



REPUBLIC OF KENYA



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**Ogutah v County Government of Kisumu & another (Environment & Land
Case E011 of 2021) [2025] KEELC 949 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 949 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E011 OF 2021
E ASATI, J
FEBRUARY 27, 2025**

BETWEEN

VICTOR ONYANGO OGUTAH PLAINTIFF

AND

COUNTY GOVERNMENT OF KISUMU 1ST DEFENDANT

THE CITY MANAGER, KISUMU COUNTY 2ND DEFENDANT

JUDGMENT

Introduction

1. Victor Onyango Ogutah sued the County Government of Kisumu and The City Manager, Kisumu City vide the amended Plaint dated 23rd August, 2021 over a parcel of land known as plot No. Kisumu Municipality/Block 10/699 herein called the suit land.
2. The Plaintiff's case is that in the year 2008 he bought the suit land, processed the lease title in respect thereof and put up a residential house thereon where he lives with his family since the year 2008 and that the value of the suit land as at the date of filing suit was Kshs.30,000,000.
3. That on 5th February, 2021 the Defendants issued a notice to him to vacate the suit land within 7 days, failure of which the Defendants were going to demolish the structures thereon on the basis that the suit land was illegally and fraudulently acquired and that it was meant for a parking space which actions of the Defendants were unlawful, illegal and irregular.
4. That part of the house was for residential for the Plaintiff and part for rental purposes.
5. That on 10th February, 2021, the Defendant descended on the suit land and marked the houses for demolition, an action that made the tenants to vacate by end of February, 2021. That since then the houses have remained vacant and the Plaintiff has been losing rental income of Kshs.87,500 per month. The Plaintiff therefore seeks for:-



- a. a declaration that the suit land parcel No. Kisumu Municipality/Block 10/699 was legally and procedurally acquired by the Plaintiff.
 - b. a declaration that the suit land parcel Kisumu/Municipality/Block 10/699 is not a public land and does not sit on a joint parking area space.
 - c. an order of permanent injunction restraining the Defendants either by themselves, agents, representatives, servants and/or any other person authorized by them from demolishing, destroying or interfering with the development on the suit land parcel number Kisumu/Municipality/Block 10/699.
 - d. an order for the removal of demolition markings on the houses on the suit land parcel Kisumu/Municipality/Block 10/699 within 7 days of failure of which the Plaintiff is allowed to do so at the Defendants' costs.
 - e. an order for compensation for the loss of rental income of Kshs.87,500 per month from February, 2021 till the date of the judgement.
 - f. costs of the suit and interest.
 - g. any other relief the court deems fit to award.
6. The Defendants denied the Plaintiff's claim vide their Defendants' Statement of Defence dated 13th January, 2023 and averred that the Plaintiff's claim was misconceived, does not lie and should be dismissed.

The Evidence

7. The Plaintiff's evidence comprised of his testimony and the documents he produced as exhibits. He testified as PW1 and adopted the contents of his witness statement dated 9th December, 2021 as his evidence in chief. He had stated in the witness statement that he was the registered owner of plot No. Kisumu/Municipality/Block 10/699 measuring approximately 0.0348 hectares together with the developments thereon.
8. That he bought the suit land in the year 2008 and thereafter processed the lease title and has put up a residential house where he has been living with his family since the year 2008 and that the value of the house was Kshs.30,000,000/-.
9. That after purchasing the suit land, he took possession and has been paying rates and all taxes due to the Defendant and the National Government. That the development plan was approved by the defunct Municipal Council of Kisumu and all procedures followed and the requisite payments made to the approving authorities.
10. That from the time he bought the land during the period of approval and development of residential house there had never been any issue raised that the suit land was irregularly or fraudulently acquired or that the same is meant for parking space.
11. That on 5th February, 2021 without any hearing or meeting, the Defendant issued a notice to vacate the suit land within 7 days failing which the Defendants were going to demolish the structures on the land.
12. That the defendants want to demolish his house on the suit land without an order of the court giving him opportunity to defend his title.



13. That the suit land was legally acquired from the original registered owner who had a valid lease from the National Government and that the place is not public land reserved for parking area or open space.
14. The Plaintiff produced land sale agreement dated 10th June, 2008, Lease dated 4th April, 1997, Certificate of leave for the suit land, approval letter, map-sheet, bundle of receipts, bundles of demand notices and payment receipts, search certificate for the suit land, demand for rent, payments receipts, inspection sheet & photographs, valuation report, certification of occupation permit, tenancy agreement, consent of the Land Control Board for transfer, Transfer of Lease Letter from Kali Security, valuation of stamp duty, certificate of incorporation, copy of lease certificate, Deed Plan and Copy of Letter. He testified further that it was the Defendants who gave him approvals and the relevant documents.

On cross-examination, he confirmed that he had tenants on the land.

