



REPUBLIC OF KENYA



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Aboka & another v County Government of Kisumu & 11 others (Civil Appeal 120 of 2017) [2023] KECA 640 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 640 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 120 OF 2017
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MAY 26, 2023**

BETWEEN

JAMES ALOYO ABOKA 1ST APPELLANT

LUCAS ANDERA 2ND APPELLANT

AND

THE COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

**THE DISTRICT CRIMINAL INVESTIGATION OFFICER, KISUMU 3RD
RESPONDENT**

THE DISTRICT LAND REGISTRAR KISUMU 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

HERINE JUMA AGOLA 6TH RESPONDENT

NELSON OTIENO OCHIENG 7TH RESPONDENT

MARGARET OWITI ABOR 8TH RESPONDENT

SUSAN ACHIENG ODHIAMBO 9TH RESPONDENT

EMANUEL AGAWO OJAL 10TH RESPONDENT

WILLIAM ODHIAMBO OWITI 11TH RESPONDENT

THE NATIONAL LAND COMMISSION 12TH RESPONDENT

(An appeal arising from the judgment and decree of the Environment and Land Court at Kisumu (Kibunja, J.) dated 27th September, 2016 in HCCC No. 91 of 2011)



JUDGMENT

JUDGMENT OF TUIYOTT, JA

1. This appeal, in the main, involves a dispute over ownership of lands designated plot Nos 15,17,35 and 36 in Nyalenda Estate, Kisumu and also registered as Kisumu/Nyalenda “B”/ 2548 and Kisumu/Nyalenda “B” 2551. That the parcels of land in dispute have two sets of numbers is itself indicative of the controversy.
2. Although he does not have any claim over the parcels of land, Lucas Diri Andera (the 2nd appellant or Lucas) found himself in the middle of the dispute over the ownership of those parcels of land between James Aloyo Aboka (the 1st appellant or James) on the one hand and Herine Juma Agola (the 6th respondent or Herine) and Nelson Otieno Ochieng (the 7th respondent or Nelson) on the other. In the petition before the Environment and Land Court (ELC) at Kisumu which gave rise to this appeal, it is averred that Lucas was an employee and caretaker of James of his various properties in Siaya and Kisumu. Lucas was charged in Kisumu Chief Magistrate Criminal Case No. 530 of 2014 Republic vs Lucas Ojin Andera where he faced two counts of forcible detainer contrary to section 91 of the [Penal Code](#) and two counts of malicious damage to property contrary to section 339(1) of the [Penal Code](#) in which Herine and Nelson were the complainants.
3. The case of the appellants was that the criminal proceedings were brought with the intention of embarrassing James, a senior public servant, and intimidating him into giving vacant possession of the suit properties to the two respondents. James defends his ownership of the four plots stating that he bought them from Margaret Owiti Abor (the 8th respondent), Susan Achieng Odhiambo (the 9th respondent), Emanuel Agawo Ojal (the 10th respondent) and William Odhiambo Owiti (the 11th respondent) who were the original allottees of the parcels of land from the County Council of Kisumu, whose functions and assets were taken over by the County Government of Kisumu (the 1st Respondent) following the promulgation of [the Constitution 2010](#). The defunct County Council became the owners of the land after the Central Government (as known then) had acquired it in favour of the Council for purposes of expansion of Kisumu Town. It was the appellants’ case that James paid all transfer fees and requisite charges to the Council, took possession thereof and paid all relevant council rent and rates, when due.
4. There was a disruption of fortune when on or about September 16, 2014 Lucas was summoned to the office of the District Criminal Investigation Officer, Kisumu (the 3rd respondent) on complaints of Herine and Nelson who claimed to have acquired the plots from the Municipal Council of Kisumu (also defunct), distinct from the County Council, which had purported to repossess the plots from certain allottees and invited members of the public to bid. On this James and Lucas called into question the ability of the Municipal Council to do so, further noting that the Commissioner of Lands, vide his letter of November 21, 2010, nullified the purported allotments made by the Municipal Council.
5. That in a nutshell was the case of the appellants in the ELC in which they sought the following prayers:
 - a. A declaration that the 1st Petitioner is the rightful allottee of the entire plots 15,17,35 and 36 Nyalenda estate of Kisumu County.
 - b. A declaration that the repossession of plots 15,17,35 and 36 by the defunct Municipal Council of Kisumu was unlawful, discriminatory, null and out rightly unconstitutional.



