



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELCC No. 205 OF 2015**

**ISABELLA BONARERI BUNDI.....PLAINTIFF**

**VERSUS**

**TABITHA MORAA MAKORI.....1<sup>ST</sup> DEFENDANT**

**JOHN ONDIEKI MAKORI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By plaint filed on 21<sup>st</sup> July, 2015, the plaintiff commenced proceedings herein. She averred that she was living as a squatter in the expansive Ol-Jorai Settlement Scheme since the year 2000 and that in or about the year 2002, she was allocated Plot No. 43 measuring about 2.5 acres in the scheme. That the allocation was cancelled and on 10<sup>th</sup> September 2008, she was allocated parcel number 2255 at Ol-Jorai Phase II Settlement Scheme measuring approximately 1.00 HA. That the said second allotment letter was similarly cancelled and on 16<sup>th</sup> August 2010, she was allocated parcel number 209 at Ol-Jorai Phase II Settlement Scheme (the suit property). That the cancellations and reallocations did not change the situation and boundaries on the ground since at all times she was already in possession. The Plaintiff further averred that on 16<sup>th</sup> April 2012, she paid the outright purchase price and that the first defendant started laying claim to the suit property sometimes in the year 2012 and started cultivating it since the year 2013 as well as building a house on it with the assistance of the second defendant. She averred that she is the rightful owner of the suit property.

2. The plaintiff therefore prayed for judgment against the defendants for the following orders:

*1. A declaration that the plaintiff is the rightful owner of all that parcel of land known as Plot No. 209 measuring approximately 1.00 HA at Ol-Jorai Phase II Settlement Scheme in Naivasha District.*

*2. A permanent Injunction restraining the Defendants by themselves, their employees, agents and or any other person acting under their authority from interfering with, entering, cultivating, planting, dealing with or registering all that parcel of land known as Plot No. 209 measuring approximately 1.00 HA at Ol-Jorai Phase II Settlement Scheme in Naivasha District in the name of any other person other than the Plaintiff.*

*3. Mesne profits for the entire period from 2013 to the conclusion of this case whereof the Defendants have been cultivating the Plaintiffs parcel of land.*

*4. Costs occasioned by this suit and interests thereto at Court rates from the date of filing suit.*

*5. Any other relief that this Court deem fit to grant.*

3. The defendants filed a defence through which they denied the plaintiffs' and urged the court to dismiss her case with costs. They averred that they were allocated 2 ½ acres of land of Ole Jorai settlement scheme which they were occupying peacefully until the plaintiff started interfering with the suit property. They further averred that the plaintiff has never settled on the suit property until the year 2014 when she started harassing the defendants by instituting criminal charges against them to force them out of the suit property. They also averred that the plaintiff was allotted a non-existent parcel of land after all other beneficiaries had settled down.

4. The matter then proceeded to hearing where the plaintiff testified as PW1. She stated that as at the date of her testimony she was a resident of Kisii and was not staying in the suit property. That the suit property was allocated to her by Agricultural Development Corporation vide a letter dated 28<sup>th</sup> May 2002 which letter described the land as plot number C43 measuring 2.5 acres. That she occupied the parcel and that after 2002 the letter dated 28<sup>th</sup> May, 2002 was cancelled and she was given another letter titled "settlement plot letter of

offer” dated 10<sup>th</sup> September, 2008 allocating her the same parcel of land situated at Oljorai Phase II then known as plot number 2255 measuring approximately 1 hectare.

5. She stated that she paid Kshs.1, 270 as part of the required money and stayed on the suit property until 2010 when she was given another allotment letter which referred to the same plot but the plot number changed to 209 and which required her Ksh.6, 446.91. That she delayed to pay and was penalized thereby making her ultimately pay Kshs.7,200. She further testified that she had built a house on the land in the year 2000 which was later demolished by the defendants on 18<sup>th</sup> April, 2014. That when she went to the settlement office, she was not given a discharge owing to a caution placed on the land. She further testified that she went to Ministry of Lands Nairobi and they wrote to Land Registrar Naivasha on 16<sup>th</sup> October, 2014.

6. Shadrack Makori Nyamondo testified as **PW2**. He stated that he was the plaintiff’s husband and a farmer residing at Keginya settlement Scheme in Nyamira County. That the plaintiff was allocated the plot in the year 2000 and that they started farming on it and even built a house on it. That they left a caretaker to live on it and watch over it. That in the year 2014, they went to the plot and found that the caretaker had been sent away and one house demolished by the 2<sup>nd</sup> defendant. That as at the date of his testimony, the 1<sup>st</sup> defendant was in occupation having entered the plot in the year 2014.

7. The plaintiff’s case was then closed.

8. The 1<sup>st</sup> defendant testified as **DW1**. She stated that in 1996 she settled on the suit property and was issued with an allotment letter dated 10<sup>th</sup> September 2008. She produced photographs which according to her depict a house that she constructed and trees which she planted on the plot. She stated that the plaintiff had erected poles on the plot with the intent of building therein and that she reported the plaintiff to elders while the plaintiff reported her to police as a result of which she was charged with forceful detainer and later on acquitted. She further testified that she was later issued with another letter of offer dated 16<sup>th</sup> November, 2017 and that on 30<sup>th</sup> January, 2018 she paid KShs. 6,700/= for the plot and was issued with a receipt. She stated that from 1996 to 2004, the plaintiff never claimed the plot and further that plaintiff was not residing in the suit property as at the date of her testimony. She maintained that she is the owner of the plot and prayed for dismissal of the suit.

9. John Kimani testified as **DW2**. He stated that he was village chairman for Eldoret Village in Kiambogo since 2003 and that the 1<sup>st</sup> defendant had been his neighbour since 1996. That the 1<sup>st</sup> defendant built a house on the suit property in which she resides. That he does not know the plaintiff and that when he moved into the area, he found the 1<sup>st</sup> defendant there.