15. The evidence for the defence comprised of the testimony of DW.1 who relied on the contents of her witness statement dated 27th March, 2023. She had stated in the witness statement that the Plaintiff had not been able to tell the court the process that was used in acquiring the property by the original Lessor.
16. That there is no copy lease signed between the then Commissioner of Lands and the purported Lessor neither are there copies of payment receipts for the allotment letter and a forwarding letter for Part Development Plant (PDP) to Kisumu for registration of the purported lease certificate.
17. That the Ndungu report clearly stipulated that Kisumu/Municipality/Block 10/699 is an open space and that PDP reference number 6/69/41 clearly shows that Kisumu/Municipality/Block 10/699 as an open space.
18. On cross-examination, DW1 stated that the Plaintiff obtained approval for development. That the property is built. That the property is marked with the “X” mark and this means that there is an anomaly with the building.
19. That no tenant can stay in a marked building. That there was no letter warning the Plaintiff that the property was to be marked. DW1 stated further that the development did not comply with the condition that he develops 50 per cent only.
20. That after building, the County Government inspect the building and compliant buildings are issued occupational certificates. That the Plaintiff was given occupational certificate and that this means that he met the conditions.
21. That the only problem with the building was non-compliance with the 50 per cent. That the Plaintiff could lease out the property or occupy it himself.

Submissions

22. Written submission dated 11th July 2024 were filed on behalf of the plaintiff.
23. On whether or not the Plaintiff is the legal proprietor of the suit property known as Kisumu Municipality/Block 10/699, Counsel referred the court to the provisions of Section 24 of the [Land Registration Act](#) and submitted that by virtue of being the registered owner, the Plaintiff is empowered to have the vested rights and privileges in the land and no person should interfere with it.
24. Counsel also relied on the case of Ahmed Ibrahim Suleiman and Another -vs- Noor Khamisi Suur (2013)eKLR where it was held that the Plaintiffs having been registered as proprietors and having been issued with certificate of lease are in terms Section 26(1) of the [Land Registration Act](#), entitled to the protection of the law.



25. Counsel submitted that in the present case, the Plaintiff had proved that he acquired the certificate of lease legally by the exhibits that he produced namely land sale agreement, the lease and certificate of lease.
26. On whether the Plaintiff breached the approved development plan, Counsel submitted that the defence did not produce any evidence to show this.
27. That the Plaintiff produced evidence to show that the Defendants have been inspecting the suit property as per the approved plan and that the Defendants issued the Plaintiff with Certificate of Occupation which is given after one has complied with the development plan.
28. On whether the Plaintiff is entitled to special damages Counsel submitted that that the valuation report produced as exhibit P.20 indicated that the market rent for the property was Kshs.100,000 per month. The Plaintiff's evidence is that he was getting a total of Kshs.87,500 which was rent from the 2-bedroom houses, one at Kshs.30,000/- and the other one at 40,000/- and that there was rent from the one bedroom at Kshs.17,500/-.
29. Relying on the case of Bash Hualers Limited -vs- Peter Mulwa Ngulu [2020]eKLR Machakos Civil Appeal No.263 of 2015 Counsel submitted that the Plaintiff had pleaded and proved the special damages.
30. That the units on the suit property are too many to be occupied by one individual or family.
Counsel prayed that the Plaintiff's claim be allowed.
31. On behalf of the Defendants submissions dated 9th September, 2024 were filed by the Office of the County Attorney, Kisumu County.
It was submitted that the issue for determination were: -
 - a. whether or not the Plaintiff is the registered owner of Kisumu/Municipality/Block 10/699,
 - b. whether or not land parcel No. Kisumu/Municipality/Block 10/699 measuring approximately 0.038 Ha is a public land,
 - c. whether or not L.R. No. Kisumu/Municipality/Block 10/699 measuring approximately 0.038 Ha was fraudulently acquired,
 - d. whether or not the Plaintiff encroached/trespassed on the Kisumu/Municipality/Block 10/699 measuring 0.038 Ha and should be held liable,
 - e. who bears the costs of this suit.
32. On whether the Plaintiff is the registered owner of the suit land, Counsel submitted that the Plaintiff is not the registered owner of the land as he has not been able to illustrate to the court the procedure by which he acquired the land. That the Plaintiff failed to prove that indeed Kendeep Construction Limited obtained a letter of consent from the then Commissioner of Lands before transferring the suit land to Kali Security Limited.
33. That there was irregularity in the issuance of the Certificate of Lease presented by the Plaintiff and dated 18th February, 2009. That the name of Kali Security Limited is not indicated in the Certificate of Lease yet the Vendor was in the sale agreement dated 10th June, 2008 and in the Certificate of Lease dated 10th June, 2008 and in the Certificate of Lease dated 31st day of March, 1999.



