



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 152 OF 2015

CHARLES MUINDI SOO.....PLAINTIFF

VERSUS

PROTUS KIRISWA.....1ST DEFENDANT

ISAIAH WANYONYI.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiffs filed a plaint dated **23/11/2015** which was filed on the same date. The Plaintiff s seeks judgment against the defendants jointly and severally for:-

(a) An order of declaration that the plaintiff is the rightful owner of all that land known as land title No. KITALE MUNICIPALITY BLOCK 7/117 measuring approximately Naught Decimal One Eight Six Four (0.1864) Hectares or thereabouts and situated within Kitale Municipality in Trans-Nzoia County

(b) An order of eviction do issue against the defendants jointly and severally, their agents, servants, employees and/or any other person claiming through them from the plaintiffs' land Title No. KITALE MUNICIPALITY BLOCK 7/117 measuring approximately Naught Decimal One Eight Six Four (0.1864) Hectares or thereabouts

(c) Costs of the suit.

(d) Any other relief that the court deems just and fit to grant

PLEADINGS

The Plaintiff

2. In his claim, the plaintiff averred that he is the registered owner of Land Title No. Kitale Municipality **Block 7/117** measuring approximately Naught Decimal One Eight Six Four (**0.1864**) Hectares or thereabouts situated within Kitale Municipality; that he was issued with a lease of the land on **27/8/2014** and later was issued with a Certificate of Title on **6/5/2015**; that the defendants have jointly and severally without color of right without the Plaintiffs' consent trespassed and/or encroached onto his parcel of land and erected illegal structures thereon; that the Plaintiff has made efforts and even involved the local authorities to have the defendants vacate the land in vain; that he intended to make extensive development on the land but has been hindered by the defendants' occupation thus necessitating the filing of this suit and he prays for the cost of the suit.

The Defence

3. The defendants filed a joint statement of defence on the **26/7/2016**. Their defence is that the suit property belongs to **Anna Nafula Wanyonyi** who was allocated land on the **29/9/1992**; that if the plaintiff was also allocated, the allocation was done fraudulently and are in breach of Anna Nafulas' rights over the land; that Anna Nafula has been in continuous occupation of the suit land; that the plaintiff has not established any reasonable claim against them and that the suit is an abuse of the courts' process; they pray that the suit be dismissed with costs.

Reply to Defence

4. The Plaintiff filed his reply to defence dated **11/8/2016** on the same date. He states that he is a stranger to the contents of the defence and avers that the suit land formerly known as **Uns. Residential Plot No. 14-Kitale Municipality** was allocated to him by the Commissioner of Lands Pursuant to a Letter of Allotment dated **30/9/1992** which was later converted to Land Title **No. Kitale Municipality Block 7/117** and a Certificate of Lease issued to him; that the acquisition of that land was done in a procedural, lawful and transparent manner with all the requirements thus there is no fraud he committed in acquiring the title; that all the defendants and Ann Nafula Wanyonyi have never been in quiet and continuous occupation of the suit property therefore are in illegal occupation of that parcel and are trespassers and that Anna Wanyonyi has no *locus* to give consent of occupation of land to the defendants which does not belong to her. He prays that the defence be dismissed with costs.

The Plaintiffs' Evidence

5. **PW1, Charles Muindi Soo**, testified on **11/7/2017**; he adopted his statement dated **23/11/2015** as evidence in chief. He states that the defendants are occupying his plot; that the Plot is No. **Kitale Municipality Block 7/117** measuring approximately **0.1864 Ha**; that he is the registered owner of the plot; that he has the title deed and the Certificate of Lease of the suit property; he produced the Certificate of Lease as **PEXh.1**; he also produced copy of the Lease (which was compared with the original and confirmed) as **P. Exhibit 2**; that he was given an allotment Letter on the **30/9/1992** in respect to the suit plot; he produced the Allotment Letter as **P. Exhibit 3**; that he paid the premiums required of Ksh.**13,030/=** he produced a copy of receipt of payment from the Lands Registry as **P. Exhibit 4**; that he has paid Land Rates in respect to the suit land, he produced receipts from **KCB Bank of Kshs. 54,343/=** produced as **P. Exhibit 5**; that he has the land rates request for payment for **Kshs. 54,343/=** which he produced as **P.Exihibit 6**; that when the surveyors worked on the plot, it was seen to be bigger and he was charged more; he produced a receipt of payment of a further **Kshs. 5,230/=** from the Lands Office produced as **P. Exhibit 7**; that he paid for registration of the lease and produced receipt of payment dated **5/1/2015** as **P. Exhibit 8**; that he was later requested to pay **Kshs. 5,762/=** to **KRA** being land rent he produced receipt of payment as **P. Exhibit 9**; that he went to Ardhi House he was given a letter written to the District Lands Officer he produced the Letter dated **13/4/2011** from the Lands Office as **P. Exhibit 10**; that another letter was written to the District Land Registrar from Survey of Kenya asking if the plot had been allocated to any other person he produced the letter as **P. Exhibit 11**; that he has a request for registration letter copied to him which he produced as **P. Exhibit 12**; that he conducted search of the plot and produced a Certificate of Search dated **7/3/2017** as **P. Exhibit 13**; that he began paying rates and produced a receipt of payment for rates as **P. Exhibit 14**; that upon payment he was given a clearance Certificate which he produced as **P. Exhibit 15**; that all the documents show that the land belongs to him; that the defendants were on the land when he brought the case to court; that he has not allowed them to be there; that he wants the defendants evicted; that they were warned by the area Chief before this suit begun; that his advocate also sent them a demand letter on **21/10/2015** he produced it as **P. Exhibit 16**; that he wants the county surveyor to go and restore the beacons; that he prays for the prayers in the plaint and costs of the suit.

