



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT KISUMU**  
**LAND CASE NO.242 OF 2015**

**LAWRENCE OTIENO ADOYO.....PLAINTIFF**

**VERSUS**

**DAVID OTIENO DUNYA.....1ST DEFENDANT**

**PETER OTIENO NYAREGA.....2ND DEFENDANT**

**RICHARD ONYANGO OKUMU.....3RD DEFENDANT**

**THE LAND REGISTRAR, KISUMU.....4TH DEFENDANT**

**NATIONAL BANK OF KENYA LTD.....5TH DEFENDANT**

**RULING**

**1. BACKGROUND**

a) The Plaintiff, **Lawrence Otieno Adoyo** commenced this suit through the plaint dated 22nd September 2015 against **David Otieno Dunya, Peter Otieno Nyarega, Richard Onyango Okumu, The Land Registrar, Kisumu** and **National Bank of Kenya**, hereinafter referred to as 1st to 5th Defendants respectively. The Plaintiff avers that the 1st Defendant unlawfully and illegally subdivided land parcel **Kisumu/Manyatta/B/612** into parcels **1918** and **1919** which were fraudulently registered in the names of 2nd and 3rd Defendants respectively. He prays for declaration that the subdivision was unlawful and an order that he be registered with the said parcel among others.

b) Filed contemporaneously with the plaint is the notice of motion under certificate of urgency dated 22nd September 2015, in which the Plaintiff prays for temporary orders of injunction.

**2. PRELIMINARY OBJECTIONS**

a) The 1st Defendant gave notice of his intention to raise a preliminary objection at paragraph 17 of his statement of defence dated 10th November 2015 on the following points of law;

- i) That the matter is resjudicata.
- ii) That the Plaintiffs suit is scandalous, vexatious, frivolous and an abuse of courts process.
- iii) That the suit is in breach of mandatory provisions of the law.

iv) That the Plaintiff is guilty of inordinate delay in filing this suit.

v) That the Plaintiffs suit is incompetent and lacks merit.

b) The 3rd Defendant filed a notice, dated 10th November 2015, to raise preliminary objection to both the application and main suit, for reasons of the matter being resjudicata under **Section 7 of the Civil Procedure Act** and listed the following points;

i) That the 3rd Defendant had filed **Kisumu SPMCC No.334 of 1992** against the Plaintiff over **Kisumu/Manyatta 'B'/1919** which is substantially and directly in issue in the present suit.

ii) That **Kisumu SPMCC No.334 of 1992** was heard and decided in his favour.

iii) That the **Kisumu SPMCC No.334 of 1992** was heard and a final judgment entered by a competent court.

3. The preliminary objection by the 1st and 3rd Defendants, came up for hearing on the 22nd February 2016 with Mr. Odhiambo, Obure, Okello and Emukule appearing for the Plaintiff, 1st, 3rd and 5th Defendants, respectively. Their submissions are as summarized hereinbelow;

a) **3RD DEFENDANTS SUBMISSIONS;**

That the 3rd Defendant became the registered, proprietor of **Kisumu/ Manyatta 'B'/1919** on 3rd May 1991. That he filed **Kisumu SPMCC No.334 of 1992** against the Plaintiff for interfering with the said land. That the plaintiff filed memorandum of appearance dated 13th May 1992. That the lower court decided in favour of the 3rd Defendant by awarding him Sh.6000/= as general damages, Sh.720/= as special damages and permanent injunction restraining the plaintiff by himself or his agents from interfering with the 3rd Defendant's occupation of land parcel **Kisumu/Manyatta 'B'/1919**. The counsel submitted that the issue of ownership of land parcel **Kisumu/Manyatta 'B'/1919** as between the Plaintiff and 3rd Defendant has been litigated and decided upon and the 1st Defendant was a witness in that case. The counsel submitted that the plaint should be struck out with costs.

b) **1ST DEFENDANT'S COUNSEL'S SUBMISSION;**

That the subject matter in **Kisumu SPMCC No.334 of 1992** was **Kisumu/Manyatta 'B'/1919** which was a subdivision from **Kisumu/Manyatta'B'/612**. That the case was decided in favour of the 3rd Defendant and that the 1st Defendant had testified as his witness and cross- examined by the Plaintiff herein. That the Plaintiff has filed the current suit after 24 years since **Kisumu SPM CC No.334 of 1992** was decided. The counsel submitted that this case is an abuse of the court process as the Plaintiff appears to be challenging the decision made by the court in **Kisumu SPM CC No.334 of 1992**. The counsel submitted that their preliminary objection should be upheld and the Plaintiff's suit struck out with costs.

c) **5TH DEFENDANT'S COUNSEL'S SUBMISSION;**

That **Kisumu SPM CC No.334 of 1992** was between similar parties and subject matter to the current suit and a final decision was made on 5th August 1994. That the plaintiff could have appealed or applied for a review of the judgment if he was aggrieved but did not do so. That the current suit is not an appeal on the decision in **SPM CC No.334 of 1992** and is therefore resjudicata. That the 5th Defendant had carried out due diligence before registering the charge and submitted that the suit should be stuck out.