34. That there is no document presented showing how Kendeep Constriction Limited transferred the land to Kali Security Limited. That without these vital documents, the validity of the Plaintiff's ownership of the suit land cannot be shown.
 35. On whether the suit land is public land, relying on the provisions of articles 40(6) and 62 of *the Constitution* of Kenya, Counsel submitted that the suit land was public land set apart for parking space. That the Ndungu Report, the Development Plant Reference No.9/69/41 clearly show that the suit land is an open space.
 36. On whether the Plaintiff acquired the suit land fraudulently, Counsel submitted that the land was fraudulently acquired because the Plaintiff has failed to show how he got the documents of ownership. Counsel relied on the provisions of section 26 of the *Land Registration Act* and the case of *Vijay Marjaria -vs- Nansingh Madhusingh Darbar & Another* (2000)eKLR to submit that the Plaintiff acquired the suit land fraudulently. That the Plaintiff was fully aware of the mistake and omissions of the transfer in the Plaintiff's Certificate of Lease dated 18th February, 2009 and the acquisition of the Certificate of Lease before the date of the transfer and that the transfer and the Plaintiff's certificate of lease should be rendered null and void.
 37. On whether or not the Plaintiff should be entitled to damages, Counsel submitted that he who comes to equity must come with clean hands. That the Plaintiff breached conditions 5 and 6 of the lease agreement dated 4th April, 1997 and condition 4 of the approval letter dated 27th August, 2008.
 38. That the Plaintiff has not demonstrated that he obtained approval for change of use to multi-sue of the premise. That the Plaintiff has not proved that he has been receiving rent from the tenants.
- Counsel prayed that the suit be dismissed with costs.

Issues for Determination

39. From the pleadings filed, the evidence adduced and the submissions made, the issues that arise for determination are;
 - a. whether the suit land is public land that sits on parking/open space.
 - b. whether the Plaintiff is entitled to the relief sought
 - c. who pays costs of the suit?

Analysis and Determination

40. The first issue for determination is whether or not registration of the suit land in the name of the Plaintiff was fraudulent.
41. The Plaintiff pleaded in paragraph 4 of amended Plaintiff that he is the registered owner of the suit land. The Defendant vide the contents of paragraph 3 of their Defence denied the contents of paragraph 4 of the plaintiff. The Plaintiff produced documents to show how he acquired the land and that the land is registered in his name. There was no pleading in the defence that the land was acquired fraudulently. The Defence witness, DW1 produced no documents to demonstrate that the land was acquired fraudulently.
42. DW1 stated that the only problem was that the Plaintiff was non-compliant with the approvals given by the Defendant and terms of the lease. DW1 also stated that the approvals for the development of the plot were given by the 1st Defendant including occupational certificate to show that the building was compliant.



43. On the basis of the evidence placed before court, I find that title held by the Plaintiff was not acquired fraudulently. Its validity was not questioned in the Defence or evidence presented by the Defendants. The law requires that fraud be specifically pleaded and proved to the required standard. The standard of such proof is proof beyond the usual standard of proof in civil cases of a balance of probabilities. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the court held that:
- “When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
44. The next issue is whether or not the suit land is public land that sits on parking space.
45. There was no claim in the defence filed by the Defendant that the suit land was public land or that it was part of the parking area.
46. DW1 in her witness statement claimed that the Ndungu Report clearly stipulated that Kisumu/Municipality/Block 10/699 is an open space. That the Development Plan reference No.9/69/41 clearly shows Kisumu/Municipality/Block 10/699 as an open space. Submissions were made in support of the claim by DW1.
47. However, no document whatsoever was produced in support of the allegations. The Ndungu Report, the Development Plan referred to were not produced. It is in the evidence produced that all the approvals and inspection of the development on the suit land in favour of the Plaintiff were done by the Defendant. It was not explained by the Defendants why they could proceed to collect rates and other levies, give approvals for development and inspect the developments to the end and issue occupational certificate in favour of the plaintiff in respect of public property sitting on open space or parking area.
48. I find that it has not been proved that the suit land is public property or that it sits on a parking area or open space.
49. The next issue for determination is whether or not the Plaintiff is entitled to the relief sought.
50. The relief sought by the Plaintiff is as contained in the amended plaint. On the basis of the evidence placed before court, I find that the Plaintiff is entitled to the relief sought save for the claim for special damages at Kshs.87,000 per month. Although the plaintiff produced tenancy agreements and valuation report to prove the claim for special damages, there was no evidence that the plaintiff had tenants occupying the suit premises who were paying the claimed amount as at the time the Defendants marked the premises with the “X” mark. There is also no evidence that the plaintiff stopped receiving the said amounts as a result of the markings on the premises. There were no rent books or receipts or any such records to demonstrate the loss. Special damages must be specifically proved.
51. I therefore find that the plaintiff has proved his claim on a balance of probabilities and hereby enter judgement in his favour and against the Defendants for: -
- i. a declaration that the suit land parcel No. Kisumu Municipality/Block 10/699 was legally and procedurally acquired by the Plaintiff.
 - ii. a declaration that the suit land parcel Kisumu/Municipality/Block 10/699 is not public land and does not sit on a joint parking area or open space.
 - iii. an order of permanent injunction restraining the Defendants either by themselves, agents, representatives, servants and/or any other person authorized by them from demolishing,



destroying or interfering with the developments on the suit land parcel number Kisumu/ Municipality/Block 10/699.

- iv. an order for the removal of demolition markings on the houses on the suit land parcel number Kisumu/Municipality/Block 10/699 within 30 days from the date of service of the decree herein upon the Defendants failure of which the Plaintiff is allowed to do so at the Defendants' costs.
- v. costs of the suit and interest.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 27TH DAY OF FEBRUARY 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Onyango for the Plaintiff.

Awuor for the Defendants.

