



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 314 OF 2015**

**ROSA TALA CHEPKONGOR.....PLAINTIFF**

**VERSUS**

**DANIEL CHEROGONY.....DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 23/10/2015 and filed in court on 02/11/2015 the plaintiff sought the following orders against the defendant:

- a. **An order of permanent injunction restraining the defendant by himself, servants and/or agents or otherwise howsoever from entering and/or trespassing upon and/or in any other manner dealing with that parcel of land known as Plot No. 1265 Oljarai Phase 11 Settlement Scheme.**
- b. **A declaration that the plaintiff is the legal and the absolute proprietor of that parcel known as Plot No. 1265 Oljarai Phase 11 Settlement Scheme.**
- c. **An order of eviction.**
- d. **Damages and/or mesne profit for the trespass and unlawful encroachment on Plot No. 1265 Oljarai Phase 11 settlement scheme.**
- e. **Costs of the suit.**

**The Plaintiff's Case**

2. The Plaintiff averred that she is the registered owner of plot number **1265 Oljarai Phase 11 Settlement Scheme** and that on or about January and/or February **2008**, the defendant encroached onto the land and commenced erecting and fencing the property; that as a result of the Defendant's action she has suffered loss and damage and she therefore seeks a permanent injunction restraining him from continuing to deal with the suit property in any other manner.

**The defendant's Defence**

3. The defendant filed his defence dated **6/05/2016** and averred that the registration of the plaintiff as the allottee for land parcel No. **1265 Oljarai Phase 11 Settlement Scheme** was put on hold after it was established that it was the defendant who has been in possession and occupation of the suit property since **2008** to date. He averred further that he did not trespass on the property as he was shown the land by the Land Adjudication and Settlement Department in the year **2008**. He then denied all the other allegations in the plaint.

**The Plaintiff's Evidence**

4. The Plaintiff gave her evidence on **18/11/2021** and adopted her witness statement dated **23/10/2015** as her evidence in chief and testified that she had given her parcel of land no. **1844** to a primary school in the year **1980**. She testified further that all those who donated their land wrote down their names for re-allocation of land and in the year **1995** she was given an allotment letter dated **24/5/1995**.

5. She testified further that the letter of allotment indicated that the government had given her a parcel of land at Oljarai and that it would be surveyed later and the title deed issued. She produced the letter of allotment as **PExh. 1**. She also testified that she went to the land in the year **2006** and farmed it until January **2008** when there were ethnic clashes and so she fled the area.

6. She testified that when she went back in **March 2008** she found the defendant on the suit property building a house. That the defendant used to assist her in farming. That the defendant stated that the land was his reward for fighting during the clashes and so she reported him to

the chief and the District Officer who ordered him to vacate the suit property but he failed to do so.

7. She testified that she was given the land on **16/08/2010** through a letter of offer of the same date (**P. Exh. 3.**); that she paid all the monies required and was issued with receipts which she produced as **P. Exh. 4(a)** and **(b)**; that she wrote a demand letter to the defendant which she produced as **P.Exh. 6** but still the defendant refused to vacate the property. That she wrote another letter dated **2/6/2015** which she produced as **P.Exh. 8** to complain to the Settlement Officer regarding the situation. That the chief wrote the letter dated **19/10/2015** (**P.Exh. 5.**) She testified further that she followed up on the issuance of the title by going to Nairobi before going to Naivasha.

8. She testified that she was informed that the defendant had tried to block the issuance of the title and that the Naivasha office declined to give her a discharge as the defendant was on the land; the District Officer wrote to the Settlement Officer stating that she be issued with a discharge but the Settlement Officer still declined to comply. The letters the officers wrote were dated **22/5/2019** and **13/06/2019** respectively. The plaintiff also testified that she got her allotment letter in **2010** and the surveyors went on the ground in the years **2006, 2008** and the year **2009**.

9. On cross-examination she stated that the reason she was not given a title deed is because the defendant wrote a letter to the land Adjudication Office Naivasha stating that he was living on the land; that she was allotted the land as per the letter of allotment (**P. Exh. 1.**); she confirmed that the plot number is not endorsed thereon but added that she received **P. Exh. 3** which came in **2010** with the plot number. She confirmed that the surveyor normally shows the beacons and boundaries but that she has never signed any beacon certificate.

10. She stated that she followed up on the discharge of charge but she was told to finish the case with the defendant first. She restated that she only farmed the land in the year **2006-2007** and by March **2008** the defendant had entered the land and that he has since constructed houses on the suit property.

11. On re-examination she stated that she took possession in the year **2006** and at that time the land was vacant and the defendant was not there. That she was shown the boundary but later she could not be given the discharge because the defendant was on the ground and was advised to follow up the matter in court.

