



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KISUMU**  
**ELC NO. 716 OF 2015**  
**(FORMERLY KISUMU HCC NO. 169 OF 2010)**

**JACOB ORENY WADAWE.....PLAINTIFF**

**=VERSUS=**

**JOSEPH ABONG'O NEWA.....DEFENDANT**

**JUDGEMENT**

**INTRODUCTION**

1. By a Plaint dated and filed herein on 8<sup>th</sup> November 2010, the Plaintiff accused the Defendant of encroaching upon and/or invading his parcel of land known as Kamnwa/Keyo/Ogoro/499 sometimes in March 2003. It is the Plaintiff's case that the Defendant has since fenced off and occupied the said Parcel of land under a false and malicious claim of ownership.

2. The Plaintiff avers that by reason of the Defendant's said actions, he has been denied quiet and peaceful possession, user and enjoyment of his property. As a result, the Plaintiff states that he has suffered great loss and damage and he accordingly prays for Judgment against the defendant for:-

(a) *General damages for trespass*

(b) *An order that the Defendant by himself or his family or his servants, or agents , or proxies or any of them do vacate all portions of land Parcel Number Kamnwa/Keyo/Ogoro/499 forthwith or be evicted therefrom, and a permanent order of injunction restraining the defendant by himself or his family or servants, or agents, or proxies or any of them from entering, occupying, remaining on, cultivating, developing or in any other way using or interfering with the plaintiff's peaceful possession, user and enjoyment of the said land Parcel No. Kamnwa/Keyo/Ogoro/499 or any portion thereof.*

(c) *Costs of this Suit and Interest thereon at Court rates*

3. In answer to the Plaintiff's case, the defendant has vide a Written Statement of Defence dated 28<sup>th</sup> October 2014 denied that the Plaintiff is the registered owner of the parcel of land known as Kamnwa/Keyo/Ogoro/499 and invites the Plaintiff to strict proof thereof.

4. In the alternative, the defendant avers that the Plaintiff's title is a forgery and was unlawfully obtained

from the title of the Defendant's father one Erasto Abongo Newa (now deceased) which title was then known as South Nyakach/Kamnwa/Keyo/Ogoro/277. The Defendant lists the particulars of the Plaintiff's alleged fraud and forgery and generally accuses the Plaintiff of:-

- (a) *Obtaining title by using falsely executed documents;*
- (b) *Failing to follow due process in obtaining title;*
- (c) *Forgery of signatures; and*
- (d) *Intermeddling with the deceased's estate and property.*

5. Accordingly, the defendant prays that this suit be dismissed with costs.

### **THE PLAINTIFF'S CASE**

6. When this matter came for hearing before me on 17<sup>th</sup> May 2017, the Plaintiff called two witnesses while the Defendant called one.

7. Testifying as PW1, the Plaintiff Jacob Oreny Wadawe informed the Court that he is a Security Officer currently working in Nairobi. It was his case that Land Parcel Number Kamnwa/Keyo/Ogoro/ 499 originally belonged to Erasto Abongo Newa who was the father of the Defendant herein. Sometime in 1970 when he was working in Mandera, his father Ismael Wadawe (now deceased) informed him that he had heard that the said Erasto Abongo Newa intended to sell a portion of his land. Subsequently, he travelled home and negotiated for a portion measuring 0.4 Ha of the parcel of land which was then referred to as parcel No. 277. He paid a total of Kshs 1,300 as per the Sale Agreement which he produced in Court (marked PEX 2).

8. After purchasing the land the parties proceeded to the Land Control Board at the DO's Office in Ogoro and the Board granted consent for the sub-division. Subsequently, on 12/10/1993, he obtained a Certificate of Lease for his portion which became known as Kamnwa/Keyo/Ogoro/499. He then moved into the land and used it for planting coffee, trees and vegetables.

