



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 14 OF 2015

EMMANUEL SATIA.....PLAINTIFF

VERSUS

YOHANA KEMBOI.....1ST DEFENDANT

HON. ZIPPORAH KITTONY.....2ND DEFENDANT

As Consolidated with

KITALE ELC No. 155 of 2015

Between

HON. ZIPPORAH KITTONY.....PLAINTIFF

VERSUS

EMMANUEL SATIA.....DEFENDANT

JUDGMENT

1. The Plaintiff sued the **1st Defendant** on **16/02/2015**, claiming to be lawful allottee of **Plot No. 957 Kitalale Settlement Scheme** (herein referred to as **Plot 957**). He averred that he was allocated **Plot No. 957** in the year **2000** onto which the Defendant trespassed on **27/12/2014**. He stated that the Defendant forcefully entered onto the parcel and started working on it thereby interfering with his quiet possession of and activities on it. He prayed for a declaration that he was the owner of the said parcel of land and that the Defendant had no proprietary interest on it. He also prayed for a permanent injunction against the Defendant, his servants and or agents from trespassing on, ploughing or in any other way interfering with his peaceful use and possession of the parcel of land.

2. He amended his Complaint on **25/07/2017** after the Court granted him leave on **17/07/2017** to do so. By the amendment complaint, he enjoined the Second Defendant who was the Plaintiff in **ELC No. 155 of 2015**.

3. Before then, the **1st Defendant**, by then sued as the only one, had filed a Defence on **12/04/2016** by which he stated that he had always been in occupation of **Plot No. 942 Kitalale Settlement Scheme** (herein referred to as **Plot No. 942**) of by virtue of being a worker of Hon. Zipporah Kittony whom he averred was the lawful owner of the said Plot. He stated that he never trespassed onto **Plot No. 957** which he pleaded belonged to one, Isaack Rotich. He then stated that the Plaintiff relied on forged documents to claim ownership of **Plot No. 957** which Plot was distinct and separate from **Plot No. 942**. He pleaded that it was the Plaintiff who instead had trespassed onto **Plot No. 942**. He prayed for the dismissal of the Plaintiff's claim.

4. Upon being served with the Amended Complaint, both the Defendant and the added Defendant filed a joint Amended Defence on **18/09/2017**. By it, in addition to the earlier defence, the **2nd Defendant** averred that she was the lawful owner of **Plot. No. 942** measuring **4.0 Ha** or thereabout. Both defendants denied ever laying a claim on the suit land (**Plot No. 957**) or trespassing thereon.

5. In regard to the consolidated suit, by a Complaint dated **08/12/2015** the Plaintiff (Hon. Zipporah Kittony) brought **Kitalale Civil Suit No. 155 of 2015**. In it she sued the Defendant (Emmanuel Satia) claiming that in or about **January, 2015** the Defendant (the Plaintiff in the lead suit) trespassed onto **Plot. No. 942** Kitalale Settlement Scheme in Trans Nzoia Court, measuring **4.0 Ha** or thereabout which belonged to her. She prayed for a declaration that the said parcel of land belonged to her. She also prayed for an order of eviction against the Defendant from the said parcel of land and a permanent injunction against him or anyone claiming through him from trespassing onto or doing any acts of commission or omission on the said parcel of land.

6. The Defendant entered appearance and filed a defence by which he denied ever trespassing on **Plot No. 942** or claiming it. On the other hand, he averred that he owned **Plot No. 957** onto which one Yohana Kemboi, the **1st** Defendant in this matter, had trespassed onto and the Court found him guilty of contempt of Court in **Kitalale ELC No. 14 of 2015**. On **21/06/2016**, this Court ordered the consolidation of the two suits but did not specify which one was to be the lead file. However, since the proceedings leading to the judgment herein were in **ELC No. 14 of 2015** it is taken to be that it became the lead file.

