

19. The determination of this case turns on the evaluation and analysis of the documents the parties have sought to rely on. In the present case, the letter of allotment is crucial as both the plaintiff and the defendant originate their claims to letters of allotment. In the case of the plaintiff, her claim stems from what she states was her letter of allotment issued to her vide a letter dated 15th July 1993 by the Commissioner of lands allocating her **UNS. RESIDENTIAL PLOT A17 – KISII MUNICIPALITY (PEX.2)**. As per this letter of allotment the lease was for a term of 99 years from 1st July 1993. The plot allocated was marked on the plan No. 31112/109B. The reference for the letter of allotment was Ref. No. 31112/150 and the authority for the allocation was vide **Gvt. API/SLO/NY/KSI/1-31112/113**. The letter of allotment was signed for the Commissioner of Lands by one, J. M. W. Gikuri.

20. In the case of the defendant, his claim has origin from the letter of allotment made to Thomas Angoi Nyagaka dated 8th July 1985 purportedly issued by the Commissioner of Lands. This letter of allotment is allocating a plot that is not specified, no plan is attached to the letter to identify the location of the plot. The letter of allotment is signed by a person whose name is not given and there is no authority shown to have been given for the allotment. The allotment letter is dated 8th July 1985 and is issuing a plot to take effect in the future for a term of 99 years from 1st July 1992. While it is usual to apportion rent depending on the month from when the annual rent is paid in the year, in the letter of allotment to Thomas Angoi Nyagaka it shows the rent from 1st July 1992 to 31st December 1992 to be the full annual rent of kshs. 680/= while it ought to have been apportioned to kshs. 340/= as the period was only 6 months (½ year).

21. As per the evidence tendered, the plaintiff paid the sums demanded under the letter of allotment of kshs. 3,120/= to the Lands Department on 28th February 1994 vide **Receipt No. 838195** and paid the stand premium of kshs. 3400/= to Kisii Municipal Council vide **Receipt No. 58752** of the same date. The payments were clearly designated as being for **UNS. PLOT A17 Kisii Municipality**. The said Thomas A. Nyagaka is shown to have paid for unspecified UNS. Residential Plot Kisii on unspecified date vide Receipt No. 612408 to the Commissioner of Lands Nairobi.

22. On the evidence tendered relating to the letter of allotment, I am not satisfied there is proof that the plot allocated to one Thomas Angoi Nyagaka, if indeed there was an allocation was **Uns. Plot A17 Kisii Municipality**. Where is the evidence? In my view, for an allotment to

take effect, the same must relate to a specific and an identifiable plot. The allotment to the plaintiff, Pauline Kerubo Orina was specific to **UNS RES. PLOT NO. A17 Kisii Municipality** and there was a sketch plan attached for identification. The terms of the allotment must also be shown to have been met. In the case of the plaintiff, there is evidence as per the payment receipt that she made payment for **Uns. Plot A17** as per her letter of allotment. **Which plot did Thomas Angoi Nyagaka pay for and when?** It is not clear and it cannot be presumed it was **UNS. PLOT NO. 17A KISII MUNICIPALITY**. From the evidence, it is not clear as to when Thomas Angoi was identified with **UNS. RES. Plot No. 17A Kisii Municipality**. What is clear is that it is the plaintiff who was allocated **UNS. PLOT NO. 17A Kisii Municipality**. On the basis of the evidence, I have to make the determination that it was indeed the plaintiff who was allocated the suit property and not Thomas Angoi Nyagaka. There was no proof that Thomas Angoi Nyagaka was allocated any particular plot.

