Obengo v Mugo & 3 others (Environment & Land Case 3 of 2019)
[2023] KEELC 16095 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16095 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 3 OF 2019

MC OUNDO, J

MARCH 2, 2023

BETWEEN

PAMELA ADHIAMBO OBENGO ..... PLAINTIFF

AND

STEPHEN N. MUGO ..... 1ST DEFENDANT

LAND REGISTRAR, KERICHO LAND REGISTRY ..... 2ND DEFENDANT

LAND ADJUDICATION OFFICER, KERICHO ..... 3RD DEFENDANT

CHIEF EXECUTIVE COMMITTEE MEMBER (CEC), IN CHARGE OF LANDS, KERICHO ..... 4TH DEFENDANT

JUDGMENT

1. Vide a Plaint dated the 21st December 2018, the Plaintiff herein sought for the following orders;

    i. A permanent injunction restraining the Defendants jointly and severally acting by their self, servant and/or agents from trespassing upon, continuing to trespass upon or in any other manner, interfering with or continuing to interfere with the Plaintiff's rights and privileges as the owner of the parcel of land situated in Kericho Municipality in the Kericho County measuring 0.0312 of hectare, being Title No. LR. No. 631/1428, I.R. No 76596.

    ii. A declaration that the Plaintiff is the absolute proprietor of parcel of land situated in Kericho Municipality in the Kericho County measuring 0.0312 of hectare, being Title No. L.R. No. 631/1428, I.R. No. 76596 and that the title in possession the Plaintiff is the genuine title.

    iii. An order by this honorable court directing the 1st Defendant to give the Plaintiff immediate vacant possession of the property immediately failure to which an eviction order do issue and the Officer Commanding Police Division (OCPD) Kericho do assist in enforcement of the Court Order.

iv. Special damages for loss of rental income and destruction of the property.

v. General damages for trespass and mesne profits.

vi. Any other relief this honorable court would deem fit to grant

vii. Costs of the suit.

2. The 1st Defendant filed his Memorandum of Appearance on the 21st January 2019 and his statement of defence dated the 13th February 2019 on the 15th February 2019 wherein he had averred that he was in occupation of an un-surveyed residential plot number 100 Kericho municipality having taken possession after he had purchased the same in 2017 from the allottee one Andrew Kipyegon Langat who had been allocated the same by the Government of Kenya in 2012.

3. That the un-surveyed residential plot number 100 was different from the Plaintiffs suit land which was initially un-surveyed residential plot number 39 and therefore the Plaintiff had not laid any claim against him.

4. That the Plaintiff had not particularized the fraud and wrongdoing by the 1st Defendant and therefore the suit against him should be dismissed with costs.

5. The Attorney General entered appearance on behalf of the 2nd and 3st Defendants via a Memorandum of Appearance dated the 9th January 2019 and filed on the 4th February 2020. Their statement of defence was dated the 27th January 2019 which was a denial of the contents contained in the plaint.

6. The Hon Attorney General also stated that further the Plaintiff had not served them with a notice of intention to sue and therefore they had been denied an opportunity to establish if this was a matter that could be settled amicably. That in due course they would seek to be struck off from the pleadings as there was no cause of action established against them.

7. There was no appearance and /or response for the 4th Defendant.

8. On the 26th March 2019, by consent parties agreed that the District Surveyor Kericho do visit the un-surveyed plot no. 100 and L.R No. 631/1428 also known a IR No.7656 and establish if there was any encroachment by either of the parties and thereafter file a report. The report was subsequently filed on 8th October 2019.

9. The parties having complied with the provisions of Order 11 of the Civil Procedure Rules, the matter proceeded for hearing on the 2nd December 2021 wherein the Plaintiff, Pamela Adhiambo Obengo testified as PW1 to the effect that she lived in Nyakatch within Kisumu County and was a farmer. That before she retired, she had been a civil servant attached to the Office of the President as a copy typist. That the matter in court was in relation to her land No. 346/1428, opposite Kericho Township Primary School within Kericho County. That its acreage was 0.0312 hectares and she had documents to show that it was her land. She produced the original allotment letter issued on 31st October 1991 as Pf Exh 1, and the title deed issued on 12th May 1998 as Pf Exh 2 wherein she continued to testify that before she was given the documents, she had paid for the same as per the receipts dated the 14th April 1992 for Ksh. 15,000/= for fees for assessment of allotment letter, a receipt dated 27th January 1995 for Ksh. 1500/= for an Appointment of allotment letter and issuance of title, a receipt dated the 2nd February 1995 for Ksh. 1,250/= and another dated the 20th January 1993 for Ksh. 30,000/= She produced the receipts as Pf Exh 3 (a-d)

10. That thereafter, she had taken possession of the suit land and had lived there for almost two years from the year 2005-2007 where she had built temporal/semi- permanent houses using iron sheets and

timber. That in 2007, during the tribal clashes/post-election violence, she had fled to Nyakatch to await the situation to calm down.

11. Her evidence was that she had planned to expand her rental houses which had 4 tenants wherein she had even installed piped water. That there was a time however that she had come back to see how the tenants were fairing on wherein she had found that somebody had demolished her houses leaving only the permanent toilet wherein that person had started constructing on her land. That she had written a letter to the municipality to help her but did not receive any response. She produced the letter dated the 5th July 2016 as Pf Exh 4.

12. That she had taken the letter personally before going to report the incidence of the encroachment of her land at the police station and thereafter filing the matter in court. It was her evidence that when she went to visit the site, someone had tried to assault her and she had reported the same to the police who had issued her with an OB No. 21/20/11/2018 which she produced as Pf Exh 5.

