



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 104 OF 2008

SAMMY POGHISIO LIMANG'OLE.....PLAINTIFF

VERSUS

KALEMUNYANG MUNYONGOLE ROTWEI.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff commenced these proceedings by a plaint dated **8th December 2008** which was filed on the same day. He sought the following orders:

- a) **A declaration that the defendant is a trespasser on Land Parcel No. West Pokot/Chepkono/1376 and an order directing that the defendant be evicted therefrom.**
- b) **Costs.**
- c) **Interests.**

2. The defendant filed his defence on the **8th January, 2009**.

THE PLEADINGS

The plaintiff's Case.

3. The plaintiffs' claim is that he is the sole registered owner of **Land Parcel No. West Pokot/Chepkono/1376** having been so registered on 27/1/2006; that the defendant is the registered owner of **Land Parcel No. West Pokot/Chepkono/643**; that the two parcels of land are adjacent to each other, separated by a common boundary; that before registration both parcels of land were subject to land adjudication pursuant to the provisions of the **Land Adjudication Act, Cap 284** Laws of Kenya, with both falling under Chepkono Adjudication Section in West Pokot District; that upon adjudication, both parcels of land were registered as one and the same parcel of land measuring approximately **14.72** (fourteen decimal seven two) hectares as **West Pokot/Chepkono/643** in the name of the defendant;

4. The plaintiff was not satisfied with the registration of the defendant as the proprietor of both parcels of land; he lodged an objection to the said registration, and the objection was heard and determined in the defendant's favour; that upon dismissal of his objection, lodged an appeal with the Minister which appeal was decided in his favour, and in which he was awarded **15 acres** of land out of **Land Parcel No. West Pokot/Chepkono/643**. The parcel of land awarded to the plaintiff was subsequently surveyed and registered in the plaintiff's name as **Land Parcel No. West Pokot/Chepkono/1376**, and remains so registered to date.

5. It is the plaintiff's case that upon the plaintiff's appeal to the Minister being allowed, the defendant herein challenged the decision of the Minister by way of an application for certiorari in judicial review proceedings in **Kitale HC Misc. Civil Appl. NO. 77 of 2006**, which application was withdrawn on **26/11/2008**. It is the plaintiff's case that the Minister's decision in respect of **Land Parcel No. West Pokot/Chepkono/1376** was final, and the defendant herein has no claim whatsoever to **Parcel No. West Pokot/Chepkono/1376**. However in the year 2006 upon filing **Kitale HC Misc. Civil Appl. No. 7 of 2006** and obtaining an order staying the enforcement of the award the defendant entered upon **Land Parcel No. West Pokot/Chepkono/1376** without consulting or obtaining the plaintiff's permission, and remains on the land to date.

The Defendant's Defence.

6. The defendant denied the plaintiff's claim. He avers that if the plaintiff is the registered owner of that parcel of land known as **LR. No.**

West Pokot/Chepkono/1376 then the said registration is irregular and ought to be revoked. He avers that the purported registration of the plaintiff as the owner of the **LR. No. West Pokot/Chepkono/1376** is null and void for having been undertaken while a court order barring such registration subsisted. He states that he has confined his activities to **LR. No. West Pokot/Chepkono/643** and denies any act of trespass.

THE EVIDENCE OF THE PARTIES

The suit proceeded to hearing on 12/4/2018 and later on 20/4/2018.

The Plaintiff's Evidence

7. The plaintiff, testified that his land that is **LR. No. West Pokot/Chepkono/1376** borders that of the defendant. He produced a certified copy of the title thereto and a green card in evidence. They show that he is the registered proprietor.

8. He reiterated what is in the plaint concerning the dispute that ended up at the Minister's doorstep and which the Minister determined in his favour.

9. The plaintiff stated that the defendant was registered as the owner of the land only because he was older and he was obliged to share that land with his younger kin later on.

