



REPUBLIC OF KENYA



**Kiplagat v Bor & another (Environment & Land Case 140 of 2021)
[2023] KEELC 20226 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20226 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 140 OF 2021
MN MWANYALE, J
SEPTEMBER 25, 2023**

BETWEEN

JOSEPH KIPLAGAT PLAINTIFF

AND

JOSEPH KIPSANG BOR 1ST DEFENDANT

LEAH TUM 2ND DEFENDANT

JUDGMENT

1. Vide the Amended Plaintiff dated 15th March 2022, Joseph Kiplagat Kogo, the Plaintiff, sought judgment against the Defendant for;
 - a) Declaration that the Defendants are not entitled to impede the Plaintiffs proprietary right of possession and occupation of that parcel of land known as Nandi/Chemelil/Scheme/657 as the claims jointly and severally whether by themselves or their servants, agents or otherwise howsoever of accordingly be declared as trespassers on the same and be evicted.
 - aa) A declaration that the Plaintiff is the indefeasible owner of land parcel No. Nandi/Chemelil Scheme/657
 - b) Permanent injunction restraining the Defendants jointly and severally whether by themselves or their servants or agents or otherwise howsoever from claiming the suit property Nandi/Chemelil Scheme/657.
 - bb) An order of eviction do issue against the Defendant jointly and/or severally to vacate land parcel No. Nandi/Chemelil Scheme/657 forthwith
 - bbb) Damages for loss of user of the land from 2017 till vacant possession is handed back to the Plaintiff



- c) Costs of the suit.
- d) Any other and further relief that his Honourable Court shall deem just to so make.

The Plaintiffs Case and Evidence: -

2. It is the Plaintiffs case that he is the registered owner of all that piece of land known as Nandi/Chemelil Scheme/657 with a title in his name.
3. That the Defendants jointly and/or severally moved into occupied possessed and allegedly lodged ownership claims of the suit parcel Nandi/Chemelil Scheme/657
4. That the Plaintiff avers having had no dealings with the Defendants jointly and/or severally and there has been no lawful arrangement allowing the Defendants to be on the Plaintiffs land as licensees and/or to squat for whatever reason.
5. The Plaintiff further averred that the Defendants are not entitled to impede the Plaintiffs proprietary right to user, possession and occupation of that parcel of land known as Nandi/Chemelil Scheme/657; and against the above averments the Plaintiff sought for the prayers set out in paragraph 1 of this judgment.
6. The Plaintiff testified as PW1 he adopted his witness statement dated 7/4/2022 and produced P Exhibit 1 and 2 from the list of documents dated 7/4/2022 while documents 3 and 4 were marked.
7. It was his testimony that he had bought Nandi/Chemelil/657 from Mr. Erastus Kipkirui Yego. The property initially belonged to Chemelil Sisal Estate Limited and squatters were allocated the same upon allocation. He was allocated as a squatter plot number 488 and he bought 657 from the said Mr. Erastus Yego. He identified the list of allottees (PMFI4) which had been signed by S. O Momanyi the Deputy County Commissioner Nandi East Sub County, and G. K. Ondiga the District Land Adjudication and Settlement Officer.
8. The witness indicated that the property did not belong to Joseph Bor or Leah Tum the Defendants as they were not part of the Original Squatters list although Leah Tum had a structure thereon.
9. In cross – examination, the witness stated that the property was about 1 ½ kilometers from where he resided. Leah Tum had not been allocated the property, by the area committee during allocation. The Area Squatters Committee were the ones compiling the list.
10. The original property was L.R. NO. 1468 and not 2459. Hence 657 was subdivision of 1468. Tambui Farmers Co-operatives was based in Kitale and the Defendants were members of the same.
11. PW2, Erustus Kipkirui Yego testified and adopted his witness statement dated 7/4/2022 as part of his evidence in chief.
12. It was his further evidence that the property was a settlement scheme and originally belonged to Chemelil Sisal where he was a squatter. He had prepared and agreement for sale on 2/12/2016 and was paid in full. His name was on the list of allottees at page 22 and the acreage allocated was 2.02Ha.
13. In cross- examination, he stated that he lives at Mlango, but used to live at Tinderet Kotnelel. He never had lived on the suit property and did not have a house on the suit property either. He had applied for allocation through the area squatters committee, there was no house on the property at the time he applied and the people who lived there knew him as the owner. He sold the property without vacant possession. the Chairman of the allocation knew where the boundaries of the property were.