- c. A declaration that the registration and issuance of title deeds for Kisumu/Nyalenda “B” 2548 and Kisumu/Nyalenda “B”/2551 are illegal and null and an order cancelling their registration.
 - d. A declaration that the Petitioner’s fundamental right to life, human dignity, economic & social development as protected and envisaged by article 26,28 and 43 of *the constitution of Kenya 2010*, consists, comprises and translates to the right and entitlement to means of livelihood and social economic wellbeing and ultimate human life.
 - e. A restraining order do issue directed at the 6th and 7th respondents, their employees,workers, agents and/or whomsoever jointly and severally restraining them from repossessing, allocating to whomsoever, trespassing, encroaching, forceful entry, fencing, selling, disposing, transferring, alienating, charging, stepping on, advertising, dealing and or interfering whatsoever with the 1st Petitioner’s land being plot number 15,17,35 and 36 situate at Nyalenda within Kisumu County.
 - f. An order compelling the 1st and 4th and 12th respondents to rectify their records by including the name of 1st respondent as the bonafide allottees to plot number 15,17,35 and 36 situate at Nyalenda within Kisumu county.
 - g. In the alternative to “D” above an order compelling the 1st respondent to compensate the 1st petitioner at current market rate with the loss of plot number 15,17,35 and 36 situate at Nyalenda within Kisumu County.
 - h. A prohibitory order do issue directed at the 2nd and 3rd respondent prohibiting them from preferring any criminal charges against the petitioners herein in violation of the 2nd and 3rd respondents mandate and obligations under the law and *the constitution*.
 - i. A mandatory injunction do issue directing the 2nd and 3rd respondents not to prefer any criminal charges against the petitioners herein in violation of the 2nd and 3rd respondents mandate and obligations under the law and *the constitution*.
 - j. An order of certiorari do issue quashing Kisumu CMCR No. 530 of 2014 Republic v Lucas Ojin Andera.
 - k. The petitioners be awarded general and exemplary damages for violation of his fundamental rights.
 - l. Any other reliefs do issue to protect the petitioner’s constitutional rights.
- The costs of this petition be paid to the petitioners.”

5. The 8th, 9th and 10th respondents supported the Petition and averred that the petitioners were in constant and continuous occupation of the suit parcels.
6. The position of the County Government was that the transfer in favour of James was invalid as the suit property was under the jurisdiction of the Municipal Council and not the County Council. Connected, James made payment to the County Council instead of the Municipal Council. Regarding possession by the appellants, the County Government stated that the alleged possession amounted to



- trespass on the suit properties which had not been allocated to them legally. The role of the Director of Public Prosecution (the 2nd Respondent) to investigate the matter was defended. It was averred that the petitioners' claim lies squarely with the police and the persons who fraudulently sold the suit property to them without following the laid down procedure with the then Municipal Council.
7. The only other respondent who filed an answer to the petition was Herine. She deposed that Kisumu/Nyalenda 'B'/357 was originally registered as a freehold title in favour of the County Council. The property was subsequently subdivided into three portions being 2376, 2377 and 2378 which were reserved for residential, school and commercial purposes respectively. Sometime in the year 2010 the Municipal Council, through illegal means, tried to repossess the parcels owned by the County Council but were warned against the illegality by the Commission of Lands in a letter dated 22nd November, 2010. Further, the County Council obtained an order in Kisumu High Court Civil Case No 36 of 2011 Kisumu County Council vs Kisumu Municipal Council barring the attempted repossession and allocation by the Municipal Council. She states that she obtained title to Kisumu/Nyalenda 'B'/2376 from the County Council and is the absolute owner thereof. Finally, that she sued James in ELC 286 of 2014, a suit that was pending during the filing of the petition which she had obtained an interlocutory order restraining James from trespassing on, wasting or interfering in any other way in Kisumu/Nyalenda 'B'/2251.
 8. The trial before the ELC was by way of affidavit evidence and in the end the trial court (Kibunja, J) held that the appellants had not succeeded in their petition and ordered as follows:
 - a. That the petition is hereby dismissed.
 - b. That due to the nature of the claim, each of the parties do bear their own costs.
 - c. That the order of stay of proceedings in Kisumu CM CRC No 530 of 2014, Republic v Lucas Adera, issued on January 20, 2015 is hereby vacated. The said Lucas Adera (2nd Petitioner) should present himself to the trial court within the next 30 days for further directions."
 9. In arriving at that outcome, the learned Judge was of the view that the purported repossession of the plots by the Municipal Council of Kisumu was not recognized by the Commissioner of Lands for failure of due process and the Council had no title to pass to any allottee including the 6th and 7th respondents; as the petitioners had not availed the original allotment letters in respect to plot numbers 15 and 36 and the sale agreement over plot numbers 15,17 and 3, the court was unable to declare James as the rightful allottee of the said Plots and; the existence of dispute relating to the ownership of the plots did not mean that the DPP or DCI should be stopped from carrying out their constitutional and statutory duties of investigating and prosecuting the criminal proceedings.
 10. James and Lucas are now before us on a first appeal in which their grievances were addressed under three heads. The learned Judge is said to have erred in fact and law in;
 - i. failing to find the 1st appellant as the rightful allottee of the plot numbers 15,17,35 and 36 in Nyalenda estate.
 - ii. finding that the criminal case Kisumu CMCR No 530 of 2008 against the 2nd appellant should be maintained.
 - iii. in finding that the petitioners' fundamental rights, to wit, human dignity, economic and social development were not infringed.