6. On cross-examination, **PW1** confirmed that he has never lived on that plot; that it is not a permanent house; that it is a brick house; that it is without approval; that he has not seen any trees on the land; that he does not know if there are boundaries on the land; that the house was built last year but does not know the month; that he does not know if it is big or small; that the Chief tried to stop its construction; that they built at night; that he does not know how the defendants entered the land; that he does not know Anna Wafula Wanyonyi; when shown **P. Exhibit 3**) he confirmed that his allotment letter is dated **30/9/1992**; that his plot is **0.14 Ha**; that it seems they are for the same plot; that they were given on the same day; that she was given the plot before him. He stated that he does not know the relationship between Anna and the defendants; that he sued the defendants because he found them on the shamba; when shown rates a payment request demand notice for payment of ground rent he confirmed that they were and that they seeks rates payment from Anna Nafula Wanyonyi for **Block 7/714** (unsurveyed). He stated that the land he was allocated was formerly government land.

7. On **11/7/2017**, the court ordered for the County Land Registrar Trans-Nzoia County to come and testify in this matter on the **12/10/2017** upon request by the plaintiff's counsel.

8. Come the **12/10/2017** plaintiff's counsel opted to close their case without calling the County Land Registrar to testify.

The Defendant's Evidence

9. **DW1, Isaiiah Wanyonyi** testified on **4/7/2018**. He adopted his statement dated **29/5/2017** as evidence-in-chief. He stated that he lives on **Plot No. 2** Lavington; that Protus Kiriswa lives in **Plot No. 14**; that Ann Nafula Wanyonyi is his sister; that **Plot No. 14** belongs to Ann; that she prayed to be allocated the plot; that she was allocated in **1992**; he produced a copy of the allotment letter dated **29/9/1992** as **D. Exhibit 1**; that Ann has been paying the rates for the plot; he produced Demand Notices for payment and rates payment requests as **D. Exhibit 2 (a)** and **2(b)**; that he does not live on the said plot; that Protus is also not the true allottee; that Ann is the owner; that she has a four bedroomed house on the plot; that he would have been there courtesy of Ann Nafula Wanyonyi if he was living there; that he prays that the case be dismissed with costs as he does not have an interest on the land.

10. Upon re-examination, he clarified that Ann has built a 4 bedroom permanent house on the land and another two roomed house and planted trees on the land and that Protus, the 1st defendant, is on the land courtesy of Ann.

11. That marked the close of the defence case.

SUBMISSIONS

12. Submissions were filed on behalf of the plaintiff on **17/8/2018**. The defendants did not file any submissions. I have considered the plaintiffs' submissions.

13. The suit went for full trial and at the point of writing this judgment, I note that the court directed that judgment in this suit be held in abeyance till the court concludes **Kitale ELC No. 4 of 2018** and **Kitale Petition No. 7 of 2018**. Judgment in that case has already been delivered and the verdict in this court is subject to the orders made by the court in that case.

DETERMINATION

14. The main issues for determination are:

(a) Whether an order of Declaration that the Plaintiff is the rightful owner of all that land known as Title Kitale Municipality Block 7/177 measuring approximately Naught Decimal One Eight Six Four (0.1864) Hectares should issue?

(b) Whether an order of eviction against the defendants jointly and severally, their agents, servants, employees and/or any other persons claiming through them from the plaintiff's land known as Land Title No. Kitale Municipality Block 7/177 do issue?

(c) Who bears the cost of the suit?

(b) What Orders should issue?

