



**Western Ceramic Industries Limited v Oranga & 11 others (Environment & Land  
Miscellaneous Case 4 of 2022) [2024] KEELC 1405 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1405 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT & LAND MISCELLANEOUS CASE 4 OF 2022**

**E ASATI, J**

**MARCH 14, 2024**

**BETWEEN**

**WESTERN CERAMIC INDUSTRIES LIMITED ..... PLAINTIFF**

**AND**

**PHOEBE ORANGA ..... 1<sup>ST</sup> DEFENDANT**  
**JUDITH AKINYI OMONDI ..... 2<sup>ND</sup> DEFENDANT**  
**MICHAEL ONG'AO ..... 3<sup>RD</sup> DEFENDANT**  
**DAVID OKUMU ..... 4<sup>TH</sup> DEFENDANT**  
**OKUMU OYOLA ..... 5<sup>TH</sup> DEFENDANT**  
**CHRISTOPHER OYIE ..... 6<sup>TH</sup> DEFENDANT**  
**MARY AKOTH ..... 7<sup>TH</sup> DEFENDANT**  
**TOM MBOYA AWINO ..... 8<sup>TH</sup> DEFENDANT**  
**CHIAGA ACHOLA ..... 9<sup>TH</sup> DEFENDANT**  
**OWINO ACHOLA ..... 10<sup>TH</sup> DEFENDANT**  
**MARTHA WANDAYA ..... 11<sup>TH</sup> DEFENDANT**  
**DERICK OGODO ..... 12<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein sued the Defendants in Kisumu CMC ELC No.478 of 2018 (the suit) vide the plaint dated 13<sup>th</sup> December 2018 seeking for a declaration that it was the absolute owner of land parcel



- No.KISUMU/KIBOS/L.R.NO.29037 measuring approximately 1.9HA a permanent injunction and an order for demolition of illegal structures put up by the Defendants on the suit land.
2. In the pendency of the suit, the Defendants filed another suit in the Environment and Land Court namely; Kisumu ELC 11 (OS) of 2020 against the plaintiff herein and the National Land Commission (NLC). Vide the amended Originating Summons dated 26/3/2020 they sought for various relief including a declaration that they are the owners of the suit land by virtue of the doctrine of adverse possession.
  3. Vide Court order made in Kisumu ELC Misc. Appl. No. 50 of 2020, the suit was transferred to the Environment and Land Court, Kisumu and registered as Kisumu ELC Case No. E004 of 2021 Western Ceramics Ltd Vs. Phoebe Oranga & 11 Others.
  4. On 26<sup>th</sup> October 2021, the Court consolidated the two cases and gave directions that;
    - a. the proceedings which had already been taken in Kisumu CMC ELC No. 478/2018 be typed and relied upon as the proceedings in the consolidated case.
    - b. Kisumu ELC No. 11 of 2020 (OS) is consolidated with Kisumu ELC No. E004 of 2021.
    - c. proceedings be conducted in Kisumu ELC No. E004 of 2021.
    - d. the Originating Summons be treated as Defence and counterclaim.
    - e. the Replying Affidavit to be treated as Defence to the Counterclaim.
    - f. hearing viva voce.
    - g. matter to proceed from where it had reached.
    - h. proceedings to be typed.
    - i. the Plaintiff's witnesses to be recalled.
  5. The case was later transferred to the Environment and land Court Vihiga for hearing and disposal after the Environment and Land Court Judge at Kisumu recused himself.

#### **The Plaintiff's case**

6. The Plaintiff's case as contained in the Plaint dated 13<sup>th</sup> December 2018 is that it is the registered owner of all that parcel of land known as Kisumu/KIBOS/L.R. No. 29037 measuring 1.9 Ha or thereabouts. That sometime on 28<sup>th</sup> September 2018 the Defendants illegally and /or unlawfully trespassed onto the suit land, destroyed the Plaintiff's wall fence and constructed temporary structures and put up a fence on the suit land thereby interfering with the Plaintiff's peaceful occupation and use of the suit land.
7. That the unlawful actions of the Defendants have caused the Plaintiff irreparable damage as the Plaintiff was supposed to start construction of an industry on the suit land and its constitutional rights to peaceful occupation and use of the suit land have been breached. The Plaintiff therefore sought the court's intervention.

