



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 64 OF 2015

DAVID WERE WAFULAPLAINTIFF

VERSUS

TITUS KIPKOSGEIDEFENDANT

JUDGMENT

The Plaintiff's Case

1. The plaintiff commenced this suit vide a plaint dated 13/5/2015 seeking the following orders:

- a. **An injunction restraining the defendant, his servants workmen and agents from entering on and/or from erecting or causing to be erected thereon any structures or from in any way interfering with the plaintiff's use and enjoyment of the plaintiff's said property;**
- b. **An order of eviction from the said premises;**
- c. **Damages;**
- d. **Interest thereon**
- e. **Costs of this suit**
- f. **Any other relief the court deems fit to grant.**

2. Claiming to be the owner of the plot known as **Plot No. 29** in Sibanga Market the plaintiff pleads that the defendant has trespassed upon the said property and damaged the perimeter fence and erected structures thereon hence this suit.

The Defendant's Defence

3. The suit is opposed. The defendant filed his defence on **11/6/2015**. In his defence he states that he was allocated the suit land by the Nzoia County Council, that he thus owns the plot, and that he is in possession thereof.

The Plaintiff's Reply to Defence

4. The plaintiff filed a reply to defence on **19/6/2015** and reiterated the matters in the plaint.

Hearings

5. This suit was heard on the **24/7/2018**, **19/9/2018**, and **11/3/2019**. Thereafter, the court ordered the parties to file final submissions and the plaintiff filed his on the **2/5/2019** while the defendant filed his on **10/5/2019**.

The Plaintiff's Evidence

6. PW1 Emmanuel Mutange the county surveyor Trans Nzoia testified on the **24/7/2018**. His evidence is that plot number 29 is on the development plan prepared in 1991 in respect of the area the suit land is located in and that it is a commercial plot. He further testified that **Plot No. 89** could not be located on the map. However he also testified that the plots may have been planned but not surveyed and that it is upon final survey the plot numbers would change.

7. PW2, Pascal Nyongesa In-Charge of the Land Registry, Trans Nzoia County, testified on **24/7/2018**. His evidence is that the plaintiff owns the suit land. He further testified that letters of allotment in respect of the land in the area were issued alternately by the County Council of Trans Nzoia and the National Government through the Ministry of Lands. However the allocations by the county council of Trans Nzoia could be annulled at any time. He also identified receipt of land rates for the plot from the plaintiff. He is also not aware of the existence of plot number 89.

8. PW3 David Were Wafula, the plaintiff, testified on **24/7/2018**. He stated that he is the chairman of the Sibanga Market; that he has held such position for **20** years as at the time of hearing; that he had fenced his **Plot No. 29** but the fence was removed; that **PEXh 2** was the letter of allotment given to him by the government; that he then paid **Kshs. 4,160/-** at the county council upon which he was shown the plot by a surveyor and he had the plot fenced by his son which was later removed and his plot split into two portions and he was left with a portion measuring **25 by 100 feet**; that he reported to the police who advised him to sue. His allocation was not temporary and from **1991 to 2015** no-one has ever laid claim on the suit land. On cross examination however he conceded that he was given plot number 88 upon application as seen in **PEXh 6(a)**. Asked on cross examination as to why he paid for the allocation late, he simply averred that no-one had ever prevented him from payment on the ground of lateness.

9. PW4, Bernard Wafula testified on **19/9/2018**. His evidence is that the plaintiff is his father; that plot 29 was given to him about 1991-1992; that he was to inherit the suit plot from his father; that when he fenced in in 2016 the fence was subsequently uprooted; that the defendant only claimed the plot when he fenced it; upon cross examination he averred that he was allocated the plot measuring 50 by 100 feet around 1991, 1992, 1993; that his father gave him the plots without any documents.

10. PW5 Salome Were testified on **19/9/2018**. Her evidence is that she sold the plaintiff, her husband, an application form in **1993**; that she issued him with a receipt; that he paid for the suit land; that the plot is 50 by 100 feet and that there was no double allocation to the defendant. When cross examined by Mr. Wanyama she stated that the allocation was done before survey. The end of the evidence of **PW5 Salome Were** marked the close of the plaintiff's case.

