



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 50 OF 2017

BENSON W. KAOS & 72 OTHERS.....PLAINTIFFS

VERSUS

THE HON. ATTORNEY GENERAL & 85 OTHERS.....DEFENDANTS

JUDGMENT

INTRODUCTION

1. Vide a plaint dated **16/3/2017** and filed on the **17/3/2012**, the plaintiffs sought the following orders against the defendants:-

(a) A declaration that the inclusion of the defendant Nos. 7 - 86 herein in the list of beneficiaries to LR No. 13503/2 was fraudulent, illegal and corrupt since the said defendants were not vetted and qualified to get the land meant for members of Chepyuk Phase III Settlement Scheme

(b) An order that the register for the titles prepared in the names of the 7-86 defendants be rectified and the said titles cancelled and an order made that titles for the respective plots to which the plaintiffs are entitled be issued to the plaintiffs.

(c) An order that the defendants Nos. 7-86 do vacate the plots occupied by them in Patwaka Farm, and in default they and anybody claiming under them be forcefully evicted.

(d) That general and exemplary damages be awarded to the plaintiffs against the 1st to 6th defendants for the fraud.

(e) Temporary and permanent injunction

(f) Costs

(g) Interest

(h) Any other relief that this court may deem fit to grant.

PLEADINGS

The Plaint

2. In the plaint, the plaintiffs state that they are residents of **Cheptais Sub-County**, landless and unsettled members of **the Chepyuk Settlement Scheme in Mt. Elgon**. The plaintiff further averred that the government purchased **LR No. 13503/2** (known as **Patwaka Farm**) for the sole purpose of settling persons who had not benefited from land in the **Chepyuk Settlement Scheme Phase III** to the exclusion of people from elsewhere. The selection committee found **1732** persons deserving settlement. However a list of **195** people was forwarded to the County Land registrar Trans Nzoia by J.K. Rotich the **6th** defendant. Upon survey however the land **LR No. 13503/2** yielded **262** plots. A meeting was held on **28/2/2013** chaired by the County Commissioner Trans Nzoia at which the **6th** defendant presented a list of **236** persons which he purported to have received from the Deputy County Commissioner Cheptais. That list included people who allegedly did not originate from **Chepyuk Phase III Settlement Scheme** and who are now named as **7th- 86th** defendants. The Deputy County Commissioner Cheptais then forwarded an approved list of **262** people and who included the **1st-73rd** plaintiffs to the **3rd** defendant the County Commissioner Trans Nzoia. The plaintiffs aver that although they are included in the list the **7th- 86th** defendants are occupying their plots on the ground. They allege that some of the defendants had been paid by the government in lieu of resettlement. It is stated the inclusion of the

7th-86th defendants was fraudulent and they should not be allowed to benefit from the illegality committed by a section of the defendants. Titles for the said defendants have been prepared and they are ready for release to the detriment of the plaintiffs hence this suit.

The 1st - 6th Defendants' Defence

3. The 1st-6th defendants filed a statement of defence on 17/9/2019. They admitted that the government initiated a process of resettling identified squatters who could not be accommodated at the **Chepyuk Phase III**; that they were to be settled at the suit land through a recommendation of a task force led by a **Mr. Ouko**; that the defendants acted diligently and in good faith and the titles prepared were based upon receipt of a genuine list of identified beneficiaries after confirmation of due process. They also aver that the 6th defendant is improperly enjoined as a party in this suit contrary to **Section 12** of the **Government Proceedings Act** as the act committed by him were done in the cause of his duties as a public official.

The Plaintiffs' Evidence

4. The plaintiffs called two (2) witnesses who testified on their behalf on 9/12/2020. The 1st plaintiff witness was **Benson Wandiemba Kaos**. He reiterated the matters in the plaint. He stated that there was a vetting committee, the Cheptais Settler Committee chaired by the Deputy County Commissioner; that the 6th defendant conducted the survey work on the suit land; that the committee sent the list of the vetted persons comprising of 195 persons (**P. Exhibit 2**) to the County Commissioner Trans Nzoia West, the 4th defendant; that another final list was made of 272 persons (**P. Exhibit 3**) which included the plaintiffs. However that list was not used to allocate the plots. Another list which included the 7th-86th (**P. Exhibit 5**) defendants was used. Pw1 stated that the plaintiffs have not gotten the land yet the 7th-86th defendants have and prayed for an order of eviction and others.