#### **The Defence case**

8. The case of the Defendants as can be gathered from the Amended Originating Summons and the Affidavit in support thereof is that the Defendants are residents of the areas that were gazetted to be acquired by the Government of the Republic of Kenya on behalf of the then County Council of Kisumu. That the necessary procedures were to be done before final acquisition and then transferring



of the land to the Kisumu County Council. That the procedures were never done and that they (Defendants) retained their parcels of land and are in occupation. That several people have been colluding with individuals at the Commissioner of Lands Offices to be allocated the Defendants' land and as a result illegal titles have been issued by individuals at the lands office to depict that they have acquired the Defendants' land including the Plaintiff herein. That the National Land Commission issued a Gazette Notice No. 1995 dated 1<sup>st</sup> March 2019 to critically look into the issue of compensation. That the entire area was to be under the trust land and hence the title herein issued by the National Land Commission is illegal, and invalid and null and void. That the Plaintiff's interest if any over the suit land is subject to the Defendants' overriding interest hence the Defendants are the genuine owners of the subject parcel of land.

### **The Evidence**

9. The evidence on record for the Plaintiff (Western Ceramics Industries Ltd) comprises of the testimonies of 5 witnesses who testified in Kisumu CMC ELC No. 478 of 2018 before the suits were consolidated. PW1 adopted the contents of his witness statement dated 13/12/2018 as his evidence in chief. He stated that he was a director in the Plaintiff Company. He produced exhibits namely CR12 showing the list of directors of the Plaintiff company, certificate of in-corporation of the Plaintiff company, resolutions by the Plaintiff company dated 6/12/2018, letter of allotment for parcel of land No. L.R. 29037, lease dated 24/7/2015, receipt for payment of land rent and rates dated 13/5/2015, bundles of receipts from City of Kisumu, certificate of title issued on 12/10/2015, certificate of clearance, certificate of payment of rates, beacon certificate by Patrick Opiyo, Physical Development Plan (PDP) Ref. 52227, site plan, letters dated 17/1/2018 from County Government of Kisumu accompanying the plan letter dated 7/7/1992 approving Industrial Project, letter dated 25/10/1991 from District Commissioner Kisumu, Requisition from police to compel attendance and photographs.
10. On Cross-examination, PW1 stated that he did not see the people who brought his fence down. That he did not see the people who erected the chain link fence but that he was told that the Defendants came from Kanyakwar area and that the site was their ancestral home, that he had bought the land to put up a ceramic plant but had not put up the ceramic factory to date.
11. PW2 who works with the Department of Planning, County Government of Kisumu testified that the Development plan in respect of land parcel No. L.R. 29037 bore the stamp of approval of City Planning dated 18/1/2018 and for Engineering dated 12/1/2018. That it also bore the stamp of Director of Public Health signed on 15/1/2018 and a stamp of the City Manager and that the approval was valid till 18/1/2020.
12. On Cross-examination PW2 stated that he knew where the subject land was situated. That he did not know if it was disputed. That it is an area that was to be acquired by the Government vide Gazette Notice No. 3400 of 1976, that the land was to be given to Kisumu County Council. That the property was in the list of Kisumu County Government properties. That there is a task force put in place which is yet to submit its report on the issue of illegally and irregularly allocated plots, that there are residents of Kajulu, Kanyakwar and Kano residing at the area of the suit property.
13. On re-examination, he stated that the suit land was not mentioned in the Gazette Notice No.3400 of 1976. That the Gazette Notice does not refer to Kuya and Kasule areas.
14. PW3 a resident of Kolwa Central Location relied on the contents of his Affidavit dated 28/1/2019 as his evidence in chief. On cross-examination he stated that he knows the suit land No. 29037 as he was employed as the caretaker thereof, that there are houses outside the fence and people reside therein.



