REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.275 OF 1994

CHRISTOPHER KAGWIRI NGARI……..……. PLAINTIFF

VERSUS

SETTLEMENT FUND TRUSTEE…….…….1ST DEFENDANT
MARY WAMBUI CHEGE…….……..2ND DEFENDANT
G.K.A. YEGON…….…….3RD DEFENDANT

JUDGMENT

This dispute, although protracted, spanning some seventeen (17) years, raises fairly straight forward and largely uncontroverted issues. For instance, it is common ground that the suit property NYANDARUA/NDEMI/682, measuring approximately 9.7 Ha is situated within a settlement scheme.

The plaintiff applied to the Settlement Fund Trustee (the 1st defendant) for its allotment to himself in 1979. Mary Wangui Chege similarly applied in 1992 and it was duly allotted to her. She subsequently obtained a title deed in 1995, after the filing of this suit. Both the plaintiff and the 2nd defendant claim ownership of the suit property.

The plaintiff testified that after paying the requisite fees and complying with the relevant conditions, the suit property was formally alloted to him. Subsequently, he occupied it, put up a fence, built a worker's house and began to rear animals. He also planted food crops on 3 ½ acres of the land. Twelve years later, in 1993, the 2nd defendant was brought to the suit land by the provincial administration maintaining that it had been alloted to her by the 1st defendant. The following year, 1994 the plaintiff filed this suit seeking permanent injunction. He also applied for temporary injunction pending the hearing of the suit which relief was granted. Upon being served with the restraining orders, the 2nd defendant voluntarily vacated the land and the plaintiff has since remained on the land.

It was the plaintiff's case that while on transfer from Turkana to Diani, in the Coast Province, where he had been posted in his capacity as an inspector of police, he lost all the documents relating to the suit property in the floods. He reported to Diani Police Station and was issued with a police abstract form. His efforts to regularize his interest on the suit land were frustrated by the officials in the Lands Office, Nyandarua. He confirmed, however that at the time the documents were destroyed or lost, he had not been issued with the title deed.

Although the plaintiff called **P.W.2, Rachael Wanjiku Maina (Rachael)**, the District Land Adjudication and Settlement Officer, Nyandarua and **P.W.3, Thomas Morara Nyangau (Thomas)**, Legal

Officer/Registrar of Titles, as his witnesses, their testimony did not seem to advance his case. The combined effect of their testimony was that the lawfully allotee, according to their records (both in Nyandarua and Nairobi) was the 2nd defendant. They, on the other hand, expressed doubt on the authenticity of the plaintiff's documents. It is apparent, Rachael and Thomas having testified, the 1st defendant saw no need to call evidence.

For her part, the 2nd defendant stated that she was a squatter who applied and was lucky, along with others to be allotted land in the Settlement Scheme having complied with all the prerequisite conditions. She took possession, initially, of only a portion, but later after the allotee of the second portion (one Yegon) declined and was relocated, the entire suit property was allotted to her. She maintained that the land was vacant. Three years later, the plaintiff invaded the land, demolished her house and other structures on the land claiming ownership. The plaintiff had a court order.

I have considered the evidence by both sides, submissions by counsel and the useful authorities cited. The main, indeed, the only issue falling for determination is whether the plaintiff is lawful owner of the suit property, from which question the issues whether an order of rectification of the register and an injunction will flow. I must indicate also that the 2nd defendant has counter-claimed against the plaintiff seeking his eviction from the suit property, a perpetual injunction to restrain him, general damages for trespass, *mense* profits, costs and interest.

Both having claimed ownership of the suit property, must prove on a balance of probabilities that ownership. Starting with the plaintiff, the basis of his claim is that in 1979, he applied to the 1st defendant for the allotment of a piece of land within Nyandarua which application was granted and in 1982 the 1st defendant allotted the suit property to him measuring approximately 24 acres. Pursuant to that allotment he entered and occupied the land and began to develop it. He relied on the following documents to support his claim:

i) A copy of a police abstract form – P. Exhibit 4.
ii) A copy of a letter of offer dated 14th August, 1983 (not produced).
iii) A copy of a charge dated 20th December, 1983 (not produced), and
iv) A copy of a receipt dated 23rd February, 1983 (not produced).

I will return to these documents shortly.

He explained that the original documents were destroyed in the floods; that he applied and obtained copies from the Ministry of Lands. The copies of a letter of offer (ii), the charge (iii) and receipt (iv) above were not produced after an objection was raised. It was hoped that they would be in the records kept by the Lands Offices in Nyandarua and Nairobi.