11. On the first grievance, Mr Odeny, learned counsel appearing for the appellants, submitted that the learned Judge failed to consider and take into account the evidence adduced by the 1st appellant in arriving at the conclusion that he was not the rightful allottee of the plots. Having appreciated that the 1st appellant purchased the suit property from the 8th, 9th, 10th and 11th respondents, the learned trial judge erred in failing to declare him the bona fide owner thereof for lack of transfer instruments. We are told that the best the local authority could do was to issue plot cards backed by the minutes of both the Works and Town Planning Committees and the full Council adopting them.
12. It is further contended that having found that the Municipal Council did not acquire any good title over the plots it purported to repossess and therefore had no good title to pass to the 6th and 7th respondents, the learned trial judge contradicted himself in failing to declare the 1st appellant as the rightful allottee of the plots.
13. In similar breath it is argued that as no good title had passed to the 6th and 7th respondents, there was no basis for the 2nd and 3rd respondents to maintain the criminal charge against Lucas. It is submitted that in interpreting the provisions of the Bill of Rights, a court must give full effect to the rights and freedoms that are construed in the Bill of Rights and must promote the values and principles that underlie a democratic society based on possession, justice, human dignity, equality and freedom and in particular the values and principles set out in Article 10 of *the Constitution*. It was urged that the law enjoins the 1st and 2nd respondents to be scrupulously just to an alleged offender and to ensure fair investigation and trial, and the duty of courts to be watchful of the constitutional right of citizens and against any encroachment of those rights. Counsel submitted that a criminal prosecution which is commenced in the absence of a proper factual foundation or basis is suspect for ulterior motives or improper purposes. The 1st and 2nd respondents are said to be conspicuously mum and did not demonstrate that they had reasonable and plausible cause for mounting the prosecution. The appellants state that criminal justice should not be allowed to become a tool for the police to violate the constitutional rights of citizens. The ELC is said to have worsened matters in believing the actions of the 1st and 2nd respondents. A further submission is that it is a travesty of justice to charge a mere caretaker.
14. On the last issue, it is asserted that the 1st appellant demonstrated that he purchased the suit plots with the key intention of developing them for personal and economic use which has been hindered by the action of the 6th and 7th respondents; there has been denial of the 1st appellant's free use of his property with threats of criminal prosecution of his employee, and, somewhat dramatically, that denying him the economic, cultural and social use of his property is akin to signing his death warrant and violates his fundamental rights.
15. Only the 6th respondent opposed the appeal and attended the plenary hearing. The 6th respondent aligns herself to the judgment of the trial court and submits that the trial court had no business handling the case as it was res judicata Kisumu ELC No. 286 of 2014. Further, that the appellants' case was short of evidence as it only produced a sale agreement relating to parcel no. 36 Nyalenda B and did not produce any allotment letters in respect of the 8th-11th respondents nor were the minutes of the Council or its committees sufficient to prove that the appellants were owners of the suit property. The 6th respondent contends that by failing to provide the necessary documents, the appellants denied the trial court an opportunity of scrutinizing the authenticity and/or genuineness of the documents of James over the suit lands.
16. This appeal and the arguments made by the parties invite us to determine the following issues:
 - i. Did the appellants sufficiently prove ownership of the suit property?



