



REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 161 of 1998

JAMES KIPRONO TINEGO.....PLAINTIFF

VERSUS

PETER KHISA MUSUNGU.....DEFENDANT

JUDGMENT

This suit relates to the ownership of a certain piece of land situated in Trans Zoia, within Maridadi scheme. The land was previously Settlement Fund Trustees land. It was subsequently allocated to persons. The Plaintiff is one of the people who got the allotment of the suit property. He paid for it in full and obtained all the necessary papers for land ownership. It is not in dispute therefore, that he is the registered owner of the land. Having secured the title documents in his name, the Plaintiff desires to get a quiet possession. He accuses the defendant of trespass to the land and wants the court to stop the trespass at once. The Defendant on his part filed a Statement of Defence and a Counterclaim in which he categorically states that the plaintiff title and the entire process of allocation is fraudulent. He asserts in his counterclaim that he is the owner of the land. The facts summarised hereinabove is what led to the dispute now before this Court.

The Plaintiff in respect of this matter was filed on 17th day of July 1998 in which the Plaintiff sought the following Orders:-

- (a) A declaration that the Plaintiff is the true owner of all that parcel of land known as TRANS NZOIA/MARIDADI/274 measuring approximately 5.25 acres or thereabouts.**
- (b) An Order of eviction to issue against the Defendant from the said property TRANS NZOIA/MARIDADI/274.**
- (c) A permanent Injunction to be issued restraining the Defendant together with his servants and/or agents from trespassing, alienating and/or dealing in any way with the said property TRANS NZOIA/MARIDADI/274.**
- (d) Costs of this suit.**
- (e) Any other relief that this Honourable Court may deem fit and just to grant.**

As stated earlier, the Defendant on his part filed a Statement of Defence and a Counterclaim dated 22nd September 1998. In his defence, he denied the claim of ownership by the Plaintiff of the suit land. In his counterclaim, he pleaded that he had bought the suit property legally and was a *bona fide* purchaser for

value without any fault. He terms the plaintiff's claim of ownership as fraudulent. He also pleads in paragraph 6 of the statement of defence that he does not admit the jurisdiction of the court taking into account the matter can be handled by the Senior Resident Magistrates Court at Kitale. However, Defendant abandoned this issue having realised that kind of pleading may not hold. This court has jurisdiction to deal with matter.

Upon pleadings being closed, the hearing commenced on 29th June 2004.

The Plaintiff, James Kiprono Tinego (PW1) was the first witness. PW1 traced the history of the acquisition of the suit property as follows:-

(a) That he is the first registered owner of the land in question which is referenced as TRANS NZOIA/MARIDADI/274 and which was owned by Settlement Fund Trustees before the said land was allocated to him.

(b) That he applied to the Ministry of Lands and Settlement on 17th June 1983 for allocation of land and received a letter of offer dated 9th March 1990 allocating him Plot No. 274 in Maridadi Settlement Scheme. He accepted the offer by reply on 3rd April 1990 to the Director of Land Adjudication and Settlement and paid a receipted 10% deposit towards the purchase of the Plot on 2nd April 1990.

(c) He was shown the Plot by a Surveyor from the District Settlement Officer, Trans Nzoia.

In a chronology of the events leading to the issuance of title, the Plaintiff gave the following;

17.6.1983 - He made a written application for allocation of land.

9.3.1990 - Ministry of Lands and Settlement accepted his application and allocated him Plot 274. He was given 90 days within which to accept the offer by making a deposit.

4.1990 - He paid a receipted 10% deposit and the balance was paid by way of a loan secured as a Chargor in favour of the Settlement Scheme.

3.4.1990 - He accepted the offer by way of a letter forwarding the receipt for the payment.

8.5.1990 - Ministry communicated the allocation to the District Settlement office, Trans Nzoia and the office sent a Surveyor to show him the plot.

6.8.1990 - He was issued with a letter of allotment. He signed the documents together with the Charge. At the bottom of the documents marked "PMF-17" shows the amount paid and the receipt number.

It is a condition of PMF-17 and PMF-16 respectively that the allottee should pay the loan and not to sell the same. He claimed to have paid the loan in installments through deductions from his salary. PW1 also stated that he had received a statement of account from the Fund and produced the original as "PMF-11". He also produced several receipts showing payments in favour of the Fund towards the loan repayment including conveyancing fees.

6.8.1996 -He was issued with a title deed Trans Nzoia/Maridadi/274 and produced as "PEXh 14".

It is his assertion that he took possession and occupied the farm in 1990, and has been cultivating it ever since. He said that when he was shown the land by the Settlement Fund Trustee, the land was not occupied by anyone. There were no structures. He claimed that he was transferred to Mombasa and returned towards the end of 1990 when he found someone on the farm who built some structures. The person who occupied the land is now deceased and claimed that he was sold the farm. His wife and son

are defendants in this suit. The deceased was charged with forceful detainer in case No. 6207/2009 at Kitale in 1990 but acquitted. He asked the Court to restrain, to have the Defendants evicted from the farm and to be awarded damages and costs.

