



**REPUBLIC OF KENYA**

**IN THE Environment And Land Court At Kisumu**

**ELC CASE NO.42 OF 2017**

**EMERECIANA AUMA OMONDI .....PLAINITFF**

**(SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF( AGGREY NASHON OMONDI)**

**VERSUS**

**COSMAS ODODA OTIANG..... DEFENDANT**

**JUDGMENT**

**1. Emereciana Auma Omondi**, the Plaintiff, suing as the personal representative of the estate of **Aggrey Nashon Omondi** (deceased), sued **Cosmas Ododa Otiang**, the Defendant, through the plaint dated 2<sup>nd</sup> July 2012 seeking for the following prayers;

- a. Permanent injunction from the suit land.
- b. Vacant possession and demolition of the structures on the suit land.
- c. General damages.
- d. Costs of the suit.
- e. Interest on (c) above at court rates.

The Plaintiff avers that in the year 2011, she realized that the Defendant had trespassed upon land parcel **Siaya/Karapul Ramba/2182**, which is part of the estate of the late Aggrey Nashon Omondi, and constructed a three bedroomed house and a shop comprising of eleven rooms. That the Plaintiff offered to sell the said land to the Defendant at the market rate but the Defendant appears averse to the offer. That the estate has suffered immense losses, loss of user and damage due to the Defendant's act of continuing trespass.

2. The Defendant denied the Plaintiff's claim through his statement of defence and counterclaim dated 21<sup>st</sup> December 2012. He averred that he bought the suit land from the original owner, **John Mangira Munyore**, in 1989 and was allowed to take possession and develop a home in the year 1990. That he has been in occupation of the land for over 20 years. That if the Plaintiff had brought the land, his title has been extinguished by operations of the law and the suit is therefore statute barred. That alternatively, the sale transaction under which the Plaintiff claim the suit land was null and void as no land control board consent was applied for or granted. That further, the transfer of the land to the Plaintiff in 2010 was through fraud and hence illegal as the vendor had died in 1990. The Defendant prays for the following

prayers against the Plaintiff;

- a. The Plaintiff's suit be dismissed with costs.
- b. A declaration that the Plaintiff's title to the suit land is extinguished by operations of the law.
- c. A declaration that the Defendant has acquired title over the suit land by adverse possession.
- d. General and aggravated damages for deceit towards deprivation of property.
- e. Costs of the counter claim.

3. The Plaintiff disputed the Defendant's counterclaim through her "reply to defence and counterclaim" dated 29<sup>th</sup> January 2013. The Plaintiff averred that if the Defendant had bought land from **John Mangira Munyore**, then it was not the suit land. She also averred that the Plaintiff got the suit land transferred to him lawfully and that the suit is not time barred. She further denied that the Defendant had acquired title to the suit land by adverse possession and avers that the Defendant had offered to buy the land from her.

4. The Plaintiff testified as PW1 while the Defendant testified as DW1. The Defendant called **Joseph Owino Mangira** as a witness and he testified as DW2. The counsel from the Plaintiff filed their written submissions dated 14<sup>th</sup> April 2016 on the 19<sup>th</sup> April 2016 while the counsel for the Defendant filed their's dated 30<sup>th</sup> March 2017 on 31<sup>st</sup> March 2017.

5. The following are the issues for the court's determinations;

- a. Whether the registration of the late **Aggrey Nashon Omondi** as proprietor of land parcel **Siaya/Karapul/Ramba/2182** was lawful, regular and procedural.
- b. Whether the registered proprietor of the said land in 1989 was John Mangira Munyore.
- c. Whether the Defendant acquired legal rights over the said land following the land sale transaction with John Mangira Munyore.
- d. Whether the Defendant occupation and possession of the said land from 1989 was adverse to the title of the registered proprietor.
- e. Whether the Plaintiff's suit is statute time barred.

6. The court has carefully considered the pleadings by both parties, oral and documentary evidence by PW1, DW1 and DW2, submissions by counsel and come to the following conclusions;

- a. That from the oral evidence of both the Plaintiff and the Defendant, land parcel **Siaya/Karapul Ramba/2182**, which is the suit land herein, came from parcel **236** which belonged to **John Mangira Munyore**, now deceased.
- b. That while both the Plaintiff and the Defendant claim to have bought the suit land from the late **John Mangira Munyore**, only the Plaintiff got registered as proprietor of the said land on the 14<sup>th</sup> May 1987. The Plaintiff produced a copy of the certificate of official search for land parcel **Siaya/Karapul Ramba/2182** dated 28<sup>th</sup> December 2010 that confirms **that Aggrey Nashon Omondi** was the first registered proprietor having been so registered on 14<sup>th</sup> May 1987 and that a title deed was issued thereof on the 20<sup>th</sup> September 2010. The Plaintiff also produced a copy of the title deed issued on 20<sup>th</sup> September 2010 as exhibit.
- c. That the copy of the land objection proceedings for **No.138 of 1978 - 79** in relation to land parcel

236 availed by the Plaintiff indicates that on 25<sup>th</sup> July 1979 **John Mangira Munyore** confirmed to having sold the said land to **Aggrey Nashon Omondi** and others and a decision was made to give them the land numbers **2432, 2182 and 2183**. The Plaintiff has availed certificate for parcels **Siaya/Karapul Ramba/2432 and 2183** showing they were registered on 14<sup>th</sup> May 1987 and 20<sup>th</sup> December 1990 in the names of Ephraim Derlicks Oduor and Peter Ombul Okode Kopyio respectively.