THE EVIDENCE

7. **PW1, Violet Wasike**, a Surveyor working with the Trans Nzoia County Survey office testified that upon receiving summons to verify the acreage and occupants of **Plot Nos. 942 and 957 Kitalale Settlement Scheme**, she, together with two other surveyors and the Settlement Adjudication Officer visited the ground in the presence of two village elders. She did so on **15/09/2019** in the presence of the Plaintiff and one Alex Kipsambu who represented the **1st** Defendant and the **2nd**. Her information as collected on the ground was that the Plaintiff owned **Plot No. 957** while Zipporah Kitony, the **2nd** Defendant, owned **Plot No. 942**.

8. She testified that she and her colleagues used the Registry Index Map (**RIM**) of Kitalale Settlement Scheme Phase **3** and other survey instruments to do their work. They verified the total acreage of **Plot No. 957** as being approximately **4.1 Ha**. They drew its sketch map which she produced as **P. Exhibit 1**. She testified that the **RIM** they used did not show **Plot No. 942** as bordering **Plot No. 957**. She produced as **P. Exhibit 2** the certified copy of the **RIM** used. She then testified that they never visited **Plot No. 942** since it was neither on the **RIM** nor did it border or was not near **Plot No. 957**.

9. Upon cross examination she stated that she did not know the owner of **Plot No. 942** but she stated that it may be on a different sheet (**RIM**). Her evidence was that the suit land was **Plot No. 957** and not **Plot No. 942**. She testified further that they did not bother to visit **Plot No. 942** as it was not the plot in question.

10. The Plaintiff, **Emmanuel Satia**, a lecturer at Moi University, testified as **PW2**. He stated that he owned **Plot No. 957** in Kitalale Settlement Scheme measuring approximately **4.0 hectares** which to him translated to **10 acres**. He testified that he was given an allotment letter thereto by the Provincial Settlement Officer in **2003**. The letter was dated **20/08/2000**. He produced it as **P. Exhibit 3**. He made the requisite payments thereon amounting to **Kshs. 12,000/=** and others. He attempted to produce the receipt but it was objected to for the reason that it had not been served upon the Defendant whereupon the Plaintiff was stood down to enable him file further documents.

11. Later, on **15/11/2021**, **PW2** continued with his testimony. He adduced evidence that the payment of **Kshs. 12,000/=** was for the title while the other payments were for processing it. The other payments totaled to **Kshs. 1,375/=**. He produced the Allotment letter as **P. Exhibit 3(a)** and the receipts as **P. Exhibit 3(b)**. He then closed his case.

12. The Defendants, though served did not attend Court. It appeared from the record that after service, the Advocates for the Defendants filed a "Notice of Cessation to Act" which is a document not known in law. Thus, in absence of both the Defendant and learned counsel, the defence was closed.

13. The Plaintiff then submitted by summarizing the evidence on record. He then relied on the case of **Joseph Kagunya v. Boniface K. Mulli and 3 others (Nairobi ELC No. 268 of 2003)**. In the matter, the learned trial judge stated that once land is allotted and the allottee meets the conditions therein, the land is no longer available for allotment since the allotment confers an absolute right of ownership except where it is challenged by the allotting authority or it is found to be acquired by fraud, mistake or representation or done illegally or against public interest.

DETERMINATION

14. The parties did not formulate the issues herein. Thus, upon careful consideration of the pleadings, the evidence and the submissions, the Court formed the opinion that the following were the issues for determination:-

a) Whether the Plaintiff was the owner of land parcel No. Plot 957 Kitalale Settlement Scheme;

b) Whether the Defendants trespassed onto Plot No. 957;

c) Whether an injunction should issue against the Defendants as prayed;

d) Whether the Plaintiff trespassed onto Plot No. 942 and if an injunction should issue against the Plaintiff as prayed in Suit No. 155 of 2015;

e) What orders to issue and who to bear the costs of the suits?

