



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 339 OF 2008

METIAN KITAEI NKOIBONI.....PLAINTIFF

VERSUS

RICHARD SALATON TOROME.....DEFENDANT

JUDGMENT

The Plaintiff and the Defendants are residents of Ntulele Town in Narok District, and according to their respective evidence friendly to each other but have become estranged due to political differences, and commercial or business rivalry. They both claim to have been allocated Plot No. 352 at Ntulele Market or now Town. According to the Plaintiff he got the allocation in the year 2002, while the Defendant says he got the allocation way back on 19th November 2003. When homely reconciliation did not resolve their rival claims to the Plot, the Plaintiff sued the Defendant and sought the following prayers: -

- (a) *an eviction order be issued against the Defendant, his agents and servants removing them with their structures, building and other belongings from Plot No. 352 Ntulele market;*
- (b) *that a permanent injunction be issued restraining the Defendant by himself, his agents and servants from dealing with, entering into, remaining in, constructing and/or building structures or in any manner whatsoever interfering with Plot No. 352 Ntulele market;*
- (c) *costs of the suit.*

Both the plaintiff and the Defendant gave evidence and produced letters of allotment, receipts of payment, for various services, survey fees and rates and in the case of the plaintiff a letter of confirmation from the County Council of Narok that he the plaintiff was the rightful allottee of the disputed plot. The plaintiff called the Legal Clerk to the County Clerk who corroborated the plaintiff's evidence from the council's records, that they tallied with the documents held and produced in evidence by the plaintiff. These were -

- (1) *Letter of allotment of 2nd July 2008 being a replacement letter,*
- (2) *Minute 14/03 dated 21st November 2003 of the County Council of Narok,*
- (3) *Bill No. 0317 dated 15th July 2008 for Kshs 8,955/=,*

(4) Letter dated 11th December 2003 from the market inspector for the County Council of Narok addressed to its surveyors called Two EMS Associates requesting the said surveyors to show the plaintiffs his Plot No. 352, Ntulele Market on the ground,

(5) Receipt dated 11th December 2003 for survey fee,

(6) Letter dated 12th November 2008 from Karanja Mbugua & Co. Advocates to the Clerk County Council of Narok,

(7) Letter dated 26th November 2008 from the Clerk County Council of Narok (then a Mr. J. M. Mahida to Karanja Mbugua & Co. Advocates, informing them that Plot No. 352 was allocated to the Plaintiff).

The Defendant too testified and called two witnesses in support of his claim to Plot No. 352. The Defence evidence may be summarized as follows -

(1) He was allocated Plot No. 352 on 19th November 2002 pursuant to Minute No. 11 of 1999. His Letter of Allotment is dated 19th November 2002.

(2) that he duly paid the County Council the requisite fees including survey fees and land rates.

(3) that pursuant to Clause 2 of the Letter of Allotment, he submitted building plans for a Petrol Station which was duly approved by the District Public Health Officer, Narok, the Physical Planning Officer, Narok or the Clerk of County Council of Narok in or about November 2003.

(4) that following approval of the building plan he commenced construction in the year 2004 and purchased building materials as well as petrol pumps and tanks,

(5) that he has since the year 2004, to-date, been obtaining all the requisite licences, permits and approvals to undertake the business of a petrol station at the suit premises.

In support of his claims, the Defendant also produced an assortment of receipts for utility bills and petrol in respect of the suit premises (Plot 352).

From the above evidence, the Defendant contended that Plaintiffs claims that he invaded the subject Plot 352, in mid-September 2008 and started construction thereon of buildings, and Petrol Service Station are false, unfounded and lacking in substance. The Defendant also contended that it is, on the contrary, the plaintiff who is interfering with the Defendant's peaceful and quiet enjoyment over Plot No. 352, by persistent and continuous harassment and intimidation of the Defendant.

The Defendant also contended that the Plaintiff's actions are motivated by sheer jealousy and personal vendetta and the fact that he is the area Councillor and one time Chairman of the Planning Committee of the County Council of Narok, and that the Plaintiff's action is part of a well old orchestrated scheme by the plaintiff and/or through the plaintiff's supporters and in collusion with some Council staff to take away the Defendant's plot.

To support these contentions the Defendant called two witnesses, DW2 was one Joseph Kayioni, a former Clerk to County Council of Narok. This was his evidence -

(i) He was Clerk of the County Council of Narok in the year 2002.

(ii) The Defendant's Letter of Allotment was genuine and the signature appearing thereon

was his.