13. That subsequently she had conducted a search in the year 2018 wherein she had found that the land was still in her name. She produced the official search dated the 22nd November 2018 as PF Exh 6.

14. She also produced her plan and map for approval, for the plans she had on developing the suit land, Pf Exh. 7 (a) (b)

15. The testimony was that she had sued Mugo the 1st Defendant who had been named after she had got a letter he wrote.That nobody was living on the suit land at the time she went there and she had not sold or given it away. She confirmed that at the moment, the place was well developed and fenced and also that she had stayed away for long. That all she wanted from the court was to help her to reclaim her land back and for costs of the suit.

16. Her evidence further was that she was aware that a surveyor had gone to the land and prepared a report dated 20th August 2019 which she marked as PMFI 8

17. In cross examination by counsel for the 1st Defendant, she confirmed that she started living in Kericho from 1970 up to 2007 at which time she had worked with the Ministry of Agriculture then Livestock, Ministry of Works, then the office of the President. That she was attached to Ministry of Health. That her position in all those offices was that of a typist. That she had also worked at lands office where her duty was to type documents.

18. When referred to PF exh 7 (a) she confirmed that it was the plan of the house she had wanted to build. That it was a plan she had drawn after she had been given the lease title in 1997. That she did not know whether she had been given the beacon certificate because it had been her husband who had been following up the issue.

19. She confirmed that the land was in the township and that she did not have the map of the area. She also confirmed that although she had sued the Defendants, that Mugo (1st Defendant) was the person who had built on her land. That there were neighboring plots to her plot and that at that time there was only a school. That at the moment she could not trace the place because of the many developments therein.

20. When she was referred to Pf MFI 8, she stated that she did not read the report and further that she did not know anything about the 2nd plan. That she had not been consulted but just heard there was a 2nd plan. That when she went to the land she had only found one part of the land, ½ had been taken. She also saw the toilet which was intact.

21. She confirmed that she did not know what happened after she left but from the letter she had received from the lands officer, they had informed her that they would survey 4 plots but would not ''touch'' her plot.

22. When she was referred to Pf Exh 2, she confirmed that she had been given the search from the lands office as well as Pf exh 6. When referred to Pf Exh 1, she confirmed that the plot was initially known as un-surveyed plot No. 39. That she did not know whether Mugo was given an allotment letter or whether the Government had been given the land to other persons.

23. In cross examination by the State Counsel for the 2nd -4th Defendants, she confirmed that she had conducted a search wherein she had found that the land was still in her name. That she had sued the 2nd -4th Defendant because she had not received any help from their office. She also confirmed that she did not know that she needed to serve the Hon Attorney General with a notice before filing suit against the office.

24. The second Plaintiff witness Margaret Ruto testified as PW2 to the effect that she was the County Surveyor-Kericho. That she had received a court order on 12th June 2019 to the effect that she visits and surveys Plot No.100 and LR No. 631/1428 with IR No.7656. That they had visited the site on 20th September 2019 and surveyed plot No.631/1428 wherein they had found that it was overlapping with the un-surveyed plot No. 100. That they had subsequently made the following findings;

    i. The two plots No. 631/1428 and un-surveyed plot 100 were of the same size 15mx30m

    ii. The shapes were not the same

    iii. No. 631/1428 had a deed plan and a surveyor plan

    iv. Un-surveyed plot No. 100 was PDP No.223 R 22/2011/2

    v. No. 631/1428 had a lease title

25. She explained that when a plot had an FR No, it meant that it had been surveyed and had a survey plan and a lease title. That Plot No. 100 had not been surveyed and had no lease and it was overlapping on the one that had a subsisting lease. That when a plot was un-surveyed, it had conditions on its allotment letters. She confirmed that she had found the lease for No. 631/1428 and that Plot No.100 has no lease and was still in the Part Development Plan (PDP).

26. On being cross examined by Counsel for the 1st Defendant, the witness confirmed that she was based at the County Government Kericho and that previously she had been with the Ministry of Lands. She also confirmed that the parcels of land were overlapping in that one was covering part of the other. That the parcels of land had different shapes but both were rectangular in shape. That the co-ordinates of the two parcels lead to the same place. That the PDP plan had shown that the shapes were different. That the lease for parcel No. 631/1428 showed that it measured 0.0312 hectares.

27. That she had not seen an allotment letter for plot No. 100 but when she was referred to allotment letter to plot No. 100 with PDP she stated that it measured 0.05 hectares. That in the allotment letter, the plot No.100 was bigger than parcel number No. 631/1428.

28. Her evidence was that when a survey is done, they would only get a survey plan from the survey of Kenya because it had the coordinates and direction. That they could not be given the computation file. She confirmed that they were not given the beacon certificate at the Survey of Kenya and that once a surveyor had done his/her work, (s)he would give the client the beacon certificate which confirmed that the boundary as fixed was correct.

29. That she joined the National Government as a surveyor in 2006, in 2013 she was "devolved" and was still in Kericho. That a PDP was normally drawn when planning is done in any town where a base mark would be used. That a PDP's were prepared by the Physical Planner and during that period, they (surveyors) would not come in.

30. Her evidence was that an Allotment of land was normally done by the Commissioner of Land and that they (surveyors) would only come in after the allotment had been done, to plant beacons on the ground. She confirmed that she knew where the suit parcels of land were which was near the township and that they had the map for that particular parcel of land. That since parcel No. 100 was un-surveyed it had no LR No and was still on the PDP. That she had not participated in placing the beacon on plot No. 100 and that to come up with her report, she had relied on the lease and the survey map, as for un-surveyed plot No. 100, on the PDP.

