



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 40 OF 2017**

**MAGDALENA J. CHESANG.....PLAINTIFF**

**VERSUS**

**LUKA RUTTO.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff filed a plaint dated 3/3/2017 and filed on 6/3/2017. The plaintiff seeks the following orders against the defendant:-

(a) **An order declaring that the plaintiff is the legal owner of plot No. TRANS- NZOIA/SUWERWA/1316 and that the defendant and those claiming under him do move out of the suit land and failing which he be evicted forthwith at his own costs.**

(b) **An order of permanent injunction restraining the defendant, his agents, servants, employees and or all those claiming under him from interfering with the plaintiff's quiet enjoyment and use of the suit land.**

(c) **Costs**

(d) **Any other relief this honourable court may deem just and fit to grant.**

**PLEADINGS**

**The Plaintiff**

2. In her claim, the plaintiff averred that pursuant to a decree in **Kitale CMC Land Case No. 38 of 2004** which emanated from a Cherangany Division Land Disputes Tribunal award she became the lawful owner of the land known as **LR. No. TRANS-NZOIA/SUWERWA/1316** which measures approximately **16 acres** and which is a subdivision of **LR No. TRANS-NZOIA/SUWERWA/156**; that she was awarded the land by the Land Disputes Tribunal alongside her co-wives, one of whom is the defendant's mother, who were also given **16 acres** while her late husband was awarded **15 acres**; that the attempts by the then land owner Mark Suter to have the decree in **Kitale HC MISC Application No. 31 of 2005** quashed failed; that in **2014** the defendant invaded the plaintiff's land and prevented her from utilizing the same instead of him using his mother's portion; that the defendant trespassed on the suit land again in **2017** and that the defendant should be evicted.

**The Defence**

3. The defendant filed his defence on **28/3/2017**. On **2/2/2018** he filed an amended statement of defence and counterclaim. He denied the plaintiff's claim and contended that the original parcel known as **TRANS-NZOIA/SUWERWA/156** belonged to his father; that the plaintiff was only entitled to occupy and work on the land known as **TRANS-NZOIA/SUWERWA/1316** and not to acquire any title thereto; that he has not trespassed on the latter parcel as stated but has been in quiet and continuous possession and occupation and utilizing **10 acres** out of the original parcel no known as **TRANS-NZOIA/SUWERWA/156**; that the portion was pointed out to him by his father in **1995**; that the plaintiff's right of ownership is subject to the defendant's right of possession and that the plaintiff has never attempted to have, and has never taken, possession of the land. In his counterclaim he reiterates the statements in his defence and alleges fraud by the plaintiff in the registration in favour of the plaintiff; though sole plaintiff and not asserting that he pleads for any other person, he states that the plaintiff is keen on dispossessing the defendant and other family members of the suit land; he seeks a declaration that the plaintiff's registration be declared null and void and the register be rectified by cancellation of that registration so that the title should revert to **Chesang Suter**,

deceased.

### **Reply to Amended Defence & Counterclaim**

4. The plaintiff filed a reply to amended defence and counterclaim on **19/3/2018**. In that pleading, she avers that the deceased has never been the registered proprietor of the suit land and that she was entitled to acquire title thereto. She denied that the defendant was shown the land he is in occupation of in **1995** and maintains that he trespassed onto the suit land. She also averred that the register can not be rectified since each widow and her children have been given their respective portions.

### **The Plaintiff's Evidence**

5. **PW1, Magdalena J. Chesang**, the plaintiff, testified on **17/5/2021**. She stated that the defendant is son to her co-wife; that her husband, upon the wives' request to distribute land refused to do so and he was compelled by the Land Disputes Tribunal to do so when it awarded the wives **16** acres each whereupon the original parcel was subdivided into **4** portions; that the tribunal award was lodged and adopted by the Magistrate's Court Kitale ; that an attempt to overturn the tribunal decision in the High Court failed and her husband acquiesced under the High Court ruling; that the defendant's mother also got **16** acres; that every wife took possession of their portion; that the area chief was also present and as a mark of his participation a letter he wrote to the Lands Office was produced; that she took possession of her portion but after her husband died the defendant began tormenting her by invading the suit land and he finally chased her completely out of the suit land. She avers that she followed up on the titling process and obtained title (**P. Exhibit 7**); that the defendant had not been given the suit land as claimed in the defence; that her co-wives are not complaining about her allocation and that the defendant has not invaded her co-wives' plots; that the defendant also utilizes a portion of the deceased's **15 acre** portion.