15. I set out to analyze the issues step by step. I begin with the first one.

a) Whether the Plaintiff was the owner of land parcel No. Plot 957 Kitalale Settlement Scheme

16. In the law of evidence, the guiding rule is that, unless otherwise provided for, he who alleges must prove the allegation to the required standard. Thus, the burden rests on the person who seeks the Court to make a finding in his or her favour about certain facts. The Plaintiff was obligated to prove the first three issues while the Defendants bore the burden of proving the fourth and fifth.

17. It regard to the ownership of **Plot No. 957**, **PW 2** testified on how in the year **2000** he was allocate the said Plot by the Provincial Settlement Officer. He received the Allotment letter dated **20/08/2006**. He made payments thereto as per the conditions on the letter. There were **Kshs. 12,000/=** and **Kshs. 1,375/=** for the title and its processing respectively. He produced as **P. Exhibit 3 (a)** and **(b)** the receipts evidencing the payments. This evidence was not controverted. Moreover, the Defendants pleaded that they did not lay claim onto the said Parcel of land. For this reason, and relying on the authority cited, I find that the Plaintiff proved that he was the lawful owner of **Plot No. 957**.

b) Whether the Defendants trespassed onto Plot No. 957

18. On the issue of trespass by the Defendants onto **Plot No. 957** as pleaded by the Plaintiff, **PW2** testified how the **1st** Defendant had, on the authority and instructions of the **2nd** Defendant entered onto the disputed parcel of land in on or about the **27/12/2014**. He started cultivating thereon. He then sued him, first and an injunction was issued against him. It is clear from the record that upon the order of the Court being issued, at one time the **1st** Defendant repeated the same activities of cultivating the said parcel of land and was found guilty of contempt of Court over the same.

19. **PW1** testified on that on **15/09/2016** she, together with two other officers, visited the disputed parcel of land. They used the RIM which she produced as **P. Exhibit 2** and other instruments of survey to locate the disputed parcel of land. It was the same parcel of land which was shown to them by both the Plaintiff and one Alex Kipsambu the representative of the Defendants. It is thus clear that since both witnesses identified the said parcel of land on the ground to be **Plot No. 957** and it is the same one the **1st** Defendant had cultivated on without permission of the Plaintiff, the Plaintiff proved the element of trespass onto the Plot.

c) Whether an injunction should issue against the Defendants as prayed

20. An injunction is an equitable remedy granted on a discretionary basis but upon proof of the elements requisite thereto. The Plaintiff has established that he is the legal owner of **Plot No. 957**. He has also established that the Defendants trespassed thereon without any colour of right. According to him the Defendant's activities on the said Plot deprived him of the use and quiet possession thereof.

d) Whether the Defendants trespassed onto Plot No. 957

21. It is trite law that he who alleges a fact proves it unless the law specifically shifts the burden to another person. Under **Section 107 (1)** of the **Evidence Act**, it is provided that, "*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*" The Defendants sued the Plaintiff in the consolidated suit, claiming that the Plaintiff trespassed onto **Plot No. 942** which belonged to the **2nd** Defendant. When the matter came up for hearing, the Defendant attended Court to adduce evidence in support of her claims. To the extent that the Defendant failed to give evidence in support of her case, her entire claim fails.

e) What orders to issue and who to bear the costs of the suits

22. Since the Plaintiff has succeeded in his claim against the defendants on a balance of probabilities in this suit, judgment is hereby entered for him against the defendants jointly and severally as follows:-

(a) A declaration be and is hereby issued that the Plaintiff is the rightful owner of land Parcel No. 957 Kitalale Settlement Scheme and the Defendants have no proprietary rights whatsoever over it.

(b) A permanent injunction be and is hereby issued restraining the defendants, their servants and/or agents from trespassing upon, ploughing or in any other way interfering with the Plaintiff's peaceful and quiet possession of land parcel No. 957, Kitalale Settlement Scheme.

(c) Costs of this suit and interest thereon.

(d) The Plaintiff's suit No. 155 of 2015 be and is hereby dismissed with costs to the Defendant therein.

DATED, SIGNED AND DELIVERED AT KITALE THIS 3RD DAY OF FEBRUARY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE