



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL CASE NO. 4 OF 2006.

PENTECOSTAL ASSEMBLIES OF GOD (BAHATI P.A.G. CHURCH)

ELIKANA SALAMBA

JOSHUA KIPKEMEI

JOTHAM MATIVA.....PLAINTIFFS

VERSUS

PETER GATHUNGU

FRANCIS BARASA

ANALD RUDALE

JOHN ESTO

PHILIP EJESTO

JAMES EKENO

LUKALE RUDUNGAZIA

JACKSON MUDOME & 2

OTHERS.....DEFENDANTS

J U D G M E N T .

1. The plaintiff is a church body registered under a deed of trust, the registered trustees are; **Elikana Salamba, Joshua Kipkemei** and **Jotham Mativa**. The plaintiff filed this suit against the defendants and by the amended plaint, the plaintiffs complained that the defendants trespassed and elected temporary structures on their property known as Kitale Municipality Block 6/231. The plaintiff sought for the following orders:-

(i) An order of eviction against the defendants, their agents and/or servants from the plaintiff's land parcel **NO. KITALE MUNICIPALITY BLOCK 6/231** and demolition of all illegal structures thereon at the defendants' costs.

(ii) A permanent injunction restraining the defendants, their agents/servants from interfering in any manner with **TITLE No. KITALE MUNICIPALITY BLOCK 6/231** i.e. destroying of the church, removing of beacons/posts demarcating the

boundary, obstructing the plaintiff from carrying on its projects and from harassing the church members/officials.

(iii) Costs of this suit.

(iv) Any other relief that this Honourable court may deem fit to grant for the interest of justice.

2. The defendants filed a defence and counterclaim. They denied the plaintiffs' claim in total and made allegations against the plaintiffs that the plaintiffs obtained the certificate of title through fraud. The defendants also filed a counterclaim in which they contest that they were allotted their respective plots by the Municipal Council of Kitale. They had moved to the plots as squatters and in 1988, they were issued with the temporary occupation licenses. Later on they were issued with letters of allotment. They sought the following orders against the plaintiff in the defence and counterclaim:-

- (a) A declaration that 1st, 2nd, 5th and 8th defendants are the sole registered and/or legal owners of respectively plot Nos. 50, 51, 75 and 56 – Kitale Municipality to the exclusion of the plaintiffs or any other party.
- (b) A declaration that the 3rd, 4th, 6th, 7th, 9th and 10th Defendants have acquired title to approximately 2 acres by way of adverse possession and an order for the entry of their names on the register.
- (c) A permanent injunction do issue restraining the plaintiffs, their agents, servants and/or anybody acting through them or on their behalf from trespassing upon the 1st, 2nd, 5th and 8th defendants plots Nos. 50, 51, 75 and 56 – Kitale Municipality and land **Title No. KITALE MUNICIPALITY BLOC 6/231** measuring approximately 2 acres.
- (d) Costs of this suit plus interest at court rates.
- (e) Any other relief that this honourable court may deem fit and just to grant.

3. **Caleb Murusa (PW1)** was authorized by registered trustees of the church to give evidence on their behalf. He testified that he has been a member of the Pentecostal Assemblies of God (PAG) for over 30 years. He is also a member of PAG Bahati which is situated within Kipsongo area on the suit property. According to PW1, he is one of the officials of Bahati PAG Church and in that capacity he wrote a letter in May, 1990 seeking to be allotted a permanent plot where they could construct a church, a nursery school and offices for the pastor. The plaintiff's request was accepted by the Kitale Municipal Council and their letter was forwarded to the District Development Committee for approval.

4. Pursuant to that approval, the plaintiffs were given a letter of allotment by the Commissioner of Lands on 11th June, 1998 in respect of an un surveyed Church Plot at Kitale Municipality measuring 0.805 hectares on condition that the plaintiff fulfilled certain conditions that are stipulated in the said letter of allotment such as the payments of the stand premium and other charges which the plaintiff said they paid. The plaintiffs were issued with a certificate of lease over Title No. Kitale Municipality Block 6/231 dated 20th May, 2003. The approximate area of the plot is 0.8050 hectares.

