REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT NO 264 OF 1997

BRIG. GILBERT SEII …….....……...….. PLAINTIFF

VERSUS

FREDRICK K CHESEREK

AGRICULTURAL DEVELOPMENT CORPORATION .....DEFENDANTS

JUDGMENT

The plaintiff Brig. Gilbert Seii filed this suit against the defendants Hon Fredrick K Cheserek and Agricultural Development Corporation. The key averments in the amended plaint are that on or about the 23rd day of August, 1994 the plaintiff was allocated for purposes of purchase 15 acres comprised in plot numbers 139, 140 and 151 forming part of all that parcel of land known as ADC Jabali farm by the second defendant as an agent of the government, that at the time of allocation the second defendant set out the following terms:- that the purchase price was 5,000/= per acre exclusive of the survey fees and conveyance among other things purchase price could be paid in full, in the meantime the plaintiff could take possession of the suit property, plaintiff would allow the second defendant to harvest its seed maize on the plot allocated at the end of September, October 1994, that pursuant to and in performance of the terms set out as attending the allocation and offer to purchase the plaintiff was shown the allocated parcel of land, tendered the sum of Kshs 21,000.00 to the 2nd defendant who duly received and accepted the sum as part payment of the consideration for purchase of the suit property and the second defendant issued a receipt for the sum on the 17th July, 1995, took possession of the suit property and allowed the second defendant to harvest its seed maize on plot allocated at the end of September, October 1994, that upon initially entering possession the plaintiff remained in quiet possession and enjoyment of the suit property until some times in June, 1996 when the defendant invaded, trespassed and committed acts of waste upon the plaintiffs parcel of land comprised in plot numbers 139, 140 and 151, that upon the defendant purporting to fence off parts of the plaintiff's parcel

the plaintiff moved in and removed the poles erected by the defendant and replaced the same with his and put a barbed wire fence by way of self help, that some time in mid July, 1997 the first defendant re-invaded and committed further acts of waste upon parts of the plaintiffs property and part of the fence defining the same, consequently the plaintiff by a letter dated 1st July, Informed the first defendant that the first defendant was trespassing upon the plaintiffs land and required the first defendant to vacate within seven days from the date of the said letter at the risk of civil proceedings for his compulsion, the first defendant declined to oblige where upon the plaintiff filed the present suit and together there with applied for an order of temporary injunction against the first defendant, in reply to the plaintiffs application for injunction the first defendant alluded to produced and annexed to his replying affidavit a letter of allocation and offer for sale dated 29th November, 1995 and a receipt for the sum of Kshs

20,000.00 dated 7th March, 1996 and on the strength of which letter and receipt the first defendant had invaded the plaintiff's parcel of land comprised in plot nos 139, 140 and 151 at ADC Jabali farm, by the said letter and receipt. The first defendant was allegedly allocated and offered for sale the whole of that parcel of land measuring 15 acres earlier allocated to the plaintiff forming part of plot nos 139, 140 and 151 ADC Jabali farm, allegedly tendered the sum of Kshs 20,000.00 as part payment of the consideration for the alleged re-allocation and offer of sale. In his said replying affidavit the first defendant further alluded to, produced, annexed and relied upon a letter dated 22nd August, 1997 from the second defendant wherefore the 2nd defendant advised the first defendant that 10 acres comprised in what the second defendant had allegedly allocated and offered for sale to the first defendant had been allocated to squatters, hitherto the plaintiff was neither aware of nor been made aware of any alleged allocation re-allocation and offer for sale of the plaintiff's parcel of land to the 2nd defendant and or to any other person whomsoever. The allocations were further made long after the suit property had been allocated to the plaintiff who had taken possession of the same and tendered part of the consideration in purchase thereof as directed, that by reasons of the foregoing the plaintiff has been denied quiet possession of the suit property and has been further occasioned loss and damage. The plaintiff further apprehends that the first defendant will trespass upon, waste, and or continue trespassing upon and committing acts of waste upon the suit property in cahoots with and with the authority and assistance of the 2nd defendant.

In consequence thereof the plaintiff claims against the defendants for a declaration that the plaintiff is entitled to the ownership occupation quiet possession and enjoyment and use of the 15 acres in plot nos 139, 140 and 151 and forming part of ADC Jabali farm, further claims against the 2nd defendant for a declaration that the second defendant was not and is still not entitled to reallocate under re-offer for sale. The plaintiffs 15 acres comprised in plot nos 139, 140 and 151 farming part of ADC Jabali farm, further claims against the second defendant for a declaration that the second defendant was not and is still not entitled to reallocate and or re-offer for sale the plaintiff's 15 acres comprised in plot nos 139, 140 and 151 farming part of ADC Jabali farm and any purported allocation and or offer for sale of the same to the first defendant or any other person whosoever is null and void and of no legal consequence whatsoever.

Further claims a declaration that the 1st defendants occupation of the plaintiffs land is and has always been wrongful and amounts and has always amounted to trespass. He prays for an order directing the eviction of the first defendant from the whole of or any part of the plaintiffs 15 acres of land comprised in plot nos 139, 140 and 151 ADC Jabali farm, claims an additional claim against the first defendant for an order of perpetual injunction restraining the first defendant his servants and or agents trespassing upon and or comitting acts of waste upon the plaintiff's property. He also claims general damages for trespass and mesne profits arising from the first defendant's trespass upon and occupation of the plaintiffs property. In the alternative and strictly without prejudice to all or any of the foregoing claims the plaintiff prays for an order directing the second defendant to allocate the plaintiff an alternative parcel land of the same measurements and user to the plaintiff's satisfaction. He also prays for costs interest and any other relief that the Court may deem fit to grant.

The first defendants defence originally filed before the amendment after plaint still stands. The key averments are that he denies that the plaintiff was allocated plot numbers 139, 140 and 151 forming part of ADC Jabali farm and puts the plaintiff to the strict proof thereof and he denies that the plaintiff paid the sum of Kshs 21,000.00 or any other sum or at all, denies that the plaintiff has been in possession of the said land and further denies that he has trespassed the said land or at all, denies that the said land by way of self help (same words left out) but the same was done in further more (furtherance) or illegal acts of trespass on the said land by the plaintiff, denied the contents of pr 6, 7, 8, 9, 10 and 11 of the plaint and put the plaintiff to strict proof. That the plaint as drawn is bad in law incurably defective and does not disclose any cause of action against the defendant.

On the basis of the foregoing the 1st defendant prayed for dismissal of the plaintiffs claim with costs. The second defendant did not enter appearance neither did they file any defence in these proceedings and interlocutory judgment was entered against them on 4.11.98.

The plaintiff was the sole witness on his side while the first defendant was also the sole witness on his side. The facts of the case are brief simple and straight forward. They are to the effect that both the

plaintiff and the first defendant applied to be allocated land. The plaintiff applied through the then Rift Valley provincial commissioner late Ishmael Chelanga. The first defendant did not say through whom he applied. The plaintiffs approval come vide letter ref MD/19/5/15/WKK dated 23rd August, 1994.

The letter produced as exhibit 1 indicates that the plaintiff had been allocated 15 acres of land or thereabout at ADC farm. The attending conditions are set out in the letters which were also pleaded and they are on the record. It is noted that there is no approval on this letter by the then managing director of the second defendant but it is common ground that the same was signed by the Managing Director.

As a fulfillment of the said condition the plaintiff made part payment towards the said land vide a receipt dated 17.7.1995 no 13795 produced as exhibit 2. After the said payment was made plot numbers 139, 140 and 151 were inserted by a person who did not disclose his identity on 17.7.1995 the date the payments were made. It is the evidence of the plaintiff that the information on the plots came from the map in the Molo office where he paid. He was then referred to the Kitale office to be shown the plots on the ground. He went to the Kitale office and an officer from that office accompanied him upto Jabali farm and showed him the plots in question contrary to his pleading it has turned out that he plaintiff never put up any structures on the land, nor fenced it. He came to the land for the first visit when he came to be shown the land. He came a second time to show the son then a third time when he found that the first defendant had fenced it off.

The version of the first defendant is that he too was allocated 30 acres of land at Jabali farm specifically specified as plot no 139, 140 and 151 vide the letter ref No MD/19/5/15/wkk dated 29.11.1995. The said allocation was approved on 1.3.1996. The letter was produced as exhibit D1 and 3.

It had the same conditions as those specified in the plaintiffs letter. He made part payment on 7.3.1996 vide receipt no 14290 exhibit D2 and 4 in the sum of Ksh 20,000.00. He first of all moved into the land he was shown the beacons fenced it off and started developments on the land and he did the following:-

1. put up a residential house.

2. put up workers' houses.

3. put up a water tank.

4. rehabilitated a disused dip.

5. started cultivation.

In the year 1997 he received a report from his workers that in his absence the plaintiff had come with youths and armed with tools and threatenedthem. On anther occasion the plaintiff came again brandishing a pistol and this time he met the first defendant whom he threatened with death if he did not move out of the land. The first defendant persuaded the plaintiff that he should not threaten him and instead he should take up the matter with the second defendant and if the second defendant rules that he first defendant should move out of the said parcels he will do so. This according to him worked and the plaintiff went away that is when he came to court and filed these proceedings.

The first defendant took further steps in the matter and inquired from the second defendant as to who was the rightful allocatee of the said parcels of land. The replied vide their letter ref Number MD/19/5/15/wkk dated 22nd August produced as exhibit D3 and 5 to the effect that the first defendant was the rightful allotee of plot numbers 139 and 140 comprising 20 acres. It was further stated that plot no 151 had been allocated to squatters. The first defendant further stated that he took up the issue with the second defendant to inquire as to why they had reduced the acreage initially allocated to him and they agreed to let him keep the entire 30 acres and the squatters were allocated another plot but he has no document to prove the same. But he confirms that he is still sitting on the 30 acres initially allocated to him.

On the side of the plaintiffs his counsels took up the matter with the second defendant. The contents of

the inquiry letter have not been disclosed to the Court. There is a letter addressed to the plaintiff's lawyers which has no date but its date stamped to have been received on 26th August, 1997 from the 2nd defendant reference MD/19/5/15/jdo. The contents are that their client refused their offer of a piece of land at ADC Jabali and instead commandeered several acres offices and assets belonging to this organization at their Oljorrai ranch in Nakuru district which action was the subject matter of a court case on trespass which has not been concluded satisfactorily despite judgment having been entered against him. Further that the above parcels of land were allocated elsewhere to other deserving Kenyans. The letter was produced as exhibit 8. This was followed by two other correspondences exhibit 6 and 7 from the second defendant to the plaintiffs counsels inquiring if the plaintiff was willing to talk direct as with the second defendant. They are dated 30th July, 1998 and 12th

November, 1998. Another correspondence on the matter is exhibit 9 which goes to show that the trespass case had been withdrawn in so far as it related to the plaintiff.

(ii) He also paid the required fee earlier fee earlier than the defendant and so at the time the first defendant was issued with the letter of allotment there was no land for alienation in his favour.

(iii) It is clear that one could not make payment if the endorsement had not been approved.

(iv) That the plaintiffs allotment letter did not need an approval endorsement as it contained the conditions he was to comply with, gave him the liberty to take possession of the property in question and it was not expressed to be subject to any approval and importing the requirement of approval in the same will be without any foundation.

3. That the submissions of the first defendant do not hold because the evidence does not show that the name of the plaintiff was inserted on his (plaintiff's) allotment letter after it had been typed and signed by the managing director such an allegation requires higher standards of proof than those in other civil cases as it borders on fraud.

(ii) The only person who would have disputed the validity of the letter is the second defendant and there is no proof that they did so and they did not even defend the suit;

(iii) A perusal of the plaintiffs allotment letter will show that all the typing on the letter is uniform meaning that the typing was done at once and the signatory to the plaintiff's letter is the same signatory to the first defendants letter.

(iv) No payment would have been accepted from the plaintiff if the letter had not been genuine.

(v) The first defendant did not blame the plaintiff for any wrong doing and instead he blamed the second defendant for double allocation.

(vi) To date the second defendant has not recalled the letter issued to the plaintiff neither has it refunded what was paid in respect of the same.

(vii) None of the parties has a title deed and so none can claim to be having a superior title to the land than the other.

(viii) That the second defendant who did not defend the proceedings is deemed to have admitted the plaintiffs claim as they failed to defend the claim and both defendants should pay the plaintiff's costs.

The defence counsel on the other hand stressed the following points.

1. That it is evident that the name of the plaintiff was typed later on to the allotment letter and the plot numbers inserted later on as they were not on the letter when it was signed.

2. By a letter dated 22.8.97 from the second defendant confirmed that plot no 139, 140 had been allotted

to the first defendant and that the same measured 20 acres while plot 151 had been given to squatters. In the mind of the second defendant it gave out nothing to the plaintiff.

3. That the plaintiff cannot rely on the letter of allotment to claim the suit plots as the acreage on the letter differs from that on the ground.

4. That since the parties have not gone ahead to perfect titles the granter of the land is still the owner of the land and can reallocate it as he deems fit to do so and so the only point in issue here is which of the two letters of allotment is to be upheld by this court. It is their stand that that problem was resolved by the second defendants letter of 22.8.97 confirming allotment to the first defendant.

