



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 61 OF 2016

PRISCA AKECH OJUNGA (Suing through her Attorneys

JOHN FREDRIC OGUMBO & MILLICENT NYANDAT).....PLAINTIFF

VERSUS

PAMELA ACHIENG OCHIENG.....DEFENDANT

JUDGEMENT

Prisca Akech Ojunga (suing through her Attorneys John Fredrick Ogumbo and Millicent Nyandat (hereinafter referred to as Plaintiff) has come to court against Pamela Achieng Ochieng (hereinafter referred to as the Defendant) by way of Plaintiff claiming that she is the registered proprietor of all the freehold interest in land parcel No. KISUMU/DAGO/1300 containing by measurement 1.00 Hectares or thereabouts and situated in Kisumu West Sub-County in Kisumu County in the Republic of Kenya. The Defendant is the registered proprietor of all that parcel of land described as Title No. KISUMU/DAGO/1755 and which is adjacent to the Plaintiff's property aforesaid.

Sometimes during the month of January 2016, the Defendant by herself, her agents, servants and/or persons claiming through her stormed into the Plaintiff's property afore-stated and in total disregard of the Plaintiff's rights under the law started digging up the same and has commenced the construction of a building and other structures therein. The Defendant's actions aforesaid are a complete breach of the Plaintiff's rights of peaceful use and occupation of her property and constitutes an unmitigated act of trespass that has deprived the plaintiff her right to the peaceful occupation and use of the property.

The Plaintiff has demanded that the defendant ceases and desists from the offending activities but the defendant has persisted with carrying on the works thereby denying the Plaintiff access to and use of her property.

The Plaintiff prays for a permanent injunction restraining the Defendant whether by herself, her servants, agents, or any other person or persons purporting to derive authority from her carrying on any activity or, remaining upon, trespassing upon or in any other manner interfering with the Plaintiff's quiet possession, occupation and/or enjoyment her property Title No. KISUMU/DAGO/1300. General damages for trespass to the Plaintiff's L.R. No. KISUMU/DAGO/1300. The plaintiff ultimately claims costs of this suit.

The Defendant filed defence denying that sometimes during the month of January 2016, either herself, her agents, servants and/or persons claiming through her stormed into the plaintiff's property aforestated and in total disregard of the Plaintiff's rights under the law started digging up the same and commenced the construction of a building and other structures therein.

The defendant denies that he has persisted with carrying on the works thereby denying the Plaintiff access to and use of her property. The Defendant denies the content of paragraph 7 of the Plaintiff that the Plaintiff has demanded that the Defendant ceases and desists from the offending activities but the Defendant has persisted with carrying on the works thereby denying the Plaintiff access to and use of her property and shall put the Plaintiff to strict proof thereof.

In the Counter claim the defendant states that sometimes in the year 2014, the Defendant went and fenced the aforementioned property and one Millicent Nyandat went and destroyed the fence. The Defendant reported the matter to the Kenya Police at Riat Police Post and was issued with an OB/NO.07/0/11/2014.

That when the Police went to the site to take photographic evidence of the destruction, the police informed the Defendant that the evidence seemed to have been destroyed.

The Defendant then decided to construct a permanent wall. On 13th April 2016, the contractor informed the Defendant that some people had come to the site and served him with some court papers. He sent the papers to the Defendant and she has therefore come to defend the suit that has been filed against her.

That on or about 2nd May 2016, the Plaintiff through his attorneys, agents, servants and/or persons claiming through her entered into her property title No. KISUMU/DAGO/1755 and demolished or brought down several columns and the perimeter wall without due regard to her rights. The cause of action arose within the jurisdiction of this Honourable Court.

The Defendant prays for plaintiff's suit be dismissed with costs and a Permanent injunction restraining the Plaintiff whether by herself, her servants, agents or any other person or persons purporting to derive authority from her from carrying on any activity or, remaining upon, trespassing upon or in any other manner interfering with the Defendant's quiet possession, occupation and/or enjoyment her property Title No. KISUMU/DAGO/1755.

