



REPUBLIC OF KENYA



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Mahulo (Suing on her behalf and as the administrator of the Estate of Marcelina Amolo Mahulo) v Okello & 4 others (Environment & Land Case 150 of 2014) [2024] KEELC 4842 (KLR) (19 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4842 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 150 OF 2014
SO OKONG'O, J
JUNE 19, 2024

BETWEEN

GRACE AYUGI MAHULO (SUING ON HER BEHALF AND AS THE ADMINISTRATOR OF THE ESTATE OF MARCELINA AMOLO MAHULO) PLAINTIFF

AND

SAMUEL OKELLO 1ST DEFENDANT
GEORGE OCHIENG 2ND DEFENDANT
LAMECK ARODI 3RD DEFENDANT
MWANAISHA TUNDUKA 4TH DEFENDANT
BRIGIT ODERA 5TH DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit through a plaint dated 31st May 2014. The Plaintiff averred that the Plaintiff together with Marcelina Amolo Mahulo, deceased (hereinafter referred to only as “the deceased”) were the registered owners of all that parcel of land known as Kisumu/Kanyakwar “A”/27 (hereinafter referred to only as “the suit property”). The Plaintiff averred that the suit property was registered in her name and that of the deceased on 2nd August 2012 following a decree that was issued in their favour in Kisumu Land Case No. 36 of 2006 (hereinafter referred to only as “the lower court case”).
2. The Plaintiff averred that the Defendants who had no proprietary interest in the suit property were occupying the same illegally and had erected structures thereon which they were using for business and



residential purposes. The Plaintiff averred that the Defendants had denied her access and use of the property as a result of which she had suffered and continued to suffer loss and damage.

3. The Plaintiff sought judgment against the Defendants jointly and severally for;
 - a. A declaration that the Plaintiff was the proprietor of the suit property and that the Defendants jointly and severally were trespassers thereon;
 - b. An order of eviction of the Defendants from the suit property.
 - c. A permanent injunction restraining the Defendants jointly and severally by themselves and/or through their agents and/or servants and/or anyone claiming title under them from remaining on, occupying, using, developing, or in any other way interfering with the Plaintiff's proprietary rights over the suit property.
 - d. Mesne profits for loss of use at the rate of Kshs. 30,000/- per month with effect from 2nd August 2012 until possession of the suit property is surrendered to the Plaintiff.
 - e. Costs of the suit and interest.

The defence

4. The 1st and 3rd Defendants filed a joint statement of defence on 22nd July 2014. The 1st and 3rd Defendants denied that they were occupying the suit property unlawfully. The 1st and 3rd Defendants averred that they were in occupation of a parcel of land known as unsurveyed residential Plot No. 122 and unsurveyed residential Plot No. 120 respectively within Migosi Site & Service Scheme, Kisumu Municipality (hereinafter referred to together as "the Defendants' Plots" and individually as "Plot No. 122" and "Plot No. 120" respectively). The 1st and 3rd Defendants denied that they were occupying the suit property. The 3rd Defendant averred that he was a bona fide purchaser of Plot No. 120 from one, Isaya Owalla Odembo.
5. The 1st and 3rd Defendants denied that they had denied the Plaintiff occupation and use of the suit property and that the Plaintiff had suffered any loss or damage. The 1st and 3rd Defendants denied that they were liable to the Plaintiff for mesne profits in the sum of Kshs. 30,000/- per month or at all. The 1st and 3rd Defendants denied that the previous suit between the parties namely; Kisumu ELC No. 58 of 2012, Grace Ayugi Mahulo & another v. Samuel Okello & 4 others had been withdrawn. The 1st and 3rd Defendants averred that the Plaintiff's suit was incompetent and urged the court to dismiss the same with costs.
6. The 2nd, 4th and 5th Defendants were served with summons to enter appearance and failed to do so. Interlocutory judgment was entered against them on 3rd July 2014. The hearing of the suit commenced before Kaniaru J. on 22nd January 2015. The hearing continued before Kibunja J. on 1st December 2016 and Ombwayo J. on 3rd February 2021 and 25th January 2022 when the Plaintiff's case was closed. The matter was fixed for the hearing of the defence case on 21st March 2022. On 21st March 2022, the matter did not proceed. It was adjourned to 5th May 2022. On 5th May 2022, the 1st and 3rd Defendants and their advocates did not turn up in court and the 1st and 3rd Defendants' case was closed and the Plaintiff directed to file submissions.
7. On 13th October 2022, the court entered judgment for the Plaintiff as prayed save for the prayer for mesne profits that was disallowed. On 8th December 2022, the court set aside the proceedings of 5th May 2022 and the judgment made on 13th October 2022 on the application of the 1st Defendant and re-



opened the 1st Defendant's case for hearing. On 18th January 2023, the 5th Defendant applied to enter an appearance and file a defence out of time. The application was dismissed on 9th February 2023.

8. In her testimony, the Plaintiff who gave evidence as PW1 narrated to the court how the suit property came to be registered in her name and the name of Marcelina Amolo Mahulo, deceased (the deceased). She stated that together with the deceased who was her co-wife, they used to occupy the land with their husband, Mahulo Odero who was also deceased. She stated that after the death of their husband, they became the owners of the suit property. She stated that they had their home on the suit property and that after the death of their husband, they left Kanyakwar and relocated to their ancestral home in Alego. She stated that after they left for their rural home, people who were not known to her came and occupied the suit property. She stated that she had a title deed for the suit property.
9. The Plaintiff stated that those occupying the suit property were strangers to her and she did not know how they acquired the property as they had not produced any title documents. The Plaintiff produced a copy of the title deed for the suit property as P.EXH. 1 and a copy of Grant of Letters of administration in respect of the estate of the deceased, Marcelina Amolo Mahulo as P.EXH.2. She stated that the suit property was occupied by the 1st, 2nd, 3rd and 5th Defendants, and one, Isaac Musa. The Plaintiff urged the court to grant her the reliefs sought in the plaint.
10. On cross-examination, she stated that her claim was in respect of the suit property and not Title No. Kisumu/Kanyakwar "A"/148 which was the original title number for the suit property. She stated that she was on the suit property more than 20 years ago. She stated that she was not aware that the County Council of Kisumu acquired land around Migosi area which it converted into Migosi Site and Service Scheme after compensating the land owners. She denied that she vacated the suit property because it had been acquired compulsorily. She stated that she was not aware that the suit property was also being claimed by the owner of Plot No. 29, one, Wilson Okada. The Plaintiff denied that she was claiming other people's land and that she had lost her right to the suit property after abandoning it for a long time. She stated that she did not know Musa Tunduka and was not aware that he was the owner of Plot No. 29. The Plaintiff stated that she was paying rates for the suit property.
11. The Plaintiff's next witness was Paul Kibet Rugut (PW2). PW2 was a surveyor working with the Survey of Kenya and based at Nyando. PW2 adopted his witness statement filed in court on 25th November 2018 as his evidence in chief. He produced the Registry Index Map for Kisumu East and West Districts, Kanyakwar Registration Section (Diagram No.19) which showed the location of the suit property as P.EXH. 4. He stated that the suit property was registered in the name of the Plaintiff and that it measured 0.008Ha. (approximately 0.2 of an acre). He stated that the suit property was freehold and had a title deed.
12. PW2 stated that he saw on a Part Development Plan No. N9/94/39 (PDP) for Migosi Site and Service Scheme, Plot No. 120 and Plot No. 122 which were proposed to be leaseholds. He stated that the two parcels of land were unsurveyed and the plot numbers given to them were provisional. He stated that proof of ownership of freehold land was a title deed and for leasehold land was a certificate of title. PW2 stated that letters of allotment were not proof of title. He stated that unsurveyed Plot No. 120 and Plot No. 122 were sitting on the suit property which was a registered parcel of land.
13. On cross-examination by the 1st Defendant's advocate, PW2 stated that he was working for the national government and that he surveyed the suit property. He stated that Plot No. 120 and 122 did not exist on the ground. He stated that in his survey he relied on the Registry Index Map for Kanyakwar "A" Registration Section, Diagram 19. He stated that in his survey, he perused the PDP but did not use it as his interest was on the suit property and he did not seek to identify Plot No. 120 and Plot No. 122.



