



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

E.L.C APPEAL CASE NO.259 OF 2017

1. JONATHAN KITUKU MUNGALA
2. DIMITILA NDUNGE WATHOME
3. ENOCK NGUMI MUKUA
4. RAEL M. KITUKU
5. ELIZABETH MULOLO
6. ROSE ATIENO
7. JACKSON MULATYA
8. DAMARIS NGEKA
9. ANGELINA NYAMAI (Members of Benhen Self Help Group).....PLAINTIFFS

VERSUS

THE DISTRICT COMMISSIONER OF KIBWEZI.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

J U D G E M E N T

1. The Plaintiff's herein are members of the secretariat and/or management Committee of Benhen Self Help Group. They have brought this suit against the two Defendants vide their plaint dated 28th September, 2009 and filed in court on even date.

2. They have averred in paragraphs 6 and 7 of their plaint that through financial support from the Danish International Development Agency (DANIDA) Benhen Self Help Group (hereinafter referred to as the Self Help Group) acquired The Makueni Small Holder Irrigation Project (MSIP) Guest House situated within plot No.293 Kibwezi Market in the then County Council of Makueni, a plot which the Self Help Group says is its property. That sometimes in the month of June, 2009, the 1st Defendant either by himself, agents and/or servants entered, trespassed, interfered and/or started dealing with the Plaintiff's plot number 293 Kibwezi by wrongfully and unlawfully stationing administration officers (sic) at the entrance of the aforementioned plot thereby hindering the smooth operation and/or running of its premises. They therefore pray for judgment against the Defendants jointly and severally for: -

(a) A declaration that the Plaintiffs are the lawful and bonafide owners and therefore entitled to occupation, possession and in any way whatsoever to enjoy the proprietary rights of Plot No.293 at Kibwezi market within the County Council of Makueni and all the developments thereon.

(b) A perpetual injunction restraining the Defendants either by themselves, their agents, servants and/or otherwise whatsoever from entering, occupying, trespassing and/or in any manner acquiring Plot No.293 in Kibwezi within the County Council of Makueni and all the developments thereon.

(c) An order that Defendants do accordingly pay the whole of the income lost during the unlawful occupation.

(d) Costs of this suit.

(e) Any such other or further relief as this Honourable Court may deem fit and just to grant.