10. Therefore the defendant held the land in trust for the plaintiff and others. The plaintiff stated that he left the land when his aunt died and went to his mother's place. He places the year of his aunt's death as 1984. He also stated that the costs of demarcation were shared between him and the defendant. He lodged an objection and it was rejected. However when he appealed to the Minister his appeal was allowed.

11. In that decision on appeal, he was given 15 acres. He produced the decision of the Minister in **Case Number 152 of 1997** as an exhibit.

12. The defendant sought to quash the decision of the Minister vide **Kitale High Court Misc Civil Application No 77 of 2006** but he later withdrew the Judicial review application. On 26/11/2008. The original court order withdrawing the judicial review notice of motion was produced in evidence in this case. The decision on appeal to the Minister therefore remained firmly in place with the effect that at the time of the filing of the suit herein the plaintiff was still the registered owner of the land comprised in **Parcel No. West Pokot/Chepkono/1376**. A copy of the register was produced in evidence as proof. In his evidence the plaintiff testified that the defendant is in occupation of the suit land, and has been in such occupation since the appeal was determined in the year 1989.

The Defendant's Evidence

13. **Jacob Pkiach Kalemunyang** the defendant's son and guardian ad litem of the defendant gave evidence in this case on behalf of the defendant he produced the original title deed for **LR. No. West Pokot/Chepkono/643** which showed that the land measured **14.72 ha**. However on cross examination he admitted that **LR. No. West Pokot/Chepkono/1376** was originally part **LR. No. West Pokot/Chepkono/643**. He testified that his father gave money for demarcation and also gave a goat to the elders of the Land Committee and that his father was thereafter given the land. By that time the plaintiff was still young and in school. He stated that the plaintiff's land is carved out of his father's land and that it borders the defendant's land. He admits that there was an appeal to the Minister but does not appear to know what the final outcome of that appeal was. He does not know whether the appeal decision was ever brought to court for adoption. He argued that he should have been asked to surrender the original title for **LR. No. West Pokot/Chepkono/643** for cancellation but was not and he alleges impropriety in the issuance of title for **LR. No. West Pokot/Chepkono/1376**.

14. **DW2 Loshakem Merimuk** testified that he took the demarcation fee and a goat from the defendant to the land committee who demarcated the land in favour of the defendant. He also avers that the plaintiff's father was also given some land. Next to the defendant's land. By then the plaintiff was according to the witness a small boy still living with his father and his father had some other land elsewhere and he was not entitled to get land from the defendant. Only adults were entitled to be given land. Though he is aware of the appeal to the Minister he is not aware of the decision made therein. **DW3** also testified that the land was the defendant's. He also does not know what happened on appeal.

THE PARTIES' SUBMISSIONS

15. The plaintiff filed his submissions on 9/5/2018. The defendant filed his submissions on 31/5/2018.

16. I have considered those submissions.

DETERMINATION

Issues for Determination

17. The issues that arise in this suit are as follows:

a. Is the defendant a trespasser on LR Number West Pokot Chepkono /1376?

b. What orders should issue?

(a) Is the defendant a trespasser on LR Number West Pokot Chepkono /1376?

18. The plaintiff has outlined the history of the suit land. It is quite straightforward. When the land was registered in the name of the defendant during the process of Land adjudication he raised an objection to the adjudication process and that objection was unsuccessful. He then lodged an appeal to the Minister which was successful.

19. In that decision on the appeal, he was given 15 acres. He produced the decision of the Minister in **Case Number 152 of 1997** as an exhibit. The ruling in that appeal reads as follows:

“The appeal case no 152 is hereby allowed. The lower side of the disputed land be subdivided. Sammy Poghismo Limangole to get 15 fifteen acres with new number. Kalemunyang M. Rotwe to remain with the whole balance and retain number 643 with the new area.”

20. Apparently the implementation of this decision is the source of the dispute herein. The defendant sought to quash the decision of the Minister vide **Kitale High Court Misc Civil Application No 77 of 2006** but he later withdrew the Judicial Review Application on **26/11/2008**.

