



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

PETITION CASE NO.19 OF 2017

{Formerly H.C. Petition Case No.33 of 2014}

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

AND

IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 19,20,21,22,23, 27,31,40,47,43,50,157(A)

AND 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

BETWEEN

JAMES ALOYO ABOKA.....1ST PETITIONER

LUCAS ANDERA.....2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF KISUMU.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

THE DISTRICT CRIMINAL INVESTIGATION OFFICER, KISUMU....3RD RESPONDENT

THE DISTRICT LAND REGISTRAR KISUMU.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

HERINE JUMA AGOLA.....6TH RESPONDENT

NELSON OTIENO OCHIENG.....7TH RESPONDENT

MARGARET OWITI ABOR.....8TH RESPONDENT

SUSAN ACHIENG ODHIAMBO.....9TH .RESPONDENT

EMANUEL AGAWO OJAL.....10TH RESPONDENT

WILLIAM ODHIAMBO OWITI.....11TH RESPONDENT

THE NATIONAL LAND COMMISSION.....12TH RESPONDENT

JUDGMENT

1. James Aloyo Aboka and Lucas Andera, the 1st and 2nd Petitioner respectively, vide their petition dated 8th December 2014 prays for the following;

“A. A declaration that the 1st Petitioner is the rightful allottee of the entire **plots 15, 17, 35 and 36 Nyalenda** Estate of Kisumu County.

B. A declaration that the repossession of plots **15, 17 35 and 36** by the defunct Municipal Council of Kisumu was unlawful, discriminatory, null and out rightly unconstitutional.

C. A declaration that the registration and issuance of the title deeds for **Kisumu/Nyalenda “B”/2548** and **Kisumu/Nyalenda “B”/2551** are illegal and null and an order cancelling their registration.

D. A declaration that the Petitioner’s fundamental right to life, human dignity economic and social development as protected and envisaged by **Article 26, 28 and 43** of the Constitution of Kenya 2010, consists, comprises and translated to the right and entitlement to means of livelihood and social economic wellbeing and ultimate human life.

E. A restraining order do issue directed at the 6th and 7th Respondents, their employees, workers, agents and/or whomsoever jointly and severally restraining them from repossessing, allocating to whomsoever, trespassing, encroaching, forceful entry, fencing, selling, disposing, transferring, alienating, charging, stepping on, advertising, dealing and/or interfering whatever with the 1st Petitioner’s land being plot number **15, 17, 35 and 36** situate at Nyalenda within Kisumu County.

F. An order compelling the 1st and 4th and 12th Respondents to rectify their records by including the name of 1st Respondent as the bonafide allottees to plot number **15, 17, 35 and 36** situate at Nyalenda within Kisumu County.

G. In the alternative to “D” above an order compelling the 1st Respondent to compensate the 1st Petitioner at current market rate with loss of plot numbers **15, 17, 35 and 36** situate at Nyalenda within Kisumu County.

H. A prohibitory order do issue directed at the 2nd and 3rd Respondent prohibiting them from preferring any criminal charges against the Petitioners herein in violation of the 2nd and 3rd Respondents mandate and obligations under the law and the constitution.

I. A mandatory injunction do issue directing the 2nd and 3rd Respondents not to prefer any criminal charges against the petitioners herein in violation of the 2nd and 3rd Respondents mandate and obligations under the law and constitution.