23. Having answered issue number (i) that it was the plaintiff who was allocated the suit property vide the letter of allotment dated 15th July 1993 it follows that I have to find that she eventually had the title to the property processed and issued in her name. There is evidence on record that the plaintiff was eventually issued with a lease to the property which was eventually registered as **Kisii Municipality/Block I/794** on 23rd April 2002. What links the said lease to the plaintiff is that on presentation for registration on 23rd April 2002 under presentation Day Book No. 138/4 of 2002 on the right hand corner the payment receipt noted is **NOC 838195** which was the receipt issued to the plaintiff on 28th February 1994 when she paid the allotment fees in respect of **Uns. Plot A17 Kisii Municipality**. There can therefore be no doubt that the lease issued to the plaintiff was in respect of the plot allocated to her vide the letter dated 15th July 1993. The plaintiff was subsequently issued with a certificate of lease on 3rd June 2002 exhibited as **"DEx.4"**. The Municipal Council of Kisii Valuation Roll (**"DEx.8"**) at serial No. 240 shows Plot No. **794** is registered in the name of Pauline K. Kemunto at the County Government offices. The copy of property rates statement attached as document (II) to the plaintiffs list of documents dated 10th November 2015 shows the plaintiff had been paying rates to Kisii County Government for Plot No. **794** from 2009 to 2015. The copies of official searches dated 7th January 2009, 8th June 2010, 20th April 2015 and 25th November 2015 all affirm that the plaintiff has been the registered owner of the suit property since 23rd April 2002. The official searches dated 20th April 2015 and 25th November 2015 were issued by DW2 who was serving as the land registrar at Kisii Lands Office during that period. The Green Card (abstract of title) for land parcel **Kisii Municipality/Block I/794** produced as **"PEx.7"** shows the plaintiff was registered as owner on 23rd April 2002 and issued with a lease certificate on 3rd June 2002. Although in the defendant's bundle of documents, document No. 6 was said to be a copy of Green Card for parcel **794** no such document was included in the bundle and also document No. 12 said to be a copy of official search on the property was not included in the bundle. Therefore no official abstract of title or official search certificate was produced by the defendant to show that he was registered as the owner of the suit property at any given time. There was no abstract of title produced showing that Mary Kemunto Angoi was ever registered as owner of the property at any time.

24. PW2, Steve Mokaya the serving land registrar at Kisii Lands Office at the time of the hearing testified that there were no records at the lands office showing that the defendant was the registered owner of the suit property but that the records in their custody show that the plaintiff is the registered owner of the suit property. Indeed, even DW2, David Dunya who was the land registrar before PW2 issued the search certificates referred to earlier that indicated the plaintiff was the registered owner of the suit property and further also wrote the letter dated 29th June 2015 confirming the plaintiff to be the rightful proprietor of the suit property. In those circumstances, one is left to wonder how the same DW2 would register a transfer in favour of the defendant unless he was compromised and/or the registration was carried out elsewhere but not at the lands office.

25. Taking the totality of all the evidence, I have no doubt that the plaintiff was duly registered as the proprietor of the suit property. The land registrar affirmed that the plaintiff was the validly registered proprietor of the suit property. Accordingly, under Section 26(1) of the Land Registration Act, 2012 the certificate of lease issued to the plaintiff is absolute and indefeasible unless it is shown the registration was obtained fraudulently or through misrepresentation or that the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme as provided under Section 26(1) (a) and (b) of the Land Registration Act, 2012.

26. Although the defendant alleged that the title issued to the plaintiff was fake and/or was obtained through fraud, he offered no evidence to establish any fraud at all. He did not call the seller, Mary Kemunto Angoi to vindicate the title she allegedly sold to him. Fraud must not only be pleaded but must be proved by evidence. It is not sufficient to merely allege fraud and leave it at that. The evaluation of the documents the defendant relied on to support his claim show the documents cannot have been genuine. The registration of the transfer of lease from Mary Kemunto Angoi to the defendant appears to have been merely desk work an indication that the documents must have been manufactured. That explains why no documents relating to Thomas Angoi Nyagaka and Mary Kemunto Angoi could be found at the lands office. **How did Mary Kemunto Angoi get registered as the owner of the property from Thomas Angoi Nyagaka? Was it through transmission and if so where is the evidence?** If Thomas Angoi Nyagaka was truly registered as owner at any one time records at the lands office ought to have shown the history of the property through the issue of an abstract of title/green card.