5. **PW2, Omar Haji Salat**, testified that he is the C.E.O of the Strategic Food Reserve Trust Fund and adopted his statement dated 29/7/2019 as his evidence-in-chief in this case. His evidence is that he was the Deputy County Commissioner in Cheptais in 2015 to 2016 during the subject resettlement exercise and that the suit land was sought to accommodate the landless who were living in Cheptais Sub-County. He was the Chairman of the settler committee which identified the persons who qualified. However he stated that there were two (2) committees reporting to the County Commissioner Trans Nzoia. He admitted to having written **P. Exhibit 2** which according to him was received by County Commissioner Trans Nzoia on 9/4/2015 comprising a list of 195 beneficiaries. He admitted that later the list was updated by his committee as per **P. Exhibit 3**. However a task force known as Ouko Task Force was created which combed and found 40 double allocation and 23 vacant plots; these were then allocated afresh and the ensued list of 256 persons plus commercial plots and public utilities forwarded to the County Commissioner. The commercial plots had no numbers. J.K. Rotich was the surveyor. **PW2** signed his list on every page to ensure there was no alterations. He maintained that the 256 member of the list were selected by the settler committee in a public baraza. However the list was not forwarded for allocation purposes and he has no idea where the new list came from. According to him he never dealt with those people who were not in his list and the list which was used to generate the titles in the suit land was not signed. According to him the complaint arose from those who missed out on allocation and some people were denied access to their plots.

The Defence Case

6. On 27/1/2021 the parties recorded a consent as follows:-

- (1) **The letter dated 14/12/2016 be produced as "D. Exhibit 1".**
- (2) **The area list for beneficiaries of Trans Nzoia/Patakwa Scheme (DMFI-1) be produced as "D. Exhibit 2".**
- (3) **The conversion list of Patakwa Settlement Scheme be produced as "D. Exhibit 3".**
- (4) **That the defence case of the 1st-6th defendants be marked as closed.**

7. The defence case was marked closed at this stage.

8. The defence case of the 7th-83rd defendants was deemed closed on 27/1/2021.

SUBMISSIONS

9. The parties were directed to file submissions on 27/1/2021. The plaintiffs' submissions were filed on 23/2/2021. I have perused the court record and found no submissions for the 1st-6th defendants.

DETERMINATION

10. I have considered the pleadings, the evidence and the filed submissions. The issues that arise in this suit are: -

- (a) *Which between the two lists presented for registration is genuine?*
- (b) *Who are the rightful persons entitled to benefit from Patakwa settlement scheme?*
- (c) *Should the plaintiffs be awarded both general and exemplary damages and if so, how much?*

(d) What Orders should issue?

11. Before delving into the above issues, it is worth noting that the 7th to the 86th defendants did not file any defence within the stipulated time or at all as required of them by law to enable them ventilate their issues before this court. Thus the claims by the Plaintiffs against them are uncontroverted for lack of any defence or defence and counterclaim filed by them or on their behalf. From the record, there were attempts of personal service by a process server upon the said defendants however there was hostility on the ground as evidenced by an affidavit sworn by the process server. The hostility forced the Plaintiff to apply in court to effect process by substituted service by way of advertisement in the local dailies; which was done as evidenced by publication dated 12/3/2018 and further by an affidavit of service sworn by **Peter Kiarie Ndarwa** dated 18/4/2018. This court finds that the 7th to 86th defendants were served but failed to come forth to defend their case to enable them have their day in court as provided by **Order 7 Rule 1** of the **Civil Procedure Rules**. They slept on their right to be heard in line with the rules of natural justice.

12. The issues are discussed as hereinbelow:-

(a) Which between the two (2) Lists presented for Registration is genuine?

13. The plaintiffs claim is that they were locked out in the allocation of the land which was meant to settle the landless persons who were initially residing at Chepyuk. They also claim that the land which they were supposed to be given was allocated to the 7th-86th defendants who they claim were not among those who were from Chepyuk and were not vetted to ascertain if they qualified to be allocated land, but were strangers who came from Kericho. **PW1** testified that in a bid to settle the landless people, there was a Committee which was formed to establish who qualified to be allocated land; that the Cheptais Settler Committee convened a meeting at Cheptais which was presided by the Assistant County Commissioner when the vetting of those deserving the allocation was done. After deliberations through a series of meetings, the Settler Committee came up with a list of deserving persons for settlement which comprised of **256** individual persons and **6** public utilities and/or amenities totaling to **262** allocations. However, the list that was approved by the Assistant County Commissioner was not used by the Land Registrar to allocate land. Instead, another list whose source was unknown to the Plaintiffs and to the Assistant County Commissioner which excluded them and introduced the 7th-86th defendants was used to allocate land and titles were prepared in their favour awaiting dispatch. The plaintiffs state that they have been displaced by the 7th- 86th defendants and locked out whereas they are the rightful people allocated land by the Settler Committee having been vetted and found legible for allocation by the Settler Committee. According to the Plaintiffs, the list which was presented by the Settler Committee for subdivision and subsequent registration was the final one which comprised of the Plaintiffs (produced as **P. Exhibit 3**).