9. However, sometime in 1998, the Defendant chased away his workers from the land. He complained to the Area Chief who proceeded to caution the Defendant vide a letter dated 3/2/1998 (marked Plaintiff Exhibit 4) but the Plaintiff refused to stop. In 1999, the Plaintiff went at night and built a home on the land. It is accordingly his prayer that the Plaintiff vacates his land and that the land be given back to him.

10. PW2, Lukoko Were is the Land Registrar, Nyando, where he has been for the past 6 years. He testified that the Records at the Lands office indicate that Parcel No. 277 was registered upon adjudication on 1<sup>st</sup> April 1966 in the name of Erasto Abongo Newa. The 2<sup>nd</sup> entry on the Record shows that the said Erasto Abongo Newa collected the title deed for the land on 30<sup>th</sup> July 1971. Thereafter the title was closed for sub-division to create Parcel Nos 498 and 499. While the Original title (277) was 3.0 Ha, the newly created parcel No. 499 measures 0.4 Ha.

11. PW2 further testified that Parcel No. 499 was initially upon creation registered in the name of Erasto Abongo Newa on 19<sup>th</sup> September 1973. It was then transferred to Jacob Oreny Wadawe (the Plaintiff herein) for a consideration indicated as Kshs 1,300. A title deed was then issued in the plaintiff's name on 20<sup>th</sup> April 1998. PW2 produced the Green Cards for the two parcels of land in Court (marked as plaintiff's Exhibit 7(a) and (b)).

12. PW2 further testified that in addition to the Green Cards there would ordinarily be an adjudication record and a Mutation Form. There would also be a Letter of Consent from the Land Control Board in the file. It was however his case that he was unable to trace the same in the Parcel File. He explained that previously from the 1960s, the Registry was in Kisumu but they had moved to Nyando about seven years

ago and the Original Parcel File may have been lost during the movement. It was his conclusion that it would have been absolutely impossible to register the name of the Plaintiff on the title if there was no consent from the Land Control Board.

### **THE DEFENDANTS'S CASE**

13. Testifying as DW1, the Defendant herein Joseph Abongo Newa informed the Court that he is currently working as a teacher at Kogonda Primary School in Homa Bay County. It was his testimony that he lives on land Parcel No. 277 which is his ancestral land. He stated that his father acquired the land from his grandfather Newa Adipo. His grandfather and two grandmothers died and were buried on the Suitland.

14. DW1 testified that his father obtained Title for the land on 30<sup>th</sup> July 1971 after the land adjudication process was completed. His father however passed on on 15<sup>th</sup> June 1989 and was buried on the same land just like his brothers. The family uses the land for agricultural purposes.

15. DW1 stated that the Original title which he produced in Court (marked Defence Exhibit 1) was handed over to him by his father sometime in April 1989 just before the old man died. It was DW1's case that they have used the land since he was born and he currently has built thereon a permanent residential house. His elder son equally has his house on the same land. His mother and brother also have their houses there.

16. In 1998, the Plaintiff went to the land and laid a claim to it. He pointed at the Defendant's home and said the land belonged to him. DW1 told him he was not aware of the plaintiff's claim on the land. He was then summoned to the Chief's Office after which the matter went before the Land Disputes Tribunal.

17. DW1 further stated that there is no demarcation on the land showing Parcel No.s 498 and 499. However, his Parcel No. 277 is marked by a fence.

18. DW1 testified that although he had seen a copy of the purported Sale Agreement between the Plaintiff and his father, he doubted that his father would have signed it since he was illiterate. None of his brothers and sisters signed the Agreement and even his mother who is still alive did not sign it. All the witnesses shown in the alleged Agreement had died except the plaintiff's brother, one John Awiti. It was accordingly his case that the title being held by the Plaintiff is not genuine and this Court ought to protect him as he takes care of his father's estate.

### **ANALYSIS OF THE EVIDENCE**

19. From the material placed before me, it is evident that the Defendant is the son of one Erasto Abong'o Newa who is said to have sold land Parcel No. Kamnwa/Keyo/Ogoro/499 to the Plaintiff herein in 1972. During cross-examination, the Defendant indicated that at the time of the said transaction he was about 11 years old.

20. It was the Defendant's case that the plaintiff's title deed is not genuine as the said Land Parcel No. Kamnwa/Keyo/Ogoro/499 does not exist and further that land Parcel No. Kamnwa/Keyo/Ogoro/277 could not have been validly sub-divided into Parcels Numbers 498 and 499 since he still has the original title deed for parcel No. 277 which he was given by his father before he passed away in 1989.

21. On his part the Plaintiff testified that in the period 1972 to 1973 he bought a Portion of the then land Parcel No. Kamnwa/Keyo/Ogoro/277 from the Defendant's father at the price of Kshs 1,300/= which purchase price he paid in full. He produced the Written Agreement showing how the transaction took place. It was the plaintiff's case that the said parcel of land No. Kamnwa/Keyo/Ogoro/277 was later sub-divided into two Portions and renumbered 498 and 499. The Portion sold to the Plaintiff was thereafter registered as land parcel No. Kamnwa/Keyo/Ogoro/499. Later after consent was obtained from the Land Control Board, the land was registered and transferred in the plaintiff's name on 12<sup>th</sup> October 1973.

22. The Land Registrar Nyando who testified as PW2, confirmed to this Court that from the records held at their office, the Plaintiff is the registered proprietor of all that parcel of land known as Kamnwa/Keyo/Ogoro/499. He produced the records held at the Registry as evidence in Court.

23. Section 26 of the Land Registration Act provides as follows:-

“26. (1) The Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the Proprietor shall be taken by all Courts as Prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the Certificate, and the title of that proprietor, shall not be subject to challenge, except:-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party;  
or

(b) Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2). A certified copy of any registered instrument, signed by the Registrar and sealed with the seal of the Registrar, shall be received in evidence in the same manner as the Original.

24. From the foregoing, it is evident that Courts of Law are bound by law to protect and uphold the sanctity of a title deed. Such protection can however be removed and the title impeached where the same is procured through fraud or misrepresentation, to which the person is proved to be party, or where it is procured illegally, unprocedurally, or through a corrupt scheme.

25. In my mind, where one intends to impeach title on the basis that the title was procured by fraud or misrepresentation, that person ought to prove that there was indeed fraud and that the title holder was party to the fraud or misrepresentation. At paragraph 9 of the Statement of Defence, the Defendant has pleaded that the title deed held by the Plaintiff is a forgery and was unlawfully obtained. There was however no material or evidence placed before me in support of this allegation. In the particulars of fraud and forgery listed under the said paragraph, the Defendant asserts that the Plaintiff obtained his title “by using falsely executed documents” but no such documents were produced and/or referred to before me.

26. The Defendant did not contest the fact that he is physically occupying and has indeed constructed buildings on land Parcel No. Kamnwa/Keyo/Ogoro/499. On the basis of the evidence placed before me, I find and hold that his occupation of the said land is unlawful.

27. Accordingly, I make the following orders:-

*(i) That the District Surveyor Nyando do carry out a survey to ascertain the boundaries of all that parcel of land known as Kamnwa/Keyo/Ogoro/499 and to ascertain the extent of encroachment thereon by the Defendant within 30 days of the date hereof.*

*(ii) That the Defendant by himself, his agents and /or servants do vacate all Portions of land parcel No. Kamnwa/Keyo/Ogoro/499 within 45 days of the date hereof and/or be evicted therefrom forthwith.*

*(iii) A permanent order of injunction restraining the defendant by himself, servants and/or agents from entering, occupying, remaining on, cultivating developing or in any other way using or interfering with the Plaintiff’s peaceful possession, user and enjoyment of the said land Parcel No. Kamnwa/Keyo/Ogoro/499 or any Portion thereof*

*(iv) Costs of the Survey and of this Suit shall be paid by the Defendant.*

**Dated, signed and delivered at Kisumu this 24<sup>th</sup> day of October, 2017.**

**J.O. OLOLA**

**JUDGE**