14. In further cross examination, he stated that the 1st Defendant was present when the survey was done and that the second Defendant lives on the property although at the time he bought there was a vacant house on the property.
15. He reiterated that he was not related for the former Deputy Governor but was a driver at the County and he would drove the Deputy Governor from time to time.
16. He indicated in further cross- examination that he did not build the house on the property but he had paid committee fees but wasn't issued with receipts, he was not issued receipts by SFT. At the time of the sale to the Plaintiff the witness did not have a title, but he sought the authority of the area squatters committee before he sold.
17. In re-examination, the witness indicated that he had signed both the witness statements and the agreement for sale. The property traverses the road and the house is on the other side of the road. The 1st Defendant had been allocated elsewhere and not 657.
18. PW3, was the County Land Registrar Nandi, Ms. Judith Cherutich, she produced a copy of the green card of Nandi/Chemelil Scheme/657 as an Exhibit 3 and the area list of squatters for No. 1468 which had 769 members, at No. 657 was allocated to Erastus Kipkirui Yego, the list contained no names of Joseph Bor and Leah Tum. The list which had been marked PMFI 2 was produced as P Exhibit No. 4.
19. In cross- examination, with witness stated that the survey plan was 2459, but L.R. NO. 1468, and the names on the list were the same. Th area list was used to Open the green card. The area list was generated by the Land Adjudication office. Role was limited to registration of parcels and issuance of titles.
20. In re-examination the witness stated that in the survey plan list (2459) the name appearing is Erastus Yego.
21. PW4, Grace Ondiga, a Land Adjudication Officer based in Elgeyo Marakwet but previously based in Nandi Land Adjudication Office testified. It was her testimony that she was in the team that subdivided L.R. NO. 1468, the team included Land Surveyors, Physical Planners, the DCC as Chairman, Agriculture Officer, representative from NLC and county Government of Nandi.
22. The team had Surveyors from Kisumu Kericho and Nairobi and team leader was from Kisumu. It was her testimony that she had compiled P Exhibit No. 4, with the help of the committee of squatters for parcel 1468 and surveyors. The total acreage of L.R. NO. 1468 was 3620 acres and at time of subdivision the property was owned by SFT.
23. It was her further evidence that P exhibit 4 was compiled from the area squatter committee, the list was vetted at a public baraza, and a grace period of 2 weeks for complaints was give n. all complaints were resolved.
24. It was her further evidence that if a name missed out on P Exhibit 4, it meant that they were not occupants on the property 1468. The witness indicated that they were adjustments on the ground, due to planning vis a vis public utilities, reservation and number of squatter's vis a vis available land. If a person not in the list claimed to be squatter they would check on the area occupied by such a person well as their application for allocation. It was not possible for the Defendants not to have known what was going on.
25. In cross – examination by Mr. Sambu the witness indicated that area squatter committee brought the list, but the raw list of squatters, was not retained. The witness stated that they had received complaints from other people some of which were dismissed but not from Joseph Bor the 1st Defendant.