15. PW4, a Land Surveyor testified that he established the beacon of land parcel No. 29037 which were shown to PW1 as a director of the company. He produced the beacon certificate as exhibit. On cross-examination he stated that the beacons had been placed much earlier and he only established them at the request of the plaintiff.
16. PW5 testified that Western Ceramics wanted to sell them land to put up affordable houses for Nyalenda.
17. Vide the directions given on 26/10/2021 by the ELC the proceedings which were taken in case No. CMC ELC No. 478 of 2018 are to be relied upon as the proceedings in the consolidated case.
18. No evidence was adduced by the Defendants in the consolidated case or at all.
19. The case came up before this Court on several dates and on 10<sup>th</sup> July, 2023 when the matter came up for hearing there was no attendance for the Defendants. Affidavit of service filed showed that the Defendants' Advocates had been served with Hearing Notice. The Plaintiff closed its case.

### **Submissions**

20. Written submission dated 14<sup>th</sup> August 2023 were filed by Carrey Joseph Advocate on behalf of the Plaintiff. Counsel submitted that the only issue for determination is whether the Plaintiff has a good title to the parcel of land known as Kisumu/ Kibos/ L.R. No. 29037. Counsel submitted that the Defendants having failed and/or lost interest to persecute their case, the Plaintiff's prayers should be granted as prayed. That the title held by the Plaintiff was properly issued to it by the government through the proper and due process as established by the testimonies of the witnesses. That the Defendants have not within their pleadings specified the nature of interest, if any they claim in the suit property and that even if it were that they specified any, the same would still fail to meet the threshold set by the Supreme Court in the case of Isaack M'nanga Kieba vs Isaaya Theuri M'lintari & Another [2018] eKLR. That the Defendants have not produced any evidence. Counsel urged the Court to allow the Plaintiff's claim as prayed with costs.
21. Written submissions dated 11<sup>th</sup> December 2023 were filed by the firm of Mauwa & Company Advocates on behalf of the Defendants. Counsel submitted that the submissions were filed on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 11<sup>th</sup> Defendants and that the case against the 5<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants was withdrawn and the 1<sup>st</sup> Defendant passed away. Counsel submitted that any title that the Plaintiff may have to the suit parcel was acquired illegally, un-procedurally and through a corrupt scheme hence not a good title.
22. Relying on the provisions of section 26 of the *Land Registration Act*, Counsel submitted that while certificates of title issued by the Registrar are usually considered prima facie evidence of proprietorship where such titles are acquired illegally the title can be challenged. That while the Plaintiff's evidence is that it applied for the suit land and was given allotment letter in 1992, the Plaintiff was incorporated in 1996. That this means that the Plaintiff managed to apply and get allotted the suit land several years before its incorporation illegally, un-procedurally and through corrupt scheme or through fraud and misrepresentation. Counsel submitted further that the suit parcel of land belonged to the Defendants who have been in actual occupation thereof since time immemorial as the land is part of their ancestral land.
23. That the area where the suit land is situated was heavily affected by historical land injustices. That vide Kenya Gazette Notice No. 3400 of 19<sup>th</sup> November 1976, the Commissioner of Lands set aside land including the suit land for housing and industrial development. That the Gazette Notice kick-started the acquisition of the said land that subsequently birthed the historical land injustices and



illegal evictions in the concerned areas. That most of the victims were neither compensated nor given alternative places to settle.

24. That vide the Gazette Notice No. 1995 dated 1<sup>st</sup> March 2019 the National Land Commission after conducting investigative hearings in respect of Kanyakwar, South Kajulu and Kolwa areas, allowed the claim and recommended the formation of a task force to review the compensation process and identify those who may not have been compensated. That the task force is still acting on the recommendations. That the National Land Commission wrote to the Environment and Land Court on 9<sup>th</sup> June 2022 requesting suspension of active court cases whose subject matter involves the extended areas of Kisumu Municipality in Kanyakwar, South Kajulu and Kolwa. That the request was rejected and the Commission directed to move the Court appropriately by way of substantive applications in the individual matters.
25. That the approval of the development of the suit land dated 17<sup>th</sup> January 2018 issued to the Plaintiff is null and void as the suit parcel is still under dispute. That condition 5 of the approval for development dated 17<sup>th</sup> January 2018 stated that the plot must not constitute past or any disputed private/public utility land otherwise the approval becomes null and void. Counsel urged the Court to find in favour of the Defendants and dismiss the Plaintiff's suit with costs, declare the Plaintiff's title to the suit land invalid and cancel it under section 26(1) of the [Land Registration Act](#) and make any other order deemed necessary in the Defendants' favour.

