



**Maseno University Retirement Benefits Scheme v Town Clerk Municipal Council of
Kisumu (Civil Suit 149 of 2011) [2016] KEELC 477 (KLR) (5 October 2016) (Judgment)**

Maseno University Retirement Benefits Scheme v Town Clerk Municipal Council of Kisumu [2016] eKLR

Neutral citation: [2016] KEELC 477 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
CIVIL SUIT 149 OF 2011
SM KIBUNJA, J
OCTOBER 5, 2016

BETWEEN

MASENO UNIVERSITY RETIREMENT BENEFITS SCHEME PLAINTIFF

AND

THE TOWN CLERK MUNICIPAL COUNCIL OF KISUMU DEFENDANT

JUDGMENT

1. The Plaintiff, Maseno University Retirement Benefits Scheme, commenced their claim against The Town Clerk, Municipal Council of Kisumu, the Defendant, seeking for a permanent injunction order restraining the Defendant either by itself, servants, agents, assignees and or allottees from selling, repossession, dealing and or in any way interfering with the Plaintiff's parcel L.R. 15298, 18040 and 22905 and or the Plaintiff's occupation, user, development and possession of the suit premises. The Plaintiff also prays for costs. The Plaintiff avers that they are the beneficial, legal and registered owners of the parcels L.R. 15298, 18040 and 22905, hereinafter referred as the suit lands. That the Plaintiff purchased the suit properties from third parties and have paid the land rates and rents due to the defendant over the parcels. That the defendant had through agents unknown to the plaintiff fenced off the parcels without their permission. That any reallocation of the suit lands to third parties by the Defendant is fraudulent as the lands have not been legally repossessed from the Plaintiff.
2. The Plaintiff's claim is opposed by the Defendant through their filed statement of defence dated 2nd March 2012 generally disputing all the averments in the plaint.
3. The hearing commenced on the 15th April 2015 with Mr. Onyango and Mrs Onyango advocates for the Plaintiff and Defendant respectively in attendance.
4. In support of the Plaintiff's case Sammy Erick Njeru Ngare, the pension Manager with the Plaintiff testified as PW1. He testified that the Plaintiff owns the suit land and produced copies of the title



documents for parcel L.R.15298, 18040 and 22905 as exhibits 1 to 3 respectively. He also produced copies of receipts for payment of rates for the years 2004, 2010 to 2012 as exhibit 4. He further produced six receipts for payment of rent for the suit properties as exhibit 5 and five payment vouchers with details of the bankers cheques drawn for the payments as exhibit 6, and the four copies of the bankers cheques as exhibit 7. The witness testified that the title documents showed that parcels L.R.15298, 18040 and 22905 were registered in the names of the Plaintiff on the 8th October 2001, 14th May 2000 and 2nd September 1999 respectively and have not been repossessed. PW1 also produced copies of the documents under which parcels L.R.22905 and 15298 were transferred to the Plaintiff from Joseph Wamwayi Odundo as exhibits 8 and 9 respectively. The witness told the court that in September 2011, some people came to the suit lands claiming that they had been allocated the land by the Defendant and the Plaintiff decided to come to court and filed this suit. He prayed that the court grants the Plaintiff its prayers as set out in the plaint and that the contents of the defence filed by the Defendant was not true. The witness was cross examined by the counsel for the Defendant and clarified that the Plaintiff has sued the Municipal Council of Kisumu through the Clerk and not the Clerk personally. He further disclosed that there were witnesses who saw the Defendant's employees come to the suit land to plant beacons. The Plaintiff second witness was Japheth Otieno Ouma who testified as PW2. He testified that on 14th December 2012 while on duty as a security person on the parcel L.R.15298, he saw people come in an open pick up vehicle KAD 778 M with inscription on the side reading "Kisumu Municipality (Kisumu Town Engineering)". That the vehicle had nine persons, wheel barrow, cement, ballast and sand. That the materials were unloaded on the suit land. That when he greeted those people they told him and his colleague that they had won the case over the land and started working. The witness testified that two of the people were in uniform worn by the Defendant's askari's. He told the court that two of the people started taking measurements while others mixed the materials and erecting beacons and making notes on a book. He said they notified their employer and on the day after, two vehicles numbers KBK 798J and KBJ 575U each with two people came to the suit land. The witness said that those people asked them to leave the land as it now belonged to the Defendant and termed the Plaintiff as land grabbers before leaving. The witness was cross-examined by counsel for the Defendant and disclosed that he got employed by the Plaintiff in November 2011. The Plaintiff counsel then closed their case.