26. It was her further answer that in case of a person being on the ground and property not allocated to them, such a scenario would be questionable.
27. The witness stated that they did not have a copy of Register of complaints, but they gave discretion and feedback.
28. In re- examination, the witness stated that if a person was in actually possession but not allocated, that would be questionable at time of allocation it was not possible to tell who was on the ground.
29. The last Plaintiff witness PW5 was Gilbert K. Cheruiyot Advocate. He testified that he had prepared the agreement of sale dated 2/12/2016 between Erastus K. Yego as vendor and Joseph Kogo as purchaser in respect of Nandi/Chemelil Scheme/657 the consideration was kshs 1,200,000/= and the document was executed before him and he produced the agreement for sale as P Exhibit 5.
30. In cross – examination, the witness stated that he had handwritten the raw draft after which it was typed by his secretary. He was present when agreement was made and that kshs 600,000/= had been paid earlier and kshs 600,000= was paid later. The witness stated that he had no role in the conveyancing hence he did not see the search nor title.
31. After the testimony of the 5 Plaintiffs witnesses, the Plaintiff case was closed, and the defence case commenced.

Defence Case and Evidence: -

32. Vide their Amended Defence and counter claim dated 14th March 2022, Defendants averred have lived on the suit property as squatters from 1997. It is the Defendants case that they paid for the survey fees in 2000 and a further kshs 6,000/= was also paid but the title was processed and given to a Mr. Erastus Kipkirui Yego.
33. By way of counterclaim, Defendants now the Plaintiffs in the counterclaim, state that the 1st Defendants proprietary right of Nandi/Chemelil Scheme/657 is unlawful and illegal.
34. The Plaintiffs in the counterclaim have pleaded and attributed Fraud on the part of Defendants in the counterclaim.
35. The particulars of fraud against the defendants in the counterclaim are interalia;
 - i) alleging the 2nd Defendant was a squatter and including the 2nd Defendants in the list of squatters, in place of the Plaintiffs.
 - ii) Doctoring the original list of squatters where the Plaintiffs were membersthe Defendants as Plaintiffs in the counterclaim thus sought for;
 - a) permanent injunction to be issued restraining the Defendants, their servants, agents and/or representatives from interfering with the Plaintiffs occupation and possession of Nandi/Chemelil Scheme/657.
 - b) Declaration that registration of 2nd Defendants as proprietor of NNandi/Chemelil Scheme/657 was illegally fraudulently and un procedurally done and that the subsequent transfer in favour of 1st Defendant was null and void.
 - c) Revocation of the title in favour of the 1st Defendant and the status of the Register before the impugned registration be restored.



- d) a declaration that the Plaintiffs are the genuine squatters in occupation of the suit land and therefore the absolute owner of Nandi/Chemelil Scheme/657 and they be registered as the proprietors.

36. The Defendants called 3 witnesses to the stand, the 1st and 2nd Defendants as DW1 and DW2 respectively and an additional witness DW3.
37. DW1 adopted his witness statement as part of evidence in chief. He stated that Erastus Yego had forged documents so to claim the same. He had planted sugarcane on the property and built 4 houses thereon. The property was 5 acres and he had lived thereon since 1997. He had paid for the first survey kshs 6000/= for the first survey in 2000 and he produced a receipt thereof as D Exhibit 1.
38. The 2nd survey was done in 2015 in his presence. His name was left out and he was not assisted. He reported the issues to the area Chief, he knew Joseph Kogo the Plaintiff who was a squatter like him. The witness produced D Exhibit 2 a-d), photographs of the houses and sugar cane on the suit property. He asked the Court to cancel the title belonging to the Plaintiff.
39. In cross – examination the witness stated that he was aware of the property initially having belonged to Chemelil sisal Estate Limited and thereafter to SFT who subdivided the same. The 1st Defendant did not have any documentation to show allocation. The witness further stated that his name appeared on the raw list of squatters but his name was later removed from the raw list.
40. After the survey in 2016, the property was registered to Erastus Yego. He stated that the SFT had during the subdivisions exercise came with surveyors from Nandi, Kericho, Kisumu and Nairobi. He had reported to the adjudication office of his name missing from the list.
41. In re-examination the witness stated that the Plaintiff had not taken possession of the property. He stated that he was on the property with the blessings of the original owner.
42. DW2, Leah Tum, adopted her witness statement dated 5th December 2020 as part of her evidence in chief. The witnesses stated that he knew the Plaintiff who was a squatter in the area, but did not know Erastus Yego who had not lived on the property.
43. The witness in cross – examination stated that she was not aware of the history of the property which had belonged to her grandfather who was evicted by settlers and thereafter the property went to the government after the sisal estate.
44. It was her testimony in cross – examination that the property was subdivided in 2016 but her name was not called out. Her husband Justine Rotich did not get any property. It was her further evidence that she had paid a Mr. Julius Arap Nyango on behalf of Joseph Bor. The Said Mr. Nyango was the custodian of the list of squatters. She had been told she occupied someone else property that he brothers name was not read out.
45. It was her testimony that they complained after discovering that Erastus Yego had been issued with a title deed. She further stated that she had not applied for the property but based her case on the fact that she had stayed and cultivated thereon.
46. The witness reiterated that Julius Nyango had received the money but he was not calling him as a witness. She reiterated that there was fraud in the allocation as she was occupying but was not registered.
47. In re-examination, the witness stated that Joseph Kogo bought the property which she was occupying.



