



Kiplimo v Settlement Fund Trustees & 7 others (Environment & Land Case 58 of 2019) [2022] KEELC 3607 (KLR) (20 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3607 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 58 OF 2019**

**FO NYAGAKA, J
JULY 20, 2022**

BETWEEN

PIUS KANDA KIPLIMO PLAINTIFF

AND

SETTLEMENT FUND TRUSTEES 1ST DEFENDANT

COUNTY REGISTRAR TRANS NZOIA COUNTY 2ND DEFENDANT

COUNTY SURVEYOR TRANS NZOIA COUNTY 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

ERNEST KEMBOI CHELIMO 5TH DEFENDANT

MUSA WABWA 6TH DEFENDANT

THE NATIONAL LAND COMMISSION 7TH DEFENDANT

SUZANNA CHEBOI 8TH DEFENDANT

RULING

The application

1. The plaintiff’s notice of motion application dated February 7, 2022 and filed on February 9, 2022 seeks the following reliefs:
 - a. ...spent.
 - b. That this honorable court be pleased to order the Trans Nzoia County Surveyor to carry out a survey of those parcels of land known as Milimani Settlement Scheme Plot Nos 1327, 1328, 1329 and 1395 and file a survey report in this court within 30 days.



- c. That the court be pleased to visit the disputed parcels of land being Milimani Settlement Scheme Plot Nos 1327, 1328, 1329 and 1395.
 - d. That the costs of the survey to be shared equally amongst the plaintiff and the 5th, 6th and 8th defendants.
 - e. That the OCS kachibora station to provide security under prayer (b) and (c) above.
 - f. Costs be provided for.
2. The application was premised on the grounds on its face and supported by the plaintiff's affidavit. The gist of the application was that the plaintiff became the legal proprietor of plot No 1329 at Milimani Settlement Scheme Trans Nzoia pursuant to a sale agreement dated June 13, 2003. He annexed the sale agreement and allotment letter in favor of John Kipkemboi Bett, the vendor. Both were marked PKM1/ (b) and 1(a) respectively. Subsequently, he took possession of the suit land in the same year. On or about 2006, the defendants fraudulently and illegally added an extra plot No 1395 to the benefit of the 6th and 7th defendants. As a consequence, the allottee of plot No 1327 moved into plot No 1328.
 3. Later that year, the 5th defendant, proprietor of plot No 1328 took possession of his allotted parcel and forcefully took over the plaintiff's land. He destroyed the plaintiff's fence, demolished his house and took possession of a section of the plaintiff's plot No 1329. Following the dispute, the OCS Cherangani police station received a letter dated October 16, 2006 from the land adjudication department. It disclosed that plot No 1329 measured five (5) acres or thereabouts.
 4. That, however, did not resolve the dispute as the plaintiff filed a case in Eldoret, Case No 1109 of 2006 against the 5th defendant for trespass, Kitale, ELC No 90 of 2010 and Eldoret, CACA No 320 of 2014. In the course of the proceedings, the 1st, 2nd, 3rd and 4th defendants presented three (3) different survey reports showing that the plaintiff's land measured 5 acres, 5.6 acres and 3.3 acres or thereabouts respectively. The survey reports were produced in evidence and marked PK/2.
 5. The plaintiff lamented that his parcel of land had been converted into a catchment area which is government land. To him this further subdivision was irregular, illegal and fraudulent as it interfered with the original survey conducted in 1999 where the plaintiff's parcel of land namely plot No 1329 was found to measure 5 acres. For this assertion, he annexed and marked PK/3 a copy of a letter from Ms Magare & Magare Advocates. He deposed that the application was brought in utmost good faith and urged this court to grant the reliefs sought.

The Response

6. The 1st - 4th defendants relied on the replying affidavit of Nyanga CA, the county land adjudication and settlement officer Trans Nzoia county. It was filed on April 8, 2022. She maintained that plots No 1327, 1328, 1329 (allotted to John Kipkemboi Bett) and 1395 were lawfully, legally and procedurally created and acquired. The plots were among the 1600 plots designated in Milimani settlement scheme.
7. She argued that since the plaintiff had no records at their offices, he was a stranger and lacked *locus standi* to institute the present suit. She stated further that the plaintiff was required to initiate the acquisition of ownership by appearing before the Land Control Board. She added that the issues raised in the application and by extension the suit, were finally determined in Kitale ELC No 90 of 2010 and Eldoret CACA No 320 of 2014. As a result, the present application was *res judicata*. She deposed that plot No 1329 remains intact on the map and the ground.



8. Be that as it may, it was deposed that the office was aware that there has been a mismatch affecting the Milimani settlement scheme in its entirety. She made a recommendation to the Cabinet Secretary, Lands and other relevant offices that a re-survey be conducted in the entire scheme before correct boundaries could be ascertained. She was of the view that a survey done on only the four (4) parcels of land would create more confusion. She urged this court to stay the application, if not dismiss it for want of locus standi or *res judicata*, until the re-survey exercise is conducted on the entire scheme. Ultimately, she committed to abide by the outcome of the application.
9. On the part of the 5th - 7th defendants, they relied on the affidavit sworn on May 14, 2022 by the 5th defendant. They argued that the application was bad in law and lacked merit. They accused the plaintiff of being a busy body having filed several claims against the 5th defendant. It was deposed that the plaintiff's property was surveyed and was found to be intact. They added that the application was *res judicata*. They accused the plaintiff of acting in bad faith for suing the 3rd defendant yet it is the same party that will be tasked with conducting the relevant survey if the orders sought were granted. He suggested that the owner of plot No 1327 will be adversely affected by the orders of the court yet is not participating in the proceedings. As a result, this would occasion jeopardy. They supported the cluster of defendants' deposition, that is, by the 1st - 4th defendants, in that the plaintiff had no standing to sue. They urged this court to dismiss the application.

Submissions

10. In his submissions dated March 30, 2022 and filed on April 6, 2022, the plaintiff argued that the present application was not *res judicata* as the former suits were based on trespass to land by the 5th defendant. In contrast, the present suit circumnavigated around the fact that the plaintiff was aggrieved by the fact that his 5 acres of land had been fraudulently and illegally taken away as a catchment area by the 1st - 4th defendants. On whether the orders sought ought to be granted, the plaintiff rehashed the averments in his disposition and captured in his grounds in support of the application. He urged this court to allow the same as prayed. On whether the court ought to visit the subject parcels of land, the plaintiff submitted that it was critical as the honorable court will yield evidence to enable it arrive at a just conclusion. He fortified these submissions by invoking order 18, rule 11 of the [Civil Procedure Rules](#). Finally, he submitted that it was indispensable to provide security to ensure smooth conduct of the exercise.
11. The 1st - 4th defendants submitted that the plaintiff has no interest over the suit land and thus lacked *locus standi* to institute the suit and the application. They added that the plaintiff was conjuring up parties or issues with a view to giving the case and application a different complexion when observed against the fore stated suits. They urged this court to dismiss the application on grounds of *res judicata*. Finally, they reiterated that the orders sought are untenable as surveying 4 out of 1600 plots will lead to confusion and administrative chaos.

Analysis and Disposition

12. I have considered the application and the parties' affidavits. I have also considered the parties' rival submissions. The application essentially seeks order for a survey four (4) plots within the Milimani Settlement Scheme. The plot numbers are 1327, 1328, 1395 and 1329, allegedly belonging to the plaintiff.
13. In disputing the application, the respondents raised two issues on points of law. In their first rebuttal, they contended that the plaintiff was not the legal proprietor of plot No 1329 hence lacked *locus standi* to institute the application and the suit in its entirety. They furthered that since there are no known



records of the plaintiff as proprietor of the parcel of land plot No 1329, at the relevant defendants' offices, he was a *persona non grata*. Attached to the application and in particular PKM/1(a) & (b), were the allotment letter to John Kipkemboi Bett and the sale agreement between the plaintiff and John Kipkemboi Bett.

