



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.780 OF 2015

BLASTO OLEWE ONDIEK.....PLAINTIFF

VERSUS

CALEB RABILO.....1ST DEFENDANT

BENJAMIN MICHURA.....2ND DEFENDANT

SERFINA OSIEKO.....3RD DEFENDANT

JUDGMENT

1. **Blasto Olewe Ondiek**, the Plaintiff, commenced this suit against Caleb Rabilo, Benjamin Michura and Serfina Osieko, the 1st to 3rd Defendants respectively, through the plaint dated 25th January 2006 seeking for permanent injunction in respect of land **parcel Kisumu/Tamu/813**, general and special damages plus costs.
2. Through the statement of defence filed through counsel dated 10th February 2012, the Defendants denied the Plaintiff's claim and prayed for the suit to be dismissed with costs.
3. The Plaintiff filed a reply to the defence through counsel dated 18th February 2012. He also filed an amended plaint dated 6th October 2015 specifying the special damages, as Kshs.500,000/- to Ksh.6,000/= for every 1 ½ years. He also filed a further amended plaint dated 4th June 2016 adding a prayer for a declaration that **Kisumu/Tamu/813** belongs to and vests unto the Plaintiff.
4. The Plaintiff avers that he is the registered proprietor of land parcel **Kisumu/Tamu/813** on which he cultivates sugarcane earning between Ksh.500,000/= to 600,000/= every 1 ½ years. That on the 22nd December 2005, the Plaintiff hired a tractor to plough the said land with a view to plant sugarcane but the Defendants chased away the worker and trespassed onto the land. That the Defendants have denied the Plaintiff the use of the land and they intend to put up structures thereon.
5. The Defendants through their filed defence denied trespassing onto the said land and chasing away the Plaintiff's worker. They aver that the land was allocated to Osengeti Nursery and Primary School and the transfer to the Plaintiff was irregular and unlawful.
6. The hearing commenced on the 13th April 2016 with the Plaintiff testifying as PW1. The Plaintiff called Kennedy Ouma Ngeso who testified as PW2 before closing his case. The 3rd and 1st Defendants

testified as DW1 and DW2 respectively before closing their case. The case against the 2nd Defendant had been withdrawn on 14th May 2015 even though his name was retained in the documents and pleadings filed thereafter.

7. That during the hearing M/S Asunah and Mr. Kowinoh advocates appeared for the Plaintiff and Defendants respectively. The counsel were granted timelines on 20th June 2016 within which to file and exchange written submissions but by 25th October 2016, only counsel for the Plaintiff had filed theirs dated 16th July 2016.

8. The following are the issues for the court's determination;

- a. Whether the Plaintiff is the registered proprietor of land parcel **Kisumu/Tamu/813**.
- b. Whether the Defendants have trespassed onto the said land and obstructed the Plaintiff from using it.
- c. Whether the Plaintiff has established the special damages, and if so how much.
- d. Whether any of the prayers sort should be issued.
- e. Who pays the costs.

9. The court has carefully considered the averments in the pleadings, the documentary and oral evidences by both sides, the written submissions by counsel for the Plaintiff and concluded as follows;

- a. That the plaintiff became the registered proprietor of land parcel **Kisumu/Tamu/813** on 24th November 1986 and his title to the said land has not been successfully challenged in accordance with the law. That this court is obligated under **Section 26** of Land Registration Act No.3 of 2012 to take the Plaintiff as the absolute and indefeasible owner of the said land as he has availed a copy of the title deed issued in his names by the land Registrar.
- b. That the said land had been earmarked in 1967 be a special purposes plot. The Plaintiff agreed when he testified that the plot was still marked in the official map as special purposes plot despite having been transferred to his name in 1986.
- c. That it is apparent that the Plaintiff's attempt to plough the land on 22nd December 2005 was stopped by a rowdy group of The residents of the area the land is situated. That though the Defendants have given evidence denying that they specifically stopped the Plaintiff from ploughing the land, their evidence clearly show that they do not recognize the Plaintiff's proprietorship of the land.
- d. That the Plaintiff has not adduced any evidence that the Defendants have physically occupied the land. There is no evidence of the Plaintiff being stopped from going to the land by the Defendants on any other date after the incident of 22nd December 2005.
- e. The Plaintiff has not availed any documentary evidence to show that he had ever planted sugarcane on the said land and that he had earned between Ksh.500,000/= to 600,000/= or any other amount per every 1 ½ years. The court therefore finds that the special damages claim has not been established by the Plaintiff.
- f. That the Land Registrar has not been made a party in this suit and there is no evidence adduced to suggest that the office was disputing the Plaintiff's proprietorship of the land. That in view of the finding in (a) above, granting of the prayer for a declaration would be of no effect. The Plaintiff should instead engage the public officers concerned to clarify to the residents the impact of his registration as proprietor of the land that was earmarked for special purposes and the way forward.

g. That the Defendants, and those others doubting the legality of the Plaintiff's title to the suit land, should seek legal advice on how to challenge the same in accordance with the law, including enlisting the intervention of the National Land Commission.

h. That the Plaintiff has shown that he is entitled to permanent injunction order against the Defendants to stop them from a repeat of the incident of the 22nd December 2005.

i. That in view of the finding in (b) above, the Defendants may have believed that the land was still a special purpose plot and their action to stop the Plaintiff from ploughing it may have been excusable. That had the relevant government departments to whom both the Plaintiff and Defendants lodged the complaints to acted professionally on the matter, they could have brought both sides together and on verifying the Plaintiff's ownership documents, advised the Defendants and other residents accordingly. That due to the foregoing the court finds that this is an appropriate case for each party to bear their own costs.

10. That flowing from the foregoing the court finds that the Plaintiff has partially proved his case on a balance of probabilities and enters judgment for him as follows:

a. That an order of permanent injunction is hereby issued against the 1st and 3rd Defendants, their agents or servants, restraining them from trespassing on or interfering with the plaintiff's use and occupation of land parcel **Kisumu/Tamu/813**.

b. That each party bear their own costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 1ST DAY OF FEBRUARY 2017

In presence of;

Plaintiff Absent

Defendants Absent

Counsel M/S Kagoya for Asuma for Plaintiff

Mr. Baganda for Kowinoh for Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

1/2/2017

1/2/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Baganda for Kowinoh for Defendants

M/S Kagoya for Asuma for the Plaintiff

Court: Judgment dated and delivered in open court in presence of m/s Kagoya for Asuma for Plaintiff and Mr. Baganda for Kowinoh for Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

1/2/2017