6. Upon cross-examination by Mr. Ingosi she averred that her husband distributed the land in the year **2008** and died in **2013**; that the wives were given the land to utilize and they were entitled to be registered as owners; that they had been utilizing the land even earlier but some had larger portions than others hence the dispute; that her house had been built on the main parcel No. **156**; that the consent of the land control board was issued in **2017** and that the title was obtained through the court process.

7. The plaintiff's case was marked as closed at that point as no other witness testified.

### **The Defendant's Evidence**

8. **DW1, Luka Rutto Suter**, the defendant, testified on **17/5/2021** and adopted his witness statement dated **27/3/2017**. He stated that the plaintiff is his stepmother being the third wife to his father; that she has never lived on the suit land but lives at Cheptonge in Marakwet West; that he was born on the suit land and lives thereon to date; that his late father showed him a portion to farm on in **1995**; that he has not annexed any other portion to that original portion; that his father died on **1/8/2012**; that his father was still the registered owner even at the time of his demise and he declined subdivision till his death; that he is not aware of the subdivision; that at one time his father chased away some surveyors who had come to the land; that even as at **2017** the subdivisions were in his late father's name; that the plaintiff had approached the court to have the transfers effected which his mother opposed; that the title to the suit land should revert back to his late father's name.

9. Under cross-examination by Mr. Chebii he admitted that he does not have any grant of letters of administration to the deceased's estate; that he did not know that the surveyors said to have been chased away in the year **2008** had come to the land pursuant to a court order. He admitted that he does not have any evidence that his father distributed land amongst his children; that he had never seen the tribunal decision and that the plaintiff's share of land is at Cheptonge.

10. After the defendant completed giving his evidence, some documents filed on **2/2/2020** were then produced by consent of the parties as **D. Exhibit 5(a)** (application dated **11/10/2017**) and **D. Exhibit 5(b)** (ruling dated **10/8/2018**). The defendant then closed his case at that point.

### **SUBMISSIONS**

11. The plaintiff filed submissions on **31/5/2021** and the defendant on **16/6/2021**.

### **DETERMINATION**

#### **Issues for Determination**

12. I have considered the pleadings, the evidence and the submissions of the parties. The main issues for determination in this matter are:

*(a) Whether the plaintiff obtained registration of the land in her name fraudulently and if she should be declared the legal owner of plot No. TRANS-NZOIA/SUWERWA/1316;*

*(b) Whether the defendant should be ordered to vacate the suit land and in default thereof be evicted at his own cost;*

*(c) Whether the defendant should be permanently enjoined from interfering with the plaintiff's quiet possession of the suit land;*

*(d) What Orders should issue as to costs of the suit?*

13. There is no doubt that the suit land is registered in the name of the plaintiff, that she is one of the three widows to the deceased Marko

Suter who had owned the land previously, that the suit land is only a portion of the land formerly owned by Marko and that the title to the land in her name was issued after the demise of Marko. Clearly allegations of fraud are the main basis upon which the defendant's counterclaim is based. So, has any fraud been proved by the defendant as alleged in his counterclaim? Did the plaintiff employ fraud in getting herself registered as proprietor of the suit land?

14. The burden of proving an allegation lies on its maker. That is the law contained in **Section 109** of the **Evidence Act Cap 80**.

15. It is alleged that the plaintiff failed to ascertain the true meaning and import of the Land Disputes Tribunal decision and failing to have regard for the deceased's interest in the suit land. It is stated that she proceeded with the registration to the exclusion of other family members; that she forged the signature of the deceased on the disposition forms; that she failed to ensure that the correct procedure and legal requirements were adhered to by failing to obtain the appropriate land control board consents and that she worked behind the scenes and used underhand means to procure a court order enabling the Executive Officer of the court to sign the disposition documents.

16. The decision of the Land Disputes Tribunal was not produced in court by any party. However the contents of that award can be gathered by a perusal of the decree (**P. Exhibit 1**) which ordered the **Plot No. 156** subdivided into **4** portions, three of which, measuring **16** acres each were to be given to the three wives of the deceased and one measuring **15** acres which was to be given to the deceased who was by then still alive. The decree mandated the government surveyor to survey the land within **6** months so that each person gets their portion. The decree was issued on **3/1/2005** and the demise of Marko the then registered owner of the land occurred about **7** years later on **1/12/2012**. From the ruling dated **10/8/2018**, it can be gathered that an order was made earlier by the court on **21/3/2016** authorizing the court's Executive Officer to execute Land Control Board and transfer forms. In that ruling the court declined to review that order and gave reasons and left the issue of propriety of the plaintiff's title to this court for determination. It found that the applicant seeking a review was a beneficiary of the same decree and would suffer no prejudice if no review was granted, and it also observed that the **High Court in Kitale HC Misc. 31 of 2005** which had sought to quash the award had found that the tribunal was within its jurisdiction to give the award.