- He stated that he made no findings on the two plots and that the County Surveyor had in his report used a PDP which was not approved.
14. On cross-examination by the 2nd Defendant's advocate, PW2 stated that he was instructed by the District Surveyor to carry out the survey before the suit herein was filed. He stated that on the ground, there were permanent buildings, semi-permanent structures and a heap of plastic containers. He stated that he did not meet people.
 15. The Plaintiff's third witness was Pauline Maina Kariuki (PW3), a national land adjudication officer at the National Land Commission. PW3 told the court that her duties included allocation of public land and renewal of leases. PW3 admitted that she wrote the letters dated 15th May 2019 and 16th May 2019 in response to the Plaintiff's letters dated 7th May 2019 in which she stated that the letter of allotment dated 25th April 2003 in respect of Plot No. 120 and letter of allotment dated 30th July 2003 in respect of Plot No. 122 did not originate from the National Land Commission. She produced her two letters as P.EXH. 7 and P.EXH.8 respectively. She stated that although the two letters of allotment were purported to have been signed by her, she did not sign them.
 16. The Plaintiff's fourth witness was Elly Ogola (PW4) who was working at the Ministry of Lands as a land registration officer based at Ardhi House, Nairobi. He stated that the register for the suit property was opened on 26th August 1986 as a first registration. He stated that the property was registered in the names of the Plaintiff and Mercela Amolo Mahulo (the deceased). He stated that the suit property was ancestral land and as such freehold. He stated that he had seen a letter of allotment of Plot No. 120, Migosi Site and Service Scheme dated 25th September 1998 issued to Joseph Monja Wamamba in File No. 211514. He stated that he had the original file No. 211514. He stated that no action had been taken in respect of the said allotment. He stated that Joseph Monja Wamamba did not pay for the allotment. PW4 produced File No. 211514 as P.EXH. 9. PW4 also produced a copy of a letter dated 13th March 2019 which the Land Registrar Kisumu East/Kisumu West Districts wrote to the Deputy Registrar of this court as P.EXH.10.
 17. On cross-examination by the 1st Defendant's advocate, PW4 stated that he was not the keeper of land records. He stated that he did not have the adjudication records relating to the suit property. He stated that he knew nothing about Plot No. 122.
 18. The Plaintiff's fifth witness was Nelson Ogeto (PW5) who was a land registrar serving at Kisumu. PW5 produced a copy of a search certificate dated 14th November 2018 in respect of the suit property as P.EXH.5. He stated that according to the search, the suit property belonged to the Plaintiff.
 19. The Plaintiff's last witness was Walter Juma Absalom (PW6). PW6 was a private surveyor. He stated that he worked with the Government until 1996 when he went to private practice. He stated that he prepared a ground report on the encroachment on the suit property dated 18th January 2019. He produced the report and the attached plans as P.EXH. 11 (a) and 11(b) respectively. He stated that the suit property was freehold which was created during Land Adjudication.
 20. On cross-examination by the advocates for the 1st Defendant, PW5 stated that a PDP is just a plan for a proposed development. He stated that a PDP upon approval could not supersede a Registry Index Map (RIM) also referred to as PID (Preliminary Index Diagram). He stated that in the circumstances, the PDP was interfering with the existing property. He stated that he did not agree with the findings of the County Surveyor, Mbok Geoffrey. He stated that he was a director of surveys until 1996. He stated that the expansion of the Municipality did not spill to the freehold land. He stated that a PDP is only prepared in respect of public land.