- ii. If so, was that sufficient for the trial court to quash the criminal proceedings against Lucas?
 - iii. If the answer to (ii) is in the positive, was there sufficient evidence for the trial court to find that the appellants' right to life, human dignity, economic and social development had been infringed?
17. I consider those questions within this Court's remit as a first appellate Court which is to re-evaluate the evidence with a view to reaching its own independent conclusion. On this occasion we stand in the same position as the trial court as hearing proceeded by way of affidavit evidence and we do not suffer the handicap that would be associated with re-appraising evidence that was presented viva voce at trial.
18. Yet before I get into the substance of the appeal I must say something about the attempt by the 6th respondent to urge us to affirm the decision on the argument that the ELC suit was improperly before Court for being res judicata Kisumu ELC No 286 of 2014. This contention, I am afraid, is not available to the 6th respondent because she neither filed a cross-appeal nor a notice to affirm the decision of the superior court below on grounds other than or additional to those relied upon by the trial court (see Rules 93 and 94 respectively of the *Court of Appeal Rules, 2010*, now Rules 95 and 96).
19. Before the superior court below, the case by James is that he acquired ownership of the suit property from the 8th, 9th, 10th and 11th respondents who in turn were the original allottees of the parcels from the County Council of Kisumu. His grievance was that the same parcels of land had been wrongfully designated Kisumu/Nyalenda B 2551 and Kisumu/Nyalenda 'B' 2548 and purportedly transferred to the 6th and 7th respondents respectively by the Municipal Council of Kisumu. The contention by James was that the Municipal Council had no authority to repossess the parcels of land and therefore to transfer them to the 6th and 7th respondents.
20. At trial the 6th respondent's evidence supported the position of James on one aspect which, ironically, reveals a fundamental misconception in the case set up by James and which could have been avoided had James carried out a search over parcels Kisumu/Nyalenda B 2551 and Kisumu/Nyalenda B/2554. The common position of both James and the 6th respondent is that the suit properties were in fact owned by the County Council of Kisumu and not the Municipal Council of Kisumu, as the registered proprietor of freehold interests in the parcels.
21. A fundamental flaw in the case by James is that the leasehold interests held by the 6th and 7th respondents were granted by the Municipal Council. James had proceeded on the assumption that upon the Municipal Council purporting to repossess the allotments he held vide the notices appearing in the Daily Nation publications of October 18, 2010 and November 12, 2010, the Municipal Council then granted leasehold interests to the 6th and 7th respondents. However, the evidence set out in the affidavit of the 6th respondent (and which is unchallenged) is that, through a different notice published in the Daily Nation of March 28, 2011, the County Council of Kisumu repossessed various allocations in Nyalenda B including those made in respect to the suit properties. In that notice, the County Council stated that it was repossessing the plots by forfeiture at the expiry of 21 days from the date of the notice. From the appellant's own documents, the allocations he held and which had been initially granted to the 8th, 9th, 10th and 11th respondents were within Nyalenda 'B' 357. The official search of this property produced by the 6th respondent shows that the registered proprietor of Nyalenda 'B' 357 was the County Council of Kisumu with absolute interest registered on March 28, 1998.

Having repossessed the plots within that land (which included those allotted to the 8th to the 11th respondents) the County Council had formally subdivided the land and fresh allotments made. The



titles held by the 6th and 7th respondent which result from these fresh allotments and the subdivision of Nyalenda 'B' 357 are leasehold interests granted by the County Council to the two.

22. The petition presented, the evidence led and the submissions in support did not seek to impeach the notice of repossession given by the absolute proprietor of the suit land, the County Council, nor did it fault the leasehold titles held by the 6th and 7th respondents as granted to them by the County Council. The petitioners train their guns on the Municipal Council but in doing so bark up the wrong tree because the leasehold interests that aggrieve them were granted, not by the Municipal Council as alleged in the petition but by the County Council. For the reason that the petitioners did not fault, or even challenge, the notice of repossession of the allotments issued by the County Council and which paved the way for grant of leases to the 6th and 7th respondents, then James could not prove that he lawfully still held the allocations (stated clearly in the letter of allotments to be as a license of occupation) over the suit properties nor did he successfully impeach the titles held by the 6th and 7th respondents. In that event it is needless to even interrogate whether he had sufficiently proved that the initial allotments were lawfully made to the 8th to 11th respondents and that those respondents subsequently transferred them to him.
23. This appeal proceeds on the faulty premise that once the learned Judge faulted, and correctly in my view, the notice of repossession of the Municipal Council (as opposed to the notice by the County Council) then the automatic result was that the entire petition would succeed. But as I have sought to demonstrate, that was a serious misapprehension on the part of the appellants. It would have been enough for the trial Judge to simply dismiss the petition, and he was therefore gratuitous in his observation that;

“...the 1st petitioner and 8th and 11th Respondents should engage the 1st and 12 Respondents to sort out the status of the license to occupy the plots alleged to have been allotted to them or their deceased’s spouses and which are alleged to have been sold to the 1st petitioner, and come up with a way forward.”

24. The success of the other two prayers in the petition was substantially pegged on the petitioners proving ownership of the suit property and having failed to do so, then the plea by James that his fundamental rights were infringed or that the criminal proceedings commenced against his caretaker was malicious and without plausible foundation cannot see the light of the day.
25. I would propose that the appeal be dismissed but just as at trial, each party to bear its own costs.

Judgment of Kiage, JA

26. I have had the advantage of reading in draft the judgment of Tuiyott, JA. I entirely agree with it and have nothing useful to add.
27. As Mumbi Ngugi, JA is in agreement, the appeal shall be disposed of as proposed by Tuiyott, JA.

Judgment of Mumbi Ngugi, JA

28. I have had the benefit of reading, in draft, the judgment of my brother, Tuiyott, JA. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF MAY, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR

