



Okeyo & another v Kenya Railways Corporation; Kenya Railways Corporation (Plaintiff to the Counterclaim); Okeyo & 5 others (Defendant to the Counterclaim) (Environment and Land Case Civil Suit 216 of 2013) [2024] KEELC 4859 (KLR) (19 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4859 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 216 OF 2013
SO OKONG'O, J
JUNE 19, 2024

BETWEEN

ELIJAH OMOLO OKEYO 1ST PLAINTIFF

DIAKONIA COMPASSIONATE MINISTRY 2ND PLAINTIFF

AND

KENYA RAILWAYS CORPORATION DEFENDANT

AND

KENYA RAILWAYS CORPORATION . PLAINTIFF TO THE COUNTERCLAIM

AND

ELIJAH OMOLO OKEYO DEFENDANT TO THE COUNTERCLAIM

MICHAEL OGWEDO, COLLINS OCHIENG & ABIL ODUMBO (SUED ON BEHALF OF RADO SELF-HELP GROUP) DEFENDANT TO THE COUNTERCLAIM

DIAKONIA COMPASSIONATE MINISTRY DEFENDANT TO THE COUNTERCLAIM

THE NATIONAL LAND COMMISSION DEFENDANT TO THE COUNTERCLAIM

THE LAND REGISTRAR, KISUMU COUNTY DEFENDANT TO THE COUNTERCLAIM

THE ATTORNEY GENERAL DEFENDANT TO THE COUNTERCLAIM



JUDGMENT

1. This judgment as will be explained later is in respect of the counter-claim by the Plaintiff in the counter-claim against the Defendants in the counter-claim. The 1st Defendant in the counter-claim who is the Plaintiff in the main suit (hereinafter referred to only as “the 1st Defendant”) filed this suit against the Plaintiff in the counter-claim(hereinafter referred to only as “the Plaintiff”) on 22nd August 2013. The 3rd Defendant in the counter-claim(hereinafter referred to only as “the 3rd Defendant”) was added to the main suit as the 2nd Plaintiff through the amended plaint filed on 3rd June 2015. The 1st and 3rd Defendants averred that they were the registered proprietors of the parcels of land known as Kisumu/Municipality 9/247 and Kisumu/Municipality/256 (hereinafter referred to only as “the suit properties”) respectively and that the Plaintiff had prevented them from developing the same.
2. The Plaintiff filed a defence to the 1st Defendant’s claim on 25th September 2013. The Plaintiff amended its defence on 2nd December 2015 and introduced a counter-claim against the 1st Defendant. The 1st Defendant filed a reply to defence and defence to counter-claim on 15th December 2015. In his defence to the counter-claim, the 1st Defendant averred that there was no basis for the relief sought by the Plaintiff for the revocation of the 1st Defendant’s title to Kisumu Municipality/Block9/247(Plot No. 247). On 31st May 2018, the 1st and 3rd Defendants’ suit was dismissed with costs for want of prosecution.
3. On 21st February 2023, the Plaintiff with leave of the court granted on 26th January 2023 filed a further amended counter-claim. The Plaintiff’s further amended counter- claim was brought against the 1st and 3rd Defendants and four additional parties, the 2nd , 4th , 5th and 6th Defendants to the counter-claim. The summons to enter appearance were taken out and served upon the parties who were added to the suit through the further amended counter-claim. The further amended counter-claim was also served upon the advocates for the 1st and 3rd Defendants who were already parties to the suit. Of the parties served, only the 5th and 6th Defendants entered appearance and filed a defence. All the other parties to the further amended counter-claim did not file a defence to the same.
4. In the further amended counterclaim dated 17th February 2023, the Plaintiff averred that pursuant to Sections 13 and 14 of the *Kenya Railways Corporation Act*, the Plaintiff had the right to acquire and own property. The Plaintiff averred that through the Kenya Railways (Vesting of Land) Order 1986 contained in the Legal Notice No. 24 of 1986 which replaced and revoked Vesting of Land Regulations 1963 (L.N No.440/1963), all land previously vested in the East African Railways Corporation by any written law as well as all land conveyed to that corporation or otherwise placed at the said corporation’s disposal was vested in the Plaintiff.
5. The Plaintiff averred that the suit properties were part of the land vested in the Plaintiff which the Plaintiff had been using as a railway station in furtherance of its mandate to offer rail transport services and other services to the public. The Plaintiff averred that through newspaper advertisements in the Daily Nation of 26th August 1999 and the East African Standard of 25th June 1999, the Plaintiff made a clarification on certain issues including land it had disposed of to other parties. The Plaintiff averred that the said advertisement was not an invitation to the public to purchase land from the Plaintiff.
6. The Plaintiff averred that the 1st , 2nd and 3rd Defendants to the Counterclaim (the Defendants) unlawfully, fraudulently and illegally obtained titles to the suit properties from Milligan Ltd. which had no authority to sell the suit properties to the public on behalf of the Plaintiff. The Plaintiff averred that the 4th and 5th Defendants unlawfully and fraudulently processed and issued titles to the suit