The Defendant's Evidence

11. DW1 Titus Kipkosgei, the defendant, testified on **11/3/2019**. His evidence is that he has no interest in **Plot No. 29**; that he only occupies **Plot No. 89** allocated to him by the Nzoia County Council, that he was issued various documents in evidence of that allocation; that his father takes care of the suit land; that when the plaintiff began harassing his father he came and fenced the plot. That the plot used to be 72 by 100 feet, that the surveyor divided it into 3 parcels; that the defendant owns the middle part; that the plaintiff's portion is located beside his; that the plaintiff has other plots at the market. Upon cross examination the defendant stated that the cancellation on the letter of allotment that he produced was not done by him but by the issuing office when his father took it back for rectification. He however denied knowledge of one Timothy Ngimor whose name was cancelled and which also appears on **DEXh 2**, the bill/receipt for plot application fees. He also stated under cross examination that before the end of the defunct Nzoia County council they promulgated the intended repossession of all the undeveloped plots.

Determination

12. Issues for determination.

a. Do the numbers 29 and 89 refer to one and the same plot at Sibanga market?

b. Who is the rightful allottee of the suit land?

c. What orders should issue.

a. Do the Numbers 29 and 89 refer to one and the same plot at Sibanga Market?

13. Both parties had an uphill task in proving their respective claims in this suit.

15. The defendant on the other hand does not produce any map of the land he purports to own. However both parties produced documents which appear to be genuine and which were issued by the County Council of Nzoia and the County Government of Trans Nzoia.

16. The parties' respective documents do not show any dimensions of the land they represent. However it is evident that the plaintiff's documents are quite old. Some have the **Plot No. 29** on their face. Others have none. I am not convinced that the number "**88**" appearing on **PEXh 6(a)** refers to a plot number as no evidence supports that theory.

17. The plaintiff's letter of allotment does not have the annexure mentioned thereon. It refers to a **Plan No. 71335/35**. In contrast **PEXh 1** bears the number **847/81/1**. Owing to the dearth of evidence to that effect, I am unable to positively identify **Plot No. 29** on that draft plan as the one mentioned in the plaintiff's letter of allotment which mentions a different plan. **PW1** admitted that after survey the plot numbers undergo a change.

18. Having considered all evidence from both parties, I can not also with certainty state that I have seen any evidence of any survey exercise alleged by the defendant in these proceedings. Therefore, it can not be said whether the **Plot No. 89** that the defendant claims to own emanates from the survey he claims was done on the land. However the plot numbers appearing on the receipts and bills issued by the County Government of Trans Nzoia and the defunct County Council of Nzoia are testimony to the existence of two separate plots.

19. I do not consider the evidence of **PW1** as helpful in this case as the plan he produced as **PEXh 1** was not approved by the Commissioner of Lands and the Director of Physical Planning.

20. It is unsafe to conclude that the map or plan produced as **PEXh 1** refers to Sibanga market and that the **Plot No. 29** mentioned in the plaintiff's letter of allocation is the same plot appearing thereon.

21. I am for the above reasons convinced that **Nos. 29** and **89** refer to different plots at Sibanga market, and, going by the recent receipts issued to the plaintiff and the defendant, the County Government of Trans Nzoia recognizes them as valid plots and even accepts payment of rates in respect thereof.

b. Who is the rightful allottee of the suit land?

22. I have found that the **Plot No. 29** is different from **Plot No. 89**. I must therefore find that each person is entitled to the plot whose number corresponds to the numbers on his receipts and letter of allotment.

23. In this regard I believe that the defendant's letter is expressly issued in respect of an identifiable plot allocated to him by the County Council of Nzoia. I can not say the same regarding the plaintiff's letter of allotment.

24. However as the plaintiff's own evidence was that both the County Council of Nzoia and the national government were mandated to issue letters of allotment in respect of plots at the market, I have no reason to doubt that the defendant's letter of allotment is not genuine.

c. What orders should issue

25. This suit was filed by the plaintiff seeking injunction and eviction orders against the defendant. The plaintiff has failed to prove on a balance of probabilities that the defendant has trespassed on a plot baptized **Plot No. 29 - Sibanga** market. Orders of injunction and eviction can not issue in these circumstances. The plaintiff's claim against the defendant must therefore fail.

26. The upshot of the foregoing is that the plaintiff's suit against the defendant fails and it is hereby dismissed with costs to the defendant.

It is so ordered.

Dated, signed and delivered at Kitale on this 8th day of July, 2019.

MWANGI NJOROGE

JUDGE

18/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi for Plaintiff

N/A for the Defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

18/7/2019