21. The original court order withdrawing the judicial review notice of motion in **Kitale High Court Misc Civil Application No 77 of 2006** was produced in evidence in this case. The decision on appeal to the Minister therefore remained unchallenged.

22. The plaintiff produced evidence that the decision of the Minister had been implemented. This information is contained in a letter dated 25/9/2006. It appears that the decision of the Minister was forwarded to and implemented by the Director of Land Adjudication and Settlement and a title was issued. That document produced as **P.Exh 3** is a letter from the Director of Land Adjudication and Settlement dated **25th September 2006**. It reads as follows:

The Chief Land Registrar,

Department Of Lands,

Nairobi.

REF: IMPLEMENTATION OF MINISTER’S DECISION ON APPEAL UNDER SECTION 29 OF THE LAND ADJUDICATION ACT CAP 284.

The Appeal before the Minister, the details of which are given below, has been decided

Land Appeal Case No.... 152 Of 1994

Name of Appellant..... Sammy Poghismo

Name Of respondent..... Kalemunyang M Rotwe.

District West Pokot

Location -----

Adjudication Section..... Chepkono

Parcel No 643

Action to be taken:

Please take action on the matter accordingly and inform me of the position. Appeal party allowed. Plot No. 643 subdivided such that Sammy Poghismo to get Plot No 1376 of 6.07 ha and Kalemunyang M. Rotwe to remain with plot No 643 of 8.65 ha. New edition of the RIM together with the amended copy of Adjudication records are attached hereto for your necessary Action.

E. N. OGEA,

For: Director of Lands Adjudication and Settlement.

Cc:

The Land Adjudication and Settlement Officer,

Kapenguria.

23. It is indisputable therefore that the **Parcel No. West Pokot/Chepkono/1376** came into being by being carved out of **Parcel No. West Pokot/Chepkono/643** in implementation of the Minister's decision which was unchallenged. The Office of the Director of Land Adjudication and Settlement processed the implementation of that appeal decision.

24. At the time of the filing of the suit herein the plaintiff was still the registered owner of the land comprised in **Parcel No. West Pokot/Chepkono/1376**. Indeed going by the provisions of **Section 29** of the **Land Adjudication Act**, it is doubtful that there was any other recourse to take in regard to the appeal decision, for the Minister's decision on appeal is expressed by the provisions of **Section 29** of the **Land Adjudication Act** to be final. It would appear that Parliament intended that there must be an end to disputes arising within land adjudication areas so as to facilitate the final outcome of the adjudication process: the issuance of individual title to land.

25. Indeed the evidence that was canvassed before the Committee or the Minister is of little relevance in the instant proceedings. The determination as to the ownership of the land was made earlier in those proceedings. I say so because the process of land adjudication is vested in certain authorities and this court may not interfere with the substance of their decision where the statute does not allow it. Therefore the argument by the defendant that the registration of the plaintiff as owner of the land comprised in **Parcel No. West Pokot/Chepkono/1376** was fraudulent and illegal is not valid as its roots can be traced to the adjudication process and the decisions made therein.

26. The court has been shown evidence that the Judicial Review Notice of Motion that had been filed seeking orders to quash the Minister's decision was withdrawn before a decision was issued by the court on the issues thereon.

27. The suit land having been registered in the name of the plaintiff through such a process as is outlined above and the title being in his name as at present, it is clear that he is entitled to the land. The provisions of the **Registered Land Act Cap 300** (now repealed) under which the land was registered provided as follows:

27. Subject to this Act –

(a) 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;

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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, but subject - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register: Provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

CONCLUSION

28. The defendant's evidence that his title still reads 14.72 ha does not aid his case. The calling up and cancellation of the old title may not have been done for reasons that this court may not have been given in this suit. However this does not change the fact that a decision was made by the Minister and that its implementation led to the issuance of a new title to the plaintiff.