48. The last witness DW3, Wesley Busienei a neighbor to the Defendants adopted his witness statement as part of his evidence in chief.
49. It was his testimony that he lived in the scheme in 1990 and the Defendant had moved in 1997. He got property number 539 but the Defendants did not get a title.
50. In cross -examination, the witness stated that he was a squatter in Chemelil Sisal Estate where he used to be a work. The squatters had a committee led by a Mr. Stephen Sang, John Too, Julius Maiyo, Koech Kipsugo, but he was not committee member. Arap Nyango is the same person as Julius Maiyo. The 1st Defendant was in the first list having been registered by Arap Nyango and his name was called out during a meeting at the DC's called by the District Commissioner.
51. He further stated that Erastus Yego was not a squatter in the scheme as the squatters knew each other. Kipsanga Bor was not a squatter from Transzoia, since he works in the farm as a can cutter. Leah entered the farm in 1997 and stays with the 1st Defendant. He indicated that survey was done in 2015 and there was a window for complaints to the committee, and the Defendants had raised the complaint to the committee. He had paid kshs 7,200/= but was not given a receipt. Committee members were from Chemelil Gugoh while receipts were issued by Chemelil squatters Chemelil Gugo and Chemelil squatters were different entities.
52. After the testimony of the 3 witnesses the defence case closed and parties were invited to file their submissions on the matter.

Plaintiff's Submisison: -

53. The Plaintiffs has framed two issues for determination and submitted on the issues.
54. The first issue being the adjudication process has submitted lengthily on the process saying that the same was followed to the later; and that once the adjudication register was completed the same could not be tempered with except for alterations under Section 27 (i) or Section 2a (3) of the Act and any objections could be entertained within 60 days as per section 26 of the said Act.
55. Plaintiff submits that an aggrieved party was to appeal to the minister under Section 29 of the Act
56. The Plaintiff submits that the Defendants had an opportunity to address their grievances under the provisions of the Act but failed to do so and cannot now complain otherwise.
57. On the second issue the Plaintiffs submits of the sanity of title as provided for under Section 24,35 and 26 of the [Land Registration Act](#).
58. It is the Plaintiff's submission that the title could only be cancelled in accordance with provision of section 26 of [Land Registration Act](#), which the Defendant had not proven.

Defendants Submissions: -

59. On their part the Defendant's have framed 4 issues of determination,
 - i) whether or not the registration of Erastus Kipkuria Yego as the proprietor of Nandi/Chemelil Scheme 657 was irregular illegal and/or un procedural.
 - ii) whether or not the Plaintiff can be an innocent purchaser for value without Notice in Erastus Yego defect in the title.
 - iv) who should bear costs of the suit?



