



**Lopem v Lopem (Environment & Land Case 150 of 2014)
[2022] KEELC 3274 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3274 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 150 OF 2014
FO NYAGAKA, J
JULY 28, 2022**

BETWEEN

LIMARENG LOPEM PLAINTIFF

AND

LOSOKOLIAN LOPEM DEFENDANT

JUDGMENT

The Pleadings

1. The present suit was instituted *vide* a Complaint dated October 14, 2014 and filed on that same day. It sought the following reliefs:
 - (a) An order of injunction barring the Defendant from entering or in any other way interfering with the Plaintiff's possession and use of Land Parcel No. 318 & 319 Sondany Adjudication.
 - (b) Costs of this suit.
2. The suit was defended. The Defendant entered appearance on October 30, 2014 after service of summons and filed his statement of Defence and Counterclaim dated 13/11/2014 on that day. He denied the averments in the Complaint and prayed that the same be dismissed with costs. In his Counterclaim, he prayed for an order for stay of the present proceedings pending the hearing and determination of an appeal before the Minister over the plots.

The Plaintiff's Case

3. The Plaintiff's case was that he was the registered owner of Plots No. 318 & 319 Sondany Adjudication Section. The Defendant, his elder brother, later on, without any right trespassed on the plots by grazing cattle. He produced a photograph of cattle which he testified belonged to the Defendant, on the parcels marked P. Exhibit 5. This interfered with the Plaintiff's quiet possession and use of the parcels.



4. Following the Defendant's actions, the Plaintiff lodged a complaint with the Land Adjudication and Settlement Office. PW2, Martin Odhiambo, a Land Adjudication Officer testified that the complaint was determined on 12/06/2012. In their findings, the said parcels belonged to the Plaintiff. He produced the Minutes of the meeting and the Map marked as P. Exhibit 6(a) and P. Exhibit 6(b) respectively. That decision has not been disturbed to date. He produced a letter dated January 26, 2016 from the Ministry of Land, Housing and Urban Development marked as P. Exhibit 2. Similarly, so, the letter dated September 18, 2014 from the Ministry of Lands, Housing and Urban Development, as P. Exhibit 8, recommended that the Defendant be compelled to vacate on the suit land.
5. Despite that, the Defendant continued to interfere with the Plaintiff's use of the parcels necessitating the filing of the present suit. He was granted consent to file the present suit pursuant to the provisions of Section 30 of the *Land Adjudication Act* Cap 284. The letter dated 08/09/2014 from the Ministry of Lands marked P. Exhibit 3 and P. Exhibit 7 was produced for this presupposition. He asked this court to find merit in the claim and award the reliefs sought.
6. When cross-examined, PW2 authenticated the Defendant's documents, yet to be marked for identification, as those emanating from the Land Adjudication Office. He, however, testified that a copy of Receipt No. 2106xxx was not in his file. He could not further ascertain the contents in the documents the Defendant intended to rely on. Finally, while it appeared that the Defendant had exercised his right to appeal, he was neither aware of any grounds of appeal lodged nor aware of the current position in the appeal.

The Defendant's Case

7. The Defendant similarly claimed ownership over the two (2) plots. He stated that the plots were excised to him following a demarcation exercise in 1984. He produced D. Exhibit 1 allotment letter dated 08/10/1986. This was confirmed by DW3, Rionokal Charito Arengenyang and DW2, Linga Chemukuk Kapcharoy, the Chairman of Sondany Land Adjudication Section. The letter disclosed that the plot was situated in Batei Location, Sondany Sub-location. DW3 stated that his name appeared on the document as Isaiah Chemukuk. He added that another document disclosed the parcel numbers. DW2 testified that the Plaintiff's portion was situate in Batei Location while that of the Defendant was situated in Soday Location (the suit land) both bordering each other. The Defendant took possession and used that plot to graze cattle.
8. In 2002, the Defendant's portion was subdivided into his three (3) houses. He produced D. Exhibit 2, Land Demarcation Sondany Location document showing that the Committee authorized the subdivision. The Defendant continued to live peacefully until 2012 when he was subpoenaed by the Land Adjudication Office. During the hearing, the Defendant lamented that he did not understand the language used hence didn't understand what was being discussed. The outcome of the hearing was delivered on 12/06/2012. He testified that he was dissatisfied with the findings of the Adjudication and Settlement Committee thereby impugned that decision by way of an appeal on July 19, 2012 before the Ministry that remained pending. He produced and was marked for identification D. Exhibit 3 Receipt No. 2106xxx dated July 19, 2012 to demonstrate that he had commenced the appeal process by way of payment of appeal fees. He testified that he appealed through his wife Chepokaptur Losokolian (Cheputai Losokolian) who he states was a co-defendant to the impugned proceedings. He maintained that the appeal has never been determined. Consequently, since it was the first in time, the present proceedings ought to be stayed pending the outcome of the appeal. The Defendant maintained that the plots were rightfully his.