J. An order of certiorari do issue quashing Kisumu CM CR. No.530 of 2014 Republic -Vs.- Lucas Ojin Andera.

K. The Petitioners be awarded general and exemplary damages for violation of the fundamental rights.

L. Any other relief do issue to protect the Petitioners constitutional rights.

M. The costs of this petition be paid to the Petitioners.”

2. The petition names **The County Government of Kisumu, Director Public Prosecution, District Criminal Investigation Officer Kisumu, District Land Registrar Kisumu, The Attorney General, Hernie Juma Agola, Nelson Otieno Ochieng, Margaret Owiti Abor, Susan Achieng Odhiambo, Emanuel Agawo Ojal, William Odhiambo Owiti, The National Land Commission** as the 1st to 12th Respondents respectively. The Petitioners then filed the notice of motion dated 5th December 2015 to substitute the names of 10th and 11th Respondents who had passed on with that of Edwina Akinyi Ayiera and Susan Akinyi Owiti. The application was granted on 9th February 2016. The counsel for the Petitioners then withdrew the Petitioners notice of motion dated 8th December 2014 to pave way for the hearing of the petition which was fixed for hearing on the 7th March 2016.

3. The 1st Respondent, through M/S Rodi Orege & Co. Advocates filed a replying affidavit sworn by Solomon Mwongo, the City Planner, on 9th February 2016 in opposition to the petition. The 6th Respondent also filed her replying affidavit sworn on 26th September 2016 through M/S Otieno Yogo and Ojuro advocates. The 9th Respondent, on behalf of 8th, 10th Respondents and herself filed an affidavit in reply, sworn on 2nd March 2016 through M/S Lore & Co. Associates.

4. Directions on filing of written submissions were given on the 7th March 2016. The counsel for the Petitioners filed their written submissions dated 12th April 2016 while counsel for the 1st Respondent filed theirs dated 15th April 2016. The counsel for 8th to 11th Respondents M/S Lore & Co. Associates filed their submissions dated 26th September 2016.

5. The following is a summary of the petitioners claim.

a) That the 1st Petitioner bought plot numbers **15, 17, 35 and 36 Nyalenda Estate, Kisumu** from the 8th to 11th Respondents in November 2008. That the plots allotment was traced to the defunct County Council of Kisumu whose functions were taken over by the 1st Respondent after the 2010 constitution and National elections of 4th March 2013.

b) That the 1st Petitioner made the necessary payments and took possession of the said plots and developed residential houses on them.

c) That on or about 16th September 2014, the 2nd Petitioner who was employed by the 1st Petitioner as a caretaker in his Kisumu and Siaya properties, was summoned by the 3rd Respondent, who had received complaints from the 6th and 7th Respondents over the suit properties which had by then been registered in their favour by 4th Respondent as **Kisumu Nyalenda B/2548 and 2551**.

d) That despite the protest of the 2nd Petitioner, the 3rd Respondent charged him in Kisumu Criminal case No.530 of 2014 on the 29th September 2014 with the charge of forcible detainer of the suit properties.

e) That the Criminal charge against the 2nd Petitioner and the intended arrest and prosecution of the 1st Petitioner by the 4th Respondent is unconstitutional and against the rules of natural justices.

6. The 8th to 10th Respondents' replying affidavits more or less support the 1st Petitioner's claim to the

suit properties. They confirm the properties had been allocated to their husbands, who have since passed on. That with the approval of the 1st Respondent, the original allottees had sold their interests over the plots to the 1st Petitioner who had taken possession.

7. The 1st Respondent's case is as follows:

- a) That the suit properties were under the jurisdiction of the Municipal Council of Kisumu and the transfer in favour of the 1st Petitioner by the County Council of Kisumu was therefore invalid.
- b) That the 1st Petitioner made erroneous payments to the then County Council of Kisumu instead of making the payment to Municipal Council of Kisumu Plot Revenue Account.
- c) That the 1st Petitioner could not confer the property to himself through wrong administrative processes and the Criminal element of the matter should be left to the Director of Public Prosecution.
- d) That the possession of the plots by the Petitioners amounted to trespass as it had not been legally allocated to them.
- e) That only plot allocations by the Municipal Council of Kisumu were valid and if its allocation had been nullified by the Commissioner for Land, then the Petitioners allocation stood nullified as well.
- f) That the Petitioners claim lies against those who fraudulently sold the plots to him.