5. The plaintiffs now complain that the defendants trespassed in their parcel of land without any color of right and started putting temporary structures. The defendants burnt down the plaintiffs' property especially the pastor's house and chased away the pastor. Due to that interference the plaintiff filed an application for injunction to restrain the defendants which was determined at the ex parte stage by **Karanja – J.** on 6th December, 2006. The plaintiffs were granted an ex parte order of injunction. That injunction was extended by consent and on 26th March, 2007, **Ocheing – J** clarified that order as follows:-

“Court: - as the respondents have confirmed that they are content to continue to co-exist with the applicants, as they have done for a long period of time, whilst awaiting adjudication of the substantive suit, it is hereby ordered that the orders issued on 7/12/2006 be reinstated. However, the parties must ensure that the orders are not used in any manner to harass each other. In other wards, the plaintiff must limit its activities to the ½ acre of land upon which the temporary structure is constructed. They should not use this order to lay claim to any other portion of the 2 acres which is the subject matter of the suit. Similarly, the respondents must respect the order by allowing he plaintiff un-hindered access to the ½ acre. It is emphasized that if any of the parties should disregard or flout these orders, they mist appreciate that that would constitute contempt of court, for which they would be liable to appropriate sanctions.”

6. On the part of the defendants, **Peter Gathungu (DW1)** testified on behalf of the other defendants except for the 2nd and 8th defendants who passed away thus the case against them abated. According to DW1, he has lived at Kipsongo area since 1988 when he and several other landless people were moved from the forest. He and other sqarters presented himself to the Kitale Municipal Council seeking to be allocated a parcel of land to occupy. He was given a letter of allotment dated 16th September, 1988 for a plot No. 50 where he lives. The other defendants were also given their respective letters of allotment. According to DW1, the plaintiff was allotted plot no. 49 where they constructed a church within his neighborhood.

7. The plaintiff co-existed peacefully with the defendants until the plaintiff fraudulently obtained a title and started harassing the defendants. This prompted the defendants to go to the District Officer who wrote a letter to the District Land Registrar, Trans Nzoia District informing him that the church was allotted land No. 49 but instead, the church acquired a title for 0.8050 hectares which is larger than the plot they were allotted and that has displaced other plot owners. The District Land's Officer also wrote a letter to the Commissioner of Lands proposing that there be a cancellation of all allotments of plots within Kipsongo Trading centre. This was to facilitate a comprehensive planning to the trading centre and priority was to be given to

the squatters who had occupied the land.

8. Thus DW1 contends that it is the plaintiff who obtained a title for 2.5 acres which exceeded the original size that is covered on the ground by plot No. 49. The plaintiffs were advised to hold a dialogue with the defendants so as to allow a re-survey and planning by the District Land Registrar but the plaintiffs have insisted on having the defendants evicted. The defendants prayed that the title should be cancelled so that the plaintiff does not interfere with the occupation of their respective plots.

9. The plaintiff's claim is supported by a certificate of lease that was issued on May, 2003 over Title No. **KITALE MUNICIPALITY BLOCK 6/ 231**. This title was issued following an application for allocation of a plot which application was successful and the plaintiffs were issued with a letter of allotment. Eventually, a provisional Development plan was prepared in respect of the plot and the plaintiffs were issued with the certificate of title. According to the counsel for the plaintiff, the plaintiffs' title is sacrosanct. It is indefeasible and the defendants cannot under the law lay a claim on their title which is a first registration. On the part of the defendants, it is contested that the plaintiff rushed to the commissioner of Lands and fraudulently registered themselves of a parcel of land that is larger than the plot which was originally occupied by the plaintiffs and the space where they had constructed a church which is $\frac{1}{2}$ an acre.

10. The plaintiff is now claiming 2.5 acres which encroaches and displaces the defendants from their plots which they have occupied since 1988. It is common ground that the defendants have been on the suit land before the plaintiffs were registered as proprietors of title No; **Kitale Municipality Block 6/231**. Before the plaintiffs obtained the registration of this title, this parcel of land was trust land which was perhaps alienated and allocated to the plaintiff as provided for under the Trust Land Act. May that as it may, I am of the humble view that the title was issued under the provisions of Cap 300. Under the provisions of section 30 of the Registered Land Act (Cap 300), it makes provisions of what constitutes an overriding interest regarding a registered title as follows:-

“Unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same without their being noted on the register –

(a) ...