3. The claim is denied by the Defendants vide their joint statement of defence dated 13th May, 2010 and filed in court on 21st May, 2010.
4. The 3rd and the 5th Plaintiff's testified on behalf of their Co-Plaintiffs. Both adopted their witnesses' statements filed in court on 12th April, 2018 as their evidence in chief.
5. Their case was that the Self Help Group was formed in the year 2004 and that it is registered under the then Ministry of Home Affairs. They produced the Self Help Group's certificate of registration as P.Exhibit No.1. That the group has a ratified constitution (P.Exhibit No.3). That plot number 293 belongs to it. That the plot initially belonged to DANIDA. That the group wrote a proposal to DANIDA whereupon it was allowed to make use of the structure on 12th November, 2004 vide the letter produced in evidence as P.Exhibit No.4. That the Ministry of Agriculture wrote to the group on 25th August, 2005 (P.Exhibit No.5). It was also their case that Makueni County Council later claimed ownership of the land even though the Council disowned the structures that were on the ground. This made the Self Help Group to apply for the plot allocation from the Council.
6. The Council demanded for site map from the Self Help Group.
7. They produced the Council's minutes of 01st July, 2008 that allocated the land to the Self Help Group as P.Exhibit No.6. That on the 26th September, 2008, the Council held another meeting and vide resolution No.03/08, the Council adopted the minutes of the meeting held on 01st July, 2008. The two witnesses produced the latter minutes as P.Exhibit No.7. That they paid fees for the plot allocation as can be seen from a bundle of five receipts marked as P.Exhibit No.8. That the Self Help Group was issued with an allotment letter (P.Exhibit No.9) by the County Council the same being dated 04th November, 2008.
8. After allotment, the Self Help Group embarked on the process of developing the plot. It installed new wardrobes, beds, mattresses of high density, re-roofed the tiles and other accessories. The Self Help Group later wrote to the Commissioner of Lands for issuance of lease through Makueni County Council vide a letter dated 26th February, 2009 (P.Exhibit No.10).
9. The Plaintiffs went on to say that they caused their advocate to write a demand letter to the District Commissioner Kibwezi to vacate the Self Help Group's facility (See P.Exhibit No.11). They also issued a statutory notice to the Attorney general dated 14th July, 2009 (P.Exhibit No.12). That the Self Help Group had approved building plans (P.Exhibit No.13) from Makueni County Council.
10. The 1st Plaintiff's evidence in cross-examination by Ms. Nyawira for the Defendants was that the plot was given to the Self Help Group by DANIDA. He said that he later learnt from the personnel of the County Council that DANIDA had been allowed by the Council to construct the structure. That the letter dated 25th August, 2005 (P.Exhibit No.5) from the Ministry of Agriculture allowed the group to occupy the guest house that DANIDA constructed. He said that he could not tell if the Ministry of Agriculture allocated the plot to DANIDA. That plot No.293 that the Self Help Group claims is next to Matezewa residential plot in Kibwezi town. He said that he did not have the area map to plot number 293. That when the County Council informed the Self Help Group that the plot belonged to it, the group was forced to request to be allocated the plot. He however had no copy of the letter in question. He admitted that the minutes of 26th September, 2009 from the County Council do not refer to plot No.293. He further admitted that the receipts (P.Exhibit No.8) do not indicate the plot number. He admitted that the Self Help Group paid Kshs.3,000/= for the plot before it was allotted to them as can be seen from the receipt dated 18th February, 2008.
11. His evidence in re-examination was that even though the plot had not been allocated to the group, the purposes of payment of Kshs.3,000/= was for plot application.
12. On the other hand, the Defendants' case was as presented by Patrick Muriira (DW1), the Deputy County Commissioner, Kibwezi Sub County. Muriira (DW1) adopted the statement that he recorded on 18th July, 2018 as his evidence. He also produced a copy of the report dated 20th August, 2009 by the District Commissioner Kibwezi as D.Exhibit No.1.
13. Muriira's (DW1) evidence in chief was that the guest house that was constructed on the suitland was a joint venture between DANIDA and the Ministry of Agriculture. That it was constructed on a public utility which forms part of a larger parcel of land occupied by the Ministry of Agriculture and that the same has never been under the authority of Makueni County Council and hence the latter had no authority to allocate it to private parties. That plot number 293 has no relation whatsoever with the plot where the guest house is situated. That the guest house now houses the District Agricultural offices which serves the entire population in Kibwezi Sub County.
14. Muriira's (DW1) evidence in cross-examination by Mr. Mutune was that he could not tell if the Self Help Group exists on the ground. He said that he could not confirm if the Self Help Group has a plot in Kibwezi town.
15. By the time of writing this judgment, it is only the Defendants' Counsel who had filed her submissions. The Counsel framed three issues for determination namely: -

a. Whether the Danish International Development Agency (DANIDA) had the capacity to transfer the suitland;

b. Whether the Plaintiffs have any proprietary rights over the suit property?

c. Whether the Plaintiffs are entitled to the prayers sought?

16. Regarding the first issue, the Counsel submitted that the letter dated 25th August, 2005 (P.Exhibit No.5) produced by the Plaintiffs does not indicate that DANIDA had any intention of transferring the plot to the Plaintiffs when it handed over the guest house to them. That the guest house remained the property of the Ministry of Agriculture which had allowed DANIDA to use it for the promotion of agricultural activities in the district. That from the evidence of DW1, the guest house is located within part of a large parcel of land which is public land occupied by the Ministry of Agriculture.

17. I concur with the Defendant's Counsel in that there was no evidence on record by the Plaintiffs on how DANIDA acquired the plot where the guest house was constructed. Suffice it to say, the Plaintiffs did not rebut the Defendant's evidence and as such, there was no way DANIDA could have transferred proprietary rights or interests to the Plaintiffs over the plot.

