



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 123 OF 2009

PHILIP WAMBUA.....1ST
PLAINTIFF

JULIUS GITEI NGUGI.....2ND
PLAINTIFF

JOSEPH NJOROGE.....3RD
PLAINTIFF

VERSUS

THE CHAIRMAN SCHOOL COMMITTEE TRANS-NZOIA PRIMARY SCHOOL.....1ST
DEFENDANT

THE CHAIRMAN, BOARD OF GOVERNORS TRANS-NZOIA SECONDARY
SCHOOL.....2NDDEFENDANT

J U D G M E N T

INTRODUCTION

1. The three plaintiffs are registered as owners of **LR. No. Kitale Municipality Block 3/65** (suitland) which measures about **0.9527 Hectares**. The plaintiffs brought this suit against the defendants seeking the following reliefs:-

- (a) A declaration that the plaintiffs are the lawful owners of land comprised in Title No. Kitale Municipality Block 3/65.**
- (b) General and exemplary damages for trespass and malicious damages to the plaintiffs' property.**
- (c) A temporary and a perpetual or permanent injunction.**
- (d) Costs.**
- (e) Interest.**
- (f) Any other relief/order that this Honourable Court may deem fit to grant.**

PLAINTIFFS CASE

2. The plaintiffs are members of **Trans-Nzoia Baptist Church**. On **28/7/1995** they entered into a sale agreement with one **Silas Sang** who agreed to sell to them land measuring **1.0 Hectares** comprised in a letter of allotment bearing reference number **20089/XXV111** at a consideration of **Kshs.750,000/=**. The property had been allotted to Silas Sang vide letter of allotment dated **29/9/1994**.

3. The plaintiffs processed title which came out as **Kitale Municipality Block 3/174**. The plaintiffs later surrendered the title in exchange for a new one which now came out as **Kitale Municipality Block 3/65** which is the suitland. It is after this that a dispute arose between the first defendant and the plaintiffs regarding the ownership of the suitland. The first plaintiff filed two suits against the plaintiffs. One of the suits was **Kitale HCCC No. 2 of 2000** and the other one was **Kitale HCCC No. 75 of 2002**. The first suit was struck out and the second one was dismissed for want of prosecution. No appeals were preferred by the plaintiff against the orders in the two files.

4. The plaintiffs fenced the suitland and put up a steel gate, a church and servant's house. On **3/11/2009**, the plaintiffs' servant called **PW1 Julius Gitegi Ngugi** and told him that people from the defendant schools were demolishing the church. He proceeded there and found that indeed the church had been demolished. The plaintiffs then engaged the services of a valuer who valued the damage caused which was assessed at **Kshs.600,000/=**.

DEFENDANTS CASE

5. The defendants stated their case through **DW1 Francis Denis Maina** who was the Chairman Board of Governors between 2009 and 2012 and **DW2 Martha Nanjala Wanyonyi**, the head teacher of Trans-Nzoia Primary School. DW1 testified that the first defendant was registered on **27/11/1957** both as a primary school and secondary school. The secondary section was however set up later in 2009. The primary school used to be operated by Hindus who later surrendered it to the Government. The primary section was set up on **Plot No. 36**. **Plot No. 37** was used as a play ground. The primary school used **Plot No. 65** for farming purposes. When the secondary section was put up, it was set up on **Plot No. 37** and **Plot No. 65** became its play ground.

6. DW2 testified that in 1990 she was posted to Trans-Nzoia primary school as a teacher. In 2007 she was transferred to Kitale Forest primary school. In 2009 she came back to Trans-Nzoia primary school as the head teacher. While she was at Trans-Nzoia primary school in the 1990's, they used the suitland for farming. DW2 went on to state that on 3/11/2009 while she was in school she saw the then area MP Eugene Wamalwa who was in the company of area chief and other people. They started demolishing the structures on the suitland. The pupils then joined them and started uprooting beans from the land. She denied that the pupils or teachers were involved in the demolition of the structures on the suitland. She stated that the teachers stood by as the demolition was going on.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

7. I have carefully gone through the evidence adduced herein vis-a-vis the pleadings filed. The issues which emerge for determination are the following:-

(a) Is the plaintiffs' suit incompetent?

(b) Was the registration of the plaintiffs as owners of the suitland lawfully done?

(c) Were the defendants pupils, teachers or parents involved in the demolition of structures on the suitland?

Whether the suit is incompetent

8. Mr. Odongo State Counsel submitted that the plaintiffs' suit is incompetent because the first plaintiff never signed any authority to plead and never gave his co-plaintiffs authority to proceed with the case on his behalf. He did not sign any verifying affidavit. The evidence which emerged during the hearing is

that the first plaintiff who was a pastor with Trans-Nzoia Baptist church had gone to the United States for further studies as at the time this suit was filed. It was conceded by the plaintiffs advocates in their submissions that indeed no verifying affidavit was signed by the first plaintiff or authority to plead. The advocates nevertheless urged the court not to dismiss the suit on this ground. They sought to distinguish the authority relied on by the counsel for the defendants.

9. **Order 1 Rule 13(1)** is clear that where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings. In the instant case, it is clear that the first plaintiff did not give authority to the other two to proceed on his behalf. However that notwithstanding, I do not think that this alone can defeat the plaintiff's suit. As rightly submitted by Mr. Odongo, this is a case where this court can invoke the provisions of **Article 159 of the Constitution** which provides that courts should determine cases without undue regard to procedural technicalities. This is a case which went to full trial. Had the defendants raised this issue for instance in an application seeking to strike out the suit for failure by the first plaintiff to swear a verifying affidavit or sign authority to plead, the court would have exercised its discretion not to strike out the suit but give the first plaintiff time to comply. But in this case, the issue is being raised for the first time in submissions. In the circumstances I cannot hold that the suit is incompetent. This is a mere procedural technicality which the court cannot give undue regard to.

Was the registration of plaintiffs as owners of the suitland lawfully done?

10. The plaintiffs bought land measuring **1.0 Hectares**. This land was described as reference **No. 20089/XXV111**. The agreement was produced as Exhibit 1. The allotment and the part development plan (PDP) were produced as Exhibit 2(a) and (b) respectively. The land being sold had been allotted to **Silas Sang** through letter of allotment dated 29/9/1994. About four years later this is on 6/1/1998, Silas Sang transferred his interest to the plaintiffs. In that transfer dated 6/1/1998 [Exhibit 3] the plot being transferred was indicated as **Block 3/174**. The plaintiffs went ahead to process a lease [Exhibit9] which came out as **Kitale Municipality Block 3/174**.

11. When the plaintiffs went to the ground with title for **Kitale Municipality Block 3/174**, they realized that what they had did not conform with the documents for **Plot No. Kitale Municipality Block 3/65** which was on the ground. They then went back and started the process of changing the land from **Kitale Municipality Block 3/174** to **Kitale Municipality Block 3/65**. What is interesting is that there is no evidence at all to show how the process of change occurred. What the plaintiffs produced is a letter dated 21/10/1998 [Exhibit 7] in which the Commissioner of Lands wrote the Land Registrar Kitale forwarding a lease in respect of **Plot No. Kitale Municipality Block 3/65** which was in exchange of a surrender of **Plot No. Kitale Municipality Block 3/174**. The surrender of lease was also produced as Exhibit 8. The new lease and certificate of lease were produced as Exhibit 9 and 10 respectively.