31. In re-examination, she confirmed that the plots were in the same direction but one lay on top of the other. She produced the surveyor's report which had been marked as PMFI 8 as Pf Exh.8 wherein the Plaintiff closed its case.

32. The defense case proceeded with the testimony of the 1st Defendant Stephen Njogu Mugo as DW1 who testified that he lived in Nakuru and was a business person. That his Plot was No. 100 and that he did not know the Plaintiff as he had never seen her save that he knew her name only after he received the summons. That he also did not know about plot No. 631/1428.

33. That he had bought un-surveyed Plot No. 100 from one Andrew Langat at the time he was looking for plots to buy. That he had gone to the township where he had seen the land and had agreed with Andrew Langat to purchase the land from him after Andrew had told him that he wanted to sell the land so as to buy land elsewhere.

34. That subsequently, Andrew had given him an allotment letter dated 18th June 2018 and receipts of payment of rates dated 20th September 2019 for Kshs. 12,600/=. That he also gave him his KRA pin and passport photo as well as a copy of his ID card after which he (1st Defendant) had gone to the lands office to confirm whether such land existed. In the said offices he had found an officer by the name of Patroberts who had checked the records that contained the names of people of Talai Community who had been given land wherein he had found that Plot No. 100 belonged to Langat. He had certified that the plot was available and that the 1st Defendant could proceed with the purchase. That he (1st Defendant) had gone back on the ground where he had found that nobody lived there and it was bushy save for a pit latrine made of corrugated iron. That Mr. Langat had informed him that he did not know whose toilet it was as they had just been given land by Government.

35. That from there he did not touch the toilet but went to the Chief of the town location where he had informed him of what he had found on the land. That he had wanted the Chief to find out the owner of the toilet so that he/she could remove it. That he later went to the survey office, where one Madam Janet had been asked to go to show him the beacons on the land, which she had done.

36. His evidence was that the plots boarded the river near the prison and that there were many of them. That having found that the toilet was outside his plot, he had started constructing when he received a call from a woman informing him that he was building on her land. It was at the same time that he had received summons. That he had informed her that he was not building but had completed building and that it had been his neighbor on plot No. 99 who was still building.

37. That the woman had gone and tried to stop his neighbor from constructing but the neighbor had proceeded to construct. That he did not know what followed next.

38. He confirmed that he had not been given a beacon certificate and further that he was not aware that the court had asked for the surveyor's report. His evidence was that he had bought the plot for Kshs. 900,000/= in an agreement executed before Counsel which was dated the 24th March 2017, and that the balance of Kshs. 50,000/= was to be paid upon receipt of the title. That he did not think anybody had titles to those parcels of land. Later he came to learn that although people had titles to those plots, yet the same had been revoked.

39. That pursuant to their agreement dated 24th March 2017, the vendor had signed the transfer for him. That vide a letter dated the 28th January 2019 addressed to the lands officer Kericho, the same was asking for confirmation and authenticity of Kericho un-surveyed plot No. 100. He was categorical that the plot was his having bought the same from Langat.

40. He produced as defence exhibits an Allotment letter dated 18th June 2012 as Df Exh 1, a receipt for payment of rates dated 20th September 2012 as Df Exh 2, a KRA PIN for Andrew Langat as Df Exh 3, the Land sale agreement dated 24th August 2017 as Df Exh 4, and a letter dated 28th January 2018 as Df Exh 5.

41. On cross examination, the 1st Defendant, confirmed that he was on the land because he had bought it from Andrew Langat pursuant to the issuance of an allotment letter to him (Andrew Langat). That he had looked at the conditions on the letter and was aware that the plot was un-surveyed.

42. He was referred to Condition No. 1 on Df Exh 1 wherein he proceeded to read the terms of the condition.

    'If the plot is un-surveyed at the time you commence building you should exercise the greatest care to ensure that any building on the other works that contained within the boundaries of the plot ....."

43. After reading the same, he confirmed that he had constructed within the boundaries of the plot. That at the time he had started the construction, there was no lease granted and he had been waiting. He also confirmed that although he did not have a beacon certificate, yet the surveyor had showed him the beacons.

44. He further confirmed that he still did not have the lease certificate and that the land belonged to the Municipality. That he had written a letter to the lands officer which they received but did not respond. That he had also come to know that people had leases in the area but he had not confirmed. That he had only received a telephone call from a lady whom he had not seen and that the lady happened to be the Plaintiff herein.

45. That he did not go back to the land officer because he had been assured that the plot was Andrew Langat's and that he had been given the same by the Government. That at the lands officer's office, there was a list of persons of the Talai community, which list he had not produced.

46. He also confirmed that at the time, there had been no temporal structure on the plot and that he did not know who had removed it. That he had asked the Chief to look for the owner of the structure whereby the Chief had informed him that he knew the owner of toilet and that he had written to him to remove the same, but by the time he was constructing, he had not been given approvals because at the time, the issuance of approvals had been stopped. He confirmed that indeed there were many people who had constructed in that area without approvals

47. He further confirmed that the sale agreement was for the year 2017 and that he did not follow up on the lease because he had been informed that the leases would be released in wholesome to the Talai Community.

48. The next defence witness was Andrew Langat who testified as DW2 to the effect that he lived in Kerego within Kericho Town that he had come to testify on behalf of the 1st Defendant and that he did not know the Plaintiff or why the 1st Defendant had been sued. He confirmed that he had sold land to the 1st Defendant being Plot No. 100 within Kericho Town which plot had an allotment letter.

