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| Case Number: | Environment and Land Case 365 of 2015 |
| Date Delivered: | 14 Dec 2016 |
| Case Class: | Civil |
| Court: | Employment and Labour Relations Court at Kisumu |
| Case Action: | Judgment |
| Judge: | Stephen Murigi Kibunja |
| Citation: | Joseph Odero v Marcus Opande Obondo & another [2016] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Land and Environment |
| History Magistrates: | - |
| County: | Kisumu |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Application allowed |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.365 OF 2015

ENG. JOSEPH ODERO.....PLAINTIFF

VERSUS

MARCUS OPANDE OBONDO.....1ST DEFENDANT

HESBON AJWANG ORUKO.....2ND DEFENDANT

JUDGMENT

1. The plaintiff, Engineer **Joseph odera**, filed this suit against **Marcos Opande Obondo and Hesborn Awang Oruko**, the 1st and 2nd Defendant respectively, through the plaint dated 26th October 2005. He seeks for “ a permanent injunction restraining the Defendants or any of them whether by themselves, their agents, servants and anybody claiming through them from trespassing, interfering with work or in any other way denying the plaintiff and his agents peaceful enjoyment of the suit property being L.R. NO. **Kisumu/Konya/3258**”. The plaintiff avers that he is the registered proprietor of the said land and that on 2nd and 3rd September 2005, the defendants obstructed him and his agents from entering and working on the said land hence depriving him of peaceful occupation, use and enjoyment of his property.

2. The Defendants opposed the Plaintiff’s claim through their written statement of defence dated 13th December 2005 and prays for the suit to be dismissed with costs. They disputed that the Plaintiff is the registered proprietor of the said land or that they had obstructed him from entering and working on it on 2nd and 3rd September 2005. The Defendants averred in the alternative that land parcel **Kisumu/Konya/3258** does not exist, and if it does then the same was illegally and fraudulently hived off **Kisumu/Konya /149** which belongs to the 2nd Defendant without his consent. The Defendants set out the particulars of fraud attributed to the Plaintiff and Land Registrar at paragraph 8 of the defence and indicated that they would move the court to enjoin the Attorney General and Registrar of Land as parties in the suit.

3. That matter came up for hearing on 13th July 2016 and on being satisfied that the hearing notice had been served on counsel for the Defendants on 9th March 2016 and affidavit of service filed, the court allowed the Plaintiff to present their case. The Plaintiff testified as PW1 and told the court that he became the registered proprietor of land parcel **Kisumu/Konya/3258** on 3rd June 1991 after buying it from one Joanness Obondo **Oyoya**, the father of 1st Defendant, in 1982. The Plaintiff produced a copy of the title deed, proceedings in Winam DMC Land Case No.20 of 1976, Sale agreement dated 19th December 1982, copy of the register of land, certificate of official search, Land Registrar’s report dated 4th September 2012 and survey maps as exhibits 1 to 7 respectively. He gave the history of the land and how after adjudication processes it got registered in his name, after the name of **Wellington Oruko Opondo**, father to 2nd defendant was removed following objection proceedings. That after buying the land, the Plaintiff fenced it and built a two roomed structure for caretaker. He testified that he would make occasional visits to the suit land from Nairobi. That after the death of the Vendor, Joanness, in 2000, the caretaker then left in 2001. The Plaintiff then noted the caretaker’s house was partly damaged and the fence removed and when he commenced the repairs, the Defendants stopped him claiming that the land was part of their father’s land. The Plaintiff reported to the assistant chief who

called a meeting with elders, including the Defendants their family members, and it was resolved that the land belonged to the Plaintiff and was at liberty to work on it. The defendants were however adamant that the land was theirs and therefore this case was filed. The Plaintiff disputed the Defendants claim in their defence that the land did not exist and he produced copies of survey maps No.9 of 8th May 2001 and 18th June 2012 that confirms that the land is indeed on the map. The Plaintiff denied that he had illegally and fraudulently had the land hived from the Defendants land and registered in his name. He also denied colluding with the Land Registrar to fraudulently acquire the land.

4. That at the close of the Plaintiff's case, the court marked the Defendants' case closed as they and their counsel had not attended court. The counsel for the Plaintiff then filed written submissions and referred the court to the decision in the case of **Chacha -V- Manini** {2002} 2 KLR 83 and submitted that a first registration of land cannot be challenged under any circumstances.

5. The following are the issues for the court's determinations;

- a) Whether the Plaintiff is the first registered proprietor of land parcel **Kisumu/Konya/3258**.
- b) Whether the defendants have any legal right to stop the Plaintiff from working on the said land
- c) Whether permanent injunction should issue as prayed.
- c) Who pays the costs.

6. The court has considered the pleadings filed by both sides, evidence adduced by the Plaintiff, submissions by the counsel for the Plaintiff and come to the following findings;

a) That the documentary evidence availed by the Plaintiff in the form of copy of title deed issued on 3rd June 1991, certificate of official search issued on 2nd September 2005, register issued on 25th November 2011 confirm that land **parcel Kisumu/Konya /3258**, measuring 0.7 hectares was on first registration on 14th March 1991 registered in the name of **Joseph Odero**, the Plaintiff.

b) That in terms of **Section 26 (1)** of the Land Registration Act No.3 of 2012, the court is obliged to take the plaintiff as the absolute and indefeasible owner of the said land by virtue of the documents issued to him by the land registrar. That the defendants attempt to challenge the title of the Plaintiff to the land on the basis of illegality and fraud, whose particulars were set out at paragraph 8 of the defence, has not materialized as no evidence to support the allegations has been adduced. That as the plaintiff has denied the allegations of illegality, fraud and collusion with the Land Registrar, the defendants had the evidential duty to prove their allegations to the standard required in law and they did not do so. The court also noted that the Defendants did not take any steps to have the Attorney General and Registrar of Lands enjoined in the proceedings as earlier indicated in their filed statement of defence.

c) That as the Plaintiff has established that he is the registered proprietor of the suit land, and noting that the Defendants have failed to establish any legal basis on which they can stop the plaintiff from using the land, the court find that the Plaintiff is entitled to the prayers sought in his plaint.

7. That the Plaintiff has proved his case on a balance of probabilities and judgment is entered in his favour and against the Defendants as follows:

a) That a permanent injunction is hereby issued restraining the Defendants or any of themselves, agents, servants or anybody claiming through them from trespassing or in any other way interfering with the Plaintiff's and his agents peaceful enjoyment of land parcel Kisumu/Konya/3258.

b) The defendants do pay the costs of this suit.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF DECEMBER 2016

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Mr. Siganga for Mashide for Plaintiff

M/S Kyamazina for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/12/2016

14/12/2016

S.M. Kibunja

Parties Absent

M/S Kyamazina for Defendant

Mr Siganga for Mashide for the Plaintiff

Court: Judgment dated and delivered in open court in presence of Mr. Siganga for Mashide for the Plaintiff and M/S Kyamazina for the Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/12/2016



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