29. However I find a much more gripping argument by the defendant that he enjoys absolute rights and that the title issued in his name, having been issued on a first registration, can not be interfered with by this court. He further avers that the instant suit is not for orders of rectification of the register. He also argues that the decision of the Minister was never filed in court for implementation.

30. Starting with the last point the defendant has failed to demonstrate that there is need to proceed to court for the implementation of such a decision.

31. On the remaining issue as to whether the title of the defendant can not be interfered with on the basis that the same issued on a first registration, I note that there should be presumed to be a bar on the processing of titles to the final point of claim of absolute proprietorship in respect of lands still under adjudication disputes.

32. It can only be presumed *a posteriori* that the decision of the Minister under **Section 29** of the Land Adjudication Act emanated from a decision on an objection raised under **Section 26** of the Act.

33. **Section 28** of the Land Adjudication Act in **Appeal No 152/1997** envisages that the Chief Land Registrar shall upon receiving the adjudication register under **Section 27** of the Act, cause registrations to be effected in accordance with the adjudication register.

34. However **Section 28** of the Act has a proviso that allows the Chief Land Registrar to register a restriction against title to land that is affected by an appeal under **Section 29** of the Act, as the land in the instant suit was. The said restriction is to endure till the determination of the appeal. Upon that determination, the register shall be altered, if necessary, in accordance with the determination.

35. It appears then that the registration that is subject to the outcome of an appeal lodged to the Minister under **Section 29** of the Act is not final; it is subject to alteration to accord with that determination. That is the alteration that led to the issuance of the plaintiff with a title.

36. The argument by the defendant regarding the indefeasibility of a first registration can not stand in the light of the provisions of **Section**

28 of the Act cited hereinabove. The only registration that can be considered here is that which issued after the Appeal was determined.

37. Notably, the title to parcel number 643 was issued in the year 1997, the same year in which the plaintiff's appeal to the Minister appears to have been filed. For these reasons, the defendant should therefore submit his old title to the District Land Registrar for destruction and issuance of a new title in his name bearing the right particulars that reflect the implementation of the Minister's decision to make the Land register record perfect.

38. The title in the name of the plaintiff was issued after the final stage of the adjudication process, that is, an appeal to the Minister. There is no doubt that the spirit of the provisions of the **Registered Land Act** mentioned earlier in this judgment still live on in **Section 25** of the subsequently enacted **Land Registration Act (No 3 of 2012)**

39. I therefore find that the defendant has no right or interest in the said land comprised in **Parcel No. West Pokot/Chepkono/1376** and that his occupation thereof is illegal and in violation of the rights of the plaintiff who is the registered proprietor. The defendant is therefore liable to the plaintiff in trespass on the land. He is a trespasser.

b. What orders should issue?

40. I have found that the defendant is trespassing on the plaintiff's land. The orders prayed for in the plaint are therefore merited. I therefore enter judgment in this suit in favour of the plaintiff and against the defendant and I issue the following orders:

a. An order of declaration, declaring that the defendant is a trespasser on Land Parcel No. West Pokot /Chepkono/1376.

b. An order that the defendant his servants and agents and all those claiming under him be evicted from Land Parcel No West Pokot /Chepkono/1376.

c. The defendant shall within 60 days of this order submit his old title to the District Land Registrar for destruction and issuance of a new title in his name bearing the right particulars that reflect the implementation of the Minister's decision.

d. The defendant will bear the costs of this suit and of the issuance of the new title in his name.

It is so ordered.

Dated, signed and delivered at Kitale on this 5th day of July, 2018.

MWANGI NJOROGE

JUDGE

5/7/2017

Coram:

Before - Mwangi Njoroge Judge

Court Assistant - Picoty

Mr. Bororio for the plaintiff

Mr. Bisonga for the defendant

COURT

Judgment read in open court in the presence of Counsel for both parties.

MWANGI NJOROGE

JUDGE

5/7/2018