In cross-examination by the defense, PW1 stated that he did not know that the farm had already been allocated to someone else and had not seen the allottee.

The second witness was John Kiboi Koskei (PW2), who was the District Settlement Officer in Kitale in Trans Nzoia from 1981 to 1999. PW2 informed the Court that there are two ways land is allocated to landless people under the scheme. One way is to compile a list of squatters on the land and to submit the list to the Minister for Lands for approval.

After approval the Director for Land Adjudication and Settlement informs the District Settlement Office of the approved allottees. While waiting for the approved list, the Fund will commission a Surveyor to demarcate the land, and submit the reports to the Director.

He further stated that non-squatters can also be allocated land by a Committee chaired by the Local District Commissioner and where the Secretary is the Settlement Officer. The Committee will consider applications and forward a list to the Ministry for approval. In the alternative, a person may apply directly to the Director in Nairobi. When the application is approved, the Director would write to the Applicant with a copy to the DC, the Settlement Officer and the Permanent Secretary.

In regards to plot No. 274, PW2 stated that the plot was initially offered to Alex Masuda. It was offered to him in 1989 but he did not turn up at the Settlement office to take up the offer and pay for it. According to PW2, Mr. Masuda did not occupy or accept the offer and thus the plot was not allocated to him.

PW2 further stated that the plot was allocated to PW1 by the Director of Settlement through direct application made by the Plaintiff. On 9.3.1990, he received a letter from the Director informing him that PW1 has been allocated the suit property. The letter was addressed to PW1 and copied to the PS, DC Trans Nzoia and PW2's office. PW1 reported to PW2's office with the original letter and a Surveyor was directed to show him the suit property. PW1 then paid 10% deposit and was given a copy of a letter to the Director confirming to the Director that the applicant was shown plot 274 and that he had paid Kshs. 625/- as deposit, PW2 initialized and stamped the letter. He was to pay the balance in the future.

He reiterated that the land was registered in the name of the Settlement Fund Trustees. There was a loan of Kshs. 6,100/= to be paid by the allottee to which there was a charge in respect of the subject plot. Upon payment of the loan, Nairobi office issued a discharge which was forwarded to the Settlement Office to be given to the allottee to process a title deed. The land was transferred to the Plaintiff herein.

PW2 worked in the Settlement Department from 1964 until he retired from the civil service in 1999. He dismissed the documents shown to him by the Counsel for the defendants which indicated that Alex Masuda was allocated the suit property as not genuine. He asserted that Mr. Masuda did not take up the offer and the land was forfeited. He said that-

“Before Tinego was allocated from Nairobi, I advised the Nairobi office. They were aware that the land had been allocated to someone who never took it. The department has the right to forfeit land. It is usually set out in the land charge. It can be forfeited for failure to pay 10%, failing to take the plot, failing to cultivate the required acreage, default in payments of required amount. (Shown MFID4) This documents show these conditions.

There are processes for forfeiture. I see condition (d). There is a requirement of service of notice to the allottee. This particular case the allottee did not accept so there was no need for notice. If it was a proper allotment, the notice would be required and forfeiture without notice would be null and void.

Where the Settlement Fund Trustee holds land, they are the first registered owner. Forfeiture means the department takes back the land before they give to someone else. I hold that those documents you

showed me are not valid. I don't agree with you that an offer is made on documents. There is 10% to be paid in acceptance of the offer. (Show MFID2).

This is also a forgery. I was there. I should have signed myself. I was the only DSO. Alex Masuda was not working in my office. I have not seen him. He should have paid 10% in my office”.

In cross-examination by the defence, he stated that *“I am not aware that Alex Masuda took possession of the land in 1983. I do not know whether Musungu was buried on the land. I do not know whether Masuda transferred the land to Musungu with approval of Settlement Fund Trustee. I do not know that Musungu have been on the land for more than 20 years.”*

In re-examination, PW2 was shown “MFID1”, and said thus...*”it was addressed to my office. It was not copied to anyone else. This looks like the original. It should have been in the personal file of the plot. It is dated 18th August 1983. I was the DSO. I did not receive the letter (shown MFID4).*

It is a letter of allotment. It looks like a photocopy. This letter is to be issued after payment of 10%, that is Kshs. 625/=. The office is supposed to write the serial number of receipt payments on this letter. That serial number of receipt does not appear. There is a signature of the allottee on it (shown MFID3). This is a charge. The land was charged to Alex Masuda. There is a place he is supposed to sign. He signed and was witnessed. Signature on MFID3 and MFID4 are different.