(g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where an enquiry is made of such person and the rights are not disclosed.”

11. The issue that I find most vexing in this matter as in other matters involving a claim of land by a registered proprietor, is the issue of whether before the plaintiffs were issued with this certificate of title, there was an enquiry of the persons who were entitled and who were in possession of the title. There are several correspondence on record which were exchanged between the Commissioner of Lands especially the letter dated 7th May, 1995 addressed to Lands Officer Kitale. Another letter dated 8th May, 1996 by the Commissioner of Lands addressed to the District Physical Planning Officer. These letters requested the relevant offices to ensure a comprehensive planning of the Kipsongo Trading Center and to ensure the needs of the squatters were taken care of.

12. There is communication especially by the Town Clerk, the District Officer and the District Lands Officer Kitale showing there was need for a comprehensive planning of the Kipsongo Trading centre so as to take care of the squatters and other requisite facilities that are necessary for such a settlement. In the midst of all this, I do not see any document showing that a proper enquiry was made to take care of the issues that were raised by these government officers. What is produced is a PDP map showing the area marked for suit land. None of the government officials came to court to testify on how the PDP was prepared although I am aware under the evidence Act, official documents are conclusive but in this case there was an allegation of fraud.

13. It also defeats logic that the Commissioner of lands, the District surveyor and the Local Council raised issues of concern regarding the allotment of the plaintiff's title and the same government offices proceeded to issue a certificate of lease without first of all making the enquiries and presenting a report. This is like the proverbial right hand that did not know what the left hand was doing. It is obvious this kind of casual approach by public officers who are charged with responsibilities of ensuring justice and fair administrative actions is what has continued to exacerbate landlessness which in turn has snowballed into high poverty ratios and Kenya is now being referred to as a failed State. Under the Constitution of Kenya, Especially article 21 (3) public officers are enjoined to address the need of vulnerable groups and in my opinion the defendants who were evicted from the forest and settled in the suit land fit that bill.

14. It follows that if the requisite enquiries were made as provided for under section 30 (g) of Cap 300 the rights of the defendants which were in any event highlighted but were not addressed, the plaintiffs would not have been issued with a title for 2.5 acres but the portion of $\frac{1}{2}$ acre that they were occupying. For this reason I am not satisfied that the plaintiffs have been able to prove their claim to the required standard that the defendants have trespassed and encroached on their parcel of land.

15. The defendants were in occupation long before the plaintiffs were issued with the certificate of title. Accordingly, the plaintiffs' claim does not meet the threshold for this court to order an eviction of the defendants. In the plaintiffs' suit, they sought for any other relief that this court may deem fit to grant in the interest of justice. Consequently, the order that meets the

interest of justice is that the plaintiff should remain in occupation of 1/2 acre of Title No. Kitale Municipality Block 6/231 that is where they have always been in occupation and where they have constructed a church. For peaceful co existence, defendants are restrained from destroying, obstructing the plaintiffs occupation of that portion of land. As regards the balance of the other portion of land covered in the certificate of title, I find it is occupied by the defendants since 1988 before the plaintiffs obtained the certificate of title. The defendants have an overriding interest as *bonafide* occupants before the title was issued. They cannot therefore be evicted as an order of eviction will not be in the interest of justice.

16. In arriving at the above conclusion, I have taken into account that this was originally public land which belonged to the Government. The plaintiff and the defendants were issued with letters of allotment. However, the plaintiff managed to get themselves registered of a larger portion which in essence dispossesses the defendants. This does not augur well with the letter and spirit of the Constitution which guarantees every Kenyan to be subjected to a fair administrative action and enjoins public officers to address the needs of vulnerable groups within the society. The defendants who are squatters fall within that category. In the upshot I make the following orders:-

(i) The plaintiff is entitled to ½ acre of Kitale Municipality Bloc 6/231 where they have constructed their church. The defendants are restrained by an order of injunction from interfering with the plaintiffs' peaceful occupation of the said parcel of land.

(ii) Due to the nature of this litigation, each party should bar their own costs.

Judgment read and signed on the 8th day of July, 2011.

MARTHA KOOME.
JUDGE.