REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC NO. 120 OF 2018

SILVESTER K. KAITANY.....PLAINTIFF

VERSUS

NYAYO TEA ZONES DEVELOPMENT CORPORATION.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

AND

NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY

KENYA FOREST SERVICES.....2ND INTERESTED PARTY

JUDGMENT

By a plaint dated 1st November 2018 the Plaintiff herein sued the defendants jointly and severally seeking for the following reliefs:

a) A declaration that the Plaintiff is the absolute and indefeasible owner of Land Reference No. 22209 (I.R 82519) (the suit property).

b) A declaration that the 1st Defendant whether by itself or its servants or agents or otherwise howsoever as trespassers are not entitled to remain on the suit property unless it legally adheres to the requirements for acquisition of private property as set out in part VIII of the Land Act, 2012 Laws of Kenya.

c) A permanent mandatory injunction for eviction of the 1st Defendant, its servants, officers, employees and/or agents from the suit property and vacant possession of the suit property be granted to the Plaintiff.

d) A permanent mandatory injunction restraining the 1st Defendant whether by itself or its servants or agents or otherwise howsoever from trespassing onto the suit property.

e) An order that the OCS Iten Police Station does assist forthwith in the due execution of these Orders.

f) General damages for trespass and mesne profits for loss of use of the suit property for Kshs. 98,120,000/-.

g) Special damages for Kshs. 16, 000,000/- for the 2000 trees cut down by the 1st Defendant valued at Kshs.8, 000/- per tree.

h) Punitive damages for the wanton conduct of the 1st Defendant.

i) Costs of the suit.

j) Interest on (f), (g), (h) and (i) above at court rates with effect from the date of filing the suit.

k) Any other or further orders that the court may deem necessary to make.

PLAINTIFF'S CASE

PW1 adopted his statement and stated that he is the registered owner of all that parcel of land Reference No. 22209 (I.R. 82519) measuring approximately 17.34 Hectares situate in South of Iten Township, Elgeyo Marakwet County pursuant to a transfer by the government through Settlement Funds Trustees registered on 29th March 2001 as IR 852519/2.

It was PW1's further evidence that he acquired the suit land through a land exchange arrangement with the 2nd interested party. He stated that he was previously the registered owner of Land Reference No. 8327/185 (1 R No. 52439) situate in South West of Molo Nyota Farm in Nakuru, which the government acquired and compensated him through an elaborate land exchange with land Reference No.22209 (I R 82519) measuring approximately 17.34 Hectares situate South of Iten Township, Elgeyo Marakwet County

PW1 testified that he learnt that the 1st defendant has illegally, invaded and encroached on to the suit land and taken possession of a portion thereof without his consent. He also stated that he engaged the 1st defendant and the Interested parties in a bid to resolve the dispute but the same was not fruitful.

PW1 further stated that when he took possession of the suit land in 2001 there were 2000 indigenous trees which trees were cut down by the 1st defendant who established a tea plantation on the suit land. PW1 further stated that the suit land is not part of the forest as there is a clear demarcation between the suit property and the forest and produced the original Deed Plan No 227335 dated 15th October 1999.

It was PW1's further evidence that he followed due process in the acquisition of the suit land and produced the certificate of title, deed plan, transfer forms in his favour, deed of surrender regarding the Molo property, gazette notices, and numerous correspondence between himself, the then Ministry of Environment, the Director of Land Adjudication and Natural Resources, the Chief Conservator, the Forest department and the survey office.

PW1 also produced the original Legal Notice No 54 of 12th May 1999 altering the boundary Kaptagat Forest to exclude the suit property and further stated that as part of the exchange the Minister for Natural Resources altered the boundaries of Eastern Mau Forest to include Land Reference No. 8327/185 (1 R NO. 52439) situate in South West of Molo in Nakuru District. He stated that the Minister of Natural Resources gave 28 days' Notice of intention to alter the boundary pursuant to Section 4 (2) of the Forests Act and produced original Gazette notice No 1422 dated 8th March 1999.

PW1 testified that upon the proper procedures for excision and exclusion of the suit property from Kaptagat Forest and the inclusion of Molo property, PW1 received a confirmation from the Ministry of Lands and Settlement to the effect that the exchange was complete and produced a letter dated 5th August 1999 and was directed to go the District Land Adjudication Officer Uasin Gishu to be shown the boundaries

It was PW1's evidence that he surrendered his Molo property to the government vide entry No 2 and a new grant and produced a copy of the certificate. That PW1 wrote to Kenya Forest Service informing them of the 1sts defendant's trespass and sought for compensation and the Forest Service responded vid a letter dated 13th November 2013 acknowledging that the land had been de- gazetted and transferred to PW1 and the process had been done lawfully.