In my view they appear to be different. (Shown MFID2). This is an ancillary agreement. The allottee is supposed to sign the document. The allottee is Alex Masuda. His signature does not appear in the document. It is to be witnessed by DSO. It is dated 4th August 1984 at the bottom it is dated 4th April 1991. The two dates can be different if document was prepared in Nairobi. However, here it was 9 years. In 1984 and 1991 I was DSO in Kitale. MFID2 has a signature for DSO Kitale. That signature is not mine. I don't know whose signature it is.

(Shown MFD6) This is an agreement between Masuda and Peter Musungu for sale of the plot. (Shown MFID3). This is the Charge. Paragraph 3 (b) consent of Settlement Fund Trustees was necessary before transfer. I have not been shown any documents to show that Alex Masuda was given consent to transfer the land.”

Joan Evedi (PW3), the current Settlement Officer stationed in Kitale stated that PW1 was offered the land on 9th March 1990. The offer is generally for 90 days in which the allottee has to make a deposit. He narrated how PW1 made his payments, the receipts issued and the documents involved. He also confirmed that Alex Masuda was offered plot 274 in 1983 but that he did not take up that offer.

PW3 also stated that Settlement Fund Trustees does not accept sale or transfer of allotted land. It is a condition of the allotment that the land would not be sub-divided, charged, let, leased or transferred without prior consent in writing of Settlement Fund Trustees.

He stated that MFID3 is witnessed but not signed and that MFID2 is not signed by Alex Masuda. He reiterated that MFD12 are not their documents, saying that Masuda never generated any documents with them. He confirmed that the land was in the name of SFT before 1996. He denied that he has ever seen some of the documents presented to Court on behalf of the Defendants and denied that Mr. Mungai was ever a Settlement Officer at Trans Nzoia.

DW1, Virginia Nasumba Khisa, the 61 year old wife of Peter Khisa Musungu stated that her husband died in 2000 and has left her with 10 children. She was granted letters of administration to the Estate of her husband. She further stated that they occupied the land in 1986 and found it vacant. Her husband is buried on the land. They bought the land from Alex Masuda whose wife is also buried there. She informed the Court that Masuda showed them the land in the presence of Chief and elders. They have been cultivating the land.

Another witness was Tom Wekesa Musungu son of Peter Khisa Musungu, who is employed as a regional

representative for Nation Media Group, stated that they went to live on the 5-acre land in 1986 and that they lived uninterrupted since 1986 to date. He however stated that he was not present when the sale agreement between his father and Alex Masuda was signed, whether Consent was obtained from Settlement Fund Trustees and did not know the authenticity of the documents the family held.

76 years old Justus Barasa Sururu also testified, he stated that he knew Peter Khisa Musungu from 1974. They worked together where he was contractor and Musungu was a driver. He also knew Alex Musunda. They met in 1973 and were given land by Settlement Fund Trustees. He also knew that he had sold the land to Peter Musungu who died and is buried on the land.

Alex Masuda testified that he was given the land by the Government in 1983 and that he took possession and cultivated it in the same year. He told the court that he built a house and lived on the land. His wife died in 1983 and is buried there. He then sold the land in 1986 to Peter Musungu who paid him fully. He sold the land after obtaining approval from the Chief.

The parties are represented by able counsels. The counsels filed written submissions. In his written Submissions, Mr. Kamau Counsel for the Plaintiff argued that the testimony of the witnesses and the evidentiary documents show that:-

- a) The Plaintiff applied for and was duly allocated the land
- b) The Plaintiff paid all the sums due to the Settlement Fund Trustees
- c) The Plaintiff complied with all the terms and conditions set by the Settlement Fund Trustees
- d) The Land parcel was duly transferred to the Plaintiff by the Settlement Fund Trustees and a title deed to that effect issued”.

He contended that the Plaintiff is registered title holder for the land and argued strongly that Alex Musunda has never had legal interests in the land and therefore could never pass a title.

On his part, Mr. Machio Counsel for the Defendants stated that the land was allocated to Alex Masunda in 1983 and to the Plaintiff in 1990. The letter of allotment issued to Alex Masunda is sufficiently conclusive that the land was allocated to him. He posed the question: Did the Settlement Fund Trustees forfeit Plot No. 274 Maridadi Scheme before purporting to allot it to the Plaintiff?

His contention was that Settlement Fund Trustees never issued notice of forfeiture to Alex Masunda before allocating it to the Plaintiff.

The learned counsel for the defendants asserted that without notice of forfeiture, Settlement Fund Trustees did not have a right to allocate the land to the Plaintiff. He quoted the condition in clause (d) of the allotment letter:-

“(d) Upon any breach of these conditions the land shall become liable for forfeiture to Settlement Fund Trustees but such forfeiture shall not be enforceable by re-entry. Suit or otherwise unless a notice shall have been served on the proprietor of the land:

- (i) Specifying the particulars of breach complained of; and*
- (ii) If the breach is capable of remedy, requiring the proprietor to remedy the breach; and*
- (iii) In any case, requiring the proprietor to make compensation in money for the breach, and the proprietor shall have failed, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money”.*

Mr. Machio concluded that Alex Masunda passed his interest under a contract of sale and therefore the

defendants' cannot be trespassers unless Alex Masunda's interest to the land is lawfully displaced.