17. The main issue here is whether the obtainance of the title was fraudulent.

18. In the Court of Appeal case of **Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR Nairobi Civil Appeal No. 106 of 2000** it was held as follows:

**"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See Davy v Garrett (1878) 7 Ch. D 473 at 489."** (Emphasis mine)

19. I find that the decree only allowed subdivision of the land and its distribution among the widows and their husband and not transfer. I would not term the registration of the land in the plaintiff's name as fraudulently procured because it was sanctioned by a court order that allowed execution of the relevant documents by the Executive Officer. If there was an error, it must have been an appealable error in the interpretation of the decree while the orders were being issued. This court waited for the plaintiff to adduce oral and documentary evidence to support his allegation that the plaintiff worked behind the scenes and used underhand means to procure a court order enabling the executive officer of the court to sign the disposition documents and he provided none. This court can not determine this suit on the baseless assumptions of the plaintiff that any underhand means were used. Besides, the plaintiff was entitled to apply for any orders she wished to have and it was for the court in **Kitale CMC Land Case No. 38 of 2004** to consider and determine whether she deserved those orders or not. Courts are sworn to administer justice to all without fear or favour; however, this notwithstanding, they may err in their judgments or rulings in suits and on many an occasion overly censorious litigants with an oversized sense of entitlement mistakenly assume without evidence to support it that the successful litigant influenced the outcome in some way. It is for this court to warn litigants, and especially litigants with legal representation, that if they do not have any evidence of wrongdoing of the nature alleged by the plaintiff in the first place they should restrain themselves from advancing such allegations in any format as when read or heard in passing by a reader disinterested in the real merits of the dispute, they tend to portray a very adverse picture of our courts and undermine the justice system. The proper approach is for the dissatisfied party to lodge an appeal against such orders.

20. The second issue is whether the plaintiff should be declared the legal owner of **Plot No. Trans-Nzoia/Suwerwa/1316**. The plaintiff's plea was countered by the defendant's counterclaim seeking a declaration that her registration be declared null and void and that it be cancelled and the title do revert to Marko Suter, deceased.

21. It must be remembered that under the provisions of **Section 25** of the **Land Registration Act** the applicant must be deemed to the owner of the land and the production of a certificate of title in his name shall be taken to be conclusive proof of his ownership thereof; the rights of a registered proprietor are protected by the provisions of **Section 26** of the **Land Registration Act**. In the absence of the defendant's defence and counterclaim this court would have no hesitation in declaring the plaintiff proprietor summarily as evidence of her registration has been presented. But now the plaintiff's case has to surmount the hurdle presented by the defence and counterclaim.

22. However of these two separate pleadings the counterclaim presents an overly lethal challenge to the plaintiff's claim.

23. If the Land disputes Tribunal never ordered a transfer and restricted itself and rightfully so to subdivision of the suit land, the question of whether transfer of land to the plaintiff was proper is a thorny one. A nullification of her title would concomitantly obliterate the other subtiles said to be meant for her co-wives, and the mutation that precipitated them, and send the parties back to the drawing board and subject them to more legal and other expenses in pursuit of the same result: subdivision of parcel number **Trans Nzoia/Suwerwa 156** into four portions as ordered by the Tribunal and the court, whose decisions still stand. No doubt this may involve even more litigation in this court regarding this very old dispute.

24. This court notes no marked resistance to the titles by the plaintiff's co-wives, whom I must refer to, in contrast to their offspring, the

substantive first generation beneficiaries of the LDT award and the court decree and that leaves her to resolve her dispute with the defendant herein alone. It is for that reason that this court must, seeing that the real first generation beneficiaries of the LDT award have not been enjoined in this dispute, re-examine the **locus standi** of the defendant to bring his counterclaim.

25. In this court's view the only person entitled to bring a claim on behalf or for the benefit, or to protect the estate of a deceased person is the administrator appointed by a competent court of law under the provisions of the **Law of Succession Act**.