PW1 testified that he informed the 1st defendant of their unlawful occupation and the 1st defendant wrote a letter dated 17th July 2015 whereby they advised PW1 to follow up his claim with the National Land Commission.

On cross examination by Mr. Kimondo, counsel for the 1st Defendant, the Plaintiff told the court that the suit property was part of a gazetted forest. He explained that the Molo property was compulsorily acquired by the government who gave him the suit land in exchange.

PW1 stated that he did not have any record to show that there were 3000 indigenous trees on the suit land and that he acquired the suit land procedurally and not fraudulently as claimed by the 1st defendant.

On cross examination by Mr. Odongo counsel for the 2nd defendant and 2nd Interested party, PW1 stated that his claim is about the land exchange with Kenya Forest Service who has never claimed the land likewise to the government.PW1 further stated that he does not have a specific claim against the 2nd defendant and Kenya Forest Service.

PW2 Geoffrey Kiprotich confirmed that he prepared the crop valuation report dated 24th June 2019 and stated that he visited the suit property together with the 1st Defendant's Field Supervisor and established that there were two varieties of tea on the suit property that is green tea on approximately 30 acres and purple tea covering approximately 10 acres. PW2 added that the projected loss of revenue and income from the tea for the last 16 years is Kshs. 93, 656, 000/-.

On cross examination by Mr. Kimondo counsel for the 1st Defendant, PW2 testified that depending on the ecological factors, the average time for tea to grow was 4 to5 years. That the valuation was done in 2003 to cover such period between 2003 and 2019. He added that he got the prices from Sisibo Tea Factory and Kapsora being the only two tea Factories in Elgeyo Marakwet County.

He confirmed on reexamination, that the Supervisor from the 1st Defendant gave him the data which he relied on to prepare the valuation report. The plaintiff closed his case after PW2's evidence.

1ST DEFENDANT'S CASE

DW1 William Togom who is the Head of Human Resource and Administration adopted his written statement dated 10th January 2019 and testified that the suit property belongs to the 1st Defendant having taken possession vide a Gazette Notice No. 265 of 1986.

DW1 further stated that the suit property falls within the tea zone established by the 1st defendant along the buffer belt of Kaptagat Forest which is a gazetted forest and therefore belongs to the 1st defendant pursuant to Legal Notice No. 30 dated 8th March 2002.He further stated that the plaintiff's title was obtained fraudulently.

DW1 testified that the Plaintiff's claim for Kshs. 16,000,000/- for trees was fabricated since his first demand notice in 2015 did not mention such trees and that it was just raised in 2017.

According to DW1, the 1st Defendant did not cut any trees but only cleared the Kaptagat forest to create a buffer zone to plant tea bushes in 1986. According to DW1 the average maturity period for tea is 5 to 6 years. The witness denied the 1st Defendant's participation in drafting the valuation report.

On cross examination by Mr. Samora for the Plaintiff, DW1 confirmed that he neither had any document to show that the 1st Defendant occupied the suit property in 1986 nor any title document in favour of the 1st Defendant regarding the suit land. He added that the suit property is not a gazetted forest. It was DW1's testimony that the 1st Interested Party confirmed that the suit property belonged to the Plaintiff.

DW1 confirmed that the 1st defendant only cultivated the buffer zone with consultation with the Conservator of Forests and that by the time the legal Notice No 30 dated 8th March 2002 was issued the suit property was already alienated and title issued on 29th December 1999.

DW1 also stated that the suit land was obtained by fraud but confirmed that the 1st defendant neither reported the fraud nor filed a counterclaim for cancellation of the plaintiff's title. Further that the 1st defendant never raised an objection to the alteration of boundaries of Kaptagat Forest which was done vide Gazette Notice No. 1422 of 8th March 1999. That was the close of the defence case.