I have considered pleadings on record and the documentary evidence placed before the court. I have also considered the rival written submissions by the counsels and the witness testimonies. It is clear from the sum total of the evidence that Alex Masuda was offered Plot No. 274 and that he did not follow the procedure of accepting the offer. The court immensely benefited from the testimonies of PW2 and PW3. They testified as experienced people who have served in Settlement office for many years. They had explained the process of acquiring land through the settlement process. They testified that Alex Masuda was offered plot 274 but the plot was not allocated to him because he did not accept the offer. He was to return a signed offer and make payment within a 90-day period. He did not.

The Defendants presented number of documents showing allocation and payments made by Alex Masuda. However, the documents and the payment receipts were dismissed as forgeries by PW2 and PW3. The defendants are making allegations against the settlement and Alex Masuda who are not party to the suit.

In this case, Alex Masuda could have returned the offer letter with an acceptance by way of payment of a deposit. He did not. The offer made to Alex Masuda had its own terms and conditions and acceptance period of 90 days.

PW2 who was then the District Settlement Officer in Trans Nzoia district has in his testimony revealed the procedure and the process of acquiring/allocating land under Settlement Schemes. He also outlined the mechanism of acquiring interests in such land and limitations. An offeree can not transfer an offer which he is yet to accept. The Plaintiff's allegation that the land was sold by Alex Masuda seems legally untenable.

Alex Masuda is alleged to have transferred the land to the Peter Khisa Musungu. No evidence of such sale and transfer being sanctioned by the Land Control Board was ever produced. In the absence of such evidence and in view of the fact that Alex Masuda cannot sufficiently show the court that he has ever accepted the offer from the Settlement Fund Trustees, I have no hesitation to find that the alleged sale of Plot No. 274 by Alex Masuda to Peter Khisa Musungu was illegal and therefore null and void. In summary, no legal interest in the land ever passed to Alex Masuda for the following reasons:-

- 1) He did not accept the offer from the Settlement Fund Trustees
- 2) He did not accept the terms and conditions of that offer
- 3) He did not make payment. Both the current and former District Settlement Officers have dismissed any payments were ever received. They pointed out several irregularities in the documents that were held by Alex Masuda and even termed his documents as forgeries.
- 4) In evidence, the current and former District Settlement Officers have stated that the land was forfeited to the Settlement Fund Transfer after the offeree failed to accept the offer and that the same land was offered to another applicant (the Plaintiff) who accepted the offer, paid for the land as offered and followed the procedure to acquire title to the land.

I am convinced that the Plaintiff fulfilled all the requirements and all his documents were in order. In the light of evidence of the District Settlement officers, I am obliged to find that the land was duly allotted to the Plaintiff and that he has good title.

Mr. Machio submitted that forfeiture should have been preceded by a notice as required the condition of issuance of the letter of allotment. I respectfully disagree with him. That notice could have been issued if there was a contract. If Alex Masuda had paid a deposit towards the acquisition of the land, there would have been a contract and the decision of this court may have been different. My view is that the evidence of PW2 and PW3 reinforces the argument that Alex Masuda was offered the land and forfeited once he failed to accept that offer.

It has been submitted that there is a family graves in the land and that the defendants were using the land for considerable period of time thinking that the land was theirs. The law has procedure and process to be adhered to which, neither this court nor the defendants can ignore without consequences. The Plaintiff adhered to and fulfilled all requirements of law. The Defendants ignored them instead and they have to suffer the consequence.

The role of this Court is to interpret the law as it is. I cannot make judgement based on my personal feeling or my sympathy towards the family of the late Peter Khisa Musungu. The law is very clear. The land is owned by the plaintiff who should get it back.

In respect to the Counterclaim, I should not in any event belabor the point because the Defendants have failed to prove their ownership and title in the suit land, and therefore their counterclaim must fail too. This being the case and for the above reasons, I am satisfied that the Defendants have no case against the plaintiff.

Having so stated, it is my holding that the Plaintiff is lawfully registered proprietor of Trans Nzoia/Maridadi/274. I therefore, do hereby enter judgement for the Plaintiff against the Defendants in terms of prayers (a), (b) and (c) of the plaint with costs to be agreed or taxed. It is so ordered.

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF AUGUST 2012.

M.K. IBRAHIM

JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF SEPTEMBER 2012.

F.AZANGALALA

JUDGE

In the presence of: Mr. Magare for the plaintiff.