12. One of the prayers in the plaint is a declaration that the plaintiffs are the lawful owners of **LR. No. Kitale Municipality Block 3/65**. It was incumbent upon them to adduce evidence to show that they were properly registered as owners of the suitland. As I have said hereinabove, there was no evidence to show how the process of change from **Kitale Municipality Block 3/174** to **Kitale Municipality Block 3/65** was carried out. The plaintiff had some letters which tried to explain the process marked for identification but they were not produced. Even if such letters are in the file, I cannot rely on them because they do not form part of the evidence. *In Nairobi Civil Appeal No. 140 of 2008 between Kenneth Nyaga Mwige and Austine Kiguta & 2 Others [2015] eKLR* the court had this to say regarding documents marked for identification but not produced:-

“Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account”.

13. The judges of the Court of Appeal went on to cite two cases as follows:-

“In *Des Raj Sharma -vs- Reginam [1953] 19 EACA 310*, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence.

In the Nigerian case of *Michael Hausa -vs- The state [1994] 7-8 SCNJ 144*, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence”.

14. There is evidence from the defendants that the record in respect of **Kitale Municipality Block 3/65** cannot be traced at the Kitale land Registry. This perhaps explains why neither the plaintiffs nor the defendants bothered to call the Land Registrar to shed light on what happened in this matter. This however notwithstanding, the defendants managed to put in documents which show that the process leading to acquisition of title by the plaintiffs was not without controversy. One such document is a letter dated 23/2/2000 from the Commissioner of Lands to District Land Registrar Kitale [Defence Exhibit 4]. In this letter **Kitale Municipality Block 3/65** was formerly **LR No. 2116/48/X1X**. The Commissioner of Lands was advising the District Land Registrar Kitale to register a caveat on the same to stop any dealings until the dispute between the plaintiffs and the first defendant was sorted out. Municipal Council of Kitale was also asked not to approve any development plans. Silas Sang had sold land which was described as **LR. No. 20089/XXV111**. I cannot understand how then this number changed to **LR. No. 2116/48/X1X** which was finally registered in the names of the plaintiffs in an unclear manner. This definitely shows that there was something wrong. The problem is compounded by disappearance of records from the Land Registry.

15. The Commissioner of Lands in his letter of 31/3/2000 [Defence Exhibit 6] talks of **Plot No. LR. Kitale Municipality Block 3/174** which was erroneously registered in the plaintiffs names. The Commissioner in that letter advised that the title in issue be cancelled. He at the same indicated that the file in respect of this parcel had since gone missing from the land registry. This was after the mysterious change from **LR. No. Kitale Municipality Block 3/174** to **Kitale Municipality Block 3/65** as confirmed by a copy of extract from the registrar in respect of **LR. No. Kitale Municipality Block 3/174** [Defence Exhibit 8]. My understanding about registration of parcels is that each parcel at least should have its own file. In the present case there were two separate parcels i.e. **Kitale Municipality Block 3/65** and **Kitale Municipality Block 3/174**. The vendor Silas Sang sold **Block 3/174** and this is the parcel which he transferred to the plaintiffs. For reasons which are not clear, this parcel was changed to **Kitale Municipality Block 3/65**. This change was effected in the file relating to **Kitale Municipality Block 3/174** by merely entering an entry that there had been a surrender of lease. The file then disappears. In the circumstances. It is difficult for this court to hold that the plaintiffs were lawfully registered as owners of the suitland.

16. The procedure for registration of a person as owner of the land must meet all the conditions precedent to that registration. There has to be a letter of allotment meeting the conditions in the allotment and finally being registered as owner after receiving title. This was clearly captured in the case of ***Dr. Joseph N.K. Ngok -vs- Justice Moiwo Ole Keiwa & Others Civil Application No. NAI 60 of 1997***. The Court of Appeal held as follows:-

“.....that it is trite law that title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act which the property is held”.

17. In the instant case, the plaintiffs have been shown to have been privy to what was going on. They bought a different parcel of land and finally processed change of title from that land to a different one. They cannot be said to have been innocent purchasers for value without notice. The defects in the process of acquisition were brought to their attention in advance but they seem not to have heeded this. In the circumstances it is difficult for them to defend what they have. I therefore find that their acquisition of

title was not lawful.