The 2nd defendant, 1st and 2nd Interested parties neither entered appearance nor filed defenses. However, the 2nd defendant stated that they would adopt the 1st defendant's defence and evidence.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff listed six issues for determination as follows

a) Whether the Plaintiff is the registered owner, acquired and holds an indefeasible title over the suit property Land Reference No. 22209(I R 82519)

b) Whether the 1st Defendant has encroached on the Plaintiff's property, and if so, whether the 1st Defendant is a trespasser on the Plaintiff's property.

c) Whether the 1st Defendant demolished and/or cut the Plaintiff's trees on the suit property.

d) Whether the 1st Defendant has unlawfully deprived the Plaintiff of possession and use of his property as a result the Plaintiff has suffered loss and damage.

e) Whether the Plaintiff is entitled to the prayers in the plaint.

f) Who is to bear the costs of the suit?

On this issue as to whether the Plaintiff is the registered owner of the suit property, counsel submitted that due process was followed resulting into the Plaintiff being registered as the absolute proprietor of the suit property. Counsel further reiterated the plaintiff's evidence together with the exhibits produced to prove ownership of the suit land.

Further that the 1st defendant acknowledged that the plaintiff is the absolute owner of the suit land and filed a Notice of Motion application dated 12th April 2021 whereby it sought to introduce a counterclaim on adverse possession after the plaintiff had testified and closed his case but the same was dismissed

Counsel relied on section 24 (a) of the Land Registration Act to buttress the plaintiff's registration as an absolute owner of the suit land which is protected by law unless it is proven that the same was acquired fraudulently.

Counsel further cited the provisions of section 26 (1) on indefeasibility of title whereby a certificate of title issued by the Registrar upon registration is prima facie evidence that the person named is the absolute proprietor. Counsel cited the cases of **Esther Ndegi Njiru & another v Leonard Gatei [2014] eKLR** and **Emmanuel Ngala Anzaya v Elkana Epiche Aura [2020] eKLR.**

Mr Samora submitted that the 1st defendant pleaded fraud on the part of the Plaintiff, but failed to sufficiently prove that claim and relied on

the case of **Urmila w/o Mahendra Shah v Barclay Bank International Ltd & another [1979] eKLR**; **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR** where the court held that fraudulent conduct must be distinctly alleged and distinctly proved ,and it is not allowable to leave fraud to be inferred from the facts.

Counsel also submitted that the Legal Notice No. 265 of 1986 did not vest any land on the 1st Defendant but it only cultivated such land in consultation with the Conservator of Forests, in trust and through the Kenya Forest Services.

Mr. Samora urged the court to protect the plaintiff's rights guaranteed under Article 40 of the Constitution of Kenya.

On the second issue as to whether the 1st Defendant has encroached on the Plaintiff's property and if so, whether the 1st Defendant is a trespasser on the Plaintiff's property, counsel cited section 3 (1) of the Trespass Act, Cap 294 and the definition of trespass under the Black's Law Dictionary 8th Edition, and submitted that the evidence on record established that the 1st Defendant has continued to encroach on the suit property since 2004 which was confirmed by PW2 who carried out a valuation on the suit land.

Further that the 1st Interested party vide a letter dated 9th November 2019 also confirmed that they had received complaints from the plaintiff on the trespass by the 1st defendant but the 1st defendant never responded to the complaint.

Counsel therefore submitted that the 1st defendant is guilty of continuing trespass hence the plaintiff should be paid damages for trespass.

On the third issue as to whether the 1st Defendant demolished and/or cut the Plaintiff's trees on the suit property counsel submitted that the 1st defendant pleaded that the suit property was within the Kaptagat Forest and that the tea bushes were along the buffer belt along the said forest hence in the circumstances, the suit property previously being part of the forest before transfer to the Plaintiff had trees which could not have been cut down by any other person other than the 1st Defendant.

On the fourth issue as to whether the 1st Defendant has unlawfully deprived the Plaintiff of possession and use of his property and whether as a result the Plaintiff has suffered loss and damage counsel submitted that it is not disputed that the plaintiff has suffered loss.

Counsel relied on the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014) eKLR** where **Mutundgi J.** stated:-

> ***"I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case."***

On the fifth issue as to whether the Plaintiff is entitled to the prayers in the plaint, counsel submitted that the Plaintiff has proved that he is the absolute owner of the suit property and therefore his is entitled to the enjoyment of the property.

On general damages for trespass, the counsel relied on the cases of **Philip Ayaya Aluchio v Chrispinus Ngayo [2014] eKLR; Nakuru Industries Limited v S.S Mehta & Sons [2016] eKLR; and Willesden Investments Limited v Kenya Hotel Properties Limited NBI HCC No. 367 of 2000** and submitted that an award of Kshs. 10,000,000 general damages for trespass would be reasonable.