properties in favour of the 1st and 3rd Defendants. The Plaintiff averred that it had not surrendered title and ownership of the suit properties to the government for allocation to third parties as required under the [Kenya Railways Corporation Act](#). The Plaintiff averred that the issuance of titles for the suit properties to the 1st and 3rd Defendants without the surrender of the same to the government by the Plaintiff was not only illegal but was also fraudulent and in breach of statutory duty on the part of the Defendants jointly and severally. The Plaintiff pleaded several particulars of fraud and illegality on the part of the Defendants. The Plaintiff averred that the actions of the Defendants had occasioned to the Plaintiff irreparable loss and damage as its constitutional right to acquire and own property had been and continued to be violated.

7. The Plaintiff sought judgment against the Defendants for;
 - a. A declaration that the Plaintiff is the legitimate proprietor of all those parcels of land known as Kisumu Municipality Block 9/247 and Kisumu Municipality Block 9/256 (the suit properties).
 - b. A declaration that the 1st and 3rd Defendants' conduct and actions in claiming ownership and possession of the suit properties was unlawful and constituted trespass and illegal encroachment on the Plaintiff's properties thus a violation of its right to property.
 - c. A declaration that the Defendants' actions, whether jointly or severally in purporting to transfer/register the suit properties in favour of the 1st and 3rd Defendants was illegal, null and void.
 - d. An order directing the 5th Defendant to cancel the certificates of lease for the suit properties issued in favour of 1st and 3rd Defendants.
 - e. An order directing the 5th Defendant to rectify the register and delete the names of the 1st and 3rd Defendants as the proprietors of the suit properties and in its place, enter the names of the Plaintiff as the lessor.
 - f. A permanent injunction do issue restraining the Defendants jointly and severally from interfering with or in any other way dealing with the suit properties to the detriment of the Plaintiff's interest therein.
 - g. An order of eviction to issue against the 1st and 3rd Defendants, their agents and / or servants from the suit properties.
 - h. Costs of the counter-claim.
 - i. Any other relief that this Honourable Court may deem fit and just to grant in the interest of justice.
8. The 1st and 3rd Defendants did not respond to the further amended counter-claim. The 2nd and 4th Defendants did not enter appearance. The Attorney General entered appearance on behalf of the 5th and 6th Defendants and filed a defence to the further amended counter-claim on 18th April 2023. The 5th and 6th Defendants denied the Plaintiff's claim in its entirety. The 5th and 6th Defendants averred that if any titles were processed and issued in respect of the suit properties, the same were issued in accordance with the law. The 5th and 6th Defendants prayed that the further amended counter-claim be dismissed with costs.
9. At the trial, only the Plaintiff tendered evidence. The 1st and 3rd Defendants who were parties to the suit from the inception did not turn up in court. They appeared to have lost interest in the suit after