18. Regarding the second issue, the Defendant's Counsel submitted that the Plaintiffs did not mention any allocation of the disputed parcel number 293 by the County Council of Makeni in their pleading. That the issue only came up in the examination in chief of Enock (PW1). That the receipts purporting to have been issued by the Council do not indicate the plot number. The Counsel went on to submit that the law is clear on proof ownership of land as was held in the case of **Evans Kafusi Mcharo vs. Permanent Secretary, Ministry of Roads, Public Works and Housing & Another [2013] eKLR** where the court stated as follows: -

“What is the legal position of a letter of allotment? in making a distinction between petitioners who held letters of allotment and those who were registered proprietors of the land in question, this Court in the case of John Mukora Wachuhi & Others –vs- Minister for Lands & Others High Court Petition No.82 of 2010 observed that the distinction is based on the fact that the right to property protected under the law and the Constitution is afforded to registered owners of land; that a letter of allotment is not proof of title as it is only a step in the process of allocation of land. The Court relied in that regard on the position enunciated by the Court of Appeal in the case of Wreck Motors Enterprises –vs- The Commissioner of Lands and 3 Others Nairobi Civil Appeal No.71 of 1997 (Unreported), where the Court of Appeal stated as follows: -

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held.’

A similar finding was made in the case of Joseph Arap Ng'ok –vs- Justice Moijo Ole Keiwua NAI Civil Application No.60 of 1997 in which the Court of Appeal observed as follows: -

‘It is trite that such a 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 pursuant to provisions in the Act under which the property is held.’

The applicant in this case thus had no title to the property in question, a fact that is readily admitted. In his submissions before the Court, Counsel for the applicant conceded that an allotment letter confers no title, hence the application for an order of Mandamus to compel the Respondents to issue the applicant with a title. The applicant could therefore not claim to be the registered owner of the subject property.”

19. The Counsel added that the Plaintiff's claim to be the lawful owners of parcel number 293 by virtue of an allotment letter from the County Council of Makeni is a sham and fraudulent because of: -

(a) The plaintiffs did not produce the application letter to the County Council of Makeni requesting to be allocation the plot in dispute.

(b) There is no letter of acceptance of the offer for allocation.

(c) The plaintiffs had no evidence that they paid for allocation since the receipts they produced did not show that the payments were in respect of Plot No.293.

(d) The Minutes of the Works, Town Planning and Markets Committee, County Council of Makeni purporting to approve the allocation of the suit plot to the plaintiffs did not indicate which plot was allocated to the plaintiffs.

20. I have read the plaint dated 28th September, 2009. I agree with the Defendant's Counsel that there is no averment in the plaint to show that plot No.293 was allocated to the Plaintiff's by the County Council of Makeni. It is trite law that parties are bound by their pleadings. In this regard, Enock's (PW1) evidence regarding the alleged allocation of plot No.293 is neither nor there is of no probative value. Indeed from the exhibits that were produced by the Plaintiffs, there is nothing to show that there exists plot No.293 on the ground in Kibwezi town. The Plaintiffs did not produce the area map of the town to show the court where the said plot No.293 is situated. In my view, the Plaintiffs' claim that they own plot No.293 near Matezawa is tenuous. I am inclined to believe the Defendant that what the Plaintiffs claim as their plot is part of the wider parcel of land belonging to the Ministry of Agriculture.

21. As for the prayers sought, the Defendant's' submissions were that the Plaintiffs are not entitled to the same. That as for loss of income, the same ought to have been pleaded in the plaint and evidence in support of the prayer. The Counsel cited the case of **Delta Haulage Services vs. Complast Industries Ltd & Another [2015] eKLR** where it was held:-

“... in this regard, a claim for special damages must not only be pleaded, but must be strictly proved. How then are these special damages to be proved? In the case cited by Counsel for the Defendants of Douglas Odhiambo Apel & Anor vs. Telkom Kenya Ltd. (supra), the Court of Appeal held that: -

“.....a Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.... unless a consent is entered into for a specific sum, then it behoves the claiming party to produce evidence to prove the special damages claimed....

Submissions, as he correctly observed are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the Plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur.”

22. My finding is that having failed to satisfy issues number (a) and (b), it is pretty obvious that the Plaintiffs are not entitled to the prayers in their plaint.

23. The upshot of the foregoing is that the Plaintiffs on a balance of probabilities have failed to satisfy this court that they have a cause of action against the Defendants. Their claim must therefore fail. In the circumstances, I hereby proceed to dismiss their suit with costs to the Defendants.

Signed, dated and delivered at Makueni this 10th day of July, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Ms. Kyalo holding brief for Kimeu for the Plaintiffs

No appearance for the Attorney General

Ms. C. Nzioka – Court Assistant

MBOGO C. G. (JUDGE),

10/07/2019.