On mesne profits, counsel submitted that the 1st Defendant's actions have prevented the plaintiff from undertaking development on the suit property and therefore entitled to Kshs. 98,120,000/- mesne profits which figure was assessed by PW2, a Public Agricultural Officer.

On special damages, counsel relied on the case of **Duncan Ndegwa v Kenya Pipeline HCC No. 2577 of 1990 cited in the Nakuru Industries Limited case** (supra) and added that the plaintiff is entitled to punitive or exemplary damages and relied on the cases of **Titus Gatitu Njau v Municipal Council of Eldoret [2015] eKLR; Obongo & another v Municipal Council of Kisumu (**supra).

Counsel therefore urged the court to grant the plaintiff's prayers as sought in the plaint together with costs of the suit.

1ST DEFENDANT'S SUBMISSIONS

Counsel for the 1st Defendant identified 7 issues for determination:

> ***a) Whether the 1st Defendant first entered into the suit property in 1987/1988 or 2004.***
>
> ***b) Whether or not the suit property was available for alienation.***
>
> ***c) Whether the purported title in respect to the suit property was procured fraudulently, illegally, unprocedurally and through misrepresentation and a corrupt system***
>
> ***d) Whether the Plaintiff acquired an indefeasible title to the suit property***
>
> ***e) Whether the Plaintiff is entitled to the reliefs sought.***

On the first issue as to when the 1st Defendant was established, counsel submitted that the 1st defendant was established vide a Gazette Notice No. 265 of 1986 which section 3 (1) (a) thereon mandated the 1st Defendant in consultation with the Chief Conservator of Forests to create tea and fuel wood growing zones to be known as Nyayo Tea Zones.

That the 1st Defendant had all the right to enter the said forest to establish a tea growing zone as per the gazette notice, therefore counsel submitted that it follows that the 1st defendant entered the suit property in 1987/1988 to establish a tea growing zone.

It was counsel's submission that the evidence of PW1 and PW2 was clear that it started picking tea from the suit property in 2003 hence it could only mean that the 1st Defendant entered into the suit property long before 2004.

On the second issue whether or not the suit property was available for alienation, counsel submitted that it was not in dispute that the suit property was part of Kaptagat Forest prior to the de-gazettment. However, the land did not become available for alienation for private use even after such de-gazettment.

Mr Kimondo submitted that such degazetted land reverted back to government and became unalienated government land which could only be alienated under the Government Lands Act, Cap 280 (now repealed) and that the suit property had been earmarked for public use even before the said de-gazettment.

To buttress this point, counsel cited the cases **of John Peter Mureithi & 2 other v Attorney General & 4 others [2006] eKLR; Niaz Mohamed Jan Mohammed v Commissioner of Lands & 4 others [1996] eKLR; James Joram Nyaga & another v Attorney General & another [2019] eKLR; Republic v PS Ministry of Public Works & Housing, ex parte Tom Miliachi Sitima [2014] eKLR; friends of Lake Turkana Trust v Attorney General & 2 others [2014] eKLR; R v Land Registrar, Kilifi & Another ex parte Daniel Ricci [2013] eKLR.**

On the third issue as to whether the purported title in respect to the suit property was procured fraudulently, illegally, unprocedurally and through misrepresentation and a corrupt system, counsel submitted that the suit property was not available for such alienation as alleged by the Plaintiff, and more particularly, the Commissioner of Lands had no such powers to allocate land.

Counsel relied on sections 2, 3 and 7 of the Government Lands Act (now repealed) and the cases of **James Joram Nyaga & another v The Attorney General & another [2007] eKLR; Kenya Anti-corruption v Online Enterprises Limited & 4 others [2019] eKLR.**

On the issue as to whether the Plaintiff acquired an indefeasible title to the suit property, it was counsel's submission that Section 23 (1) of the Registration of Titles Act, Cap 281 (now repealed) and 26 (1) of the Land Registration Act, 2012 provided that a title obtained through fraud or misrepresentation did not enjoy the protection of the law. In the circumstances, the Plaintiff's title is not indefeasible.

On whether the 1st Defendant is or not a trespasser in the suit property, counsel stated that the 1st Defendant entered the suit property in 1987 pursuant to the Gazette Notice No. 265 of 1986 and the subsequent Gazette Notice Number 30 of 8th March 2002, hence the suit property belonged to the 1st Defendant and therefore could not be a trespasser on its own land.