8. The 6th Respondents response is summarized as follows:

- a) That she was allotted parcel **Kisumu/Nyalenda 'B'/2551** which was a subdivision of parcel **551**, which had come from parcel **3762**, which itself had come from parcel **357**, owned by the County Council of Kisumu.
- b) That she obtained title to her plot regularly and lawfully.
- c) That the allocation of the plots to the 1st Petitioner had been extinguished and that the County Council of Kisumu had the right to allocate it.
- d) That she had sued the 1st Petitioner in Kisumu **ELC No.286 of 2014** and obtained an order restraining the Petitioner from **Kisumu/Nyalenda B/2551** and that the suit is still pending.

9. The litigation counsel for the 2nd to 5th Respondents did not file any reply to the Petition. They also did not file any submissions. The counsel for the Petitioners filed written submissions dated 12th April 2016 while counsel for the 1st Respondent filed theirs dated 15th April 2016. The counsel for the 8th to 11th Respondents filed written submissions dated 26th September 2016. There were no submissions filed by counsel for 6th Respondent. The 7th and 12th Respondents did not participate in the proceedings. The submissions filed are as summarized herein below;

a) **PETITIONERS SUBMISSIONS**

- i) That the County Council of Kisumu became the owner of the land from which parcels 15, 17, 35 and 36 were later subdivided through gazette notice No.3400 of 10th November 1976 through the Central Government.
- ii) That the County Council of Kisumu allotted plot numbers 15, 17, 35 and 36 to the 8th to 11th

Respondents who subsequently sold them to the 1st Petitioner and transfers effected with the County Council's approval.

iii) That the 1st Petitioner took possession of the plots and placed the 2nd Petitioner on the plots as his caretaker and further continued paying the rates and rents.

iv) That in 2014, the Petitioners learnt that the 6th and 7th Respondents were laying claims on the plots having acquired them from the Municipal Council of Kisumu after the 2010 advertisement calling for applications. They also learnt that the plots had been registered with new numbers being **Kisumu/Nyalenda B/2551 and 2548**.

v) That the purported allotment by the Municipal Council of Kisumu in 2010 was nullified through the Commissioner of Lands letter dated 22nd November 2010 due to the unlawful repossession.

vi) That the registration of the plots with 6th and 7th Respondents did not follow due process as the Municipal Council of Kisumu were not the owners of the land that had been set apart for its expansion.

vii) That the repossession of plots and allocation thereof by the Municipal Council having been invalidated by the Commissioner of Lands, the registration of the plots with 6th and 7th Respondents as absolute owners was null and void.

b) **1ST RESPONDENTS' SUBMISSIONS**

i) The purported allotment made by the Municipal Council of Kisumu in 2010 was nullified by the Commissioner of Lands vide the letter dated 22nd November 2010 to the clerk of the Municipal Council. That in addition the Permanent Secretary Ministry of Lands had warned the public not to participate in the unlawful repossession that had been advertised by the Municipal Council of Kisumu.

ii) That the 1st Respondent is wrongly enjoined in the proceedings as in **Section 7(2)** of the Transition to Devolved Government Act 2012, the Transition authority was the right body to be enjoined.

c) **8TH TO 11TH RESPONDENTS SUBMISSIONS**

i) That the 8th to 11th Respondents had no proprietary interests over the suit lands by the time the petition was filed as their deceased husband's had by then sold and transferred their interests, with 1st Respondent's approval, to the Petitioners.

ii) That the Petitioners have been in occupation of the plots.

10. The following are the issues for determinations;

a) Whether the 1st Petitioner was a bona fide purchaser of the four plots numbers **15, 17, 35 and 36 Nyalenda Estate**.

b) Whether the allotment of the said plots has been lawfully and procedurally repossessed, and if so, to whom their title reverted.

c) Whether the registration of **Kisumu/Nyalenda B/2551 and 2548** with the 6th and 7th Respondents was pursuant to a lawful and procedural process, and if so, by what office.

d) What orders to issue.