d) **PLAINTIFF'S COUNSEL'S SUBMISSIONS;**

That the 1st, 2nd , 4th and 5th Defendants were not parties in **Kisumu SPMCC No.334 of 1992** and the decision thereof does not make the

Plaintiff's claim against them in the current suit resjudicata. That the fact that the 1st Defendant was a witness does not make him a party in the proceedings. That the current suit is about **Kisumu/Manyatta B/612** while **Kisumu SPM CC No.334 of 1992** was about **Kisumu/Manyatta B/1919** and therefore the subject matter of the two cases are different. The counsel submitted that the Plaintiff has not come to this court on appeal on **Kisumu SPMCC No.334 of 1992** but on a claim based on fraud and in view of **Article 159 of the Constitution** that discourages reliance on technicalities, the preliminary objection should be rejected and the Plaintiff suit be allowed to be heard and decided on merit.

4. The main issues for determination are as follows:

- a) Whether this suit is resjudicata by virtue of the decision in **Kisumu SPM CC NO.334 of 1992**, and if so, in respect of which parties.
- b) Whether this suit is an abuse of the court process.

5. The court has considered the grounds raised by 1st and 3rd Defendant's counsel in the preliminary objection, the rival submissions by counsel for the four parties who participated in the hearing hereof, the pleadings and come to the following findings;

a) That from the copy of the adjudication record dated 23rd April 1979 that is annexed to the plaintiff affidavit sworn on 22nd September 2015, Land parcel **Kisumu/Manyatta B/612** was registered in the names of **Lawrence Odoyo Otieno** (Plaintiff). It is also apparent from the documents attached to the 1st Defendant's replying affidavit sworn on 10th November 2015, especially copy of application for consent and letter of consent dated 18th April 1991, that the Plaintiff applied for and obtained consent to transfer land parcel **Kisumu/Manyatta 'B'/612** to the names of **David Dunga Omolo** (1st Defendant) and himself and a title deed in their joint names was issued on 2nd May 1991. That the two owners applied for and obtained consent letter dated 3rd May 1991 to partition the said land.

b) That the Mutation forms attached to the aforementioned affidavits of the Plaintiff and 1st Defendant shows that **Kisumu/Manyatta B/612**, whose acreage was 0.07 hectares, was partitioned into parcels **1918** and **1919** on 3rd May 1991. The copy of the title deed for **Kisumu/Manyatta B/1919** that is annexed to the 3rd Defendant replying affidavit sworn on 10th November 2015 shows that the land was registered in the names of **Richard Okumu Onyango**

(3rd Defendant) on the 3d May 1991. That parcel of land was the subject matter of **Kisumu SPM CC No.334 of 1992** filed by the 3rd Defendant as the Plaintiff, against the Plaintiff herein as the Defendant. That parcel of land is also a subject matter in the current suit as the Plaintiff seeks under prayer (a) to have the subdivisions created from **Kisumu/Manyatta B/612** declared to have been created illegally, unlawfully and fraudulently and therefore a nullity abinitio. That if the Plaintiff was to be granted that prayer, parcels **Kisumu/Manyatta 'B'/1918** and **1919** would cease to exist and revert back to parcel **Kisumu/Manyatta 'B'/612** which is the original title reference. The copies of the proceedings in **Kisumu SPMCC NO.334 of 1992** annexed to the 1st and 3rd Defendants replying affidavits, contains the Plaintiff's evidence in his defence in that case at Page 5 which is reproduced hereinbelow:

**" DEFENDANT MALE ADULT CHRISTIAN SWORN STATES IN DHOLUO:**

**I am Lawrence Adoyo Onene from Manyatta 'B' Kanyakwar. I know the Plaintiff. I and the Plaintiff agreed that I'd fence his land. But he wanted a bigger size than what it was. The surveyors mapped out an acreage of 0.01 Hectares. The plaintiff wanted 0.035 so I refused. I told him to get the mutation. He refused. That is all.**

**Xxd by Plaintiff**

**I told you what you were claiming is more. I even told you to return the title deed. I never refused to fence if you rectified the demarcation. The mutation shown (sic). the correct demarcation."**

In the judgment delivered on the 5th August 1994, the learned trial Magistrate found as follows:

" From all the matters aforesaid, it became clear that the Defendant (now the Plaintiff) is not disputing the Plaintiff (3rd Defendant herein) ownership of the piece of land No. KSM/Manyatta B/1919 ..... He conceded that there was an arrangement between him and the Plaintiff over the fencing for which he was paid 720/= by the Plaintiff ..... In fact there is a statutory declaration that the defendant made on 2.6.92 whereby he said on oath that whatever proprietary claims he raised herein over the suit land (in the interlocutory application) were false claims which he has since renounced. .... That being the case it becomes clear that the defendant had no justification in refusing the Plaintiff access to the land. It is also clear that he was lying when he told the court on 19.5.92 that PW2 (1st Defendant herein) had not fully paid him for the land ..... It is therefore my finding that the defendant is liable to the Plaintiff in damages for breach of contract/undertaking, exh P.3, and for unlawfully restraining the Plaintiff from using the land in question. For the breach aforesaid I'd award the Plaintiff Kshs. 6,000/= (six thousand shillings only), general damages and Shs.720/= special damages. In addition it is directed that a permanent injunction issue restraining the Defendant by himself or his agents or representatives from future or further interference with the Plaintiff peaceful occupation of land parcel No. Kisumu/Manyatta B/1919. ...."