14. **PW2** confirmed that the final list comprised of the **262** allocations and he signed on each and every page to ensure that no alterations were made to the final list; that the area list which was produced by the 1-6th defendants confirms that there were **262** beneficiaries who were to be issued with titles and consequently occupy the area so allocated to them as per the conversion list which was produced as **D. Exhibit 3**.

15. There is no doubt that the Land Registrar Trans-Nzoia County received the list so called the original list as referred by the plaintiffs. The list contains the signature of the Land Registrar confirming that the same was certified as a true copy of the original. This logical conclusion is that the list that is in the record for allocation of the suit land is the original list that contained the names of the plaintiffs herein and it was presented to the Lands Registry for the registration of titles. The same list tallies with the one **PW2** signed.

16. The Plaintiffs claim that the titles were then issued by the land registry but they were not among those who were issued with titles; instead, the 7th-86th defendants got titles and subsequently took occupation of the respective areas as allocated to them by the surveyor.

17. A close scrutiny of **P. Exhibit 2** and **D.Exhibit 3** confirms without any doubt that indeed the names of the 7th-86th defendants are missing.

18. The questions that beg are:

(a) If at all the list that was forwarded by the Assistant District Commissioner to the land registry for registration was P. Exhibit 2 which tally with D. Exhibit 1 and corroborated by D. Exhibit 3, then why were the 73 Plaintiffs not given the titles and vacant possession of the land whereas they had been vetted by the Cheptais Land Allocation Committee and found fit for allocation?

(b) Where did the names of the 7th-86th defendants come from whereas they were not in the approved and signed list?

(c) How were 7th-86th defendants able to get titles and occupation of the land?

(d) Which criteria was used by the Land Registrar to allocate them land?

19. The plaintiffs claim that the 7th-86th Defendants are relatives of some of the beneficiaries who come from Kericho and were not settlers from Chepyuk. The defendants have not come forth to rebut the allegations by the Plaintiffs. I am therefore left with no option but to believe on the evidence of the plaintiffs.

20. He who alleges must prove. Basing on the overwhelming evidence adduced by the Plaintiffs, it is my considered view that the list that was produced by the plaintiffs as **P. Exhibit 2** is the genuine list of those who were fit to be allocated the suit land. It was the duty of the 7th-86th defendants to prove the contrary. However they blatantly and voluntarily refused to present their defence before this court when they knew of the existence of the case. This court therefore finds that **P. Exhibit 2** was the genuine list and it affirms so.

21. How and why the plaintiffs were left out from being issued titles and possession of the land and the 7th-86th defendants issued titles in their stead remains a mystery. The plaintiffs claim that the 7th-86th defendants were allocated land through a fraudulent scheme which was carried out with the knowledge of the 1st-6th defendants. There is no doubt that the 7th-86th defendants were issued with titles because they are in actual occupation of the land whereas the 73 Plaintiffs are not in occupation of the land. The logical conclusion is that there was a fraudulent scheme plotted by administrative officials to lock out the plaintiffs and forcefully settle the 7th-86th defendants on the land instead of the plaintiffs. The Land Registrar did not come to court to shed light on this issue. Being the custodian of government documents in relation to this suit land, he should have. It is my considered view that there was fraud which locked out the plaintiffs out of the process at some point and brought in the defendants. The titles issued in favour of the 7th-86th defendants were a result of an illegality and are candidates of cancellation.

22. **Article 47 of the Constitution of Kenya** guarantees the right of fair administrative action to all as it was held by the Court of Appeal in **Onyango Oloo -vs-Attorney General (1989) EA 456:**

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly, and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principles of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...”

23. In this case, the plaintiffs were denied fair administrative action contrary to the principles of natural justice. This is so because the 5th defendant has not adduced any evidence to prove that indeed the list he relied on when issuing titles was the one presented by Assistant County Commissioner and it is obvious that it was not. She does not in the defence address the issue; what are contained in the joint statement of defence are only denials of the averments of the plaintiffs. The 5th defendant ought to have come to court to tell what list and criteria was used to allocate and issue titles if she did not rely on the list produced by the plaintiffs and the source of the names of the 7th-86th defendants who have been issued with titles which are now pending dispatch.