Both records, however, begin with folios relating to the year 1991 and not earlier implying that the file was opened that year, yet the three documents relied upon by the plaintiff related to 1983. The first entry in the green card (D. Exh.5) and P. Exh.5) is clear that in 1992 was in respect of the Settlement Fund Trustee (1st defendant). When shown a copy of the plaintiff's receipt dated 23rd February, 1982 purporting to be deposit for the suit property Rachael noted that it was irregular as it purported to be have been issued in Nairobi but signed and stamped in the Nyandarua office. She clarified that if it was issued in Nairobi, it ought to have borne the Nairobi office stamp. She also confirmed that the receipt would be issued in triplicate, for the allottee, for the headquarters (Nairobi) and for Nyandarua. Yet both Rachael and Thomas confirm that there were no copies in their offices (Nairobi and Nyandarua) even if the allottees copy was misplace or destroyed. Similarly, it was confirmed that both the charge dated 20th December, 1983 and the letter of offer of 14th August, 1983 were not in the Ministry's two files. The only documents in the two files are:

i) the police abstract form dated 25th July, 1991

ii) a letter from the District Land Adjudication and Settlement Officer, Nyandarua dated 31st July, 1991 to the effect that the plaintiff had reported the loss of his documents in respect of the suit property

The credibility of the documents the plaintiff is basing his claim on have seriously been challenged. It is for example inconceivable that even before the interest of the Settlement Fund Trustee was registered in 1992, the plaintiff had already in 1982/83 been allotted the suit property. It is equally incredible that only the plaintiff would have documents relating to allotment to him issued in 1983 while the official record, both at the district and headquarters levels do not have those documents.

Furthermore, what a coincidence it was that only documents relating to the suit property were lost in the floods, yet the plaintiff conceded that he had other parcels of land. As a matter of fact, the police abstract form does not specify which documents were lost.

The procedure of allotment of land in a settlement scheme is described by both Rachael and Thomas was clearly not followed in the case of the plaintiff. It was explained by Thomas that Settlement Fund Trustee is represented in the districts by the District Commissioners who chair the District Squatter Selection Committee. The District Commissioner identified deserving persons and forwards the names to the Director of Land Adjudication and Settlement who in turn makes an offer to the identified deserving persons.

Those who accept the offer are then shown the parcels proposed to be allocated and payment made. It is clear from the totality of the evidence presented that after payment is made in full there would be discharged of the charge and thereafter the title deed would be issued. The 2nd defendant followed this route and had the entire suit property allotted to her.

From what I have stated, it should be apparent that the plaintiff has not discharged the burden of proof to demonstrate that he is the lawful allotee of the suit property. It appears to me that the plaintiff applied to be allotted the property but received no positive response. The result is that he has no proof of any letter of offer, charge, payment allotment, discharge of a title deed, as opposed to the 2nd defendant whose application was made albeit after the plaintiff went through the whole circle and is now the holder of a title deed.

In the case of **Caneland Limited** Vs. **The Commissioner of Land and 5 others**, Civil Application No. NAI.311 of 1998, the Court of Appeal explained that:

"Though the applicant obtained a letter of allotment over the same property several years back it did not perfect it into a title and the 2nd, 3rd, 4th and 5th respondents who obtained another letter of allotment on 14th March, 1996 proceeded to obtain and transfer title in favour of the 6th respondent."

A similar point was made in **Wreck Motor enterprises** Vs. **Commissioner of Lands and 3 others**, Civil Appeal No.71 of 1997 as follows:

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

See also **Dr. Joseph N. K. Arap Ngok** Vs. **Justice Moijo Ole Keiwa & 4 others,** Civil Application No.NAI. 60 of 1997.

It should have been clear to the plaintiff that his claim was still-born as early as 1991 from the letters exchanged between him and the Ministry of Lands and Settlement as well as the reports made with regard to his claim. Some of those reports suggest that when all these were going on, the plaintiff rushed to the suit property and fenced it without any colour of right. He had been told in no uncertain terms by those

responsible for allocation of land in the scheme that he is not entitled to the suit property. Instead, using a restraining order, he evicted the 2nd defendant, who he has acknowledged in his testimony was on the property. He said in cross-examination:

"She had not built on the land when I brought this suit. ……. Yes she had built a temporary house on the land and planted crops. She was evicted by an order of the court. I did not destroy her house and crops."

In his affidavit in support of his chamber summons dated 8th April, 1994, he confirmed the above status when he deposed that the 2nd respondent had forcefully entered the suit land and had constructed a temporary house, cultivated and planted crops and was indenting to construct a permanent house.

For these reasons, the plaintiff's suit is dismissed with costs to the Defendants, while the 2nd defendant's counterclaim succeeds and judgment entered against the plaintiff in terms of prayer a) and aa) of the counter-claim.

There were no submissions on the general damages for trespass but having found that the plaintiff has been unlawfully occupying the 2nd defendant's land, the 2nd defendant having lost the use of the same for nearly 17 years and the kind of structures and crops destroyed in the process of eviction. I award to the 2nd defendant Kshs.50,000/= in general damages for trespass. No basis was advanced for an award of Kshs.4.5m sought in the submissions.

As regards *mesne* profit, it is trite learning that this is a special damages claim that must be specifically pleaded and strictly proved. There was no proof of Kshs.700,000/= submitted but not pleaded. I award costs of this suit to the respondents and interest on the Kshs.50,000/= from the date of counter-claim until payment in full.

Dated, Delivered and Signed at Nakuru this 25th day of February, 2011.

W. OUKO
JUDGE