



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E&L 539 OF 2012**

**AGNETA AGISA MUDUKIZA ..... PLAINTIFF**

**VERSUS**

**TERESA NOEL .....1ST DEFENDANT**

**KAITANO ANDUKU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

By a plaint dated 30<sup>th</sup> June 2009 the plaintiff herein sued the defendants seeking for orders for:

- a. A permanent injunction against the defendants restraining them and /or their servants, agents and /or their representatives from interfering and /or any other manner dealing with the plaintiff's parcel and the defendants be evicted from the said parcel of land.
- b. Costs of this suit and interest
- c. Any other or further relief that this honourable court may deem fit to grant.

The plaintiff subsequently amended her plaint pursuant to a court order dated 25<sup>th</sup> January 2012 whereby the plaintiff sought for an order for eviction and demolition against the defendants and their agents. She also sought for mesne profits.

The defendants filed a Joint defence and denied that the plaintiff is the owner of plot no. MAUTUMA CENTRAL SETTLEMENT SCHEME 656 measuring 3 acres. The defendants stated in their defence that the plaintiff was allocated plot No. 680 B and not 656. The defendants further alleged in their defence that they applied to the District Commissioner Lugari for plots and were allocated.

This matter was initially filed in the High court before the establishment of the Environment and land Court but was later transferred to the E & L in 2012 and given a new number. This matter has a history of several adjournments instigated by either the defendants' absence or their counsel.

This case came up for hearing on 28<sup>th</sup> March 2017 when the plaintiff proceeded with her case in the absence of the defendants. The defendants advocate was served with a hearing Notice on 1/3/2017 but did not send any representation. The defendants were also not present in court. The defendants advocate had received the hearing notice 'under protest' but did not send any representation to hold brief and state the reasons for the protest.

In my view, I find that receiving hearing notices under protest has no force in law. If courts were to allow such practices, then advocates and litigants will delay the cause of justice when they are not ready to proceed with hearings in the guise of receiving notices under protest. The Advocate should have sent counsel to hold brief and adjourn the matter. When a matter is fixed for hearing, the parties must also attend court even if they intend to apply for adjournment. Parties can only miss court attendance if the same is dispensed with or they have a compelling reason not to attend.

Having said that I allowed the plaintiff to proceed with her case as the defendants' advocate was served and an affidavit of service filed in court.

### **Plaintiff's Case**

It was the plaintiff's case that she was allocated the suit land MAUTUMA CENTRAL SETTLEMENT SCHEME 656 measuring 3 acres in 1998 and given an allotment letter by the then District Commissioner Adan Haji. She produced a plot allocation letter dated 15<sup>th</sup> June 1998 and the same was marked as exhibit No. 1. The plaintiff also testified that she was later given a letter of offer dated 31<sup>st</sup> July 2000 which was marked as exhibit No. 2. She stated that she took possession of the suit land and built a house and fenced it.

The plaintiff averred that she got sick and while she was hospitalized in a Kakamega hospital for two weeks and later in Nairobi, when she went back she found when her house had been demolished by the defendants who subsequently built theirs on her plot. The plaintiff stated that she reported the matter to the District Officer and the Sub chief and the defendants were arrested and charged before Eldoret court vide Criminal Case No 6144/04 which proceedings were produced as exhibit No. 4 before the court. She further stated that the defendants appealed the judgement vide Criminal Appeal No 76/06 and the same was produced as an exhibit before the court.

It was the plaintiff's evidence that the Chief and the Assistant Chief of the area are aware of this dispute and wrote letters confirming that the plaintiff is the rightful owner of the suit land. She produced a letter from the area Chief dated 9<sup>th</sup> may 2013 which was marked as exhibit No. 5. The plaintiff further produced letters from the Assistant chief and Senior Assistant Chief marked as exhibits 6 and 7 respectively to support her case for ownership. She testified that the defendants still occupy her land and have refused to move out. The plaintiff urged the court to grant an eviction order against the defendants, a permanent injunction restraining them from interfering with the suit land, damages for demolishing her house and costs of the suit. The plaintiff closed her case.

The plaintiff's counsel submitted that since the defendants were served with a hearing notice and chose not to attend court, it was imperative that the court considers their case closed. The defendants case was deemed as closed as they were not present to defend themselves.

### **Plaintiff's Counsel's Submissions**

Counsel for the Plaintiff Mr. Chepkwony filed written submissions on 11<sup>th</sup> April 2017 which reiterated the plaintiff's evidence. Counsel submitted that from the evidence on record it was clear that the plaintiff was indeed allocated land parcel No. 656 MAUTUMA SETTLEMENT SCHEME measuring 3 acres. He stated that the plaintiff had proven her case on a balance of probability. He urged the court to grant the plaintiff orders as prayed.

### **Plaintiff's List of Issues.**

The Plaintiff filed a list of issues dated 24<sup>th</sup> January 2014

1. Whether the Plaintiff is the lawful owner and/or allottee of the land in dispute.
2. Whether the Defendants have illegally dispossessed the Plaintiff parcel of land namely

MAUTUMA CENTRAL SETTLEMENT SCHEME NO. 656 (B) also known as No. 680 B measuring 3 acres.

3. Whether the Plaintiff has been denied the use and utilization of the said parcel of land by the Defendants.
4. Whether the Plaintiff as a consequence has suffered loss and damage.
5. Whether the Plaintiff is entitled to the orders and reliefs sought.
6. Who should pay the costs of the suit.

The defendants did not file any issues.