12. The plaintiff then closed her case.

#### **The Defendant's case**

13. Daniel Cherogony testified as **DW1**. He adopted his witness statement dated **6/05/2016** as his evidence-in-chief. He testified that Oljorai plot number **1265** belonged to him as he had applied for land at the Lands office. That this was after a Lands officer had come to the ground to settle people. That in the year **2008**, another officer came to the ground and found him on the same parcel and that at that time the parcels had no numbers. That another officer came together with the District Officer Ireri of Elementaita and an assistant chief who went from one house to another to verify the earlier list.

14. He testified further that his house was on plot number **1265** and that the plaintiff came to the property for the first time in the year **2008** and when she was asked to show any development she could not show any. He testified that in **2008**, letters came from Muiru that indicated that there was a problem as people were occupying parcels that did not belong to them. It was his evidence that there was a meeting in the year **2009** called by a District Commissioner by the name Biriq which meeting was held on **14/10/2009** and which canceled the letters of allotment; that the Muiru committee was disbanded and another committee formed on **27/10/2009**. That they were registered afresh and the register was sent to the lands office and back to the chief of Kiambogo and that when he went there he found in place of his name, the name of the plaintiff.

15. He also testified that he lodged a complaint at the Chief's office which the administrator was not able to resolve and as the plaintiff had come to court; that by the year **2009** he had built on the land and that he has been in occupation of the suit property since the year **2000**.

16. On cross-examination he stated that he has no counterclaim and after he was referred to **P. Exh. 5** which is the Chief's letter saying the suit land belongs to the plaintiff, he stated that the chief was not being truthful. He admitted that he never wrote a letter requesting for allocation of land as he was a squatter and that the land belonged to the squatters. He admitted that he was registered as number **206** and issued with a letter of allotment in **2008** which was cancelled. He also admitted that he did not bring the letter of allotment to court. He further admitted that he did not pay for the land and neither did he have letters from the committees.

17. On re-examination he restated that he never applied for land and that he never saw any letter from the plaintiff applying for land.

**18. James Wachira** testified as **DW2**. He stated that he is the Naivasha Sub-County Land Adjudication and Settlement Officer since the year **2014**. He testified that Oljorai is within Gilgil in Naivasha Sub County. He testified further that he had the file record for plot No. **1265 Oljorai Phase 2**.

19. It was his evidence that after the government buys land through the Settlement Fund Trustee, the SFT Land Committee is constituted. The SFT Land Committee is chaired by the District Commissioner and has a settlement officer as a secretary, members drawn from the NLC and members drawn from the county government and the chief. That the committee vets all the applicants and comes up with an accountability list which is forwarded to the director for issuance of letters of offer. That the allottees must receive a letter of offer from the Director. That various allocations of land were from the ADC and in the year **2008** there was an allocation from the Director which was cancelled following an outcry from residents.

20. He testified that it was resolved that the local leaders were to verify the occupation and fresh letters of allotment issued. After verification, a fresh list was sent to Nairobi. That there was also a black book which was a report of elders chosen by the village who had the assistance of a surveyor to interpret the map for them. That they picked the developments for each person. That the black book indicated the

name, ID and parcel number that they occupied. He admitted that he was not a member of the committee and that in **2015** he was instructed by the letter dated **21/01/2015** to restrict the release of charges; that the letter required him to do a ground report which he did and which ground report is dated **1/4/2015**. The ground report stated that the land was registered in the name of *Rosa Tala Chepkongor*. That her name was on the accountability list and was issued with a letter of offer dated **16/08/2010** and signed the acceptance letter, that she paid Ksh. **12,300/=** and Ksh. **1,526/=** on **16/8/2011** and **23/09/2010** respectively. That by **1/4/2015** the occupant on the ground was Daniel Chegwer Cherogony who had effected some developments on the property that included semi-permanent houses; that there was a claim that he had been there before the year **2008**; that upon payments being made by Rosa, the discharge of charge and transfer were sent to Nairobi but after he found a dispute on the ground he forwarded the discharge to Nairobi but did not get any response. That they had a committee on the ground composed of the District Commissioner, the chief and local elders to resolve such disputes but they could not proceed because of the pending matter in court. He also stated that all previous allocations before the year **2009** were cancelled and a fresh process begun.

21. On cross-examination he confirmed that ADC allocates land while the District Committee makes the list. He also confirmed that he visited plot **1265** and that in **2009** there was a vetting that was done by his predecessor. He was referred to **P. Exh. 3** and stated that it was of **16/08/2010**. He stated that he complied with the Director's instructions and returned the discharge for plot no. **1206** and that he was not aware of how the defendant entered the land. He also confirmed that as per the final accountability list Rosa T. Chepkongor is the allottee. He was referred to **P.Exh 5** and he stated that he does not have a letter from the defendant saying that his name is omitted from the accountability list.