11. The court has carefully considered the grounds on the petition, the affidavit evidence, the filed written submissions and come to the following determinations;

a) That though the 1st Petitioner alleges to have bought plot numbers 15, 17, 35 and 36 from the 8th and 11th Respondents, only one Land sale agreement concerning plot number **36 Nyalenda B** has been availed to the court. The other documents attached are applications for transfer of ownership in respect of plots 15, 17, 35 and 36. There is also annexed two copies of allotment for plots numbers 17 and 35 in favour of Susan Achieng Odhiambo and Emmanuel Agawo Ojal respectively dated 24th January 2000. That there is no allotment letter availed in respect of plot No.36 Nyalenda and there is no way the court could confirm that the one who had signed the sale agreement as the vendor had capacity to sell and title to pass to the 1st Petitioner.

b) That the said four plots are alleged to have been allotted by the defunct County Council of Kisumu and the applications for their transfer were processed through its Works and Town Planning Committee meeting held on the 18th December 2008 and adopted by the Full Council meeting of 22nd December 2008. The minutes of the said Committee and Full Council meetings are attached to the petition but there are no documentary evidence to confirm that the transfers in favour of the 1st Petitioner were effected.

c) That the attempt of the Municipal Council of Kisumu to repossess the plots subject matter of this petition among others, and the subsequent allotment thereof, was nullified and invalidated by the Commissioner of Lands and appropriate written communication to the Clerk and the Public done. The court notes that the counsel for the 1st Respondent has in his submissions concurred that the Municipal Council of Kisumu act of repossessing the plots in 2010 was nullified by the Central Government through the Commissioner for Lands and Permanent secretary Ministry of Lands. That it follows that any allocation by the Kisumu Municipal Council of the plots allegedly repossessed in 2010 was therefore null and void.

d) That the letter dated 22nd November 2010 from the Commissioner of Lands addressed to the Town Clerk, Municipal Council of Kisumu termed the advertisements of 18th October 2010 and 12th November 2010 offering the plots to the public as untenable for reasons that;

- Land in Kisumu Municipality is vested to the Government of Kenya and any nullifications or alienation of land must be undertaken strictly as stipulated under the provisions of Government Land Act Cap 280.
- Your office has nullified, repossessed, advertised and reallocated plots within the aforementioned areas of Kisumu Municipality which is contrary to the provision of the said Act. The special conditions appended to the documents of lease clearly empowers the Government through this office in collaboration with the stakeholders to enforce development conditions.
- It was imperative that you consult this office on the modalities related to such issues as nullification and reallocation of land not only to avoid litigations but also to ensure that the right procedure is followed.
- In view of the above, please take note that the repossession and reallocation you have done are illegal and therefore invalid.”

e) That in view of (d) above the purported repossession of the plots by the Municipal Council of Kisumu of 2010 was not recognized by the Commissioner of Lands for failure to follow the due process. That it therefore follows that the Municipal Council of Kisumu did not have or acquire any good title over the plots it had purported to repossess and therefore had no title to pass to any allottee including the 6th and 7th Respondents.

f) That following the 2013 National General Elections that ushered in the devolved Governments in

accordance with the Constitution 2010, the County Government of Kisumu (1st Respondent) took over both the duties and responsibilities of the Municipal and County Council of Kisumu. The 1st Respondent cannot now run away from the responsibilities inherited from both institutions. That it is therefore upon the 1st Respondent and other constitutional and Public bodies, including the National Land Commission (12th Respondent), to verify and audit the allocations of the Public plots done by the Municipal and County Council of Kisumu and take appropriate action in accordance with the law.

g) That further to the findings in (a) and (b) above, the Petitioners have not availed the original allotment letters in respect to Plot numbers 15 and 36. They have also not availed any written sale agreement over plot numbers 15, 17 and 35. That though the court has taken note of the minutes of the Works and Town Planning Committee of 18th December 2008 and Full Council meetings of 22nd December 2008, there is insufficient evidence to enable the court determine whether the said plots had been procedurally and lawfully allotted as alleged to the 8th to 11th Respondents. That the court cannot therefore declare the 1st Petitioner the rightful allottee of the said plots in absence of allotment letters issued by the Commissioner for Lands in favour of those the Petitioner alleges he bought them from. That the court cannot also for the same reason order that the 1st Petitioner be registered as proprietor of the said plots.