- v) What are the appropriate reliefs to grant?
60. On the first issue, the Defendant submits that the Plaintiffs acquired the suit property illegally through Misrepresentation and corrupt means.
 61. The basis for the submissions being that the allottee did not meet the criteria for allocation of Chemelil Sisal Estate since he was not in occupation of the portion. The allottee was not in occupation and/or possession of the suit property.
 62. The Defendant's submit that the allottee was not a beneficiary of the scheme, and have placed reliance on the decision in *Jolly Mbogo vs John Mugeno Gitau (2022) Eklr* where for similar reasons, the Court held that allottee without roots in the scheme could not be a beneficial owner.
 63. On the issue of whether or not the Plaintiff is an innocent purchaser for value without Notice.
 64. It is the Plaintiff's submission that the Plaintiff is not a bonafide purchaser for value without Notice in the defect in title to Nandi/Chemelil/657.
In support of this submissions, the Defendant's place reliance on the decision in the case of *Lawrence P. Mukiri Mungai vs Attorney General (2017) eKLR*.
 65. The Defendant submits that the squatters knew themselves and that the allottee was not among the squatters.
 66. Placing reliance on the decision of *Arthi Highway Developers Limited vs West End Butchery Limited and 6 others (2015) eKLR*, the Defendant submits that the Plaintiff title does not deserved the protection of law, under the head of innocent purchaser for value.
 67. On the 3rd issue, the Defendant submits that there was no declaratin of an adjudication section by the Minister under Section 3 of the *Land Adjudication act* was exhibited by the Plaintiff; and the *Land Adjudication Act* was not compiled with.
 68. On the basis of the above submissions the Defendant submits that the plaintiff has not proven his case and that th4e counterclaim be allowed.

Issues for Determination: -

65. Before settling on the issues for determination, a few facts were settled in the course of the hearing that are not contested.
66. The first being that the Plaintiff is the registered owner of Nandi/Chemelil Scheme/657, having purchased the same from a Mr. Erastus Yego. The second issue is that Nandi/chemelil/657 is a subdivision of L.R. NO. 1468 which was initially owned by Chemelil sisal estate and thereafter owned by the Settlement Fund Trustee (SFT), and that the Defendants are in occupation of Nandi/chemelilscheme/657.
67. Having heard the evidence on both parties to the suit, perused the pleadings herein and the rival submissions, as well as the cited authorities, the Court frames the following as issues for determination.
 - i) what was the acquisition process of Nandi/Chemelil Scheme/657 and the import of the allottees list?
 - ii) whether the Defendants as occupiers have proven ownership of Nandi/chemelil/657
 - iii) What reliefs ought to issue?