15. The issues are addressed as hereunder:-

(a) Whether an order of Declaration that the Plaintiff is the rightful owner of all that land known as Title Kitale Municipality Block 7/177 measuring approximately Naught Decimal One Eight Six Four (0.1864) Hectares should issue?

16. The Plaintiff in this matter alleges that he is the rightful owner of the suit property. He produced among other documents a copy of a Certificate of Lease marked as **P. Exhibit 1**.

17. P. Exhibit 1 the Certificate of Lease issued to the plaintiff on the **6/1/2015** showing that he is the registered owner of the suit property. The plaintiff also produced a copy of an allotment Letter dated **30/9/1992** showing that he was allotted the suit property. The defendant on the other hand in his defence produced a Letter of Allotment dated **29/9/1992** in favour of one **Anna Nafula Wanyonyi**. It is worth noting that **Anna Nafula Wanyonyi** was not enjoined as a defendant in this suit. The defendants are the relatives of the allottee one **Anna Nafula Wanyonyi**. That notwithstanding, the matter raises triable issues as to whether the plaintiff is the rightful owner of that suit of land.

18. According to the evidence, and of most importance is the allotment letter issued to the plaintiff and Ann Nafula Wanyonyi. This appears to be a matter of double allocation of land since the allotment letters are in respect to the same parcel of land that is **Kitale Municipality Block 7/117**.

19. The allocation was done on the **29/9/1992** and **30/9/1992** respectively. This means that the second allotment in favour of the Plaintiff was issued only a day after **Ann Nafula Wanyonyi** was issued the allotment. Clearly, the first allotment dated **29/9/1992** was still in force when the second allotment was issued to the Plaintiff; the same had not been revoked to warrant the government to reissue the allotment to the Plaintiff.

20. That being the position, the question then becomes who between the plaintiff and Anna Nafula Wanyonyi, whose claim over the suit property to the other? The court has to discern on a balance of probabilities based on the evidence and documents before it whether the Plaintiff established its case against the defendants.

21. The 1st defendant testified that Anna Nafula Wanyonyi is the true allottee of the plot and that Ann is the one residing on the plot having erected a four bedroomed permanent house and another house of two rooms as evidenced by the allotment letter **D. Exhibit 1**.

22. Evidence at the trial was that Ann Wanyonyi and the 2nd Defendant reside on the plot. Secondly has been impressed upon this court that Ann Wanyonyi has been paying rates to the County Government in respect to the suit property.

23. The Plaintiff stated that he has also been paying rent in respect of the suit property. He produced payment requests in the name of Anna Nafula Wanyonyi, though he did not indicate whether she has been paying rates or not. The request for payment receipt is dated **20/6/2014** and **9/7/2014** respectively.

24. It appears that until **2014**, the allottee of the suit property was Anna Nafula Wanyonyi. If that were not so, the rates and rent payment requests could be reading the plaintiffs' name instead. There is no evidence from the plaintiff that Ann Nafula Wanyonyi's allotment had been cancelled and the land re-allocated to the Plaintiff or anybody else.

25. The defendants' evidence is that they took possession of the suit property after allocation. In evidence, the plaintiff alleged that the defendants are trespassers on his plot but he conceded that he does not also know when they entered into the land. It would appear that the Plaintiff has never been in occupation of the suit property. He appears to have woken up in **2015** and acquired a Certificate of Lease in respect to the suit property.

26. Land that has already been allocated can not be available for re-allocation while the first allocation subsists. This court can not assume that the allocation that appears to have been made before the plaintiff's was ever cancelled. The plaintiff failed to call the Land Registrar to shade light on how the Certificate of Lease was issued to him. This court is left wondering how the Plaintiff acquired the Certificate of Lease in respect to the suit property.

27. The conclusion of this court is that the Plaintiff is not the rightful owner of the plot. However this court must caution that the ownership of the land is also subject to the orders of this court in its judgment in **Justice And Peace Center Kitale Vs National Land Commission**

And Others- ELC Petition No. 5 Of 2018 (As Consolidated With Kitale ELC Pet. No. 6 Of 2018 -Isaiah Wanyonyi & 42 Others vs National Land Commission, County Government Of Trans –Nzoia, The Principal Secretary, Ministry Of Agriculture and The Attorney General and also KITALE ELC PET. NO. 7 OF 2018 Trans National Times Sacco Ltd Vs National Land Commission County Government of Trans –Nzoia, the Principal Secretary, Ministry Of Agriculture and the Attorney General.)

28. In light of the foregoing I find that the Plaintiff has failed to prove his case on a balance of probabilities against the defendants. The suit is hereby dismissed in its entirety with costs to the defendants.

It is so ordered

Dated, signed and delivered at Kitale via electronic mail on this 3rd day of May 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.