14. It is not disputed that the said plot No 1329 was allotted to John Kipkemboi Bett. I further find that the plaintiff has established that indeed a subsequent sale agreement was entered into between himself and the said John Kipkemboi Bett. The sale agreement, remained undisputed. I thus hold the view that indeed the said John Kipkemboi Bett had every intention of transferring legal ownership to the plaintiff. I consequently, hold also that the plaintiff has established standing to sue. The application is found to be with merit on this ground.
15. The other issue raised was that the application and the suit holistically were *res judicata*. According to the 1st - 4th defendants, the plaintiff implored this court by use of embellished language to make it appear that the suit was separate and distinct from the aforementioned cases that the plaintiff had cited. The plaintiff's rebuttal centered around the fact that the suit gravitated around his 5 acres being excised from him and taken as government land which was separate from the antecedent suits that sought to find the 5th defendant as a trespasser. Looking at the arguments in totality, I am satisfied as to the explanation proffered by the plaintiff. I find and hold that there was no sufficient material placed before me to make a finding on whether or not the matter is *res judicata*. All that the 1st-4th respondents stated in paragraph 8 of the replying affidavit sworn on 6/04/2022 that the issues were dealt with in Kitale ELC Case No 9010 of 2011 and Eldoret Court of Appeal No 320 of 2014. To that extent the allegation was unaddressed. Since the issue, if successfully raised, may go to the root of the case, the defendants are at liberty to raise it, in the earliest instance, by way of a preliminary objection so that the court can deal with it on merits.
16. The only counterargument that is left for this court's determination is whether the survey as to be ordered by this court will have the effect of rendering the request to the Cabinet Ministry an academic exercise. According to the affidavit of Nyanga CA., the County Land Adjudication and Settlement Officer Trans Nzoia County, she noted that there was a mismatch in the settlement scheme. This prompted her to make a recommendation to the Cabinet Secretary, Lands and other relevant offices that a re-survey be conduct on the entire settlement scheme before boundaries can be shown to individuals. Consequently, the orders herein will create administrative chaos and more confusion.
17. Mysteriously however, the deponent failed to attach the proof of any such evidence for the benefit of the trial court. It will therefore be recalcitrant to prove with absolute certainty that such communication was rendered to the relevant offices. The absence of such relevant evidence in support of their arguments simply vitiates their argument. I find no direct conflict, confusion or chaos as alleged by the defendants that would be created if the orders sought herein are granted.
18. In challenging the application, the 5th, 6th and 7th defendants argued that the orders were adverse against the proprietor of plot No 1327. This argument must fall for two reasons; firstly, it is not disclosed who the proprietor of that plot is. Secondly, the said parties have had every opportunity to make the necessary application if they indeed feel that the orders against the proprietor would jeopardize his/her interests. My conclusion on these averments were simply intended to defeat the cause of the application.
19. In the upshot, I find that the application is to be with merit. I find that it was made in the interest of justice. I will however not direct the court to visit the plots to be surveyed as I have utmost faith in the survey process being conducted within the confinements of the law. Consequently, I allow the application dated February 7, 2022 in the following terms:



- a. The Trans Nzoia County Surveyor shall carry out a survey of those parcels of land known as Milimani settlement scheme plot numbers 1327, 1328, 1329 and 1395 and file a survey report in this court within 30 days.
- b. The costs of the survey to be shared equally amongst the plaintiff and the 5th, 6th and 8th defendants;
- c. The OCS Kachibora Station to provide security under prayer (a) above.
- d. Costs of the application shall be in the cause.
- e. For the purpose of ensuring compliance, this matter is fixe for mention on 6/10/2022 to report on the progress.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 20TH DAY OF JULY, 2022.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.