The defendant claims general damages for trespass to the Defendant's property title No. KISUMU/DAGO/1755 and ultimately cost of the counter claim.

When the matter came up for hearing, the Plaintiff adopted her statement as evidence in chief and stated that she had a Power of Attorney which was donated to her and Millicent Nyandat and that they filed this suit because of the failure by the donee to utilize her land because the land was swapped with Kisumu/ Dago/ 1755. Prisca's land is Dago/1300 whereas the defendants land is Kisumu /Dago /1755 and that the two plots neighbour each other. Pamela is occupying and utilising No. KISUMU/DAGO/1300 which she has fenced and has put a stone perimeter wall. In a nutshell, the defendant has moved to the property of the plaintiff. Before coming to court, they did a search. They tried to resolve the matter through the Land Registrar but without success.

When they came to court they requested the lands officials to go on the ground and identify the position of the plots. The order was made on 17/11/2016 and issued on 15/12/2016. The Registrar acted and the exercise was undertaken and that Pamela was present during the exercise and ultimately, a report was done. The report was filed on 23/1/2019. The surveyor established that the two plots were interchanged. The interchange happened on 26/9/2013. There was need of a consent to the interchange but the plaintiff was not aware of the interchange. Mrs. Ojunga was registered in 2008. She lives in Texas in the United States of America where she has been for over 10 years. She has never met the defendant except through this case.

On cross examination by Mr Ayaya counsel for the defendant, he states that when they moved on the ground they found a stranger occupying the same. The Lands office could not understand how it was done. The burden of proof of the swapping was upon Pamela who would lose the case if the court finds out that there was swapping. Parcel number Kisumu/ Dago/1755 belongs to Pamela and its vacant. The land was vacant when they filed the suit. Pamela had fenced Kisumu/ Dago/1300 which belonged to the plaintiff.

PW2, a surveyor with the County Government Kisumu testified that on 17/11/2016 the court ordered the County Land Registrar and County Surveyor to do a survey and confirm the ground boundaries and pursuant to the order he visited the land in the company of the County Land Registrar on Friday the 23/3/2018. The survey was conducted when parties were present. The two parcels of land appear on the same Index diagram. They found that there had been an interchange of position on the maps. The parcels are from Kisumu Dago 987. There were no supporting documents for interchanging. The owner of Kisumu/ Dago/1755 is relying on the

interchange but there is no document to support the interchange. The interchange was recorded 26/9/2013 but was not legally effected. He confirmed that for an interchange to be done, both parties should consent.

DW1 Pamela Achieng Ochieng states that at all material time, the Defendant is the absolute registered owner of the suit property having been registered in the year 2014. That sometime in the year 2014, the Defendant went and fenced the aforementioned property and one Millicent Nyandat went and destroyed the fence. The Defendant reported the matter to the Kenya Police at Riat Police Post and was issued with an OB/No.07/0/11/2014. That when the police went to the site to take photographic evidence of the destruction, the police informed the Defendant that the evidence seemed to have been destroyed. The defendant then decided to construct a permanent wall. On 13th April 2016, the contractor informed the Defendant that some people went to the site and served him with some court papers.

That on or about 2nd May 2016, the Plaintiff through his Attorneys, agents, servants and/or persons claiming through her entered into the Defendant's property title no. Kisumu/Dago/1755 and demolished or brought down several columns and the perimeter wall without due regard to her rights for which the Defendant prayed for damages against the Plaintiff. The parties filed submissions as directed by the court.

I have considered the evidence on record and do find that the Plaintiff is the registered proprietor of parcel number Kisumu/Dago/1300 whereas the Defendant is the registered proprietor of parcel number Kisumu/Dago/1755. This court ordered the County Land Registrar and the County Surveyor, Kisumu County to visit the land parcels numbers Kisumu/Dago/1755 and Kisumu/Dago/1300 and confirm their ground boundaries and eventually file a report in court.