21. The hearing of the defence case commenced before me on 5th October 2023. The 1st Defendant, Samuel Otieno Okello(DW1) was the first to give evidence. He stated that he was running a business of welding and fabrication at Kondele on Plot No. 122. He stated that he had occupied the property since 2008. He stated that the property was owned by one, Viola Atieno Otieno (hereinafter referred to only as “Viola”) from whom he purchased the same. He produced the agreement of sale between him and Viola as D.EXH. 1). He stated that he purchased the property on the strength of a letter of allotment which was held by Viola. He produced a copy of the letter of allotment as D.EXH. 2. DW1 stated that in addition to the letter of allotment, Viola also gave him rates demand notices and payment request from the Municipal Council of Kisumu which were in the name of Viola and one, George Ochieng Okello. He produced the same as D.EXH. 3(a), (b) and (c). He stated that he had occupied Plot No. 122 since 2008. He stated that he had had issues with his neighbours some of whom took him to court.
22. He stated that one of his neighbours, Wilson Okanda Ombiri filed a suit against him at Winam Law Court claiming to be the owner of the suit property. He produced the pleadings in that case as D.EXH. 4. He stated that whereas the Plaintiff was claiming Title No. Kisumu/Kanyakwar “A”/27 (the suit property), Wilson Ombiri was claiming Title No. Kisumu/Kanyakwar “A”/29 which was adjacent to the suit property. He stated that Plot No. 122 was neither part of the suit property nor Title No. Kisumu/Kanyakwar “A”/29.
23. He stated that he engaged a surveyor by the name of Opiyo to locate Plot No. 122 and process for him a title for the property. He stated that the said surveyor surveyed the property and prepared a report dated 10th January 2019. He stated that the said surveyor concluded that Plot No. 122 was leasehold and that it was adjacent to the Kanyakwar “A” Registration Section. He urged the court to dismiss the suit against him with costs.
24. On cross-examination by the Plaintiff’s advocate, DW1 stated that the letter of allotment that was issued to Viola and George Ochieng Okello was dated 30th July 2003. He stated that Plot No. 122 was allocated to the two by the Commissioner of Lands as unsurveyed plot. He stated that he was not aware if the plot had been surveyed or had had its boundaries determined. He stated that he was not aware if the allotment was accepted by the allottees and if they paid the allotment fees. He stated that he bought part of the plot owned by Viola and that George Ochieng Okello did not sell his portion of the plot. He stated that Viola sold to him land measuring 0.036Ha. and that George Ochieng Okello did not consent to the sale in writing. He stated that he did not have a title for Plot No. 122. He stated that he had not even obtained a lease in respect thereof. He stated that he could not remember when he last paid rates for the plot. He stated that he did not have a receipt for the payment of Kshs. 8,995/- which was payable for the allotment. He stated that he had a copy of a cheque for the said amount. He stated that a portion of Kanyakwar “A” Registration Section was acquired by the Municipal Council of Kisumu in 1975 from which leasehold titles were created. He stated that there was no evidence that the suit property was acquired by the Municipal Council of Kisumu.
25. The 1st Defendant called one witness, Patrick Opiyo Adero (DW2). DW2 was a licensed land surveyor. DW2 narrated to the court in summary his professional journey. He stated that he prepared a ground report in respect of a parcel of land referred to as Plot No. 122 within Migosi on PDP No. L9/96/42. He stated that the land was situated in Migosi Site and Service Scheme Phase III (the Scheme). He stated that before the PDP was prepared, the Scheme was owned by the Municipal Council of Kisumu (the Council). He stated that the Council referred to the Scheme as 2-485-4. He stated that the PDP was prepared in 1996. He stated that in the PDP, the land in dispute was given reference No. 122. He stated that he was working at the Council at the material time. He stated that the PDP was approved by the Director of Physical Planning. He stated that the Council recommended to the Commissioner of Lands that Plot No. 122 be allocated to Viola and George Ochieng Okello. He stated that the PDP



superseded the RIM(PID). He stated that the boundaries of Plot No. 122 were depicted in the PDP which defined the boundary between Kanyakwar “A” Registration Section and Migosi Site and Service Scheme Phase III (the Scheme).

26. DW2 stated that from his survey, Plot No. 122 was outside Kanyakwar “A” Registration Section. DW2 produced his report as D.EXH. 5 and the PDP as D.EXH. 6. He stated that when the PDP was prepared, Plot No. 120 and Plot No. 122 were in existence and the same were owned by the Municipal Council of Kisumu. He denied that Plot No. 122 had encroached on the suit property. On cross-examination by the Plaintiff’s advocate, DW2 stated that between the RIM and PDP, the RIM was the first in time. DW2 claimed that Plot No. 122 had been registered and that the title thereof was in the names of Viola and George Ochieng Okello. DW2 admitted that the suit property was in the RIM and that there was no amendment of the said RIM as far as the suit property was concerned. DW2 stated further that he had not come across any evidence of the acquisition of the suit property by those said to have owned it.

The submissions

27. After the close of evidence, the court directed the parties to make closing submissions in writing. The Plaintiff filed submissions dated 16th October 2023 while the Defendants did not file submissions (I did not see any on the record). The Plaintiff framed seven issues for determination. The Plaintiff submitted that she had proved that she was the registered owner of the suit property which measured approximately 0.08 of a hectare and that the Defendants were occupying the same illegally. The Plaintiff submitted further that since the suit property was private land, the same was not available for alienation to the Defendants by the Commissioner of Lands as Plot No. 120 and Plot No. 122. The Plaintiff submitted that at the time of the approval of the PDP that created Plot No. 120 and Plot No. 122, the suit property was already registered in the name of the Plaintiff. The Plaintiff submitted that the suit property was not unalienated government land that could be allocated to the Defendants. In support of that submission, the Plaintiff cited the Supreme Court case of Torino Enterprises Limited v Hon. Attorney General, Petition No. 5(E006) of 2022.
28. The Plaintiff submitted that there was no evidence that any portion of the suit property was compulsorily acquired. The Plaintiff submitted further that in any event, the letter of allotment dated 30th July 2003 did not confer upon the allottees any proprietary interest in the land the subject thereof. The Plaintiff submitted that there was no evidence placed before the court showing that the allottees accepted the allotment and paid the requisite fees. The Plaintiff submitted that a letter of allotment was merely an offer that could not confer any interest in land until the conditions spelt therein were fulfilled. The Plaintiff submitted that a holder of a letter of allotment is incapable of transferring or passing a valid title in land to a third party. In support of this submission, the Plaintiff cited Torino Enterprises Limited v. Hon. Attorney General (supra). The Plaintiff submitted that Viola had no title to Plot No. 122 that she could transfer to the 1st Defendant.
29. The Plaintiff submitted that there was only one letter of allotment in respect of Plot No. 120 which was issued to Joseph Monja Wamamba. The Plaintiff submitted that this allocation was never processed. The Plaintiff submitted that there was no documentation placed before the court regarding the allocation of Plot No. 120 to the Defendants or the persons they purported to have acquired the property from.
30. The Plaintiff submitted that she was registered as the absolute proprietor of the suit property and as such none of the Defendants was entitled to any right of ownership and possession of the property. The Plaintiff cited Section 26 of the *Land Registration Act* 2012 in support of this submission. The



Plaintiff submitted that the Defendants did not adduce any evidence showing that the Plaintiff's title was tainted with any illegality.

31. The Plaintiff submitted that she had proved her case against the Defendants on a balance of probabilities and as such she was entitled to the reliefs sought in her plaint. The Plaintiff prayed for judgment to be entered against the Defendants jointly and severally as prayed in the plaint together with costs.

Analysis and determination

32. I have considered the pleadings, the evidence tendered by the parties and the submissions on record. In my view, the issues arising for determination in this suit are; whether the land parcel known as Kisumu/Kanyakwar "A"/27(the suit property) exists, whether the Plaintiff is the lawful owner of the suit property if it exists, whether the Defendants have trespassed on the suit property, and whether the Plaintiff is entitled to the reliefs sought in the plaint.

Whether the land parcel known as Kisumu/Kanyakwar "A"/27(the suit property) exists.