c) That as can be seen in the excerpts from the proceedings and judgment in **Kisumu SPM CC No.334 of 1992** in (b) above, land parcel **Kisumu/Manyatta B/1919**, which is a subject matter in this case, was also a subject matter in that case. The lower court settled the issue of ownership of that land as between the 3rd Defendant who had bought it from PW2 (the 1st Defendant) and the Plaintiff herein. The court also settled the issue of occupation of the land and issued permanent injunction against the Plaintiff. It is therefore obvious that as between the Plaintiff and 3rd Defendant, the issue of occupation and ownership of **Kisumu/Manyatta B/1919** was settled on 5th August 1994 in **Kisumu SPMCC NO.334 of 1992**. This court has not been moved in its appellate jurisdiction on that decision but in its original jurisdiction through a fresh suit. This is contrary to the provisions of **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya** which states:

" 7. No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties; or between parties under whom they or any of them claim,

litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation (1) .....

Explanation (2) .....

Explanation (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly, by the other.

Explanation (4) – Any matter which might or ought to have been ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit ....."

In this current suit, the Plaintiff has alleged fraud in the process of creating parcels **Kisumu/Manyatta B/1918 and 1919** from parcel **612** while in **Kisumu SPM CC No.334 of 1992**, he had initially claimed that he had not been fully paid for parcel **1919** by PW2 (1st Defendant) who later sold it to the 3rd Defendant. He later withdrew that claim as observed in the learned trial magistrate's judgment of 5th August 1994. The plaintiff did not raise any claim of illegality, unlawfulness or fraud in the way land parcel **Kisumu/Manyatta B/612** was subdivided to create parcel **1919** during the hearing in **Kisumu SPM CC NO.334 of 1992**. He had the opportunity to have the 1st Defendant enjoined as a party in that case and raise the issue that he has raised against him in this matter. He did not do so and yet those issues

are under explanation (4) above deemed to have been directly and substantially in issue in that other case. The court therefore finds merit in the 3rd Defendant's counsel's submission in support of their preliminary objection that the Plaintiff's claim, against the 3rd Defendant over ownership and occupation of land parcel **Kisumu/Manyatta B/1919** is res judicata. The court makes a similar finding in respect of the allegations against the 1st Defendant in view of the decision in **Kisumu SPM CC NO.334 of 1992** in which he was a witness.

- d. That an action to recover land should be commenced within twelve (12) years from the date the right of action arose. (see **Section 7 of the Limitation of Action Act Chapter 22 of Laws of Kenya**). The provision of **Section 17** of the said Act states that the title is extinguished after the limitation period lapses.

The partitioning of land parcel **Kisumu/Manyatta B/612** was done in 1992.

The Plaintiff was aware of this fact as shown in the proceedings in **Kisumu SPM CC NO.334 of 1992** which was decided in 1994. A period of about 21 years had lapsed from that year to the time this suit was filed. The pleadings in the plaint dated 22nd September 2015 state that the Plaintiff did not know that the 2nd Defendant was registered with **Kisumu/Manyatta B/1918** until the year 2015. That claim may therefore be allowed to continue to hearing in view of **Section 26 of the Limitation of Actions Act**. The claims against 1st and 3rd Defendants are however statute barred.

6. That having found as above, the court issues the following orders;

- a) That the preliminary objection raised by the 1st Defendant through the statement of defence is upheld with costs, and the claim against him struck out for being statute barred and abuse of courts process.
- b) That the preliminary objection raised by the 3rd Defendant through notice dated 10th November 2015 is upheld and the Plaintiff's claim, against him over ownership and occupation of land parcel **Kisumu/Manyatta B/1919** is struck out with costs for being statute barred, abuse of court process and res judicata in view of the decision in **Kisumu SPM CC No.334 of 1992**.

It is so ordered.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 19th DAY OF APRIL 2016**

In presence of;

Plaintiff        Absent

Defendants      Absent

Counsels

Mr Adiso for Odhiambo for Plaintiff

Mr Obure for 1st Defendant

Mr Okero for 3rd Defendant and

Mr Emukule for 5th Defendant.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**19/4/2016**

19/4/2016

S.M. Kibunja J

Oyugi court Assistant

Parties absent

Mr Adiso for Odhiambo for Plaintiff

Mr Okero for 3rd Defendant

Mr Obure for 1st Defendant

Mr Wmukule for 5th Defendant

Court: Ruling delivered in open court in presence of Mr Adiso for Odhiambo for Plaintiff Mr Okero for 3rd Defendant and Mr Emukule for 5th Defendant.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**19/4/2016**