5. The plaintiff has a remedy against the second defendant and since he already has a judgment against them he should direct his claim against them. They rely on the case cited of *Cane Land Ltd v the Commissioner of Lands, G Mosiri George Ocholi E Biegen, Beatrice Mumo and Nyanza Etnerprises Ltd* Nairobi CA 311 of 1998 where there was double allocation but one party had processed title and the Court upheld the right of the title holder as against that of an equitable owner.

On the Court's assessment of the evidence in the light of the pleadings and the submissions of both counsels the following facts have come out clearly.

1. The plaintiff was allocated 15 acres of land at Jabali ADC farm by the second defendant through its managing director. It is evidently clear that the plot numbers or number was not indicated in this letter. The plot numbers 139, 140 and 151 were inserted later by a person alleged to be an employee of the second defendant whose rank is not known and who did not come to give evidence to show on what basis he inserted the said plot numbers. There is no dispute that the plaintiff made part payment as was stipulated in the allotment letter. As noted earlier contrary to the pleadings the plaintiff did not move to settle on these plots but he first visited them on 3 occasions when the events leading to this case were sparked off.

2. There is no doubt that the documents given to the plaintiff were earlier in time.

3. Subsequent to the above the first defendant was given an allotment letter which specified the plots he was being given namely plot no 139, 140 and 151 which were 10 acres each and they satisfied the acreage he had been given of 30 acres. The first defendant subsequently paid part payment for the same.

4. It is evidently clear that since neither party had title to the land the reversionary title is still with the second defendant when the dispute herein erupted and the matter was referred to the second defendant the second defendant confirmed the allocation of two of the three plot numbers to the first defendant. The third plot was alleged to have been given out to some other parties but the first defendant has told the Court that it was not taken away and he has retained all the 30 acres. On the other hand as regards the plaintiff there was no such confirmation. The information that came from the second defendant was that the plaintiff had rejected the offer of land in Jabali farm and had instead gone to invade the second defendant's land in Oljorrai Ranch which the plaintiff has denied.

5. It is also clear that despite what the second defendant said of the plaintiff they have not withdrawn the letter of allotment issued to him, they have not refunded the money he paid to them, they have not confirmed giving him alternative and neither have they offered any other land.

They were served but they never come to defend the suit and offer a possible resolution of the dispute.

Both parties have claimed the suit plots and as submitted by both counsels the key question for consideration here is who of the two is to be given the plots. The plaintiff agrees that the letter of allotment given to him talks of 15 acres of land at Jabali farm. He agrees to plot numbers were inserted by an employee of the second defendant at Molo. This employee has not come to court to explain how he inserted the plot numbers and whether he was one of the officers authorized to allocate the plots. In the absence of that information this court is not in a position to conclusively rule that the suit plots had been

properly allocated to the plaintiff. A further fact or which tends to disentitle the plaintiff to the said plots is that his entitlement is 15 acres and he has no quarrel with that. He assumed the three plots were 5 acres each although he had not taken ground measurements when it was put to him that the plots in question are 10 acres each he said he does not know how that came to be the case. He had assumed they were 5 acres each. The total 9 acreage amounts to 30 acres and if they are given to the plaintiff then that will be an excess of his entitlement. He himself has not suggested that they be split so that he gets 15 acres and leaves the rest for the first defendant.

Turning to the first defendant he also has the letter of allotment specifying the plots he was given and they are the same ones he was shown on the ground and the same ones he has retained although two were confirmed positively to have been allocated to him. He has settled on the land and he says he carried out some developments on the same. Weighing the two versions together and considering the interests of both parties the Court finds that the balance tilts in favour of the first defendant as the person who should retain the said three plots. As for the plaintiff he is still owed 15 acres by the second defendant and they are the right party to make good what the plaintiff is complaining about. The second defendant did not challenge the claim and at some point they were willing to discuss the matter with the plaintiff as shown by the exhibit 7 and 8. He says he took up the issue with them but they did not act and make good his claim. He is willing to be given an alternative land elsewhere and he has pleaded so. The alternative land will come from the second defendant. On the issue of costs I find that it is the second defendant who occasioned the proceedings and so they are the ones who are to pay costs both to the plaintiff and the first defendant.

For the reasons given the plaintiffs claim against the first defendant is dismissed.

The plaintiffs claim against the second defendant is allowed. An order be and is hereby made directing the second defendant to allocate the plaintiff an alternative parcel of land of the same measurements and user to the plaintiffs satisfaction.

3. The second defendant will pay costs both to the plaintiff and the first defendant.

Dated and delivered at Eldoret this 23rd day of May, 2003

R. N. NAMBUYE

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JUDGE