33. I am satisfied from the evidence before the court that the suit property exists. The Plaintiff produced in evidence a copy of the title deed for the suit property dated 2nd August 2012. According to the said title deed, the register for the suit property was opened on 26th August 1986 and the Plaintiff and Mercelina Amolo Mahulo(deceased) were registered as the owners of the property on 2nd August 2012 on which date they were also issued with the said title deed. According to the said title deed, the suit property is on Registry Index Map(RIM) Sheet No. 19. Mercelina Amolo Mahulo(deceased) having passed away, the suit property was registered in the sole name of the Plaintiff on 19th February 2016 while this suit was pending. The Plaintiff was issued with a title deed of the same date. A certificate of official search dated 14th November 2018 produced in evidence by the Plaintiff showed that the Plaintiff was the sole registered owner of the suit property. The Plaintiff also produced in evidence a copy of the RIM Sheet No. 19 which showed that the suit property was in that RIM. The Plaintiff's witness, Walter Juma Absalom(PW6) confirmed the existence of the suit property on the said RIM and on the ground. A report dated 13th March 2019 filed in court by the District Land Registrar on 14th March 2019 also confirmed the existence of the suit property. For the foregoing reasons, it is my finding that the suit property is in existence.

Whether the Plaintiff is the lawful owner of the suit property if it exists.

34. The evidence and material referred to above show that the suit property is registered in the name of the Plaintiff. That evidence was not challenged by the Defendants at the trial. The legality of the registration of the Plaintiff as the owner of the suit property was also not challenged.
35. Sections 24, 25 and 26 of the [Land Registration Act](#) 2012 provides as follows:

“ 24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in 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.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (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.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

36. Under the *Land Registration Act* 2012, the registration of a person as a proprietor of land or lease confers upon that person the absolute ownership of the land and in the case of a lease, the leasehold interest in the land. The title of a registered land owner can only be defeated or impeached where such registration has been obtained fraudulently, through misrepresentation, illegally, unprocedurally or through a corrupt scheme. No evidence was placed before the court on the basis of which the Plaintiff's title to the suit property can be impeached. It is therefore my finding that the Plaintiff is and was at all material times the lawful owner of the suit property.



Whether the Defendants have trespassed on the suit property

37. As mentioned earlier in the judgment, only the 1st and 3rd Defendants defended the suit. The 2nd, 4th and 5th Defendants never entered appearance and an interlocutory judgment was entered against them. The Plaintiff's claim that the 2nd, 4th and 5th Defendants had trespassed on the suit property was therefore not controverted. On their part, the 1st and 3rd Defendants claimed that they were not occupying the suit property. The 1st Defendant claimed to own and occupy Plot No. 122 Migosi Site & Service Scheme (Plot No. 122) while the 3rd Defendant claimed to own and occupy Plot No. 120 Migosi Site & Service Scheme (Plot No. 120). The 1st and 3rd Defendants therefore denied trespassing on the suit property.
38. The evidence adduced by the Plaintiff showed that Plot No. 122 and Plot No. 120 claimed by the 1st and 3rd Defendants respectively were created on top of the suit property and have encroached on a large portion of the suit property. See the Plaintiff's exhibits 4, and 11(a), (b) and (c). The evidence before the court shows that Plot No. 122 and Plot No. 120 were created as part of Migosi Site & Service Scheme Phase 3 through a Part Development Plan (PDP) No. N9/96/42(See Defence Exhibits Nos. 5 and 6). A look at D.EXH.6 shows that the PDP dated 15th May 1996 that created Plot No. 122 and Plot No. 120 was approved by the Director of Surveys and the Commissioner of Lands on 19th June 1996 and 26th February 1997 respectively. The suit property was created through land adjudication in Kanyakwar "A" Registration Section that took place in the early 1980s or thereabouts. As I mentioned earlier, the register for the suit property was opened on 26th August 1986. This means that at the time the PDP that created Plot No. 122 and Plot No. 120 was prepared in 1996, the suit property was in existence.
39. The said PDP was prepared over what was referred to in evidence as land belonging to the defunct Municipal Council of Kisumu. The land adjudication that gave rise to the suit property was over private land. The suit property was therefore private land. The suit property did not belong to the Municipal Council of Kisumu or the Government of Kenya. The suit property being private land could only be acquired by the Municipal Council of Kisumu or the Government of Kenya through purchase or compulsory acquisition. No evidence was placed before the court showing that the Municipal Council of Kisumu acquired the suit property through purchase or compulsory acquisition. I do not agree with the evidence of Patrick Opiyo Adero(DW2) that the PDP that created Plot No. 122 and Plot No. 120 superseded the RIM that created the suit property. There is no basis for that conclusion by the witness. The Municipal Council of Kisumu or the Government of Kenya could not acquire the suit property which was private land owned by the Plaintiff through a PDP. From the evidence before the court (See P.EXH.4), Kanyakwar "A" Registration Section covered the entire area of land forming Plot No. 122 and Plot No. 120 which were created on top of the suit property. The PDP could not extend Migosi Site & Service Scheme Phase 3 to the land which was already adjudicated as part of Kanyakwar "A" Registration Section and registered as private land without a formal acquisition of the affected land, prompt payment of the affected land owners and amendment of the RIM. None of these was undertaken.
40. According to the 3rd Defendant, Plot No. 120 was allocated to one, John Ombewa Gare by the Commissioner of Lands through a letter of allotment dated 25th April 2003. John Ombewa Gare sold the Plot to one, Isaya Owalla Odiembo on 6th April 2004. Isaya Owalla Odiembo sold Plot No. 120 to the 3rd Defendant on 1st March 2008 and transferred the property to him through a "form of transfer" of the same date. From the evidence on record, Plot No. 120 has neither been surveyed nor registered. No title has been issued in respect thereof in favour of the 3rd Defendant.
41. It also appears that Plot No. 120 was not allocated to John Ombewa Gare as the 3rd Defendant wanted the court to believe. The 1st and 3rd Defendants filed in court a sale agreement dated 31st May 2001