h) That at best, the allotment the County Council of Kisumu could have issued was but a temporary licence to occupy and not a leasehold for 99 years as the Petitioners seems to believe. This position is based on the paragraph in the two Allotment letters annexed that read;

” This allocation operates in law as a license of occupation, but both the Minister for Local government, and the Commissioner of Lands have been approached to convert the license into the leasehold title, whereupon you will be issued with a 99 year lease.”

That it is noteworthy that no evidence of a 99 year leasehold allotment or certificate has been reported to have been issued to the initial allottees or to the 1st Petitioner in respect of the four plots.

i) That the decision by the Counsel for 4th and 5th Respondents not to file replies to the petition and submissions thereof and the absence of the 12th Respondent in the proceedings denied the court the benefit of their official position in this tussle. The court has noted that the Litigation Counsel will in matters of this nature take an inactive position waiting for the other parties to argue their cases. That the court is of the view that in cases of this nature, where different persons have various title documents issued at different times by the same or different public offices over the same parcel of land, the Litigation counsel and the National Land Commission should be actively participating in the pleadings and hearing thereof with a view of assisting the court to determine the documents that are regularly, procedurally and lawfully issued.

j) That the existence of disputes relating to the ownership of the plots subject matter in this case do not mean the Director of Public Prosecution and or the District Criminal Investigations officer Kisumu should be stopped from carrying out their constitutional and statutory duties of investigations and prosecuting Criminal cases that are pursued in accordance of the law. That in any case, should the Petitioners be facing criminal charges or have criminal charges preferred against them at any time, there are legal provisions to be followed in the trial or appellate courts to protect their interests. The Petitioners have not laid the basis of injuncting the Director Public Prosecution and the District Council Investigation officer Kisumu from performing their duties or why the Criminal Proceedings against the 2nd Petitioner should be quashed.

k. That the Petitioners have not demonstrated how their fundamental rights to life, human dignity, economic and social development have been infringed in view of the finding above that they have not been registered with any of the said plots or established existence of registrable proprietary

interests over the same.

l) That the 1st Petitioner and 8th to 11th Respondents should engage the 1st and 12 Respondents to sort out the status of the license to Occupy the plots alleged to have been allotted to them or their deceased's spouses and which are alleged to have been sold to the 1st Petitioner, and come up with a way forward.

12. That flowing from the foregoing, the Petitioners have not succeeded in their petition and the following orders are hereby issued;

a) That the petition is hereby dismissed.

b) That due to the nature of the claim, each of the parties do bear their own costs.

c) That the order of stay of proceedings in Kisumu C.M. CR. C No.530 of 2014, Republic –V- Lucas Adera, issued on 20th January 2015 is hereby vacated. The said Lucas Adera (2nd Petitioner) should present himself to the trial court within the next 30 days for further directions.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

Dated and delivered this 8th day of February 2017

In presence of

Petitioners Absent

Respondents Absent

Counsels Mr. Odeny for Petitioner

Mr Rodi for 1st & 2nd Respondent, Mr Nyanga for Ojuro for 6th Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/2/2017

8/2/2017

S.M. Kibunja Judge

Oyugi court assistant

2nd Petitioner present

Mr Nyanga for Ojuro for 6th Respondent

Mr Odeny for the Petitioners

Mr Rodi for 1st & 2nd Respondents.

Court: Judgment dated and delivered in open court in presence of

Mr. Odeny for the 1st and 2nd Petitioner, Mr. Rodi for 1st and 2nd Respondent, Mr. Nyanga for Ojuro for 6th Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/2/2017