- the dismissal of their suit for want of prosecution. The 5th and 6th Defendants were represented at the trial but chose not to call evidence. The Plaintiff called one witness, Geoffrey Wekesa Nyongesa (PW1). PW1 told the court that he was working with the Plaintiff as a senior Cartographer in its Headquarters in Nairobi. He stated that he had worked with the Plaintiff since 2014. PW1 adopted his witness statement dated 16th February 2023 as his evidence in chief and produced the documents attached to the Plaintiff's List of Documents filed on 21st February 2023 as P.Exh.1,2 and 3 respectively and the document attached to the Plaintiff's further List of Documents filed on 9th October 2023 as P.Exh.4.
10. PW1 stated that Milligan Ltd. had no authority to sell Plot No. 247 and Plot No. 256 to the public. He stated that the suit properties were falling within the Plaintiff's Nyalenda Railway quarters. He stated that the sale of the suit properties by Milligan Ltd. to the 1st and 3rd Defendants was not approved by the Plaintiff. PW1 stated that the Plaintiff was a state corporation and that there were procedures to be followed when disposing of the Plaintiff's land. He stated that the sale of the Plaintiff's land must be approved by the Plaintiff's Board of Directors. He stated that Milligan Ltd. was not given such approval by the Plaintiff's Board of Directors to sell the suit properties. He stated that Nyalenda Railway quarters had residential houses for staff classified as class 5,6 and 7. He stated that the Railway quarters had amenities like a playing field, a nursery school and a shopping centre. He stated that P.Exh 1 showed the location of the suit properties within Nyalenda Railway quarters. He stated that the Plaintiff's Board of Directors did not approve the sale of the suit properties.
 11. After the close of evidence, the parties were directed to make closing submissions in writing. Again, only the Plaintiff filed submissions. The Plaintiff submitted that the suit properties, Kisumu Municipality Block 9/247 and Kisumu Municipality Block 9/256 were amongst the properties that were vested upon the Plaintiff under sections 93 and 95(4) of the [Kenya Railways Corporation Act](#) through Legal Notice No. 24 of 1986 that revoked Legal Notice No. 440 of 1963. The Plaintiff submitted that P.Exh. 1 showed that the suit properties were located within the boundary of the Plaintiff's Nyalenda Railway quarters. The Plaintiff submitted that the Satellite image produced as P.Exh. 2 showed the same thing. The Plaintiff submitted that the suit properties were reserved for use by the Plaintiff. The Plaintiff submitted that the suit properties were created from land that was reserved for the Plaintiff. The Plaintiff averred that even if the land from which the suit properties were created were designated as government land at the time of alienation, Sections 13 and 14 of the [Kenya Railways Corporation Act](#) required that the Plaintiff be involved in the alienation thereof.
 12. The Plaintiff submitted that it did not surrender the suit properties to the government for allocation to third parties. The Plaintiff submitted that the suit properties were not unalienated government land. The Plaintiff submitted that the Plaintiff did not instruct Milligan Ltd. to sell the suit properties to the 2nd Defendant who sold the same to the 1st and 3rd Defendants. The Plaintiff submitted that the 1st, 2nd and 3rd Defendants acquired the suit properties fraudulently. The Plaintiff submitted that the Defendants did not tender evidence in proof of the validity of their titles. The Plaintiff averred that the 4th Defendant had no power to allocate to third parties the land from which the suit properties were created as the same was reserved for the use of the Plaintiff. The Plaintiff submitted that it had proved its claim to the required standard and as such was entitled to the reliefs sought in its counter-claim.

Analysis and determination

13. I have considered the pleadings, the evidence tendered by the parties and the submissions filed by the Plaintiff. In my view, the following are the issues arising for determination in this suit;
 - i. Whether the suit properties were vested in the Plaintiff.
 - ii. Whether the 1st and 3rd Defendants illegally and fraudulently acquired the suit properties.



- iii. Whether the Plaintiff is entitled to the orders sought.
14. The Defendants did not tender evidence in their defence. The evidence placed before the court by the Plaintiff in proof of its ownership of the suit properties was not rebutted by the Defendants. The Plaintiff's contention that all that parcel of land known as Nyalenda Railway quarters is among the parcels of land that were vested upon the Plaintiff through Legal Notice No. 24 of 1963 which was revoked by Legal Notice No. 440 of 1986 was not disputed.

Section 14 (2) 4 and 5 of [Kenya Railways Corporation Act](#) provides as follows:

“4. The Corporation may at any time convey, transfer or surrender any land surplus to both its existing and future requirements by a conveyance or a deed of surrender either for, or without consideration: (emphasis added)

Provided that land which was public land or trust land shall be surrendered to the Government and shall not be conveyed or transferred to any other person unless the Minister responsible for lands shall consent and so direct.

(5) The provisions of subsection (4) shall apply to land vested in the Corporation by any written law, including this Act, as well as to land conveyed to it or otherwise placed at its disposal”.

