



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.108 OF 2012

HEZBON PANDE NYAIDHO.....PLAINTIFF

VERSUS

JOEL OKUDO ONDU.....1ST DEFENDANT

GEORGE AUMA ASOLA.....2ND DEFENDANT

MESHACK OWINO ONDU.....3RD DEFENDANT

MARY ACHIENG.....4TH DEFENDANT

EDWARD KENNETH OLANDO WAMBIA5TH DEFENDANT

JUDGMENT

1. **Hesbon Pande Nyaidho**, the Plaintiff, commenced this suit through the plaint dated 3rd may 2012 against **Joel Okudo Ondu, George Auma Asola, Meshack Owino Ondu, Mary Achieng** and **Edward Kenneth Olando Wambia**, herein after refered to as the 1st to 5th Defendants respectively. The Plaintiff seeks for the following;

- i. Eviction of the Defendants from **Kisumu/Marera/3406**.
- ii. Mesne profits from the date of the judgment conferring ownership of the land to him
- iii. Interests.
- iv. Any other relief.

The Plaintiff avers that the said land was awarded to him by the Court of Appeal on 11th July 2008 in Civil Appeal No.174 of 2003 (Kisumu 28/03). That the land has been registered in his name but the Defendants have refused to give vacant possession and hence this suit.

2. The Plaintiff's suit is opposed by the 1st, 3rd to 5th Defendants through their joint statement of defence dated 2nd July 2012 and filed through M/S S.O. Madialo & Co. Advocates. They aver that they are not on the said land and that the land as described did not exist. They pray that the suit be dismissed with costs.

3. George Auma Asola, the 2nd Defendant ,entered appearance in person through the memorandum dated 12th July 2012. Thereafter vide memorandum of appearance dated 27th July 2012, M/S S. O. Madialo &

Co. advocate entered appearance again for him. Then M/S Amondi & Co. Advocates filed notice of change of advocates on behalf of 2nd to 4th Defendants and subsequently filed the 2nd Defendant statement of defence dated 4th October 2013. The said statement of defence is on all fours a replica of the defence filed earlier for 1st, 3rd to 5th Defendants.

4. The Plaintiff who was in person testified as PW1. He gave the background of his claim from the 1991 High Court case between his father and the Defendants father. He told the court how he lost the case before the High Court and that he filed an appeal in the Court of Appeal, being Civil Appeal No.180 of 1995. That he was successful and the Court of Appeal ordered the case be heard in the High court by another Judge. He produced a copy of the court of Appeal Judgment. The Plaintiff testified that the subsequent judgment of the High Court was not favourable to him and he filed another appeal with the Court of Appeal being Civil Appeal No.174 of 2003 which was ruled in his favour. That before the court of appeal decision was made, the Defendants had him evicted from the suit land. That the court of Appeal directed that the Plaintiff get two hectares from **Kisumu/marera/2469** and authorized the Deputy Registrar to execute the necessary documents to give effect to that order among others. The orders of the court of Appeal were carried out and the two hectares subdivided from the said land and registered as **Kisumu/Marera/3406** in his names. That he filed this suit after the Defendants, who had taken possession of portions of that land, declined to vacate.

5. In his defence, the 1st, 2nd, 3rd, 4th and 5th Defendants testified as Dw1 to DW5 respectively. DW1 defence is that he had not participated in the earlier cases and could not tell which portion of land parcel **Kisumu/Marera/2469** belonged to the Plaintiff. DW2 told the court that though he knew that the court of Appeal had given the Plaintiff two hectares out of **Kisumu/Marera/2469**, the Plaintiff did not reside on that land but on **Kisumu/Marera/1119**. DW3 testified that he was not involved in the case that gave the Plaintiff two hectares from **Kisumu/Marera/2469**. That on 2012, he saw the Plaintiff come with police and surveyors to subdivide the land. That it was later that he learnt the court of Appeal had given the Plaintiff two hectares out **Kisumu/Marera/2469**. DW4 told how the 3rd Defendant sold to her a portion of **Kisumu/Marera/2469** on 13th July 2009. That in 2012 she received an order from the court of Appeal to vacate from the land. DW5 testified that land parcel **Kisumu/Marera/2469**

belonged to his late father, **Robert Ondugo Wambia**, who died in 1986. He informed the court that he was aware of a case between the Plaintiff and his father in the High Court. That his family members were called by the High court after his father died and directed to appoint one of them to proceed with the case. That the family appointed him and he filed a Succession cause and was appointed the administrator of his father's estate. DW5 further testified that he had participated in the two court of Appeal proceedings. That they were heard one 11th June 2008 after which they were told to wait for the court's ruling. That later he learnt the court had given the Plaintiff two hectares. Thereafter the Plaintiff went to the land with police officers and surveyors and subdivided **Kisumu/Marera/2469** into parcels **3405** and **3406**.

6. The 2nd to 4th Defendants called Wellington Wambia Oudu and Joseph Owiti Omoga who testified as DW6 and DW7 respectively.