26. The defendant was asked in cross-examination by Mr. Chebii as to whether he was an administrator of the deceased Marko Suter's estate and this is what he had to say:

**“I do not have letters of administration to his (Marko Suter's) estate.”**

27. By what authority then can the defendant purport to represent the estate of the deceased to secure orders in the counterclaim nullifying the titles, one of which has been issued to the plaintiff? None! And he having no grant of representation at all and perchance his plea was granted, what is the foreseeable future of this dispute, other than bloat the statistics of the ubiquitous, costly, unsavoury, perpetual familial melees which dot our legal and social landscape after the fall of many family patriarchs? This court is not inclined to grant prayers of such possibly serious consequence to a person who lacks a grant of letters of representation to the deceased's estate. I find that the plaintiff has no **locus standi** and that he is a busybody in so far as agitating his counterclaim is concerned. He has no standing. It is for this reason that this court finds that his counterclaim is improper and a candidate for summary striking out.

28. The third issue is whether the defendant should be ordered to vacate the suit land and in default thereof be evicted at his own cost. It is clear that the plaintiff and her co-wives were entitled to occupy and utilize the suit land. It must be assumed that that right extended to their children and the defendant has admitted to be among them, and is entitled to settle on the portion of land meant for his mother. It must also be proper to assume that in the proper order of things where the tribunal award is being upheld by all, the defendant would have had to move to the portion issued to his mother.

29. In this court's view the determination of the tribunal which was embodied in the decree and which did not include the defendant's name overruled all other arrangements that had been made on the ground either by the deceased or by other parties or by default.

30. In this court's further view, it matters not that the defendant was born or has lived all his life on that portion now claimed by the plaintiff. He never adduced any evidence that his father allocated him that portion. However, even assuming that claim of allocation is genuine, the defendant's possessory rights are first, subject to a landowner's legal rights, and second, he being a mere licensee, such possessory rights are not forever glued to only one portion of the land as that would defeat the intent and purpose of **Section 26** of the **Land Registration Act** that protects the landowner's right to use the property as he wishes. And though this court is not inclined to delve into matters succession to any greater degree than is stated in this sentence, considering the polygamous nature of the instant family, the defendant's possessory rights as a son were also subject to and in echelon ranked distantly behind the plaintiff's rights as a widow- who has her own children- to succeed Mark Suter, and in this case the court is witnessing a very unequal fight between a step-mother and a step-son, the latter who even lacks standing. The wives of Marko Suter were supposed to take possession of their respective portions and the plaintiff avers that she took possession thereof and worked on it till the defendant interrupted her possession.

31. Consequently, the right of possession and use of the portion of land by the plaintiff must be upheld, and this can only be effected by ordering that the defendant who was not party to the proceedings in the Tribunal and in the High Court case be ordered to give vacant possession of the suit land to the plaintiff and in default be evicted therefrom.

32. As to whether the defendant should be permanently enjoined from interfering with the plaintiff's quiet possession of the suit land, there is no limit as to the period that the plaintiff can enjoy the occupation and use of the suit land. She can not enjoy its use while constantly under threat of trespass thereon by the defendant and I find that an order of permanent injunction against the defendant is appropriate in the circumstances.

33. In regard to costs, I find that both the plaintiff and the defendant have been partially successful in their respective claims and that consequently each party should bear their own costs of the suit. This will also serve to lessen familial strife.

34. I therefore issue the following final orders:

**(a) An order declaring that the subdivision of the suit land in accordance with the award of the tribunal and the decree in Kitale CMCC No. 38 of 2004 was proper;**

**(b) An order that the registration of the mutation dated 20/5/2013 was proper and it is hereby upheld;**

**(c) An declaration that the plaintiff is the legal proprietor of the suit land known as Trans Nzoia/Suwerwa/1316 and she is entitled to be in quiet possession thereof at all times;**

**(d) An order that the County Surveyor, Trans Nzoia shall revisit the suit land and re- establish on the ground the boundaries of the 4 portions of the land as represented in the mutation dated 20/5/2013 and the plaintiff shall take vacant possession of the suit land.**

**(e) An order that the defendant shall forthwith give the plaintiff vacant possession of the suit land in default thereof be evicted at his own cost.**

**(f) An order of permanent injunction prohibiting the defendant or any person claiming under him from interfering with the plaintiff's quiet enjoyment of the suit land.**

**(g) Each party shall bear their own costs of this suit.**

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 24<sup>th</sup> day of June, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**