22. On re-examination he stated that **P. Exh 5** is not the format for ADR proceedings and that the accountability lists could be amended depending on the court decisions or ADR.

### **Submissions**

23. The plaintiff filed her submissions on **04/02/2022** and gave a background of the matter, a summary of her case, the defendant's case and submitted on the following issues: whether the plaintiff is the registered and/or the beneficial owner of plot no. **1265 Oljorai Phase II Settlement Scheme**, whether the defendant has unlawfully trespassed onto the plaintiff's parcel of land no. **1265 Oljorai Phase II Settlement Scheme** and whether the plaintiff is entitled to damages for trespass.

24. On the first issue the plaintiff submitted that she has demonstrated that she is the owner of the suit property as she has produced an allotment letter, offer letter and payment receipts and **DW2** has confirmed that her name is on the accountability list. She relied on **Section 24** of the **Land Registration Act** and submitted that the defendant did not challenge the ownership of the suit property by way of counterclaim despite claiming ownership.

25. On whether the defendant has trespassed onto the plaintiff's parcel of land it was submitted that the defendant trespassed in the year **2008** and has refused to move out and he should therefore be evicted. She relied on the definition of trespass under the **Trespass Act CAP 403** and the case of **Joseph Kipchirchir Koech vs. Philip Cheruiyot Sang Kericho High Court ELC No. 31 of 2013** and sought damages.

26. The Defendant filed his submissions on **24/02/2022** and submitted that even though the Plaintiff had an allotment letter she has never been in occupation of the suit property. He also submitted that there is an established internal alternative dispute resolution mechanism which the plaintiff ought to have followed instead of coming to court. He relied on the case of **Speaker of the National Assembly vs. Njenga Karume [1992] KLR 21** among other cases and sought that the plaintiff's suit be dismissed with costs.

### **Analysis and Determination**

27. After considering the pleadings by both parties, the evidence and submissions it is this court's opinion that the following broad issues arise for determination:

**a. Who between the plaintiff and the defendant is the lawful owner of the suit property?**

**b. Whether the plaintiff is entitled to the orders sought.**

28. On the first issue, the plaintiff gave evidence that she was allotted a plot in Oljorai Phase II Settlement Scheme in Naivasha County. She produced an allotment letter dated **24/05/1994** and a letter of offer dated **16/08/2010**. The letter of offer was for plot No. **1265 Oljorai Phase II Settlement Scheme** measuring approximately **2.02 Ha**. She also produced receipts for various payments that she made for the suit property. She testified that she began to farm the land in the year **2006** and that in **January 2008** there were clashes and so she fled the area. She also testified that when she came back she found the defendant in possession of the suit property and when she asked him to vacate he refused. She had testified further that she involved the Chief but the defendant still refused to vacate.

29. The defendant on the other hand testified that he applied for land from the lands office and a land officer came to the ground and took names of everyone and where they were occupying in the year **2006**. He also testified that in **2008** another officer came to the ground and found him on a one-acre parcel of land that had no parcel number. It was his evidence that in **2009**, all allotment letters were cancelled and names were taken afresh and that when he went to verify his name he found the plaintiff's name instead of his name and he therefore raised a complaint. He stated during his testimony that even though it was the plaintiff who has been allocated the land, he is the one who has been in occupation thereof. The defendant did not produce any documents in support of his case and neither did he demonstrate how he came into occupation of the suit property.

30. At the hearing, the Naivasha Sub-County Land Adjudication Officer gave evidence that as per the accountability list, the plaintiff was registered as the owner having paid all the necessary monies but it was the defendant who was on the suit property. It was his evidence that the plaintiff could not be issued with the discharge of charge and transfer because of the dispute.

31. It is my view that from the totality of the evidence produced in this matter the plaintiff has proved that she was allocated the suit property, that she paid all the required monies and had taken possession in the year **2006** before leaving in **January 2008** and that when she came back she found the defendant in possession of the suit property in **March 2008**. This evidence has not been controverted by the defendant in any way.

32. This court has noted that the defendant appears to have been on the suit land for a considerable period of time. Besides, it is common ground that all the allocations that had been effected before **2009** were nullified. That must have included the plaintiff's allotment. The plaintiff's allotment letter (**PExh1**) issued by the Agricultural Development Corporation is dated **24/5/1995**. It is in respect of land that had not been surveyed. That means that there were no demarcated boundaries to identify the land that she was to get. After nullification of previous allotments, the plaintiff was issued with a letter of offer (**P. Exh 3**) by the Director of Land Adjudication and settlement, dated **16/8/2010** while the defendant was in occupation of the suit land. She stated that when she went to farm on the land she never constructed any house on the land but was living in someone else's house elsewhere. Since the land was not surveyed there is no evidence of the extent of land that she fenced using the *kariaria* plant. It would appear that she only farmed once on the suit land, in the year **2007** and later fled due to clashes.