Lastly on whether the Plaintiff is entitled to the reliefs sought, counsel submitted that the plaintiff has not proved his case on a balance of probabilities therefore not entitled to the prayers sought.

On general damages for trespass and mesne profits, the 1st Defendant submitted that the same was not sustainable in law for the reason that the Plaintiff was not in possession of the suit property.

Counsel submitted that the Plaintiff failed to prove that he was in immediate possession and relied on the case **of M'kiriara M'Mukanya & another v Gilbert Kabeere M'Mbijiwe [1984] eKLR**. It was counsel's submission that a nominal value of Kshs. 50,000 would suffice.

On special damages, counsel submitted that the same must be specifically pleaded and proved and relied on the cases of **Christine Nyanchama Oanda v Catholic Diocese of Homabay Registered Trustees [2020] eKLR** and **Duncan Ndegwa v Kenya Pipeline Limited HCCC No. 2577 of 1999.**

On punitive damages, it was counsel's submission that the Plaintiff is not entitled to the same since he did not show how the 1st Defendant acted recklessly or maliciously so as to warrant such an award and relied on the cases of M**uncipal Council of Eldoret v Titus Gatitu Njau; Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR.**

Counsel therefore urged the court to dismiss the plaintiff's case with costs to the 1st defendant.

2ND DEFENDANT'S SUBMISSIONS

Counsel submitted that the 1st Defendant's interest in the suit property created an overriding interest which preceded the Plaintiff's certificate of title which was issued in error or as a result of material non-disclosure and relied on the case of **GITWANY INVESTMENT LIMITED v TAJMAL LIMITED & 3 OTHERS [2006] eKLR** where Lenaola J. (as he then was) had this to say:

> ***"My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs***

Commissioner of Lands, C.A. No. 71/1997 (unreported):- is the "grant [that] takes priority. The land is alienated already." This decision was again upheld in Faraj Maharus vs J.B. Martin Glass Industries and 3 others C.A. 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity. The Gitwany title fits this description and in fact upto the end of this case, the 3rd party has not sought to cancel it!

47. My answer above does not solve the puzzle however. What then happens to the second title issued apparently procedurally but subsequent to an earlier valid title? Again my view is that the answer lies in s.23(1) aforesaid. Whereas the first title cannot be challenged, the second one can be challenged because whereas it exists and even if procedurally issued, or so it appears, it is not absolute nor indefeasible and is relegated to a level of legal disability and the remedy for a party holding it if aggrieved, lies elsewhere, a matter I will shortly address.

Mr. Odongo also cited the cases of **Philemon L Wambia -versus- Gaitano Lusitsa Mukofu & Brothers (2019) eKLR** and **Kipsirgoi Investments Limited v Kenya Anti-corruption Commission** where the Court of Appeal held that no good title passes when land reserved for public use is subjected to an alienation as such land is no longer available for further alienation.

Counsel further submitted that though the 2nd interested party held a radical title to Kaptagat Forest exclusively as forest land, the area occupied by the 1st defendant in the Kaptagat Forest including the suit property was divested from the reach of the 2nd interested party and conferred upon the 1st defendant by dint of section 3(1)(b) of the Legal Notice.

Further that consequently, it was not proper for the 2nd interested party to agree or consent, if it did, to dispose of the suit property to plaintiff by way of land exchange without knowledge or involvement of the 1st defendant. Counsel therefore urged the court to to dismiss the plaintiff's case in its entirety.

ANALYSIS AND DETERMINATION

The issues for determination that arise from the pleadings and the evidence of the parties are as follows:

a) Whether the Plaintiff is the registered owner and holds an indefeasible title over the suit property Land Reference No. 22209(I R 82519)

b) Whether the suit land was available for alienation

c) Whether the 1st Defendant has encroached on the suit land and if so, whether the 1st Defendant is a trespasser on the Plaintiff's property.

d) Whether the title in respect to the suit property was procured fraudulently, illegally, unprocedurally and through misrepresentation and a corrupt system

e) Whether the 1st Defendant cut the Plaintiff's trees on the suit property.

f) Whether the 1st Defendant has unlawfully deprived the Plaintiff of possession and use of his property as a result the Plaintiff has suffered loss and damage.

g) Whether the plaintiff is entitled to the reliefs sought

The plaintiff testified that he is the registered owner of the suit land and produced a certificate of title in his name. The plaintiff gave a chronology of how the 2nd Interested party acquired his land through a land exchange namely Land Reference No. 8327/185 (1 R No. 52439) situate in South West of Molo Nyota Farm in Nakuru, which the government acquired and compensated him through an elaborate land exchange with land Reference No. 22209 (I R 82519) measuring approximately 17.34 Hectares situate South of Iten Township, Elgeyo Marakwet County.