Whether the defendants' pupils, teachers and parents were involved in the demolition of the structures on the suitland

18. The plaintiffs contend that it is the pupils, parents and teachers of the defendants who trespassed onto the suitland and destroyed properties therein. The plaintiffs' evidence is that PW2 received a call from their servant that there was destruction of property in the suitland. He went there and found teachers, pupils and parents demolishing structures on the suitland. The plaintiffs sought to rely on photographs which were marked for identification but were never produced. As per the authority of ***Kenneth Nyaga Mwige (Supra)*** there can be no reliance on such documents. Though the pictures finally entered the court record through the valuation report which was produced as Exhibit 15, the photographs are of no evidential value as they were not introduced in accordance with the provisions of the Evidence Act. The maker of those documents (photographs) is not known. There was no certificate accompanying those photographs. I agree with the finding of Justice Gikonyo in ***Bungoma Election Petition No. 2 of 2013: Moses Wanjala Lukoye –vs- Benard Alfred Sambu*** in which he rejected photographs which were sought to be introduced without compliance with the provisions of the Evidence Act.

19. The defendants had denied that their pupils, teachers and parents were involved in the destruction of the structures on the suitland. It was upon the plaintiffs to bring credible evidence to show that the pupils, teachers and parents were involved. It is not enough for a witness to claim that he found teachers, parents and pupils destroying the properties. The plaintiff's only evidence having failed the test, I do not find any other evidence which can lead to a finding that the parents, pupils and teachers from the defendant schools were involved. I therefore find that parents, teachers and pupils from the two schools were not involved in the destruction of the structures on the suitland.

20. Before I conclude this judgment, I must address one request by the defendant through the state counsel. The way I understand the state counsel is that he wants me to order cancellation of title which is in the names of the plaintiffs. The basis of this is that the Commissioner of Lands had realized that the title was erroneously given to the plaintiffs and had even called for its surrender for purposes of cancellation. Though cancellation of title was not one of the prayers by the defendants as there was no counter-claim, the state counsel nevertheless pleads that I exercise my powers under ***Section 13 of the Environment and Land Court Act*** to order cancellation of the title. The state counsel cited one Court of Appeal decision and one decision from ELC Court at Eldoret. These are ***Nyeri Court of Appeal Civil Appeal No. 8 of 2014 Henry Muthee Kathurima -vs- Commissioner of Lands & Another*** and ***Eldoret ELC Case No. 479 of 2012 Timothy Ingosi & 87 Others -vs- Kenya Forest Services & 2 Others***. The two decisions cannot assist the defendants in their plea. The defendants did not raise any counter-claim and the court cannot give an order which is not based on pleadings. In the Eldoret case, the judge merely recommended to the Government to consider allocating the land to the plaintiffs after it dismissed their claim. The recommendation was based on the fact that there had been attempts in the past to degazette the same forest which the plaintiffs were seeking. In the Court of Appeal case, the issues were quite different. Though the issues had not been pleaded, the parties canvassed them before the judges in the appeal. This is why the court decided to address them even though they had not been pleaded. This is unlike in this case where the issue was not even canvassed before me. It was only raised in submissions. I decline to grant the same. Perhaps the defendants may try to raise the issue with National Land Commission if at all they are of any assistance.

CONCLUSION

21. As I have found that the plaintiffs acquisition of title was not proper, and the plaintiffs having failed to establish that the defendants were involved in the destruction of their property, I find that this suit is for dismissal. I proceed to dismiss the same with costs to the defendants.

Dated, signed and delivered at Kitale on this 29th day of August, 2016.

E. OBAGA

JUDGE

**In the presence of Mr. Kiarie for Plaintiffs and Mr. Mukabane for Mr. Odongo for Defendants.
Court Assistant – Isabellah.**

E. OBAGA

JUDGE

29/8/2016