9. Later on he was served with the pleadings in this matter on October 16, 2014. He urged this court to allow his counterclaim by staying the proceedings herein pending the outcome of the appeal before the Minister. Otherwise, he urged this court to dismiss the Plaintiff's suit with costs.

Submissions

10. In his submissions dated February 26, 2022, the Plaintiff avowed that he remained the lawful owner of the suit land and no evidence has countermanded that of his. He submitted that the Defendant failed to establish that he had filed an appeal against the decision of the Land Adjudication Office. He urged this court to grant the reliefs sought in his Plaint.
11. In his submissions dated 10/05/2022, the Defendant summed it that the decision of the Land Adjudication Officer remains challenged. His argument was that in fact, this Court lacked jurisdiction to entertain the subject matter. He submitted that in compliance with Section 29 of the Land Adjudication Act, the Defendant filed his appeal within the time limits. For this presupposition, he produced his receipt in settlement of appeal fees. The Defendant further relied on Section 30 of the Act for the holding that a court shall not entertain a suit in respect to a matter unless the Adjudication register for the Adjudication Section has become final in all aspects under Section 29 (3) of the Act. He added that unless the register has become final under Section 29 (3) of the Act, courts are mandatorily prohibited from entertaining disputes concerning land falling within Adjudication area. He maintained that he was the rightful owner of the plots since he took possession in 1984 contrary to the Plaintiff who had never taken possession. He urged this court to dismiss the Plaint and allow the Counterclaim.

Analysis and Disposition

12. I have carefully considered the pleadings filed, the evidence and the submissions that parties have impressed me with. I postulate that the following issues fall for determination:
- (i) Whether the Plaintiff is the owner of Plots No. 318 & 319 Sondany Adjudication Section?
 - (ii) Whether there is a pending appeal the effect which renders the proceedings a nullity?
 - (iii) What orders if any should be granted?
13. Against those issues for determination, this court shall determine the Plaint and Counterclaim accordingly.

(i) Whether the Plaintiff is the owner of Plots No. 318 & 319 Sondany Adjudication Section

14. The parties in the present suit have both laid claim to ownership of the suit land. According to the Plaintiff, he is the owner Plots No. 318 & 319 Sondany Adjudication Section. He contended that the Defendant illegally continued to trespass on his land hence the suit. He initially lodged a complaint with the Land Adjudication and Settlement Office. In their findings delivered on 12/06/2012, the Land Adjudication and Settlement office found that the Plaintiff was the proprietor of the suit lands. He relied on P. Exhibit 6(a) for the proposition that a hearing was conducted and the office awarded the Plaintiff with the suit land. P. Exhibit 6(b) was a Map delineating the suit plots. The Plaintiff further relied on several letters from the Ministry of Land, Housing and Urban Development, P. Exhibit 2 and P. Exhibit 8 that corroborated that he was recognized as proprietor of the suit land.



15. The Defendant similarly claimed ownership over the two (2) plots. He testified that he became the owner of the said plots in 1984 pursuant to an allotment letter dated 08/10/1986, D. Exhibit 1. The letter disclosed that the plot was situate in Batei Location, Sondany Sub-location. He took possession and used that plot to graze cattle. In 2002, the Defendant's portion was subdivided amongst his three (3) houses. D. Exhibit 2 demonstrated that the Committee authorized the subdivision. He lived peacefully until 2012, when the Land Adjudication and Settlement office ruled in favor of the Plaintiff that the plots belonged to the Plaintiff.
16. A number of issues become relevant. These, as discussed, will assist the court to determine who the rightful owner of the two (2) suit plots are. Firstly, the Plaintiff's documents relied on disclose the particular plot numbers separate and distinct from the Defendant's documents. In fact, DW2, disclosed that the plot numbers were registered in a particular document that was regrettably not produced for the benefit of this court's scrutiny.
17. Secondly, the Plaintiff's exhibits, namely, P. Exhibit 2, P. Exhibit 3, P. Exhibit 4, P. Exhibit 7 and P. Exhibit 8, from the Ministry of Lands, unvaryingly and corroboratively disclose that the Plaintiff remains the legal proprietor of the suit lands. The documents relied on by the Defendant, D. Exhibit 1 and D. Exhibit 2 are only a demonstration that he may be having some property within the locality. However, no acreage or description of the proprietor, which bear their own unique attributes, was demystified from the documents.
18. Thirdly, from the disclosure in P. Exhibit 6(a), it appears that the Plaintiff lodged a suit way after 2002 when the Defendant alleged that subdivision took place. It also appears from the Minutes that the Defendant participated in the proceedings. He was afforded an equal opportunity, as that of the Plaintiff, to ventilate his issue in the dispute. It remains a mystery why the Defendant never argued the matter the way he is purporting to do so now at the hearing before the Land Adjudication and Settlement office. The Defendant decried that he was not in a position to understand the proceedings therein. However, I don't see that explanation captured in the proceedings. It simply appears as an afterthought to distance himself from blame when he was within his rights to prepare adequately for his case and defend himself. He cannot have his cake and eat it.
19. Lastly, the Defendant admitted that from the decision of the Land Adjudication and Settlement Office, the said land was awarded to the Plaintiff. As it stood, the Defendant did concede that was the true state of facts. It is for this very reason that he stated that he opted to appeal against the decision of the said office.
20. From the above elucidation, my conclusion is that there is overwhelming evidence on record to conclude that the Plaintiff, and not the Defendant, is the legal owner of the (2) two plots in dispute.