- iv) Who bears the costs of the suit?
68. The process of registration and acquisition of title in Nandi/chemelil/657 can be traced from the evidence of PW2, PW3, and PW4. It was their testimony that the same was through allocation, which allocation was done by the squatter allocation committee which comprised of Area Squatter Committee and physical planner and technical persons being Land Settlement Officers and Surveyors from Nandi, Kisumu, Kericho under the supervision of the Deputy County Commissioners Agricultural Officer, Representative from National Land Commission and County Government which team picked and vetted the squatters and prepared a list of allottees. The said list of allottees was vetted at a baraza and later used to prepare the green cards used for registration as was stated by District Land Registrar PW3.
69. The said list was compiled by village elders and the area squatter committee from amongst the squatters who were resident and who had applied even though in the allocation process there was a provision for other people who were non-residents according to the testimony of PW4.
70. The Defendants indicated that whereas the Plaintiff was a squatter on the property, the original allottee of 657 and Erastus Yego (PW2) was not a squatter. In the squatters list (P Exhibit 4) the name of Erastus Yego appeared as No. 657 which number was converted to plot numbers and parcel numbers.
71. Both Defendants name do not appear in P Exhibit 4 and the Court cannot ascertain whether they were deliberately and/fraudulently omitted as they claim or did not simply apply for allocation. In her evidence PW4 stated that they had a Grace period of 2 weeks to look into any complaints but they did not maintain a register of complaints, neither did she as secretary recall any complaint by the 1st Defendant. Allocation as a means of acquisition of title to land is provided for under Section 7 of the Land Act and is the process that was sued in the Chemelil Scheme.
72. It is the list (P Exhibit 4) that culminated to the registration process. The Defendants indicated that their names were on the raw list, which list, was not produced in Court and was not used in Open to Register.
73. The Court finds that Erastus Yego though not a resident of the scheme was included in the list since the list had a provision for others who were not living thereon., and pursuant to P Exhibit 4 was registered as the proprietor of the Nandi/chemelil/657 and a title issued to him before he transferred it to the Plaintiff.
74. The root of the registration of Erastus Yego has thus been demonstrated and his title can only be challenged under section 26 of the Land Registration Act for fraud or acquisition through corrupt means.
75. The evidence before Court does not suggest either fraud or acquisition through corrupt means as the title belonging to the Plaintiff can be traced from the allocation process and the allocation process and the allocations produced in Court and Mr. Erastus Yego thus had a valid and proper title capable of transferring interest to the Plaintiff.
76. I do find that on a balance of probability the Plaintiff has demonstrated the proper acquisition and is to protection of his title and interest comprised therein under Section 24 – 26 of the Land Registration Act.
77. On the second issue, it is undoubtably that the Defendants were in occupation of the suit property. However unlike in the Solly Mbogo case cited by the Defendants Advocates, in their case the Defendants only mentioned making payment to a Mr. Arap Nyango who was a committee member



of the squatters and that their names were in the raw list of squatters and that Mr. Erastus Yego was not a squatter.

78. Had the Defendants pleaded adverse possession based on the occupation since 1997, the same would still not be successful since the Registration of the title in respect of Nandi/chemelil 657 was done on 20/9/2016 in accordance to P Exhibit 3 and the suit was filed in 2017 only a year after. Hence the occupation between 1997 to 2016 was on Government land belonging to SFT which a claim of adverse possession could not arise in any event.
79. in arriving at the said conclusion I am guided by the decision in the Civil Appeal No. 110/1997 Francis Gitonga Macharia vs Muiruri Waithaka where the Court of Appeal held as follows; -
- “Limitation period for purposes of adverse possession only starts running after the Registration of the property in the name of Respondent.”
80. The Court thus finds that the occupation by the 1st and 2nd Defendants on the suit property does not give the said Defendants an entitlement and claim of ownership and the Amended Counterclaim has thus not been proven and does not succeed.
81. On issue number 3, on reliefs that ought to issue, the Court having found the Plaintiff to have proven ownership of Nandi/Chemelil Scheme/657 and ultimately proving his case, finds the Plaintiff to be deserving of the prayers, in the Amended Plaint save for the prayer of loss of user of the property since the Plaintiff had not taken possession of the suit property in any event; together with costs of the suit.

Disposition: -

82. Judgment be and is hereby entered for the Plaintiff as follows;-
- a) Declaration that the Plaintiff is the indefeasible owner of land parcel No. Nandi/chemelil Scheme/657
 - b) Declaration that the Defendants are not entitled to impede the Plaintiffs proprietary interests in Nandi/Chemelil Scheme/ 657 as they are trespassers
 - c) An order of eviction issues against the Defendants. The Plaintiff to issue the relevant eviction notices in accordance with Section 152 (a) of the Land Act.
 - d) Costs of the suit and the counterclaim are awarded to the Plaintiff.

JUDGEMENT, DELIVERED AND DATED AT KAPSABET THIS 25TH DAY OF SEPTEMBER 2023.

HON. M. N. MWANYALE

JUDGE

In the presence of;

Mr. Sambu for the Plaintiff

Mr. Otieno for the Defendant.