49. That as a person from the Talai Community, they had been given land in the year 2012 by the Government because they did not have land. That the Government took down their names as a community whose Chairman was called Siele and who had fowarded their names to the District Commissioner. Subsequently they had been informed that there was land in three phases, township, Kerego and Eland. That he had been allotted land in the township where he had paid Ksh. 3,050/= and had been given a receipt. That they were then shown their parcels of land by the surveyor whose name he could not remember. That he had later sold the land to the 1st Defendant in 2017.

50. He confirmed that he had not lived on the land but had only cultivated on the same and that besides it was a pit latrine of which he did not know who had dug it. That after somebody had lay claim on the land, he and the 1st Defendant had gone to see the Chief who had confirmed that the land was his (DW2) after looking at a list that had the names of the people who had been given the plot.

51. In cross examination, he confirmed that he knew the lands officer Kericho was called Patroberts. He also confirmed that he did not have a lease certificate, and neither had he followed up on the same. That the pit latrine was besides the plot, on the corner. That they had also gone to the plot with a private surveyor whose name he could not remember where they had been shown the beacons on the land.

52. He further confirmed that he had not been given a beacon certificate but about 500 landless people from Talai community had been given land of whom some had cases pending in court. His evidence was that he could not construct on the parcel of land as he did not have the ability to put up a building. That he was also not informed of the conditions of the allotment letter but had been told that he could construct. That he had sold the land so as to buy another piece of land in the rural area.

53. When examined by the court, he responded that he had recently bought ½ acre but did not have a title deed to show.

54. The next defence witness, Jackson Langat Kipkoech testified as DW3 to the effect that DW2 who was his brother had sold land plot No 100 to DW1 wherein after somebody had lay claim to the land. He confirmed that the land was near Kericho Township Primary and that DW2 had been given the land by the Government in the year 2012. That he had lived on that land since birth which land had no papers. That Hon. James Orengo the then Minister of Lands had visited them and given them given numbers wherein DW2's plot was no. 100. Thereafter the surveyor, had sub-divided the plots, and thereafter they had been shown their respective plots and beacons had been put on the ground. That his plot was No. 25 and nobody had lay claim to the same. He also confirmed that at the time DW2 had been given the land, there was a pit latrine besides the suit plot.

55. In cross examination, he had confirmed that he had witnessed the sale agreement that he was there when the beacons were placed but that they had not been issued with beacon certificates. That the pit latrine was outside the beacons. That he was not informed that the Plaintiff's land overlapped his brother's land.

56. In re-examination the witness confirmed that before DW2 was given the plot, he lived at home which was within the same area.

57. DW4, Annette Khancili Lichungu a Land Administration Officer in Kericho office since February, 2021 was referred to Df Exh.1 which she confirmed was a letter of allotment dated the 18th June 2012

and which had been issued to Andrew Kipyegon Langat. That the verification of the same could be done by the Director of Land Administrator based in Nairobi who had the records of allotment letters. That allotment was done by the Lands Commissioner who signed the letter.

58. That the National Land Commission was the custodian and that she could not verify the authenticity of Df Exh.1. She denied Andrew ever visiting their office for assistance regarding the letter of allotment.

59. In regard to Df Exh.5, she confirmed that the letter had been written to the lands officer on 28th January 2019 by Enoch A. Miruka Advocate requesting for confirmation of the allotee of the suit land, but she did not know if the same had been responded to.

60. The 2nd and 3rd Defendants having intimated to the court that they would not be calling any evidence, the defence case was marked as closed and parties were directed to file their written submissions.

Plaintiff's submissions.

61. After giving a summary of the evidence adduced in court the Plaintiff framed their issues for determination as follows;

    i. Whether the Plaintiff is the legal registered proprietor of the suit land and is entitled to the suit property as registered.

    ii. Whether the Defendants have trespassed on the Plaintiff's Property.

    iii. Whether the Plaintiff should be entitled to the reliefs sought in the Plaint

62. On the first issue as to whether the Plaintiff was the legal registered proprietor of the suit land and therefore entitled to the suit property as the registered, the Plaintiff relied on the provisions of Section 107 *Evidence Act* provides to submit that she had purchased the suit land from Kericho Municipality wherein she had been issued with an allotment letter and later issued with a title deed accompanied with a deed plan, in the year 1997. That her evidence was not rebutted by the defense but rather corroborated by the testimony of PW-2 Margaret Ruto as well as the 3rd and 4th Defendants who confirmed that he suit land No.631/1428, IR No. 76596 had a lease title registered in the Plaintiff's name.

63. That indeed the Plaintiff had produced a title deed to the suit land which was accompanied by an official search and which documents showed that the Plaintiff had been registered as proprietor of the land on the 24th December 1997, and her title therefore needed to be protected. Reliance was placed on the provisions of Sections 24(a) and 26 of the *Land Registration Act* as well as the decision in the case of Mary Njeri Mungai vs. Teket ole Munitet & Another [2018] eKLR.

64. The Plaintiff's submission was that nothing had been presented by the Defendants to prove that her title was tainted with fraud, illegality, malpractice and/or irregularity, save for alleging that the suit land 631/1428 and un-surveyed plot No. 100 were different lands and that he bought un-surveyed plot No. 100 from the Allotee, Andrew Langat. That the Defendant's never led any evidence to counter the Plaintiff's assertions on her title, use and occupation.

65. That since the Plaintiff held a good title there was need that it be protected as was held in the case of Joseph N.K Ngo'k vs. Justice Moijo Ole Keiwua &2 Others C.A No. 60/1997.