- between John Ombewa Gare as purchaser and Joseph Monja Wamamba as the vendor. This means that John Ombewa Gare purchased the property from Joseph Monja Wamamba. It is therefore not clear how John Ombewa Gare obtained the letter of allotment dated 25th April 2003 while he was not the allottee of Plot No. 120 but only a purchaser thereof.
42. The Plaintiff's witness, PW4 produced the parcel file for the allocation of Plot No. 120(P.EXH.9). According to the file, Plot No. 120 was allocated to Joseph Monja Wamamba through a letter of allotment dated 25th September 1998 and by 10th February 2008, Joseph Monja Wamamba had not accepted the allotment and paid the requisite fees. According to PW4, no payment was made for the allotment and as such no further action was taken in the matter. Joseph Monja Wamamba who had not accepted the allotment and who had not paid the requisite fees had no proprietary interest in Plot No. 120 that he could pass to John Ombewa Gare through the purported agreement of sale dated 31st May 2001.
43. Whatever the case, when the Commissioner of Lands purported to allocate Plot No. 120 to Joseph Monja Wamamba and John Ombewa Gare, the land from which the Plot was created was private land and the same had already been registered as such. As correctly submitted by the Plaintiff's advocates, the land was not unalienated government land capable of being allocated. The purported allocations were therefore illegal, null and void. It follows therefore that Isaya Owalla Odiembo, Joseph Monja Wamamba and John Ombewa Gare had no valid proprietary interest in Plot No. 120 that they could pass to the 3rd Defendant.
44. Concerning Plot No. 122, the same is said to have been allocated to George Ochieng Okello and Viola Atieno Otieno by the Commissioner of Lands through a letter of allotment dated 30th July 2003. The 1st Defendant is said to have purchased a portion of Plot No. 122 measuring 0.036 of a hectare from Viola Atieno Otieno(Viola) on 21st March 2008 at a consideration of Kshs. 600,000/-. There is no evidence that a title had been issued to George Ochieng Okello and Viola Atieno Otieno (Viola) in respect of this property on the strength of which Viola could sell a portion thereof to the 1st Defendant. There is also no evidence that any consent was obtained from the Commissioner of Lands to the transaction. From the evidence on record, even George Ochieng Okello did not give consent to the transaction between the 1st Defendant and Viola. Like Plot No. 120, Plot No. 122 is yet to be registered and no title had been issued in favour of the 1st Defendant or anyone else in respect thereof. A part from copies of the purported letter of allotment and the sale agreement with Viola, the 1st Defendant had nothing evidencing his purported title to the property. Like the case of Plot No. 120, Plot No. 122 was created from private land. The land was not available for allocation by the Commissioner of Lands to George Ochieng Okello and Viola Atieno Otieno. The purported allocation of Plot No. 122 to George Ochieng Okello and Viola Atieno Otieno was therefore illegal, null and void. Viola Atieno Otieno did not therefore have any valid proprietary interest in Plot No. 122 that she could pass to the 1st Defendant.
45. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph 18-01. In *Gitwany Investments Limited v. Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. This means that if one has a title to a property, he can maintain an action for trespass even if he is not having physical possession. It is not disputed that the Plaintiff is the registered proprietor of the suit property and that the Defendants are in occupation of a portion of the suit property. As the owner of the suit property, the Plaintiff is entitled to quiet possession and enjoyment thereof. To prove trespass, a land owner or occupier of land must establish that the Defendant's entry on the land is without a justifiable cause. Mere occupation of land by a Defendant is



