



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU
ELC CASE NO.69 of 2017
[FORMERLY H.C.C.CIVIL SUIT NO.186 OF 2010]

FRANCIS OMONDI OYOO.....PLAINTIFF

VERSUS

MICHAEL OJUKA.....DEFENDANT

JUDGMENT

1. **Francis Omondi Oyoo**, the Plaintiff, vide the plaint dated 30th November 2010, filed this suit against **Michael Ojuka**, the Defendant, seeking for the following prayers;

- a. Permanent injunction against the defendant in respect of land parcel South Sakwa/Bar Kowino/890.
- b. General damages/ mesne profits.
- c. Costs and interest
- d. Such other relief as the court may deem fit.

The Plaintiff avers that he is the registered proprietor of the said land, and that the Defendant trespassed onto the said land in 2010 without his permission, knowledge and/or authority.

2. The Plaintiff's claim is denied by the Defendant vide his statement of defence dated 14th June 2012 in which he among others avers that the Plaintiff obtained title to the said land through forgery, fraud and misrepresentations. The Defendant further avers that the land was bought by his later father, **Gabriel Ojuka**, from the late **Jennarius Oloo Miduda** in 1990. That after his late father passed on in 1991, he has been using the land peacefully and without any interruptions. That he is entitled to the said land as a beneficial owner and under adverse possession.

3. The Plaintiff testified as PW1 and called Angelina Okelo Oloo plus one Fred Okoth Nadwa, a Land Registrar, who testified as PW2 and PW3 respectively. The Plaintiff's case is that land parcel **South Sakwa/Barkowino/890** belonged to one **Jennarius Oloo Miduda** and on passing on, his widow (PW2), transferred it to her name before selling it to the Plaintiff in 2009. That the two did a sale agreement and applied for and obtained land control board consent. The Plaintiff availed copies of the application and consent dated 2nd July 2009 as exhibits as well as a copy of a receipt dated 16th September 2009 for

stamp duty payment of Ksh.700/=. He also produced a copy of the transfer form and green card confirming that he became the registered proprietor of the land on 16th September 2009. That it is the Plaintiff's case that after buying the land, he visited it to plough and found the Defendant had started tilling it. He did a demand letter to the Defendant and then filed this suit. The vendor, (PW2), confirmed the Plaintiff's claim over the land and added that the father to the Defendant had indicated interest to buy a portion of land from her late husband but did not pay for it. The Land Registrar, (PW3), confirmed that the legal processes were followed in the transaction leading to the Plaintiff being registered with the land from the documentary evidence availed.

4. The Defendant testified as DW1 and called Solomon Oloo who testified as DW2. It is the Defendant's case that his late father, Gabriel Ojuka Odhiambo, bought the suit land from Janarius Oloo Miduda in two phases between 1974 and 1980. That the first phase involved half of the land and the purchase price was paid in form of a plough, sack of maize, brown bull and some cash. The second phase involved the other half which was initially being bought by one Shadrack Midudu who however failed to pay the purchase price. That at the prompting of the late Jenarius Oloo, the Defendant's father bought that half in 1980 after refunding to Shadrack what he had paid. That he thereafter took possession of the land and after he passed on in 1991, the Defendant continued using it. That the Plaintiff started clearing the land in 2009 and 2010. That when the Defendant learnt of it, he went there, and the people working on the land told him that they had been sent there by the father to the Plaintiff. Later he learnt that PW2 had sold the land to the Plaintiff which report she confirmed to him. The Defendant filed a complaint with the chief on 26th August 2010 and the elders allowed him to continue using the land. The Defendant proceeded to take back possession of the land and in September 2010. That in 2011 he was served with demand notice and suit papers. The Defendant testified that PW2 had not filed a succession cause before transferring the land to her name and then transferring it to Plaintiff. The Defendant indicated that though he had filed a succession Cause in respect of his later father's estate, he was yet to receive the grant of letters of administration.

5. The counsel for the Plaintiff and Defendant filed their written submissions on the 25th July 2016 and 14th February 2017 respectively.

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

- a. Whether the Plaintiff's registration as proprietor of the suit land was procedurally, legally and regularly procured.
- b. Whether the Defendant has any legal proprietary interest over the suit land.
- c. Whether the Plaintiff is entitled to the prayers of injunction and damages as prayed.

7. The court has carefully considered the pleadings filed, oral and documentary evidence availed, submission by both counsel and come to the following conclusions;

- a. That the Plaintiff's evidence that he obtained registration as proprietor of the suit land in accordance with the law has been supported by PW2, the widow of the first registered proprietor. That the copy of the green card in respect of the suit land clearly shows that the land was first registered on the 18th November 1985 in the names of Jenarius Oloo Miduda who PW2 confirmed was her late husband. The Land was then transferred through R.L.7 to PW2 on the 8th October 2008 before she transferred it to the Plaintiff on the 16th September 2009.
- b. That though the Defendant now faults the title of the Plaintiff on the basis that no succession cause in respect of the estate of Jenarius Olooo Miduda had been filed and confirmed grant obtained before PW2 got the land registered in her name, the court noted that PW2 was only a witness in this suit and has not been enjoined as a party. That the Plaintiff as a purchase was entitled to take PW2 as the absolute owner of the land when he transacted with her in 2009 as she was the registered proprietor in accordance with the records maintained at the land Registry.

c. That the provisions of **Section 27 and 28** of the Registered Land Act Chapter 300 of Laws of Kenya (Repealed), which was in force then, and **Sections 24 and 25** of the Land Registration Act No.3 of 2012 are clear on the interest and rights of a registered proprietor of a land. The provisions of **Article 40** of the constitution also protects a registered proprietor's right to land which can only be impugned on being challenged as unlawfully obtained. The provision of **Section 26** of the Land Registration Act requires the court to take the person named in a certificate of title issued by the Land Registrar as the absolute and indefeasible owner until and unless the title is successfully challenged on grounds of fraud, or misrepresentation which that person was involved in or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. That in this case, there has been no proceedings initiated against the Plaintiff or for that matter PW2, to challenge their registration at the different times as proprietors of the suit land.

d. That the Plaintiff, having received the support of PW2, and noting that statutory consent and payment prerequisite to the transfer were obtained and or made, the court find that the Plaintiff obtained the registration of the suit land in his name legally and procedurally and is therefore the absolute and indefeasible owner of the suit land. That the Plaintiff is therefore entitled to the rights of a registered proprietor over the suit land and the Defendant, who has been interfering with his use of the land, should and is hereby restrained.

e. That the Plaintiff has not given any evidence of the nature of the use he wanted to put the land which would have acted as a guide in determining whether he had suffered any damages or loss. That as such no damages will be issued.

f. That as the Defendant action of trespassing onto the land is what that led to this suit being filed and noting that he had been served with a demand notice, he will pay the Plaintiff costs of the suit.

8. That flowing from the foregoing, the court find that the Plaintiff has proved his case against the Defendant and judgment is entered in his favour in terms of prayers (a) and (c) of the plaint dated 30th November 2010. The filed be closed.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2017

In presence of;

Plaintiff Present

Defendant Present

Counsel Mr. Odhiambo for the Plaintiff

Mr. Omondi for Odongo for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/10/2017

11/10/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties present

Mr. Odhiambo for the Plaintiff

Mr Omondi for Odongo for the Defendant

Court: The judgment dated and delivered in open court in presence of the parties, Mr. Odhiambo for Plaintiff and Mr. Omondi for Odongo for the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/10/2017