d. That the finding in (b) and (c) above leads the court to conclude that the registration of land parcel **Siaya/Karapul – Ramba/2182** in the name of **Aggrey Nashon Omondi** on the 14<sup>th</sup> May 1987, having been a first registration following the decision of the objection proceedings **No.138 of 1978 – 79**, was lawful, regular and procedural as the late **John Mangira Munyore** and his family never lodged any appeal with the Minister in accordance with **Section 29 of the Land Adjudication Act Chapter 284 of the Laws of Kenya**. That further, the said John Mangira Munyore had not challenged the registration of the land in the names of **Aggrey Nashon Omondi** by the time he died on the 23<sup>rd</sup> February 1990. [date of death as per the certificate of death No.225866 issued on 28<sup>th</sup> March 1991 and produced as exhibit by the Defendant].

e. That further to the finding in (d) above, it is obvious that as of 1989 when the Defendant claimed to have bought the suit land from **John Mangira Munyore**, the said Vendor had no legal or beneficial interest over the said land and could not have passed any good title to the Defendant. That the foregoing notwithstanding, the evidence adduced by the Defendant shows clearly that he took possession of the suit land on the basis of a purchaser and could not have been an adverse possessor over the land that he believed was rightfully his. That the Defendant believed the land belonged to John Mangira Munyore who gave him permission to take possession and do his development thereon. That the time for adverse possession in favour of the Defendant could not have started to run until the year 2011 when the Plaintiff lodged her claim over the land on discovering that the Defendant had trespassed onto it and done some constructions. That as this suit to recover the land was filed in 2012, the period of 12 (twelve) years had not lapsed from the date the Defendant discovered that the land he had always believed he had bought from **John Mangira Munyore** belonged to the late **Aggrey Nashon Omondi** and therefore a defence and claim based on adverse possession is not available to the him.

f. That the pleadings and evidence by the Plaintiff confirms that she got to know the Defendant had trespassed onto the suit land and constructed some houses there in 2011. That she had earlier in 2010 obtained the title deed for the suit land in the names of her late husband. That as the Plaintiff and her late husband had not consented to the transactions through which the Defendant took possession of the suit land, and there is no evidence to confirm that they knew of the transaction before 2011, the time for purposes of the **Limitation of Actions Act Chapter 22 of the Laws of Kenya** did not start to run against them until the year 2011 as provided for under **Section 26** of the said Act. That this suit having been filed only a year later, in 2012, is therefore not statute time barred.

g. That had the Defendant done due diligence to confirm whether the late **John Mangira Munyore** had any legal rights over the suit land in 1989, he would have found out that the land was not registered in his names. That it appears that the Defendant blindly believed that the land belonged to the said **John Mangira Munyore**. That even DW2, who is a son to the said **John Mangira Munyore**, believed that the land belonged to his late father and that he had lawfully sold it to the Defendant. That what the Defendant, and those supporting him, believed about the ownership of the suit land cannot be a substitute of who the law says is the owner of the suit land.

h. That it is obvious that before the filing of this suit the parties had engaged through some negotiations on an out of court settlement. That the Plaintiff had accepted to sell the suit land to the Defendant at Kshs.2 million which the latter had offered in writing. That the Plaintiff had communicated to the Defendant her preferred payment schedules but it appears the Defendant did not pursue the matter any further. That the Defendant however continued to occupy the suit land

receiving rent of Ksh.58,000/= per month. That as stated by the Plaintiff, the Defendant could not have offered to purchase the land from her if he really believed that the land was legally his.

i. That in view of the findings above, it is obvious that the Defendant has continued to benefit from the suit land while the Plaintiff has continued to suffer loss and damages, especially since 2011 when she demanded her land back. The Plaintiff is therefore entitled to damages for loss of user of the land. That the counsel for the Plaintiff asked the court to use the monthly rent that the Defendant admitted to receiving in determining the damages payable.

7. That flowing from the foregoing the court finds that the Plaintiff has proved her case against the Defendant on a balance of probabilities and judgment is entered in her favour. The court also finds that the Defendant has failed to prove his counterclaim against the Plaintiff to the level of proof required by the law and the counterclaim fails. The court issues the following orders:

a. That the Defendant's counterclaim is dismissed with costs to the Plaintiff.

b. That the Defendant do give the Plaintiff vacant possession of land parcel **Siaya/Karapul – Ramba /2182** in ninety (90) days and in default eviction and demolition orders to issue.

c. That upon being evicted the Defendant by himself, servants and agents be restrained permanently from entering encroaching, trespassing upon or interfering with the Plaintiff's use and occupation of the suit property.

d. That the Defendant do pay the plaintiff Kshs.10,000/=, being damages for loss of user the suit land, per month from February 2012 to May 2017 which totals Ksh.630,000/=. That the amount to continue increasing by Ksh10,000/= per month for each of the months the Defendant continues to be on the suit land after May 2017.

e. That the Defendant do pay the Plaintiff costs of this suit.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 24<sup>TH</sup> DAY OF MAY 2017**

In presence of;

Plaintiff Present

Defendant Absent

Counsel M/S Otieno for Plaintiff

Mr. Ayayo for Ojuro for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**24/5/2017**

24/5/2017

S.M. Kibunja Judge

Oyugi court assistant

M/S Otieno for the Plaintiff

Mr. Ayayo for Ojuro for Defendant

Court: Judgment dated and delivered in open court in presence of Plaintiff, her counsel M/s Otieno and Mr. Ayayo for Ojuro for the Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**24/5/2017**