(iii) *the receipt of survey fee (Def. Exhibit No. 2) is also genuine as it was a receipt issued at the time from the Government Printer, and therefore the Council received the money.*

(iv) *that survey fees are paid after allocation, but that there were instances when there is a rush for the plots, an applicant pays such fees even before an allocation.*

(v) *that Minute 11/1999 referred to, in the Defendant's Letter of Allotment was in reference to Minutes of the Council used to approve allocation of plots within the council's jurisdiction.*

(vi) *that in case of double allocation the first allocation takes priority and is recognized by the Council.*

DW3, one Sankuya Ole Esho testified that he was the area Councilor for Ntulele Ward from 1999 to 2002 and that he allocated Plot No. 352, Ntulele Petrol Station to the Defendant. This witness also testified that he knows the Plots No. 350, 351 and 352 very well. These plots are adjacent to each other. Plot No. 350 is his. Plot No. 351 is that of the Plaintiff, and Plot No. 352 is that of the Defendant. DW3 also testified that he as area Councilor is the one who recommended the allocation of these plots.

Following the evidence for the respective parties, Counsel for the two parties also filed and exchanged written submissions, which reiterated the above positions. Despite apparent protestations to the contrary by both parties, what comes out clearly is that there was double allocation of Plot No. 352, or at most clandestine issue of a Letter of Allotment to the plaintiff in respect of the Plot. This is clearly so, from the evidence of DW3, a former Councillor of the area, and DW2 a former Clerk to the County Council of Narok who confirmed the signature to the Allotment Letter and receipt issued to the Defendant. This is not to say that PW2's evidence was false. It was not, he was speaking from records of the plot as he found them. He however did not answer questions relating to issuance of approvals for buildings plans by the Defendant, and subsequent licences for operation of the Defendant's Petrol Station on Plot 352. That lack of answers constituted institutional opaqueness on a matter that needed clarification.

The question that therefore begs an answer, and the issue herein, is who is the rightful owner of the Plot No. 352 Ntulele Market/Town of Narok District? The answer is clear in my mind, from the evidence. It is the Defendant. These are the reasons for that conclusion.

He was the first allottee. He met the conditions of allotment. He submitted plans for the construction and installation of Petrol Service Station. He obtained the necessary approvals from the County Council of Narok, including the Council's own Planning Committee, Public Health Authorities, and the National Environmental and Management Authority (NEMA) for the operation of his Petrol Service Station.

Construction of a Petrol Service Station is not a matter which is done overnight. It takes time to plan, draw up plans, raise bills of quantities, assemble materials, hire a contractor and build over a period of time. All of these stages are very public and visible stages of development. The Plaintiff had every opportunity to stop the Defendant from developing the plot.

I think the plaintiff did not do so, or think of doing so, primarily because he had obtained his letter of allotment clandestinely by virtue of his position as Councillor of the area. Prudence demands that if a public document like a Letter of Allotment is defaced, or otherwise torn so as to be illegible, a record will show that a replacement copy was issued, for that reason, and the original will be cancelled and filed away marked cancelled, and not otherwise. There was no evidence that the Plaintiff had such a letter, he merely asserted that he received a replacement because the previous one did not have the Logo or water

mark security to distinguish them from the forgeries that were "*flying*" round. From the evidence of DW3, the Defendant's Letter of Allotment was not one of those "*flying*" ones.

Mr. Karanja Mbugua, learned counsel for the plaintiff referred the court to SS. 80(1) & (2) and 129 of the Local Government Act (*Cap. 265, Laws of Kenya*), on the keeping of records of minutes of a Local Authority and the Authority of such minutes (*SS. 80(1) & (2)*), and the responsibility of a Clerk of every Local Authority (*S.129*). This is correct, that the minutes in this case refer to the allocation of the same plot twice! This is why I have employed the expression "*clandestine*" in the purported second allocation.

As I understand the requirements of allocation of land, once a parcel has been allotted, there has to be followed a procedure for either cancellation or forfeiture of the allocation. This is usually premised upon either breach of the conditions of the allocation, such as development, or outright rejection of the allotment. Once an allottee has accepted the allotment, for the allotment to be forfeited there has to be a notification to the allottee of the cancellation or forfeiture. It is a cardinal principle of the rules of natural justice. Such a clandestine act will be quashed by the court, and rendered void.

For those reasons, I would dismiss the plaintiff's suit with costs against the defendant.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 1st day of July 2011

M. J. ANYARA EMUKULE
JUDGE