24. In **Dry Associates Ltd vs Capital Markets Authority & Another Petition No. 328 of 2011** the court held that:

“Article 47 of the Constitution was intended to subject administrative process to constitutional discipline hence relief for administrative grievances is no longer the realm of common law or judicial review ...but is to be measured against the standards established by the constitution...”

25. It was the responsibility of the 5th defendant to accord fair administrative action to the Plaintiffs by issuing them with titles and that of the 2nd, 3rd and 4th defendants to ensure that the persons who took occupation of the land were eligible for the allocation. Instead, the plaintiffs were shortchanged when the 7th-86th defendants were allocated the land which was rightfully their entitlement under the vetting process. I say so because the titles have already been issued in favour of the 7th-86th defendants and the same are only awaiting to be dispatched; that is why the Plaintiffs sought a temporary injunction and stoppage of the dispatch of the titles to the defendants which the court allowed pending the hearing and determination of this suit. Secondly, and without any doubts, the 7th-86th defendants are among those who are in occupation of the land in place of the plaintiffs. Clearly, the plaintiffs have been deprived of their right to own and enjoy their proprietary rights over the suit land by failure of the 2nd-6th defendants to exercise fair administrative action to the plaintiffs.

(b) *Who are the rightful persons entitled to benefit from Patakwa Settlement Scheme?*

26. As discussed above, and this court having found that the genuine list is **P. Exhibit 2**, then the answer to this issue is that the plaintiffs and the rest who are in the list are the rightful persons to have been allocated the suit land. The 7th-86th defendants therefore have no right over the suit land and must vacate the said land to leave vacant occupation of the land to the plaintiffs.

(c) *Should the Plaintiffs be awarded both general and exemplary damages and if so, how much?*

27. The Plaintiffs have sought for both general and damages against the 1st-6th defendants for fraud.

28. In the case of **Victoria Laundry (Windsor) Ltd Vs. Neman Industries Ltd; Coulson & Co. Ltd (Third Parties) [1949] 2KB 528**, the court held thus:

“It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position so far as money can so as if his rights had been observed”.

29. On the award of damages, the court determines what is appropriated based on the circumstances of the case. This was stated in the Court of Appeal in the case of **Gitobu Imanyara & 2 Others -vs- Attorney General [2016] eKLR** when it held:

“...it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate

determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement, which can go a long way in effecting reparation of the breach, if not doing so all together. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

30. Article 23 (3) of the Constitution empowers the court to grant appropriate relief, including an order of compensation. The award for general damages is however at the discretion of the court and is dependent on the circumstances of each case and what is appropriate and just.

31. In the instant case, the plaintiffs were to take up occupation of their respective portions in the suit land in **2016** but due to the illegal and fraudulent allocations and occupation by the **7th-86th** defendants, they have not been able to settle on their portions. Commonsense dictates that some of the plaintiffs if not all have families who were to settle on the suit land; and for the reason of having been deprived the right to occupy the land, they were forced to rent houses to provide shelter for their loved ones and accord them decent life. That translates to expenditure which would not have been incurred by the plaintiffs if they were in occupation of their lands. They (the plaintiffs) must have suffered a degree of injury and loss due to the acts of the **2nd-6th** defendants which amount to a violation of their rights. They are therefore entitled for compensation for such loss. However, it is noteworthy that they are on the land and their presence thereon is by the doing of the **1st-6th** defendants who authorized them to be on the land. However, they must have known that they are illegally on the suit land, having not been vetted as required. Nevertheless, it is now over seven years since the vetting exercise was done. The date of taking possession by the **7th- 86th** defendants was not given but it is admitted they are in possession. The extent of development on the ground was also not availed to this court. It is clear that the **7th - 86th** defendants will be affected by this judgment but they must bear the consequences of failing to answer to this suit, and for the illegality committed in settling them on the suit land.

32. The upshot of the foregoing is that in my considered view the plaintiffs have established their case on a balance of probabilities against all the defendants. I therefore enter judgment in favour of the plaintiffs against the defendants.

(d) What orders should issue?

33. Consequently I issue the following final orders:

(a) Prayers (a), (b), (c) and (e) in the plaint dated 16/3/2017 are hereby granted.

(b) Prayer (d) is also granted only to the extent that each and every Plaintiff is awarded general damages of Kshs. 50,000/= to be borne by all the defendants jointly and severally.

(c) The costs of the suit shall be borne by the all the defendants jointly and severally.

It's so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 27th day of May, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.