



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT AND LAND COURT

HCC NO CASE. NO.67 OF 2010

JOSANA

ACADEMY.....PLAINTIFF

VS.

**DAVID OWINO ONDENG.....1ST
DEFENDANT**

**KOSETIONY KIPRUTO TINDERET.....2ND
DEFENDANT**

**KIPROTICH KORIR.....3RD
DEFENDANT**

**COMMISSIONER OF LANDS4TH
DEFENDANT**

**THE DISTRICT LAND REGISTRAR KISUMU.....5TH
DEFENDANT**

JUDGEMENT

1. The plaintiff- **JOSANA ACADENY** – first filed this suit in the lower court at Winam against only one defendant- **DAVID OWINO ODENG** – vide a plaint dated 30/12/2009 and filed on 19/1/2010.
2. But the plaint was later amended and 4 other defendants – **KOSETIONY KIPRUTO TINDERET** (2nd defendant), **KIPROTICH KORIR** (3rd defendant), **COMMISSIONER OF LANDS** (4th defendant) and **THE DISTRICT LAND REGISTRAR KISUMU** (5th defendant), - were added. **DAVID OWINO ONDENG** became the 1st defendant.
3. The contestation revolves around Land parcel No. **KISUMU MUNICIPALITY/BOLCK 4/362** (Suit land hereafter) said to have been allocated to the plaintiff together with another parcel **L.R. NO.KISUMU MUNICIPALITY/BLOCK 4/361**. The defendant is said to have allocated the parcels.
4. Before the allocation, the suit land was alienated government land and the 4th defendant had the statutory mandate to let, sell, alienate, allow or refuse occupation of all government land. The allocation to plaintiff was done on 1/3/1999. That was done after payment by the plaintiff of the requisite fees said to amount to Kshs.12,020. The plaintiff then went into possession and fenced

the land. The plaintiff is a school and it said the suit land has all along been used as playing ground for its pupils.

5. But things took a strange turn on 28/12/2009. The 1st defendant went to the school and stated that the suit land belonged to him. The following day, the 1st defendant descended on the suit land with some people and pulled down the school fence. Then some measurements were taken in apparent preparation to start construction.
6. The plaintiff then decided to find out why this was happening. It discovered that the 4th and 5th defendants had secretly allocated the land to the 1st defendant.
7. According to plaintiff, this is all fraud; first, by 2nd and 3rd defendants who misled the 4th defendant that the suit land was available for alienation to them; second, by the same defendant causing the 5th defendant to register the land in their names knowing that it belonged to the plaintiff. The 4th defendant is said to have acted fraudulently by allocating the land to 2nd and 3rd defendant while he had allocated it earlier to the plaintiff. The 1st, 2nd and 3rd defendants are said to have acted fraudulently in taking the benefit of fraudulent transaction. All these, and more, are fraudulent actions attributed to the defendants.
8. As a result of all this, the plaintiff wants judgment against the defendants for:

(a) General damages

(b) An order that the 1st defendant do vacate all portions of the suit land or be evicted therefrom and a permanent order of injunction restraining the 1st defendant, by himself or his agents or servants or proxies

or any of them from entering, remaining on developing, occupying or using the suit land or doing anything that may restrict, curtail, diminish or interfere with plaintiffs quiet possession, use and enjoyment of

the suit land.

(c) Declaration that the preparation of lease document by the 4th defendant in favour of 2nd and 3rd defendants, and the subsequent registration of the same by the 5th defendant and the issuance of lease

certificate to 2nd and 3rd defendants was fraudulent, illegal, irregular and therefore null and void.

(d) an order directing the 4th and 5th defendants jointly and severally to cancel registration of the 1st defendant proprietor of the suit land and to register and transfer the same in favour of the plaintiff.

(e) costs are also asked for.

9. The defence of 1st defendant was filed on 1st January 2010. He is a stranger, he pleaded, to most of the averments in the plaint. He bought the suit land from 2nd and 3rd defendants at Kshs1,200,000 vide an agreement executed on 8/7/05. He said he exercised due diligence before buying and he is therefore the bonafide registered owner of the suit land. According to 1st defendant, the plaintiff is non-suited against him.
10. The 4th and 5th defendants filed their defence on 7/4/2011. The defence consist of denial of all the contents of the plaint save the introductory aspects describing the parties in the beginning paragraphs.
11. The 2nd and 3rd defendant didn't enter appearance or file defence despite service.
12. The court started hearing the matter on 25/3/2013. **Benson Peter Ochieng** testified on behalf of the plaintiff.

He was **PW1**. His evidence is an amplified version of what the plaint contains. He produced many exhibits including:

- (i) Letter of allotment for the suit land (Pff. Ex.No.1)
- (ii) Copy of bankers Cheque showing payment of monies stated in the allotment Letter (Pff. Ex.No.3)
- (iii) the letter dated 18/9/2000 forwarding the bankers Cheque (Pff Ex.No.3).
- (iv) the receipt issued after the money sent was received (Pff Ex.No.5).
- (v) Letter from, the commissioner of Land a assuring that the process of issuing title to suit land was underway (Pff Ex.No.6).
- (vi) Receipt showing payment of survey fee (Ptt Ex.No.7a).
- (vii) Letter from Commissioner of Land directing survey Office here to act (Pff Ex.No.7).
- (viii) Letter from Commissioner of land requesting for submissions of amended Registry Index Map (RM), (Pff Ex.No.8).
- (ix) Copy of Search conducted at land office after the 1st defendant came claiming the suit land (Pff Ex.No.9a).
- (x) Receipt showing payment for that search (Pff Ex.No.9b).
- (XI) Notice of intention to sue t the 4th defendant (Pff Ex.No.10).
- (xii) Letter written by State Counsel to Principal secretary, Land, concerning the suit land (Pff Ex.No.11)
- (xiii) Letter from Commissioner of Lands resisting inspection of the suit land by District land Administration office.
- (xiv) Letter by plaintiff to commissioner of Land explaining that strange people were going to the suit land (Pff Ex No.14).

13.In addition to the evidence of PW1, there was PW2 – **Oyino Mukobe**, who is a

District Lands officer, Kisumu. Mokobe was clear that the suit land belonged to the plaintiff. He was tasked with compiling a report concerning the suit land. He did so. He confirmed too that there were fake leases in circulation concerning the suit land. Mukobe also produced a copy of his report as plaintiff Ex.No.13.

14.There was vigorous cross-examinations done to both PW1 and PW2. Both maintained their stand that the suit land belongs to the plaintiff. Indeed, the cross-examinations generally confirmed, instead of contradicting, their evidence in chief.

15.The first defendant gave his evidence on 4/6/2014. He said interalia, that after post-election violence in year 2007, he became apprehensive about his security in Nakuru where he had put up

his residential house. He decided to sell the house and re-locate to Kisumu. He started looking for some land to buy. That is how he came to the suit plot.

16. The owners of the suit plot, he was told, were 2nd and 3rd defendant. Before long, the two defendant came and showed him their documents of ownership. The 1st defendant then conducted a search at the land office. He confirmed that the suit land belonged to the two defendants. He entered into a sale agreement with them. Thereafter the process to issue him with title started and he was ultimately issued with a Certificate of Lease. According to the plaintiff, he didn't participate in any fraud and every thing was done transparently.

17. The 1st defendant availed the following exhibits:

(I) Certificate of Lease showed by the 2nd and 3rd defendants (Exhibit D 4)

(ii) Copy of search conducted at land office and receipts for payment for the search

((exhibit D 5a and b)

(iii) Photographs taken of the suit plot. These were not produced but were marked

MF1- D1, D2 ... D f.

(iv) Invoice for rates, two receipts for payment of rates, and rates clearance

Certificate (Exhibit D7, a, b, c, and d)

(vi) Land rent invoice, Land rent pay-in slip, customer transaction voucher,

National Bank of Kenya (Ex. D 8 a, b, and c)

(vii) Rent clearance Certificate from Ministry of Lands Ex D9.

(viii) Letter by consent issued in the name of 2nd defendant to transfer the suit land to 2nd defendant (Ex D9 a)

(ix) The receipt for the letter of consent (Ex. D-10 b)

(xi) Certificate of lease issued to 1st defendant (ex – D 12)

(xiii) Search conducted after Certificate of lease was issued and receipt for payment

for search (Ex No.13 a – b)

(xiii) Search conducted after PW2 testified here to say land didn't belong to 1st

defendant. (ex D 14 a & b). (b) is the receipt for payment for the search.

18. Both sides filed written submissions after hearing. The plaintiff's submissions were filed on 23/7/2014. The 1st defendant submissions were filed on 25/9/2014.

The submissions of 4th and 5th were filed on 26/11/2014. I have considered the submissions including the decided authorities availed.

19. The plaintiff availed the following decided authorities to reinforce its case.

(I) Dr. Joseph N. K. arap Ng'ok Vs Justice Maijo Ole Kerwoa & 4 others.

C.A No.60 of 1997, NAIROBI

[1997] eKLR

(ii) Wreck Motor enterprises Vs Commissioner of Land & 3 others:

CA NO.71(1997, NAIROBI

{1997} eKLR.

(iii) Cross Current Indigenous Network LTD Vs commissioner of Lands & Another:

HCC No.535 of 2000, NAIROBI.

{2005} eKLR.

(iv) Rukeya Alie Mohamed Vs David Gikonyo Nambacha & Another: HCCA No.9/2004, Kisumu.

(v) Aden Abdirahani Hassan & 2 others Vs the registrar of titles, Ministry of Lands

& 2 others {2013} eKLR.

20.The 1st defendant also sought to rely on Dr Joseph N. Arap Ngo'k Supra, Wreck motors enterprises (Supra) and Kross Current Indigenous (supra).

21.The 4th and 5th defendant didn't avail any decided authorities.

22. It seems clear to me that the 1st defendant transacted with 2nd and 3rd defendants to buy the suit land after the two represented to him that they were the registered owners. He conducted due diligence and official sources apparently confirmed ownership of the suit land by the two Defendants. After this confirmation, all procedural steps were followed and all paper work was done and after payment of requisite charges and fees, a certificate of lease was finally issued to 1st defendant.

23.The problem arose for the 1st defendant when he went to the suit land to enter into possession. A new reality confronted him; somebody else, the plaintiff, was claiming ownership of the suit land. Thereafter, it didn't take long before the plaintiff filed this suit.

24.The plaintiff on the other hand asserted that it was the first to be allocated the land. That happened way back on 1/3/1989 when it was issued with a letter of allotment. And before allocation, the suit land was unalienated government land. The plaintiff all along waited to be issued with Certificate of lease and had official assurance that it would be issued with one.

25.What happened later therefore was a surprising turn of events. A new person, the 1st defendant, had come to the scene claiming ownership. This jolted the plaintiff to action. The next step was to move to the lands office to conduct a search; the result of the search showed the 1st defendant as the new owner. But this had happened in spite of the fact that the plaintiff still held the allotment letter; the promise to issue title had not been repudiated; and no communication had been given about this new development. The plaintiff's next move was this suit; and here we are.

26.This problem has its genesis in the office of the commissioner of Lands. Under the now repealed statute, the Government Lands Act cap 280, the president had power under Section 3 (a) to make grants of unalienated government land. The president almost always delegated the power to the commissioner of land.

Unalienated government land, in the context of the statute, meant government land not leased to any person or for which no letter of allotment has been issued by the Commissioner.