5. That the matter came before me for the first time on 28th October 2015 when directions were taken that the hearing do proceed from where it had reached. Then a date for defence hearing was fixed and after a few adjournments the Defendant's counsel closed their case on 16th May 2016 without calling any witness. The counsel then agreed to file written submissions. The counsel for the Plaintiff and Defendant filed their written submissions dated 14th June 2016 and 28th June 2016 respectively.
6. The following are the main issues for the courts determination;
 - a) Who between the Plaintiff and the Defendant is the registered proprietor of the leasehold interests on the suit lands.
 - b) Whether the Defendant has lawfully and procedurally repossessed the suit land from the Plaintiff.
 - c) Whether the prayers sought should issue .
 - d) Who should pay the costs.
7. The court has carefully considered the averments in the plaint and defence filed by the parties, the evidence adduced by the Plaintiff's two witness, the rival written submissions by both counsel and come to the following findings;



- a) That from the documentary evidence adduced by the Plaintiff through PW1 as exhibits 1 to 3, the Plaintiff has been the legal registered proprietor of L.R. 15298, 18040 and 22905, the suits lands, with effect from the 8th October 2001, 14th May 2000 and 2nd September 1999 respectively.
 - b) That the Plaintiff has also through production of documentary evidence in form of copies of receipts, payment vouchers and bankers cheques established that they had paid rates and rents for the years 2011 when this suit, was filed and the year before which is 2010. That subsequent to the filing of this suit the Plaintiff continued to pay the rates and rents for the year 2012 and or 2013.
 - c) That the evidence adduced by both PW1 and PW2 confirms that the Plaintiff has been in some possession of the suit lands specifically parcel L.R.15298, which PW2 was guarding since his employment in November 2011.
 - d) That even though no eye witnesses were availed by the Plaintiff to confirm the nature of the interference with the suit lands attributed to the Defendant or their agents before the filing of this suit, the evidence of PW2 on the events of 12th and 13th December 2012, confirm there were some interference after the filing of the suit. These incidences occurred more than one year after the filing of this case and cannot be taken as evidence to prove that the Defendant interference with the suit land that led to the filing of this suit. That these incidences would only be relevant as confirmation of the interferences after the filing of the suit and not before.
 - e) That indeed a party who alleges the existence of a fact has a duty to offer proof to the standard required to succeed in a court of law. That the standard of proof in a Civil claim, like this before the court is on a balance of probabilities. That the Plaintiff being the one alleging that they are the legal owner of the suit lands has discharged that duty upon availing copies of title. That this court is obligated under Section 26 of the Land Registered Act to take the person registered as proprietor in a document issued by the Land Registrar as the absolute and indefeasible owner of the land. That there has been no evidence tendered to challenge or rebut the plaintiff's title to the suits lands. The court holds the plaintiff as the absolute and indefeasible owner of the three parcels of land subject matter of this suit.
 - f) That the Plaintiff had a duty to offer proof that the defendant had been interfering with the suit land so as to lay the basis of a permanent injunction being issued. That the evidence of PW1 cannot suffice as he was not an eye witness and only told the court what he had learnt from others whose details he did not disclose. That the witness (PW1) did not mention the names or give details of the person(s) who had gone to claim the suit lands in September 2011. That there is therefore no evidence to connect those people who were unknown to the Plaintiff, with the Defendant. That the Plaintiff therefore fails to show that the Defendant had before the filing of this suit interfered with the suit lands to the detriment of the Plaintiff.
 - g) That in view of (f) above the court has no basis to restrain the Defendant from acts that have not been proved to the standard required.
8. That flowing from the foregoing the court find that the Plaintiff, who is the absolute and indefeasible owner of the suit lands, has failed to prove that the Defendant had interfered with the suit land by the time this suit was filed. That the prayer of permanent injunction cannot therefore issue. The Plaintiff's suit fails. That this is a suit where each side should bear their own costs. That the final order of the court is that the Plaintiff's suit is dismissed with each party bearing their own costs.

It is so ordered.



DATED AND DELIVERED THIS 5TH DAY OF OCTOBER 2016

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr Mbaganda for the Plaintiff

Mr Omondi for Otieno for Defendant

5/10/2016

S.M. Kibunja J.

Oyugi court Assistant

Parties absent

Mr Omondi for Otieno for Defendant

Mr Mbaganda for Plaintiff

Court: The judgment dated and delivered in open court in presence of Mr. Mbaganda for the Plaintiff and Mr Omondi for Otieno for Defendant.