66. On the second issue as to whether the Defendants trespassed on the Plaintiff's Property and whether damages should be assessed, the Plaintiff submitted that pursuant to the evidence of DW1, he had constructed on his alleged un-surveyed Plot No 100. That he had also confirmed that indeed while taking possession of the said parcel of land he had found a pit latrine thereon. That this evidence was corroborated by the evidence of PW1 as well as the defense witnesses DW2 and DW3. That

the construction had been done without the issuance of a beacon certificate despite knowing the conditions issued with an allotment letter that:

> "if a plot is Un-surveyed, at the time you commence a building, you should exercise the greatest care to ensure that any building or works are contained within the Boundaries of the plot, for should you inadvertently over step the aforesaid Boundaries, the cost of your removal an reconstruction must be borne by you".

67. That DW1 did not in any way deny the averments by the PW1 together with her evidence that he had trespassed into the suit land. He had only introduced the un-surveyed plot No. 100 which he alleged was his property. That he had also confirmed that he had not bothered to find out whether there was an existing Lease and that was the reason why he had just constructed on what he knew as Plot No. 100.

68. The Plaintiff further submitted that there was no evidence from the Defendants that suit land 631/1428 or the beacons had been moved which clearly confirmed that there had been encroachment by the 1st Defendant into the Plaintiff's suit land suit land 631/1428. Reliance was placed on the Black's Law Dictionary 2nd Edition, Clerk & Lindsell on Torts 17th edition at Paragraph 17 and Section 3 (1) of the *Trespass Act*, which not only defined trespass but also lay down its elements, in support of their submissions.

69. That despite there having been orders via a Ruling of 3rd June 2020, which had directed the parties not to proceed with any development on the suit land, the 1st Defendant in his evidence had confirmed that he had finished construction on the same.

70. The Plaintiff relied on the decision in Alex Kihonge Mukoma vs. Joseph Nugi Mburu & 2 Others Civil Appeal No. 206 of 2012 to submit that the Defendant having not undergone survey process and being the owner of an un-surveyed plot could not assert that he was not illegally on another person's land. That there was uncontroverted evidence by the Plaintiff that the 1st Defendant did trespass into the suit land hence denying the Plaintiff an opportunity to access and/or develop the said parcel. That there had been semi-permanent houses which were brought down yet she had been collecting rent from them. The Plaintiff thus sought for compensation.

71. The Plaintiff then relied on the decision in Mrao Ltd vs. First American Bank of Kenya Ltd (2003) eKLR to submit that there existed a legal right which had apparently been infringed by the 1st Defendant. That it was trite law that trespass to land was actionable per se (without proof of any damage) as was held in Park Towers Ltd vs. John Mithamo Njika & 7 Others 2014 eKLR. The Plaintiff sought for general damages be assessed at Ksh. 1,000,000/- (One Million)

72. On the third issue as to whether the Plaintiff was entitled to the reliefs sought in the Plaint, the Plaintiff submitted that since she had acquired the suit land legally, she was thus entitled to enjoy, occupy and use her property without any interference whatsoever from the Defendants. She sought that the prayers in her plaint be granted.

The 1st Defendant's submissions

73. The 1st Defendant's submission was that it was the duty of the Plaintiff to prove her case on the balance of probability. That the Plaintiff had confirmed that she had obtained the lease of the subject parcel of land, but that she had not been in occupation having left the subject parcel of land for Nyakach, in the year 2005 or thereabouts with occasional incognito visits.

74. That it could not be true that she had tenants on the suit land as nothing had been placed before court concerning any temporally structures being on the suit land. The Plaintiff did not even produce

a current official search to confirm that she was still the lessee and neither did she call any witness from the Ministry of Land and Housing to produce the file confirming she was their lessee. That without an official search and a witness from the Ministry of land and Housing, the authenticity of the lease in her possession could not be vouched. That the register was the conclusive prove of ownership or leasehold.

75. The 1st Defendant further submitted that the Plaintiff did not produce the area map of the location together with a beacon certificate and no survey records were produced either and in the absence of production of these crucial documents, the lease by itself could not stand in support of her case.

76. That there was further no prove of payment of rates to the County Government of Kericho or the Rent payment to the National Government, these being annual mandatory payments by the lessee (Plaintiff) would in fact demonstrate the known land lessee. That no explanation of their non- production had been given and interesting enough the Plaintiff was not aware of the area her alleged parcel of land was situated or that the same had been repossessed by the Government and allocated to the landless people. All that she knew was that her land had not been affected athough there was none production of any evidence confirming such allegations.

77. The Plaintiff's land having been repossessed, she ought to have sued the entity that had repossessed it and not the beneficiary. That from her plaint it was clear that she was aware of the people to sue otherwise how she could explain the role of the Adjudication Officer in an encroachment dispute.

78. That the report produced by PW2 spoke for itself. According, to PW2, land parcel No. Kericho IR 631/1428 and un-surveyed No. 100 all existed in the Government records. That the ground report was however contradictory because according to PW2, the plots were of the same size but different shapes and overlapped each other. However looking at the Plaintiff's lease in comparison to the allotment issued to the 1st Defendant, the sizes were not the same as the 1st Defendant's land was bigger and the pieces of land were of different shapes yet there had been no explanation as to the extent of the overlap.

79. That were the simple and crucial areas that PW2 ought to have covered as an expert witness, she would have assisted the honorable court to precisely determine on the alleged encroachment if any.

80. That on the other hand, the 1st Defendant and his witness had testified on the process leading to the allotment. Dw2 had been allotted an un -surveyed plot No. 100 amongst other landless beneficiaries, as was confirmed by PW2.