### **Issues and determination**

I have considered the pleadings, evidence adduced, exhibits produced and the submissions of plaintiff's Counsel and I have come to the conclusion that the issues can be narrowed down to three being:

1. Whether the Plaintiff is the lawful owner and/or allottee of the land in dispute namely MAUTUMA CENTRAL SETTLEMENT SCHEME NO. 656 measuring 3 acres.
2. Whether the Plaintiff has been denied the use and utilization of the said parcel of land by the Defendants.
3. Whether the Plaintiff is entitled to the orders and reliefs sought.

I will now turn to the issues for analysis.

On issue No. 1, as to whether the Plaintiff is the lawful owner and/or allottee of the land in dispute namely MAUTUMA CENTRAL SETTLEMENT SCHEME NO. 656 measuring 3 acres, from the evidence on record the plaintiff claimed that she was allocated the suit land and produced a copy of the letter dated 15<sup>th</sup> June 1998. The letter which was marked as exhibit No.1 indicated that the plaintiff had been allocated plot No. 656. The letter was from the District Commissioner Lugari. It indicated that the plaintiff was to occupy the plot within 30 days from the date of the letter and failure to do so it would be allocated to other needy cases. The plaintiff testified that she took possession of the plot immediately after allocation and built her house and fenced it. This is evidence that she adhered to the contents of the letter by taking possession as required within the stipulated period.

The plaintiff further produced a letter of offer dated 31<sup>st</sup> July 2000 which originated from the Director of Land Adjudication and Settlement informing her that her application for a settlement plot had been successful. I notice on the letter that the plot mentioned as being allocated to the plaintiff is plot No. 656 at Mautuma Scheme in Kakamega District. The reference in the letter states DLAS/EST/MAUTUMA/656. This is a confirmation that the plot referred to is plot No. 656. The plaintiff indicated in her statement which she adopted as evidence before the court that plot No. 656 is also known as Plot No. 680 B. The question is, was there a change of numbers of the plots or are they different plots? I noticed that on the letter of allocation of plot to the plaintiff, the two numbers 656 and 680 B referred to the same 3 acres that the plaintiff was allocated. The two numbers appeared on the letter. I would therefore safely conclude that the two plot numbers refer to one and the same plot. This leads me to a further conclusion that the plaintiff has established that she was allocated the suit land. I am satisfied that it is the plaintiff who was indeed allocated plot **NO. 656 MAUTUMA SETTLEMENT SCHEME also known as plot No 680 B** and that she duly met and satisfied the terms of allotment as she took possession within the stipulated period in the letter.

The second issue is as to whether the Plaintiff has been denied the use and utilization of the said parcel of land by the Defendants. It was the plaintiff's evidence that she fell ill and was hospitalized and when she

came back she found when the defendants had demolished her house and taken over her plot. She further testified that she has been living in Lumakanda trading center as she could not go back to the suit land for fear of her life. She stated that she has not been allowed to utilize her parcel of land for the past 13 years. This is evidence that she has been denied the use and utilization of the suit parcel of land by the defendants. The plaintiff produced letter from the Area chief and assistant chief showing that she has been seeking for assistance from the provincial administration to help her get back her land. All the letters are in the affirmative that the plaintiff was allocated the suit land. The defendants were also arrested and charged with a criminal offence of trespass on private land. They were convicted and later on Appeal the conviction was quashed on the ground that the matter should have been a civil matter.

I have looked at the joint defence filed by the defendants, their statements and documents and notice that they have not stated any tangible proof that they were allocated the suit land. They have neither filed nor attached any evidence of allocation of the suit plot. The defendants statement talks of a list of squatters but the list that was filed is in respect of public collection permit. A letter dated 2<sup>nd</sup> June 2011 from the District Commissioner Lugari authorizing 14 members of Mautuma Settlement Scheme Committee to collect funds from people who were allocated land for Environmental Impact Assessment. The defendants' names do not appear in that list and they are also not committee members. I do not see the relevance of this document. This is how far the defendants have gone to deny the claims that the plaintiff was allocated the suit land. Further the defendants were given an opportunity to come and defend themselves in court and give evidence but they never showed up even after being served with a hearing notice. It seems they were not interested in the case. On that limb, I find that the defendant being trespassers on the suit land have denied the plaintiff the utilization and use of her parcel of land.

On the last issue, as to whether the Plaintiff is entitled to the orders and reliefs sought, I find that the plaintiff having proved that she was allocated plot No. 656 also known as 680B MAUTUMA SETTLEMENT SCHEME is entitled to orders sought save for the mesne profits which were not specifically pleaded and proved. Mesne profits are special damages which must be specifically pleaded and specifically proved. The plaintiff did not state how much she would require in terms of compensation. I therefore find that the plaintiff is not entitled to the relief for mesne profits.

The plaintiff having established a case against the defendant is also entitled to a permanent injunction restraining the defendants and or their agents, servants and or employees from interfering and or in any manner with the plaintiff's parcel of land known as MAUTUMA SETTLEMENT SCHEME No. 656 also known as 680B.

I have considered all the pleadings, the evidence and the exhibits in support and against this case and I am satisfied that the plaintiff has established her claim against the defendants with respect to the suit land.

I therefore make the following orders:-

1. That the defendants do vacate the suit land within 30 days upon service of this judgment or decree. In default of so vacating, an eviction order be issued permitting the plaintiff to evict the defendants and or demolish the structures from the suit land.
2. That a permanent injunction is hereby issued restraining the defendants and or their agents, servants and or employees from interfering and or in any manner with the plaintiff's parcel of land known as MAUTUMA SETTLEMENT SCHEME No. 656 also known as 680B.
3. That the prayer for mesne profits is disallowed as the same was not proved.
4. Costs of the suit to the plaintiff.

Dated and delivered at Eldoret on this 23<sup>rd</sup> day of May, 2017.

**M.A ODENY**

**JUDGE**