27. The defendant may have genuinely been hoodwinked by conmen, and that appears probable, to buy the property but then a seller who did not have any title could not sell what he did not have. That person could not pass any interest in the property where there was the real owner as in the present case. It is regrettable that DW2, the land registrar may have contributed to the defendant being defrauded of his money, as he, (DW2) appears to have acted casually in effecting the registration as he does not appear to have cared to check the records which would have revealed that the plaintiff was the registered owner going by the searches that had been issued earlier in 2009 and 2010 which showed the plaintiff to be the registered owner of the suit property. The registration of the defendant as owner and the issue of title to him on 12th March 2015, was in my view of no effect as it was done against the title of the suit property and PW2, Mr. Steve Mokaya the land registrar, testified that the transaction was not recorded in the records held on the property at the lands office. The defendant was issued with a **"paper title"** that was not backed by any property.

28. In the premises therefore and on the basis of the evidence, it is my finding and holding that the plaintiff is the person lawfully registered as the owner of the suit property and as such owner is entitled to have exclusive possession and use of the property. Consequently, it is my finding that the defendant has trespassed onto the plaintiff's land parcel **Kisii Municipality/Block I/794** and he has no right or justification to do so.

29. What I have discussed hereinabove should be sufficient to dispose of this matter but the defendant in his submissions and the pleadings raised the issue that the plaintiff's suit having been based on the tort of trespass was barred by limitation by reason of Section 4(2) of the

Limitation of Actions Act, Cap 22 Laws of Kenya. I do not think this submission has any merit for the reason that the plaintiff was claiming the property as the owner and the law allows an owner of property upto 12 years under Section 7 of the Limitation of Actions Act to seek the recovery of his land. The plaintiff's action against the defendant was not statute barred.

30. The defendant further raised the issue of the validity of the Power of Attorney donated by the plaintiff to her husband to represent her in these proceedings. The defendant contended the Power of Attorney was granted pursuant to the Registered Land Act, Cap 300 Laws of Kenya which had been repealed and further that the Power of Attorney had not been stamped by the land registrar for it to be used in a court of law. I have perused the Power of Attorney dated 28th April 2015 and note that the same gave powers to Geoffrey Bosire Maronga to act as the Attorney of Pauline Kerubo Orina the plaintiff herein and to act on her behalf in regard to matters relating to her land parcel **Kisii Municipality/Block I/794** registered under the Registered Land Act, Cap 300 Laws of Kenya. Under the duties given to the donee of the Power of Attorney inter alia was **"To receive service of legal process and sue and be sued on behalf and in the name of Pauline Kerubo Orina"**. In my view, the power to prosecute the present suit was envisioned. The reference to Registered Land Act, Cap 300 Laws of Kenya was incidental as the suit property was registered under the provisions of the Statute.

31. As regards the stamping and/or the registration of the Power of Attorney, my view is that the stamping and registration of the same could not invalidate the Power of Attorney. The substance of the Power of Attorney was clear and the same had been duly executed by the donor and attested by the notary public. The defendant did not raise any objection to the donee testifying on the basis that the Power of Attorney had not been stamped and/or registered. The court admitted the Power of Attorney as **"PEX.1"** and the defendant in my view was not prejudiced in any way by the Power of Attorney being admitted. The overriding objective of the court is to administer justice in an expeditious manner and in the instant matter, the non-admission of the Power of Attorney would have resulted in further delay of the suit.

32. In the final result and on evaluation of all the evidence, I am satisfied the plaintiff proved her case on a balance of probabilities and I enter judgment in favour of the plaintiff against the defendant in terms of prayers (a), (b) and (c) of the plaint.

33. I find no merit in the defendant's counter claim and I order the defendant's counterclaim dismissed with costs to the plaintiff.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 12TH DAY of OCTOBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Godia for Mogire for the plaintiff

Mr. Ollando For the defendant

Ruth Court Assistant

J. M. MUTUNGI

JUDGE