81. The Plaintiff had not specifically pleaded and proved special damages together with general damages and lose of user. That she had never been in occupation of the suit land as there had never been any building, whereas the 1st Defendant and DW2 had obtained possession by virtue of the Government allotment letter .Their entry if any was sanctioned by the law.

82. That if there was any mess than it was the Government to blame but there was the emphasis placed that there was no way the 1st Defendant would have occupied the Plaintiffs entire parcel of land being that the parcels of land were not of the same size and shape.

83. Evidence had been adduced by DW2 that before taking possession of plot No. 100, there had been no buildings or structures and in fact he had cleared the bushes and commenced his activities before he sold the parcel of land to the 1st Defendant in 2017.

84. That in seeking injunctive orders there were three pillars which ought to be satisfied to wit;

    i. A prima facie case

    ii. Demonstrate irreparable loss /injury

iii. That a balance of convenience favors the party seeking the injunction.

85. That the Plaintiff had not proved any of the above pillars in an act of trespass in that she had not proved that the action by the 1st Defendant had impeded her the use and quite enjoyment of the said land. Indeed the evidence in court was that while her land measured 0.0312 Ha that of the 1st Defendant measured 0.05 Ha. There was no evidence adduced that the 1st Defendant was in possession of her land and neither had there been any evidence that she was in occupation either. That the Plaintiff had not proved and established the grounds to warrant her the grant of an injunction. That the Plaintiff's allegations were bare against the 1st Defendant hence the suit should be dismissed with costs.

The 2nd and 3rd Defendants submissions.

86. In support of their submissions, the 2nd and 3rd Defendant's framed their issues for determination as follows:

i. Whether the 2nd and 3rd Defendants are proper parties to the suit.

ii. Whether there is any reasonable cause of action against the 2nd and 3rd Defendants.

87. On the first issue for determination, the Defendants submitted that they were not proper parties to the suit herein as there was no cause of action against them. That Order 1 Rule 3 of Civil Procedure Rules and in the case of Gladys Nduku Nthuki vs. Letshego Kenya Limited: Mueni Charles Maingi (Intended Plaintiff) [2020] eKLR as quoed in Kingori vs. Chere & 3 Others 2 KLR 243, it had been made clear as to persons who may be joined as Defendants in a suit.

88. That as it was noted during cross examination, the Plaintiff had admitted to having no claim against the 2nd and 3rd Defendants. It was further noted that the Government records showed that the Plaintiff herein was the owner of the suit property and that the title was valid. What then was the role of the Land Registrar and Land Adjudication Officer in this suit?

89. That the court ought to be cognizant of the fact that judicial time was precious and must not be wasted in engaging parties against whom no relief was being claimed. That the participation of the Land Registrar and Land Adjudication officer was not necessary to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit. That indeed at no time had the Plaintiff in her pleadings mentioned the 2nd and 3rd Defendants or claim any relief against them and therefore they ought to be struck off from the pleadings as they have no role in the same.

90. On the second issue for determination as to whether there was any reasonable cause of action against the 2nd and 3rd Defendants herein, their submission was in the negative. Reliance was placed on the provisions of Order 2 Rule 10(a) of the Civil Procedure Rules to submit that the Plaintiff had not particularized any wrong or illegalities committed by the 2nd and 3rd Defendants but had only highlighted actions of the 1st Defendant.

91. Reliance was further placed on the decided case in Michael Kalani Muatha vs Kyalo Mwikya & Another [2022] eKLR to submit that it was unfair to drag a person into a seat of justice when the case brought against him clearly disclosed no action.

92. That the suit against them was vexatious, scandalous, frivolous as enumerated in Order 2 Rule 15(b) of the Civil Procedure Rules and the decided case in Trust Bank Limited vs. Amin Company Limited [2000] KLR 164 as highlighted in Kivanga Estates Limited vs. National Bank of Kenya [2017] eKLR.

93. That the Plaintiff's Plaint lacked merit and formed classical description of an abuse of due court process and therefore should be dismissed with costs.

Determination.

94. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law herein. I have also considered the uncontroverted facts herein to which that the bone of contention is the ownership of No.631/1428, IR No. 76596 visa vie un-surveyed Plot No.100, between the Plaintiff herein and the 1st Defendant.

95. The Plaintiff's case is based on the fact that pursuant to having been allotted parcel No. 346/1428, measuring 0.0312 hectares, land which was opposite Kericho Township Primary School within Kericho County via an allotment letter issued on 31st October 1991, she had subsequently been issued with a title deed on 12th May 1998. That she took possession of the suit land where she had built temporal rental buildings and a pit latrine with the plan of developing it later. That she had only been in possession of the suit land for almost two years, from the year 2005-2007 when in 2007there had been tribal clashes and the post-election violence, wherein she had fled to Nyakatch to await the situation to calm down. It was upon her return that she had found the temporal structures on her land had been demolished and there stood only the pit latrine. That someone, who happened to be the 1st Defendant was now constructing thereon. She had reported the matter to the police and had sought for help from the 2nd to 4th Defendants who had not assisted her and thus she had filed suit.