#### **Issues for determination**

26. Through their respective written submissions, the parties are in agreement that in this matter there is only one issue for determination and that is whether or not the Plaintiff has good title to the suit land. I adopt the same as the issue for determination herein.

#### **Analysis and determination**

27. There is no dispute that the Plaintiff holds the lease in respect of the suit land No. Kisumu/KIBOS / L.R. NO. 29037 measuring approximately 1.9990 hectares or thereabouts. Exhibit P.5 was the lease. The same is dated 24<sup>th</sup> July 2015. It is a 99 years lease in favor of the Plaintiff running from 1<sup>st</sup> November 1992.
28. The law in section 24(b) of the [Land Registration Act](#) provides that subject to the Act;

“the registration of a person as the proprietor of a lease shall vest in that person the lease hold interest described as the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease”.

Section 25 of the same Act provides for the rights of a proprietor as follows;

“the rights of a proprietor whether acquired on a first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided for in this Act and shall be held by the proprietor together with all privileges and appurtenant belonging thereto, free from all other interests and claims whatsoever but subject to;

- a. to the lease, charges and other encumbrances and to the conditions and restrictions if any shown in the register;



- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register unless the contrary is expressed in the register.

And section 26(1) provides that certificate of title is to be held as prima facie evidence of proprietorship.

- 29. On the basis of the above cited provision of the law, the certificate of lease held by the Plaintiff is to be taken by this Court as prima facie evidence that the Plaintiff is the absolute and indefeasible owner of the suit land hence entitled to unhindered enjoyment thereof only subject to the exceptions in the said provisions of the law.
- 30. The Plaintiff adduced evidence of the process it followed in order to acquire the proprietorship and development of the suit land.
- 31. The law provides instances where a title held by an individual can be challenged and impeached. These are provided for in sections 26 and 80 of the *Land Registration Act*. They include;
  - a. on the ground of fraud or misrepresentation to which the person is proved to be a party;
  - b. where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
- 32. The burden to prove of the existence of the instances the basis of challenging the title lies with the person alleging the existence of these incidences, under section 107 and 108 of the *Evidence Act*. In this case the burden to prove that the lease was obtained illegally, un-procedurally or through a corrupt scheme or by fraud or misrepresentation to which the Plaintiff was a party lay with the Defendants.
- 33. The Defendants adduced no evidence to support their pleadings. Vide the directions given by the Court on 26/10/2021 the Originating Summons filed by the Defendants was treated as Defence and Counterclaim. No evidence was adduced in support thereof. The narration of facts contained in the submissions filed on behalf of the Defendants was not supported by any evidence. No evidence was adduced that the suit land was the ancestral land of the Defendants, that the Defendants have occupied the suit land since time immemorial, that the suit land is one of the lands affected by Kenya Gazette Notice No. 3400 of 1976 and that the plaintiff's title is invalid.
- 34. On the other hand, the Plaintiff produced documents of ownership of the suit land. It produced both documentary and oral evidence regarding the process of acquisition of the ownership and of the interference of the Defendants with the suit land. I find no evidence to impeach the Plaintiff's title. I further find that the plaintiff has proved its case on a balance of probabilities and enter judgement in its favour in terms of prayers a), b) and c) of the plaint. Costs of the suit are awarded to the plaintiff.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED VIRTUALLY THIS 14<sup>TH</sup> DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

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**E. ASATI**

**JUDGE**

**In the presence of:**



Ajevi: Court Assistant.

Carrey Francis Advocate for the Plaintiff.

No appearance for the Defendants.