A site visit was made to the above cited location, of parcel numbers Kisumu/Dago/1755 and Kisumu/Dago/1300, on Friday 23rd March, 2018. The survey exercise was conducted in the presence of the area chief, the plaintiffs, the defendant and their respective attorneys.

In the Findings It was established that the two parcel numbers in this suit are distinct plots both on the map and on the ground. The boundaries of the two plots were defined by the barbed wire fence. On thorough scrutiny on the documents that generated the two parcels in this suit, the following issues were highlighted.

a) On the amendment column of the Preliminary Index Diagram (P.ID)/Map sheet No. 5 of Dago Registration Section, a note is engraved insinuating that an interchange/swapping of the spatial or geographical positions of the two parcels was done.

b) That the said action above was initiated vide a letter from the Land registrar's office referenced as KSM/DLR/PS to the regional surveyor instructing on the purported interchange of the parcels Kisumu/Dadgo/1755 and 1300 to be effected on P.I.D (map).

c) The said letter from the Land Registrar was then filed with the survey registry in file with folio number PS/NYA/7/TECH/COMP/VOL. III/72.

d) The interchange/swapping was then effected on 26th September 2013.

From the above highlights, both the survey and Lands registry departments were unable to trace the locations of the aforesaid correspondences that effected the interchange. The two parcel numbers were as a result of subsequent subdivisions of the original number, Kisumu/Dago/987. According to the survey records, parcel number Kisumu/Dago/1300 came into existence on 13TH March, 1991 or thereabout from parcel number Kisumu/Dago/1099 as illustrated on a mutation form.

The parcel number Kisumu/Dago/1099 was subdivided into two portions i.e. Kisumu/Dago/1299 and Kisumu/Dago/1300. Then sometimes later, a further subdivision was effected on parcel Kisumu/Dago/299 into Kisumu/Dago/1753, 1754, 1755 and 1756.

Once a mutation form is approved and new numbers assigned, a map is then amended depicted the same scenario as the mutation form with no alterations at all. This forms the spatial location of the parcel when on the actual ground.

The General observation was that the spatial locations for the two parcels in this suit are distinct and do not overlap as per the available survey documents. The position of parcel number Kisumu/Dago/1300 as at the time of subdivision and registration of the mutation form was confirmed to be in conflict with the position of the parcel as depicted on the map and on the ground. According to the mutation form, parcel Kisumu/Dago/1755 occupies the position of parcel Kisumu/Dago/1300.

The Recommendation were that since the geographical locations of the two plots is confirmed to have been interchanged both on the map and on the ground it would be prudent when some other pertinent information such as a jointly signed consent letter from the two proprietors is produced to confirm the same. The Report was Compiled by George O. Nyagweso, District Land Registrar and Mbok Geoffrey O. Ag. County Director Of Surveys Kisumu Kisumu East/Kisumu West

I have considered the evidence on record and do find that there is no evidence of interchange of land as there is no agreement of interchange. This court finds that the interchange amounted to a disposition and therefore was supposed to be in writing signed by both parties. There is no evidence in writing of the interchange. Moreover, there was no consent of the parties for interchange of the plots. An interchange is an agreement that should be in writing and I find no such agreement.

In conclusion, I do find that the plaintiff is the registered proprietor of Kisumu/Dago/1300 and should enjoy the rights and privileges appurtenant thereto whereas the defendant is a trespasser on the suit property.

Ultimately, I do grant a permanent injunction restraining the Defendant whether by herself, her servants, agents, or any other person or persons purporting to derive authority from her carrying on any activity or, remaining upon, trespassing upon or in any other manner interfering with the Plaintiff's quiet possession, occupation and/or enjoyment her property Title No. KISUMU/DAGO/1300. I do decline to grant general damages for trespass as the plaintiff has not proved the same. The counter claim is dismissed as the defendant is not the registered owner of the suit property. Costs of this suit to the plaintiff.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF OCTOBER, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE



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