96. In support of her case, she had produced documentary evidence in form of:

    i. the original allotment letter issued on 31st October 1991 as Pf Exh 1,

    ii. the title deed issued on 12th May 1998 as Pf Exh 2

    iii. the receipt dated the 14th April 1992 for Ksh. 15,000/= for fees for assessment of allotment letter,

    iv. a receipt dated 27th January 1995 for Ksh. 1500/= for an Appointment of allotment letter and issuance of title,

    v. a receipt dated the 2nd February 1995 for Ksh. 1,250/= and another dated the 20th January 1993 for Ksh. 30,000/= as Pf Exh 3 (a-d)

97. She also called the County Surveyor – Kericho in support of her case who confirmed that pursuant to the court's order, she had visited the site on 20th September 2019 wherein they had found that plot No.631/1428 was overlapped with the un-surveyed plot No. 100. Their further findings was as followings;

    1. The two plots No. 631/1428 and un-surveyed plot 100 were of the same size 15mx30m

    2. The shapes were not the same

    3. No. 631/1428 had a deed plan and a surveyor plan

    4. Un-surveyed plot No. 100 was PDP No.223 R 22/2011/2

    5. No. 631/1428 had a lease title

98. The 1st Defendant's case was that he had purchased the Un-surveyed plot No. 100 for Ksh. 900,000/= via a sale agreement dated 24th August 2017 herein produced as Df Exh 4, from one Andrew Langat

(DW2) who had been issued with an Allotment letter dated 18th June 2012 herein produced as Df Exh 1. That DW2 had then given him a receipt for payment of rates dated 20th September 2012 produced as Df Exh 2, and a KRA PIN produced as Df Exh 3, wherein he had proceeded to construct thereon until the Plaintiff lay claim to the suit land.

99. Indeed DW2 and DW3 had confirmed that the un-surveyed plot No. 100 had been allotted to DW2 by the Government at that time plots were being allotted to the landless Talai community, wherein he had subsequently sold the same to the 1st Defendant.

100. Having laid the background of the matter in question, I find the undisputed issue as being that parcel No.631/1428 was overlapped with the un-surveyed plot No. 100 and whereas both the Plaintiff and DW2 had allotment letters to the respective parcels of land, the Plaintiffs allotment letter which was issued earlier was latter substituted with a lease and it is the one that takes priority as was held in the case of Wreck Motors Enterprises vs. The Commissioner of Lands and Others Civil Appeal No. 71 of 1997.

101. The issues that arises for determination herein are as follows;

i. Whether the letter of allotment conferred proprietorship to the 1st Defendant.

ii. Whether the Plaintiff is the registered proprietor of the suit land herein.

iii. Whether the 1st Defendant herein was a trespasser on land No. 631/1428 IR No. 76596.

iv. Whether the Plaintiff is entitled to the reliefs sought.

102. The Registration of Titles to a piece of land emphasizes on the accuracy of the land register so as to mirror all registerable interests that affect a particular parcel of land. The Government, as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration only the person affected is guaranteed of Government compensation.

103. An allotment letter as has been held by the courts time and again, does not confer ownership to land, but is just a letter of offer. Indeed a person holding an allotment letter has to proof that they have met the conditions stipulated therein to wit, paying the stand premium, rent, conveyancing fees, registration fees, stamp duty, survey fees, approval and planning fees as stated in the letter.

104. In the case of Philma Farm Produce & Supplies & 4 others vs. The Attorney General & 6 others (2012) eKLR, the court held as follows:

> " The Petitioners' claim is grounded on two letters of allocation of the suit properties. These letters do not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. It is in this respect that the Petitioner claim must fail..."

105. Further in Marcus Mutua Muluvi & Another vs. Philip Tonui & Another [2012] eKLR the court had also held as follows:

> " The applicants have no title to the suit premises. That being the case, I do not see the proprietary interest of their suit premises that have been infringed by the Respondent, their claim to the suit premises being anchored on letters of allotment."

106. In the case in Joseph Arap Ng'ok –vs- Justice Moijo Ole Keiwua NAI Civil Application No. 60 of 1997 the Court of Appeal observed as follows:

> 'It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document (my emphasis) pursuant to provisions in the Act under which the property is held.'

107. In the instance case, being merely in possession of the letter of allotment, it could therefore not be said that 1st Defendant herein had proprietary interest to the un-surveyed Plot No. 100 plot which overlapped parcel No. 631/1428 IR No. 76596 merely because he had in his possession a letter of allotment that had been issued 21 years after the initial letter of allotment had been issued to the Plaintiff. It cannot also be said that these were two different parcels of land as the unchallenged evidence of PW2 was to the effect that the coordinates of plots were in the same direction but one plot lay on top of the other.

108. The Plaintiff's case on the other hand was supported by the production of a title deed being No. 631/1428, IR No. 76596 together with a deed plan No 197492 .

109. The provision of Section 24(a) of the *Land Registration Act* No. 3 of 2012 outlines the interests and rights of a registered proprietor of land as follows;

> 'the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'

110. Section 25(1) of the *Land Registration Act* also stipulates that ;

> 'The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...'

111. The law is very clear on the position of a holder of a title deed in respect of land. Indeed Section 26(1) of the *Land Registration Act* provides as follows:

> " the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –
>
> a. On the ground of fraud or misrepresentation to which the person is proved to be a party
>
> b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

112. It will be seen from the above, that title to land is protected, but the protection can be removed and title impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

113. There was no evidence adduced to the effect that the Plaintiff acquired the suit land through fraud or misrepresentation or that her certificates of title had been acquired illegally, un-procedurally or through a corrupt scheme.

114. Indeed based on the evidence adduced herein above, and while relying on Section 26(1) of the *Land Registration Act*, we cannot ran away from the fact that the Plaintiff has indeed satisfied the legal provision that she is the proprietor of the suit land No. 631/1428, I.R. No 76596 and hence has absolute ownership including all rights and privileges appurtenant to it.