not sufficient proof of trespass. The Plaintiff has established that he is the registered owner of the suit property and that the Defendants have entered and occupied a portion thereof without her permission.

46. The Plaintiff having established her title to the suit property and the Defendants entry and occupation of the property, the burden shifted to the Defendants to prove that they had sufficient cause for occupying the suit property. As discussed above, the 1st and 3rd Defendant's justification of their occupation of the suit property was that they were the lawful owners of Plot No. 122 and 120 respectively. The court has already made a finding that Plot No. 122 and Plot No. 120 were illegally created on top of the suit property and allocated to the persons who sold the same to the 1st and 3rd Defendants. The court has declared the purported allocations a nullity. The null and void allocations could not therefore confer upon the 1st and 3rd Defendants any lawful interest in Plot No. 122 and Plot No. 120 which formed part of the suit property. The 2nd, 4th and 5th Defendants did not give any justification for their occupation of the suit property. It is my finding from the foregoing that all the Defendants did not justify their occupation of the suit property. The Defendants are therefore trespassers on the suit property.

Whether the Plaintiff is entitled to the reliefs sought in the plaint.

47. I have set out at the beginning of this judgment the reliefs sought by the Plaintiff. I am satisfied that the Plaintiff has proved her claim against the Defendants on a balance of probabilities. The Plaintiff is entitled to the reliefs sought in prayers (a) to (c) of the plaint. The Plaintiff is also entitled to mesne profits for loss of use. It is not disputed that it was the Defendants who were occupying and using the suit property. I will award the Plaintiff a sum of Kshs. 1,000,000/- as mesne profits.
48. On the issue of costs, under Section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, costs of and incidental to a suit are at the discretion of the court. The Plaintiff has proved her claim against the Defendants. The Defendants have not given any reason why the Plaintiff should be denied her costs of the suit. For the foregoing reasons, I will award the costs of the suit to the Plaintiff.

Conclusion

49. In conclusion I hereby enter judgment for the Plaintiff against the Defendants jointly and severally in terms of prayers (a) to (c) of the plaint dated 31st May 2014. I also award the Plaintiff mesne profits of Kshs. 1,000,000/-. The Defendants shall vacate and hand over possession of the property known as Kisumu/Kanyakwar "A"/27 to the Plaintiff within 30 days from the date hereof in default of which the Plaintiff shall be at liberty to apply for warrants for their forceful eviction from the property. The Plaintiff shall have the costs of the suit.

DATED AND DELIVERED AT KISUMU ON THIS 19TH DAY OF JUNE 2024

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

N/A for the Plaintiff

Ms. Nabifo h/b for Mr. Njoga for the 1st and 3rd Defendants

N/A for the 2nd, 4th and 5th Defendants

Ms. J. Omondi-Court Assistant