10. **DW2** further stated that the plots were surveyed in 2002 and that the surveyors showed everyone their plot. That some people were brought later and given plots in the area.

11. The Defence case was then closed. Parties thereafter filed and exchanged written submissions.

12. It was argued on behalf of the plaintiff that the manner in which the plaintiff possessed the suit land can be clearly traced as opposed to the first defendant’s claim which raises suspicion as to how she got her letter of offer. That the first defendant’s letter of offer dated 2017 and subsequent receipts are dumbfounding owing to the fact that this matter was already ongoing in court which beats logic as to the timing since the first defendant claimed to have settled on or been in occupation of the suit property from the year 1996 and began claiming ownership in 2012 without any proof. It was further submitted that failure by the defence to tender any evidence on cancellation of the offer to the plaintiff and subsequently failing to show how she allegedly acquired a letter of offer 21 years later points to an illegal, irregular and unprocedural scheme of how she got the same. Reliance was placed on **section 26 (1) (b)** of the **Land Registration Act** with further argument that the plaintiff’s compliance with the initial requirements that were set out in the offer and subsequent offers by paying earlier than the first defendant ought to be construed as rendering her claim indefeasible. It was further argued while relying on the case of **Kamau James Njendu v Serah Wanjiru & another [2018] eKLR** that when two equities are equal, the first in time prevails and that the court should therefore find in favour of the plaintiff.

13. For the defendants, it was argued that the first defendant has been in occupation since 1996, was allotted the property through letter of offer dated 10<sup>th</sup> September 2008 and has developed it. The defence faulted the plaintiff for failure to call the settlement officer to explain why there are two sets of letters of offer in regard to the suit property. The defendants therefore urged the court to dismiss the plaintiff’s suit with costs.

14. I have considered the parties’ pleadings, evidence and submissions. The issues that arise for determination are whether any of the parties has demonstrated ownership of the suit property and whether the reliefs sought should issue.

15. From the material on record, both the plaintiff and the first defendant are claiming the suit property on the basis of letters of offer or allotment letters. None of them has obtained title even though they claim to have paid the sums that were specified in their respective offer letters.

16. Although the plaintiff claims an earlier right to the suit property by virtue of a letter from Agricultural Development Corporation dated 28th May 2002, I note that the property seems to have later been owned by the Settlement Fund Trustees since both parties rely on subsequent letters of offer issued by the Director of Land Adjudication and Settlement on behalf of the said trustees. The circumstances under which the property transitioned from Agricultural Development Corporation to the Settlement Fund Trustees have not been explained by the plaintiff. Nothing has been offered from Agricultural Development Corporation or the Settlement Fund Trustees to confirm that the property which was referred to by the former in its letter dated 28th May 2002 as plot No. C43 is the same one that was later referred to by the Director of Land Adjudication and Settlement initially as plot number 2255 in the plaintiff’s letter of offer dated 10<sup>th</sup> September 2008, as plot number 2280 in the first defendant’s letter of offer dated 10<sup>th</sup> September 2008 and later as plot number 209 in the parties’ subsequent letters of offer.

17. There is no dispute that the parties are claiming the same plot on the ground and that the first defendant is in possession. Neither the plaintiff nor the defendants called any witness from the office of the Director of Land Adjudication and Settlement to vouch for their respective letters of offer, to confirm that they paid the sums specified in the letters or even to clarify who between the plaintiff and the first defendant was allocated the suit property and complied with the terms of offer and is thus entitled to it.

18. It is trite that a letter of allotment is not title to land. The allottee has to follow it up, comply with all the conditions of the offer before she gets issued with a title document. The Court of Appeal reaffirmed that in **Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR**, where it stated:

*... Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.*

19. Thus, to the extent that none of the parties has any title document in respect of the suit property, the plaintiff must demonstrate that the suit property was exclusively offered to her and that she complied fully with the terms of the offer. In an effort to show that a title ought to have been issued to her, the plaintiff produced a letter from the Chief Land Registrar dated 16<sup>th</sup> October 2014. A reading of the said letter however shows that it was just an enquiry as to why discharge of charge and transfer had not been released to the plaintiff. Seeing that the Director of Land Adjudication and Settlements shortly thereafter issued to the first defendant a letter of offer in respect of the very same property dated 16<sup>th</sup> November 2017, I am not surprised that the Land Registrar Naivasha was at a loss as to who to release discharge of charge and transfer to.

20. In view of the letters of offer that the first defendant has produced and in the absence of any confirmation from the Director of Land Adjudication and Settlement as to which of the parties was offered the suit property and whether such a party complied with the terms of the offer, I am not persuaded that the plaintiff has demonstrated ownership of the suit property. If the plaintiff really wanted to get to the bottom of the dispute, she should have joined the Director of Land Adjudication and Settlement to the case or at the very least called the said director to testify and vouch for her claim. Both the plaintiff and the first defendant produced letters of offer dated 10<sup>th</sup> September 2008 and in the absence of proof as to who between the parties is the real or first allottee, the plaintiff's arguments as to existence of two equities that are equal have no foundation.

21. In view of my conclusion that the plaintiff has not demonstrated ownership of or a superior right the suit property, it follows therefore that the reliefs that the plaintiff has sought cannot issue to her. That does not however mean that the first defendant has any better right to the suit property. The parties will have to go back to the Director of Land Adjudication and Settlement to establish their claims there.

22. In the end, I dismiss the plaintiff's suit. Considering the circumstances of the case, I make no order as to costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF FEBRUARY 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered through electronic mail in the presence of:

Court Assistant: E. Juma