115. Having esblished that the Plaintiff was the proprietor of parcel No. 631/1428, I.R. No 76596 and that the un-surveyed Plot No. 100 had overlapped the said parcel of land, then it goes without saying that by embarking on constructing on the said parcel of land, without the Plaintiff's authorization and/or consent, the 1st Defendant was a trespasser on the said parcel of land.

116. Trespass has been defined by the 10th Edition of Black's Law Dictionary as;

> " an unlawful act committed against the person or property of another; especially wrongful entry on another's real property."

117. Section 3 (1) of the *Trespass Act*, also defines trespass as follows;

> " Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

118. The Court in John Kiragu Kimani vs Rural Electrification Authority [2018] eKLR also in defining trespass relied on Clark & Lindsell on Torts, 18th Edition on page 923 which defines trespass as;

> 'any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason'.

119. I find that the Plaintiff is indeed entitled to protection by the law from the 1st Defendant who interfered with her rights and privileges over the suit land. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of Park Towers Ltd vs. John Mithamo Njika & 7 others (2014) eKLR where J.M Mutungi J., stated:-

> 'I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case...'

120. In Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR the court held as follows:

> " The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See Hostler – vs – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).

121. In this case the Plaintiff has not adduced any evidence as to the state or the value of her property before and after the trespass. This makes it difficult to assess the special damages.

122. I have also considered the provisions of Order 1 Rule 3 of the Civil Procedure Rules which provide as follows:

> ''All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.''

123. Indeed in In Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd [1999] 1 EA 55 it was held as follows;

> ''A clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter....''

124. In this matter however, I find that although the 2nd, 3rd and 4th Defendants were joined to the suit, not because there was a cause of action against them but for reason that should there have been questions raised on the registration of the documents herein relied upon, as custodians of those documents, they would have enabled the court to effectually and completely adjudicate upon and settle all questions involved therein.

125. In Kenya Agricultural Research Institute (K.A.R.I) vs. Farah Ali, Chairman Isahakia Self Help Group & Another [2011] eKLR, Hon Judge R.P.V. Wendoh had held that section 13A is not applicable in a situation where a declaration is sought as follows;

> ''The third limb of the objection is that Section 13A of the *Government Proceedings Act* was not complied with. In my view, it is only the Commissioner of Lands who could have raised that objection and who can confirm whether or not the required notice to the Attorney General was served 30 days prior to the filing of this suit. The 1st defendant is not privy to the notice. In any event, under Section 13A (3) there is no requirement for notice where a party is seeking a declaratory order under Section 16(1) of the *Government Proceedings Act* is not couched in mandatory terms. It provides "that the court may". A prayer for injunction is not fatal to the suit. Besides, the words used being persuasive, it should be left to the court to decide whether or not to grant the prayer sought. The plaintiff seeks a declaration in the main suit. I find the objection to have no basis. For the above reasons, I find that the objection raised has no basis and is hereby dismissed.''

126. I thus find that since this was a suit where a declaratory order was sought, lack of service of Notice to the Hon Attorney General was not fatal in the circumstance.

127. I note that by a ruling made on the 3rd June 2020, the court had ordered as follows;

> ''Accordingly, I issue the following order for the purpose of maintaining the status quo. Both the 1st Respondent and the applicant and/or their agents, servants, assignees, employees or any other person acting at their behest or instructions be and are hereby restrained from conducting further or other activities, or selling, transferring, alienating, leasing, or in any way interfering with both land parcels NO L.R NO 631/1428, IR 76596 and/or un-surveyed plot NO 100 until this suit is heard and determined and/or until further or

other orders of the court. Further, the structures on the property whether belonging to 1st respondent or applicant are allowed to remain intact but no further or other developments should take place.

I consider that this order serves both sides well and will preserve the property pending determination of the case. In any case, it would be foolhardy of the 1st respondent or the applicant to conduct activities on the land while it is not clear at this stage how the issue of ownership will ultimately turn out to be, In my view, it would be imprudent use of money or resources to engage in such activities.''

128. That said and done I hold that the Plaintiff has proved her case on a balance of probabilities and is entitled to the prayers sought in the plaint. Consequently, I hereby enter judgment for the Plaintiff against the 1st Defendant in the following terms:

i. A permanent injunction is herein issued restraining the 1st Defendant jointly and severally acting by himself, servant and/or agents from trespassing upon, continuing to trespass upon or in any other manner, interfering with or continuing to interfere with the Plaintiff's rights and privileges as the owner of the parcel of land situated in Kericho Municipality in the Kericho County measuring 0.0312 of hectare, being Title No. LR. No. 631/1428, I.R. No 76596.

ii. It is herein declared that the Plaintiff is the absolute proprietor of parcel of land situated in Kericho Municipality in the Kericho County measuring 0.0312 of hectare, being Title No. L.R. No. 631/1428, I.R. No. 76596 and that the title in her possession is the genuine title.

iii. The 1st Defendant is herein ordered to give the Plaintiff immediate vacant possession of the property failure to which an eviction order do issue and the Officer Commanding Police Division (OCPD) Kericho do assist in enforcement of the Court Order.

iv. The Plaintiff is herein awarded general damages of Ksh. 1,000,000/= (One million shillings only) to be paid by the 1st Defendant within 30 days of the delivery of the judgement.

v. The Plaintiff had the burden of proof to place material before the court demonstrating how the amount that was claimed for special damages, if any, had been arrived at. (See Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others [2018] eKLR) She failed to do so and so the prayer for special damages is denied.

vi. Costs of the suit.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 2ND DAY OF MARCH 2023.

M.C. OUNDO

ENVIRONMENT & LAND, JUDGE