15. Since the land from which the suit properties were created belonged to the Plaintiff, the same could only be acquired by the Defendants directly from the Plaintiff, or from the Government in case the same had been surrendered to the Government by the Plaintiff. From the material on record, it is not clear how the 1st Defendant acquired Plot No. 247. On the one hand, it is claimed that Plot No. 247 was sold by the Plaintiff to the 2nd Defendant through Milligan & Company Ltd. on 17th November 1999. The 2nd Defendant is said to have sold Plot No. 247 to the 1st Defendant on 22nd February 2002. The 1st Defendant is said to have been issued with a Certificate of Lease for the property on 27th March 2009. On the other hand, there is on record a letter of allotment dated 22nd March 1999 issued by the Commissioner of Lands to the 1st Defendant in respect of Plot No. 247 (initially referred to as “Plot No. 55”). It is not clear how the 2nd Defendant could have sold Plot No. 247 to the 1st Defendant on 17th November 1999 and for the same parcel of land to have been allocated to the 1st Defendant by the Commissioner of Lands on 22nd March 1999. How could the 2nd Defendant sell to the 1st Defendant land that had already been allocated to the 1st Defendant.
16. The Plaintiff denied selling Plot No. 247 to the 2nd Defendant or surrendering it to the Government for allocation to third parties. The Plaintiff termed the acquisition of Plot No. 247 by the 1st and 2nd Defendants illegal and fraudulent. The Plaintiff having established its claim over Plot No. 247, the burden shifted to the 1st and 2nd Defendants to prove that they acquired Plot No. 247 lawfully. In the absence of any evidence by the 1st and 2nd Defendants on how they acquired the said property, the only logical conclusion the court can arrive at in the circumstances is that the acquisition was unlawful and fraudulent as claimed by the Plaintiff.
17. The 3rd Defendant on its part claimed that Plot No. 256 was allocated to it by the Commissioner of Lands on 22nd March 1999 as unsurveyed residential Plot No. 64-Kisumu Municipality. The 3rd Defendant averred that it was subsequently issued with a Certificate of Lease in respect of the property on 17th April 2009. The Plaintiff denied that it had surrendered to the Government its parcel of land from which Plot No. 256 was created. The Plaintiff contended that the land was not unalienated Government land that could be allocated by the Commissioner of Lands to the public. Neither the



3rd Defendant nor the 4th, 5th and 6th Defendants gave evidence on how the land that belonged to the Plaintiff came to be allocated to the 3rd Defendant. The Plaintiff's contention that the purported allocation was fraudulent and illegal was not rebutted.

Section 2 of the repealed Government Lands Act, Chapter 280 Laws of Kenya defines "unalienated Government land" as:

18. Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment."

Section 3 of the same Act provides that:

19. The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may-
 - a. subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land."
20. It is the finding of this court that since the land from which Plot No. 256 was created was not unalienated government land, the Commissioner of Lands had no power to allocate the same to the Defendant or anyone else.

Conclusion

21. For the foregoing reasons, I find the Plaintiff's counter-claim against the Defendants in the counter-claim proved. I therefore enter judgment for the Plaintiff in the counter-claim against the Defendants in the counter-claim for;
 - a. A declaration that the Plaintiff in counter-claim is the legitimate proprietor of all those parcels of land known as Kisumu Municipality Block 9/247 and Kisumu Municipality Block 9/256(the suit properties).
 - b. A declaration that the 1st and 3rd Defendants' conduct and actions in claiming ownership and possession of the suit properties was unlawful and constituted trespass and illegal encroachment on the Plaintiff's properties thus a violation of its right to property.
 - c. A declaration that the Defendants' actions, whether jointly or severally in purporting to transfer and register the suit properties in favour of the 1st and 3rd Defendants was illegal, null and void.
 - d. An order directing the 5th Defendant in the counter-claim to rectify the registers of the suit properties by cancelling the registration of the 1st and 3rd Defendants in the counter-claim as the proprietors of Kisumu Municipality Block 9/247 and Kisumu Municipality Block 9/256 respectively and the certificates of leases issued to the 1st and 3rd Defendants in respect thereof.
 - e. An order directing the 5th Defendant in the counter-claim to register the Plaintiff in the counter-claim as the leasehold proprietor of the suit properties in place of the 1st and 3rd Defendants.
 - f. A permanent injunction restraining the Defendants jointly and severally from interfering with or in any other way dealing with the suit properties to the detriment of the Plaintiff's interest therein.
 - g. An order of eviction against the 1st and 3rd Defendants in the counter-claim, their agents and/or servants from the suit properties.



- h. The 1st and 3rd Defendants in the counter-claim shall vacate and hand over to the Plaintiff in the counter-claim possession of Kisumu Municipality Block 9/247 and Kisumu Municipality Block 9/256 respectively within 60 days from the date hereof.
- i. Costs of the counter-claim to be paid by the 1st , 2nd , 3rd and 6th Defendants in the counter-claim.

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;

Ms. Mora for the Plaintiff in the counter-claim

N/A for the 1st and 3rd Defendants

N/A for the 2nd , 4th , 5th and 6th Defendants

Ms. J.Omondi-Court Assistant