(ii) Whether there is a pending appeal the effect which renders the proceedings a nullity

21. As testified by the Defendant, he exercised his right to lodge an appeal against the decision dated June 19, 2012. This was vehemently opposed by the Plaintiff who maintained that the decision of the Land Adjudication and Settlement Office remains undisturbed. I am guided by the fundamentals espoused in the *Land Adjudication Act*. The relevant parts under Section 29 provide thus:
 1. Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-
 - a) Delivering to the Minister an appeal in writing specifying the grounds of appeal; and



- b) Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such orders as he thinks just and the order shall be final.

22. From the foregoing Section, did the Defendant lodge an appeal? According to the Defendant, the appeal was lodged. He corroborated his evidence by relying on D. Exhibit 3, Receipt No. 2106xxx which described that the received sum was in settlement of an appeal to the Minister of plots 318 & 319. PW2 confirmed that the said receipt emanated from the office he worked for but could not ascertain if indeed an appeal was lodged.
23. My understanding of Section 29 of the *Land Adjudication Act* is that where a party is desirous of filing an appeal, he must do so within the prescribed limitation of time by delivering to the Minister an appeal in writing specifying the grounds of appeal and sending a copy of the appeal to the Director of Land Adjudication. This is not in any way synonymous to paying for fees. In my view, an appeal can only subsist where specific grounds have been delivered to the Minister and the Director of Land Adjudication. Consequently, I am of the view that the Defendant failed to lodge an appeal as prescribed under the Act. In fact, as at 26/01/2016, the relevant Ministry confirmed that their records indicated that no appeal had been lodged in respect to the two (2) plots. (see P. Exhibit 2).
24. It may as well have been the Defendant's intention to lodge an appeal as indicated. As a result of this, the Plaintiff was on 08/09/2014 (P. Exhibit 3/P. Exhibit 7) granted consent to move the court in respect to the two (2) plots, the subject of these proceedings. The Defendant relied on Section 30 (1) of the Act for the holding that this court lacked jurisdiction to entertain the subject matter in light of the pending appeal. However, I find that the Plaintiff complied with the said provision which states:
- “Except with the consent in writing of the Adjudication Officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act”.
25. Having obtained consent, the Plaintiff had properly invoked this court's jurisdiction to hear and determine the present dispute. Finally, this court on January 27, 2020 directed the Defendant or his Counsel to confirm whether an appeal before the Minister was pending. On December 15, 2020, Ms. Chebet, Counsel for the Defendant reported that the appeal had been overtaken by events.
26. I have laid my analysis to determine that indeed no appeal against the decision of the Land Adjudication and Settlement Office exists. In essence, this entirely collapses the Defendant's Counterclaim, the kernel to wit that his Counterclaim lay.

(iii) What orders are to issue?

27. The upshot of the above is that the Plaintiff has proved to the required standard of proof being on a balance of probabilities that the suit is merited. Consequently, I make the following orders:
- (a) An order of injunction be and is hereby issued barring the Defendant from entering or in any other way interfering with the Plaintiff's possession and use of Land Parcel No. 318 & 319 Sondany Adjudication Section.
- (b) The Plaintiff is awarded costs of the main suit.
- (c) The Defendant's Counterclaim dated 13/11/2014 is dismissed with costs to the Plaintiff.

It is so ordered.



**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON
THIS 28TH DAY OF JULY, 2022.**

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