7. The counsel for Defendants moved the court to visit the suit land at the close of taking of the oral evidence. The court made a visit on the 22nd June 2016 at 3.10 pm. The Plaintiff, 1st to 3rd Defendants pointed out the boundary marks for the parcel registered as **Kisumu/Marera/3406**. On the left side the boundary runs along a public road all the way down to a live fence next to the homestead of 2nd Defendant's father. Then it passes between the houses of the 2nd Defendant and that of his father and continues across a service road to a recently constructed semi-permanent house of one Mika Oduor. The boundary then heads upwards to a few metres from the house of 3rd Defendant. The court noted that within the pointed boundaries of the suit land are the semi- permanent houses of the 1st and 2nd Defendants, a permanent house under construction next to the house of the 2nd Defendant,

a permanent house of the 4th Defendant, maize crops on the largest portion of the cultivated area and uncultivated portion with grass and trees. The court then reminded the parties in the presence of the

Defendants counsel of the content of the Court of Appeal decision in Civil Appeal No.174 of 2003 and implored upon them to explore an out of court settlement as the court has no jurisdiction to change an order of a higher court. That when the matter came up for mention on the 17th October 2016, the parties reported that there had been no settlement. The court then fixed the matter for judgment after informing the parties that they were still at liberty to seek an out of court settlement and inform the court before the delivery of judgment.

8. The following are the issues for determination;

- a) Whether the Plaintiff is the registered proprietor of land parcel Kisumu/ Marera/3406.
- b) Whether the Plaintiff registration with the said land was regularly and procedurally obtained.
- c) Whether the Defendants have any legal right to occupy the said land.
- d) Whether eviction order should issue and against whom.
- e) Whether the Plaintiff is entitled to mesne profits and if so, how much.
- f) Who pays the costs of the suit.

9. The court has carefully considered the pleadings filed, evidence adduced by all parties, submissions filed by counsel for the 1st and 5th Defendants and come to the following conclusions;

- a) That the Court of Appeal in Civil Appeal No.174 of 2003 between the Plaintiff and 5th Defendant, as Appellant and

Respondent respectively entered judgment in favour of the Appellant as follows;

“Accordingly we allow the appeal, set aside the order of dismissal and substitute therefore a decree giving judgment to the appellant against the respondent for a declaration that 2 hectares of the parcel of land known as Kisumu/Marera/2469 is held by the Respondent in trust for the appellant. Consequently, the respondent is ordered to execute relevant documents and to take such steps as are necessary under the law to effect the transfer of the 2 hectares to the appellant. The portion to be transferred should as far as possible be the portion the appellant and his father before him had been occupying. If the respondent fails to

act as aforesaid the Deputy Registrar of the High court at Kisumu is to execute the necessary documents to give effect to the decision of this court.”

- b) The court of appeal order set out in (a) above has not been varied, set aside or successfully appealed against since the judgment of 11th July 2008 and any attempt by the Defendants to wish it away or to treat it casually wouldn't been of any help to any of them.
- c) That pursuant to the said order of the Court of Appeal the Plaintiff caused land parcel **Kisumu/Marera/2469** to be subdivided into parcels **3405 and 3406** and the latter parcel measuring 2 hectares was registered in his name on 4th February 2011 and title deed issued.
- d) That the Plaintiff therefore obtained registration as proprietor of land parcel **Kisumu/Marera/3406** procedurally and regularly and is therefore the absolute proprietor. That the Plaintiff title has not been challenged in any court of law by the Defendants as provided for under **Section 26(1)** of the Land Registration Act No.3 of 2012 and the Plaintiff is therefore entitled to enjoy the rights and privileges of a registered proprietor over that land.

e) That the 5th Defendant has been aware of the Plaintiff's claim over the said land from the time the court of appeal rendered its judgment in his favour. The other Defendants, who may not have known of the case, have also been aware of the Plaintiff's claim over the land in question since the survey exercise or soon thereafter, but took no legal action to challenge the court's decision. That in addition, the 5th Defendant who is the administrator of the estate of the late Robert Ondugo Wambia has done nothing to assist the Plaintiff get possession of the 2 hectares awarded to him by the Court of Appeal.

f) That the plaintiff's interest over the suit land, having emanated from the decision of the Court of Appeal cannot be challenged in any other court except that same court, or Supreme Court. That there is no evidence of any such challenge by the Defendants or any other party.

g) That the proceedings herein are more or less to give effect to the Court of Appeal decision by ensuring that the Plaintiff obtains vacant possession of the two hectares of land awarded him by the Court in C.A NO.124 of 2003. The Plaintiff is entitled to have vacant possession of the suit land. The Plaintiff is also entitled to costs of this suit.

h) That in view of the close family relationship between the Plaintiff and most of the Defendants, the court do not consider the award of mesne profits appropriate as the Defendants will have to shoulder some expenses in moving from the suit land.

i) That the court consider a period of ninety (90) days to be sufficient to enable the Defendants give vacant possession of the portions of the suit land in their possession to the Plaintiff.

10. That flowing from the foregoing, the court finds that the Plaintiff has proved his case against the Defendants on a balance of probabilities and judgment is entered in his favour as follows;

a) That the 1st to 4th Defendants are hereby ordered to vacate from the portions of land parcel **Kisumu/Marera/3406** in their possession within ninety (90) days from today and in default eviction orders to issue.

b) The Defendants do pay the Plaintiff costs of this suit. The costs to be paid through the court to ensure the applicable court fees, to be ascertained by the Deputy Registrar, which should have been paid by the Plaintiff, is deducted from such costs and receipt issued. The balance thereof, if any, be released to the Plaintiff.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 24TH DAY OF JANUARY 2017

In presence of;

Plaintiff Present

Defendants Present

Counsel Mr Amondi for 2nd to 4th Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/1/2017

24/1/2017

S.M. Kibunja judge

Oyugi court assistant

Parties present

Mr. Amondi for 2nd to 4th Defendants

M/S Kyamazma for 1st to 5th Defendants absent the plaintiff present in person.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/1/2017

Court: The judgment dated and delivered in open court in presence of all the parties and Mr. Amondi for 2nd to 4th Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/1/2017