



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE**

Civil Case 78 of 2003

JAMES KITERIE ALFAYO PLAINTIFF.

VERSUS

MARGARET C. WAMBETE.....DEFENDANT.

R U L I N G.

By a chamber summons dated 24th July, 2009, pursuant to the provisions of order VI Rules 13 (1) (b) (c) and (d) of the Civil Procedure rules the defendant/applicant seeks orders:-

1. **THAT**, the plaint herein be struck out and judgment be entered as prayed in the counter-claim.
2. Costs be provided for.

The application is based on the grounds:-

- (a) The defendant/applicant is absolute allottee of Plot No. 38 Kitale Scheme.
- (b) The claim is frivolous and vexatious.
- (c) It is an abuse of court process.
- (d) The plaintiff/respondent is taking advantage of the temporary orders granted pending full hearing.
- (e) From the discoveries and report of the District Land Adjudication Officer Trans Nzoia, there is no nexus between plot No. 38 and 80 Kitalale Scheme.
- (f) The plaintiff/respondent is causing injustice to the defendant by refusing the defendant/applicant occupation to her rightful plot.
- (g) It is obvious from the pleadings that the plaintiff/respondent has been in occupation and use of the suit land since 1999 thus the defendant's counter-claim is justified.

The application is predicated upon the annexed affidavit of Magret Wambete sworn on the 24th of July, 2009.

On behalf of the applicant, it was argued that discovery has been undertaken by the parties. Arising from the discovery, it has been established, on the one hand, that the plaintiff/respondent is not an allottee and in deed has no allotment letter. On the other hand, it has been established that the defendant/applicant has an allotment letter. That an exercise undertaken by the District Land Adjudication and Settlement Officer Trans Nzoia District clearly

established that plot No. 35 Kitale Scheme belongs to the defendant/applicant as embodied in exhibit "MW5". That the defendant/applicant has paid Settlement Fund Trustee loan as encapsulated in exhibit "MW6"

In the premises the plaintiff/respondent is in occupation of the disputed land (2 ½ acres) at the expense of the defendant/applicant since 1999. Hence the prayer for mesne profits.

The plaintiff/respondent resisted the application by filing a replying affidavit sworn on the 25th day of September, 2009. On behalf of the plaintiff/respondent, I was urged to find that when the Deputy Registrar visited the disputed parcel on 17th January, 2005, it was established that plot No. 80 which is now 38 initially belonged to one Philip Eyanae Lobelu as embodied Exhibit "JKA1". Allotment letter exhibit JKA – 2A and "JKA - 2B" is evidence of this fact. The said Phillip Eyanae Lobelu then sold the said plot to one Patrick Towett who in turn sold the same to the plaintiff/respondent. The agreements in support are exhibited as "JKA – 3" and "JKA 4" respectively. Accordingly, there is confusion on the ground which could only be clarified by oral evidence at the hearing of the main suit.

On the available evidence, the defendant/applicant claims that he purchased the subject plot from one Patrick Towett. That Patrick Towett purchased the said plot from Philip Eyanae Lobelu. She contends that the plot was initially plot 80. Later it was merged with plot No. 38 and became plot no. 38. That she has lived in the said plot since 1999 and has undertaken extensive developments therein. The report of the district surveyor and district Registrar is to the effect that it was not possible to demarcate plot No. 80 from plot No. 38. Both of them appeared to have been merged and they now measure 5 acres.

The plaintiff/respondent contention, on the other hand, is that plot No. 38 belongs to him and has no relationship with plot No. 80. Her contention is that the 2 plots are separate and distinct.

From the District Registrar's report and the sketch map drawn by the District Surveyor, both parcels of land are separate and distinct. According to the report of the District Land Registrar the two parcels are 400 meters apart.

To my mind, it is not a boundary dispute since the two parcels are separate and distinct – 400 meters apart.

On the one hand the letters of allotment – exhibit "JKA 2B" is evidence that plot No. 80 is 2 ½ acres. It was allotted to **Philip Eyanae Lobelu**. This was later sold to **Patrick Towett** embodied in Exhibit JKA5") **Patrick Towett** later on sold it to **James Kiterie Alfayo** – the plaintiff/respondent herein.

In the premises this is not a clear case for striking out (**see D.T. DOBBIE & KENYA & CO. KENYA LTD. VS. JOSEPH MBARIA MUCHINA & LEAH WANJIKU MBUGUA (CIVIL APPEAL NO. 37 FO 1978)**). By way of directions the parties should fast track the main suit for hearing so that all the issues arising may be ventilated by oral evidence.

Accordingly, this application is for rejection. It is dismissed with no orders as to costs.

Dated and delivered at Kitale this 3rd day of February, 2010.

N.R.O. OMBIJA.
JUDGE.

Mr. Bungei for Barongo for defendant.

Mr. Njoroge for Ngeiywa for plaintiff.