33. It would further appear that when the authorities were verifying ground occupation there were two people claiming occupation, the plaintiff who had not constructed any dwellings and the defendant who had dwellings and who had lived on the land. In his evidence the defendant stated that the officer who came to verify ground occupation in the year **2008** found him farming on one acre of land, though he admits that he had not built any house by then, but he remained thereon thereafter. While under cross-examination by Mr Chebii, the defendant described himself as a squatter and asserted that no one was required to apply for allocation of the suit land. He states that when the plaintiff came in **2008**, she was unable to demonstrate that she had ever been settled on the suit land.

34. In this court's view and having regard to the emphasis placed on the ground occupation to the extent of causing repeat ground verification reports as demonstrated by **DW2**, it is hardly understandable why the defendant's ground occupation did not secure him any registration at least over the land he occupied. In this court's view ground occupation mattered. The black book alluded to by **DW2** showing ground occupation in respect of the suit land was not produced in evidence by any party, but it is undeniable that it was the defendant and not the plaintiff in occupation and **DW2** confirmed this. **DW2** also indicated that the Ministry settles any citizen from any corner of the country.

35. It is this court's view that the Ministry of Lands through the Director of Land Adjudication and settlement ought to have conducted a better process that respected the very ground occupation that they repeatedly sought to verify, otherwise there would have been no need for repeated ground verification exercises. The land being available for landless squatters and by the very fact that the defendant was settled on a portion of it was a matter for consideration, especially where extension developments had been effected by the defendant. In any, event evidence shows that attempts were made to dislodge the defendant from the suit land long after he had settled and extensively developed the same under the watch of the very authorities mandated to distribute the land. In this court's view there appears to have been as much legitimate expectation on the part of the defendant of receiving an allocation as there was on the part of the plaintiff. If the plaintiff's lamentations had been proved to have begun in the year 2008 this court would have had a different opinion of this matter, but it appears that even processing and issuance of titles, in which ground occupation played a great part, was done after the defendant was settled on the land. In the circumstances of this case I do not find that the Plaintiffs' rights to registration as owners had crystallized by the time the Defendant settled on the portion of land he occupied. Indeed the plaintiff's act of propping up her claim using the decision in **Kericho ELC No 31 Of 2013 Joseph Kipchirchir Koech Vs Philip Cheruiyot Sang, Section 24 and 25 of the Land Registration Act** and the provisions of the **Trespass Act Cap 403** has been met by the stringent submission by the defendant, citing **Gladys Wanjiru Ngacha Vs Theresa Chepsaat & 4 Others Nyeri Civil Appeal No 182 Of 1992** and **Dr Joseph N.K. Arap Ngok Vs Justice Moiwo Ole Keiwua & 4 Others CA No 60 Of 1997**, as well as **Stephen Mburu & 4 Others Vs Comat Merchants Ltd And Another 2012 eKLR**, that a letter of allotment does not confer on the allottee any proprietary right or interest in the land. It is indeed the position that the plaintiff later became the registered owner of the suit land after the defendant was settled on the land.

36. The upshot of the foregoing is that this court finds that due to the unique circumstances of the dispute, the parties in this case deserve to benefit from subdivision of the suit land in equal portions.

37. Consequently, I issue the following orders:

**a. Plot No. 1265 Oljorai Phase 11 Settlement Scheme shall be subdivided and shared equally between the plaintiff Rosa Tala Chepkongor and Daniel Cherogony and each shall be issued with their own separate title to their respective portion.**

**b. The subdivision of Plot No. 1265 Oljorai Phase 11 Settlement Scheme shall but only in so far as it is practicable observe the extent of physical developments on the land effected by the defendant which shall be included in his portion.**

**c. The defendant shall remove himself from the portion of Plot No. 1265 Oljorai Phase 11 Settlement Scheme that will by virtue of the subdivision ordered in (a) above be assigned to the plaintiff and in default the defendant shall be forcibly evicted therefrom.**

**d. The Defendant shall refund the Plaintiff half of the total fees she paid in respect of the suit land to the Settlement Fund Trustees being Ksh 6,913.00 (In words Six thousands nine hundred and thirteen only) within 60 days of this Order failing which the same shall be executed.**

**e. Each party shall bear their own Costs of the suit.**

It is so ordered.

**Dated, signed and delivered at Nakuru via electronic mail on this 28<sup>th</sup> day of April 2022.**

**MWANGI NJORGE**

**JUDGE, ELC, NAKURU.**