27.It seems clear that when the letter of allotment was issued to plaintiff in 1999, the suit land was unalienated government land. Thereafter, that land could not be leased or allocated to somebody

- else as it had been alienated land. The issuance of letter of allotment to plaintiff made it alienated land; it was no longer unalienated government land and neither the commissioner nor the president could re-allocate under the law.
28. It is in these circumstances that the 1st defendant bought the land. The 2nd and 3rd defendants were late comers to the scene. The plaintiff was there before them. When the office of Commissioner of land was purporting to grant them the suit land and issue them with Certificate of lease, it was engaging in futile exercise. It could not legitimately exercise that power since the suit land was no longer unalienated government land. The Commissioner of lands therefore allocated nothing since he had nothing to allocate. The only legitimate exercise he could engage in was to process the plaintiff's Certificate of lease a promise he had undertaken to fulfill.
29. This being the case, the lease granted to 2nd and 3rd Defendants counted for nothing and there was nothing to allocate them. The suit land had already become alienated and the Commissioner had no power over it.
30. But if, for any reason, the government wanted the land back, due process had to be followed. And that process would have to involve the plaintiff; and the plaintiff's entitlement to hearing could not be wished away. The unilateral decision therefore to allocate the land to 2nd and 3rd defendants was contrary to law and was in contravention of the plaintiff's rights.
31. When the 2nd and 3rd defendant therefore set out to purport to sell the suit land to the 1st defendant, they were selling nothing as they had nothing. When the lands office purported to authenticate the process by granting the 1st defendant a lease Certificate, it had no authority to do so and couldn't grant any title that could confer rights over the suit land.
32. What I am stating here is not a new legal position. I am not breaking new ground. The cases availed by the plaintiff viz **Dr. Joseph Arap Ng'oks** (Supra), **Cross Current Indigenous Network LTD's case** (supra) and **Rukaya Ali Mohammed's case** (Supra) are all illustrative of this legal position. One case may emphasise a shade of this; another a shade of that; but the sum total is the legal position I have expressed herein.
33. It is therefore not enough for 1st defendant to purport to be an innocent purchaser for value without notice. He bought nothing, for there was nothing to buy. It is not enough for 1st defendant to say he has Certificate of Lease while the plaintiff has a letter of allotment. If one looks at **Rukaya Ali Mohamed's case**, the reality dawns, all too well, that a letter of allotment confers absolute proprietorship unless it is challenged by allotting authority or was acquired contrary to law. None of this obtains here.
34. In all appearance, the 1st defendant seems to be a helpless victim of an elaborate con-game involving two private citizens, 2nd and 3rd defendants, and crooked government officials in various land offices.
35. It is not lost on me that the 2nd and 3rd defendants, though served, never entered appearance or filed defence. The case against them is therefore not controverted and the plaintiff therefore wins hands-down against them.

Question is: can the 1st defendant win if the two have lost? These are the alleged sellers of the suit land. They didn't own the suit Land both in law and in fact. The 1st defendant obviously is in a precarious position.

36. I have looked also at the submissions of the 4th and 4th defendants. The submissions stated clearly that the work of Land Registrar is to issue title on the basis of documents presented. This is not entirely true. The Land Registrar has a duty to act diligently and establish the reality pertaining to a given situation. The documents showing that the plaintiff was the first allottee of the land were in office that the registrar could reach easily. These offices were in his line ministry.
37. The submissions then delve into the procedure for allocation of land. The aim, it seems, was to show that the procedure was followed. But the procedure is not the issue. The issue is whether there was land that could be allocated. And in this case there was no such land. If we were to consider procedure alone, the 1st defendant seem to have followed it too. But what was he buying? Non-existent Land.
38. It should not be forgotten that PW2 is a land official. He testified and said his signatures were

forged. He wrote a report indicating that the plaintiff is the bonafide owner of the land. His evidence was not successfully discredited and he stood his ground even during cross-examination.
39. When all is considered, and in light of the analysis done heretofore, I make a finding that the plaintiff has proved his case on a balance of probabilities against the defendants.
40. I therefore grant prayers (b), (c), (d) and (e) in the amended plaint, which are the same prayers stated at paragraph 8 of this judgment.

Prayer (a), which is for general damages, is not granted as no evidence was led on that.

A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

7/5/2015

7/5/2015

A.K. Kaniaru j

John Ogendo court clerk

Parties absent

Orengo for plaintiff

Odeny for Maube for 1st defendant

Interpretation English/Kiswahili

Court: Judgment read and delivered in open court .

Right of appeal 30 days.

A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

7/5/2015