The plaintiff produced gazette notices which de- gazetted the portion of Kaptagat Forest. The Forest Act has elaborate procedures for alterations of boundaries which must be adhered to before it becomes legal. Section

Section 4 of the Forest Act, Cap 385 (now repealed) provides as follows:

4. (1) The minister may, from time to time, by notice in the Gazzete-

(a) declare any unalienated Government land to be a forest area;

(b) declare the boundaries of a forest and from time to time alter those boundaries;

(c) declare that a forest area shall cease to be a forest area.

(2) Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1), twenty -eight daysnotice of the intention to make the declaration shall be published by the minister.

In this case it started with the Minister of Natural Resources vide a Gazette Notice No 1422 dated 8th March 1999 giving 28 days' notice of intention to alter boundaries pursuant to Section 4 (2) of the Forests Act Cap 385 (Repealed) The Notice read as follows:

GAZETTE NOTICE NO. 1421

THE FOREST ACT

(Cap. 385)

INTENTION TO ALTER BOUNDARIES –EASTERN MAU FOREST

IN ACCORDANCE with the provisions of Section 4 (2) of the Forests Act, the Minister for Natural Resources gives twenty- eight (28) days' notice, with effect from the date of publication of this notice, of his intention to declare that the boundaries of the Eastern Mau Forest, will be altered so as to include the area described in the schedule hereto

SCHEDULE

An area of land of approximately 4.763 hectares, known as L.R. No. 8327/185, adjoining the Western boundary of Eastern Elburgon Township in Nakuru District, Rift Valley Province, the boundaries of which are more particularly delineated, edged green, on the Boundary Plan No. 175/363 which is signed and sealed with the seal of the survey of Kenya and deposited at the Survey Records office, Survey of Kenya, Nairobi, and a copy of which may be inspected at the office of the District Forest Officer, Forest Department, Nakuru.

Dated the 8th March, 1999.

F.P.L. LOTODO,

Minister for Natural Resources.

GAZETTE NOTICE NO. 1422

THE FOREST ACT

(Cap 385)

INTENTION TO ALTER BOUNDARIES-KAPTAGAT FORREST

IN ACCORDANCE with the provisions of Section 4(2) of the Forest Act, the Minister for Natural Resources gives twenty-eight (28) days' notice, with effect from the date of publication of this notice, of his intention to declare that the boundaries of the Kaptagat Forest, will be altered so as to exclude the area described in the schedule hereto

SCHEDULE

An area of land approximately 17.34 hectares, known as L.R. No. 22209, lying within and adjoining the northern boundary of Kaptagat Forest, situate approximately 21 kilometres East of Eldoret Municipality in Keiyo District, Rift Valley Province, the boundaries of which are more particularly delineated, edged red, on the Boundary Plan No. 175/364 which is signed and sealed with the seal of the Survey of Kenya, Nairobi, and a copy of which may be inspected at the office of the District Forest Officer, Forest Department, Iten.

Dated 8th March, 1999.

F. P. LOTODO,

Minster of Natural Resources

The alteration vide Legal Notice No 54 of 12th May 1999 in respect of the boundary of Kaptagat Forest to exclude the suit property and as part of the exchange further it is also on record that the Minister for Natural Resources altered the boundaries of Eastern Mau Forest to include Land Reference No. 8327/185 (1 R NO. 52439) situate in South West of Molo in Nakuru District.

Upon the lapse of the 28 days' notice, the plaintiff received a confirmation letter dated 5th August 1999 from the Ministry of Lands and Settlement to the effect that the exchange was complete and was directed to go the District Land Adjudication Officer Uasin Gishu to be shown the boundaries

Vide a letter dated 13th August 1997 from the Chief Conservator of Forests titled

"Forest Exchange: Eastern Mau & Kaptagat Forests"

The letter stated that the Permanent Secretary Ministry of Environment and Natural Resources had authorized an excision of 17.34 hectares from Kaptagat Forest to be exchanged with 4.763 hectares to be added to Eastern Mau.

The plaintiff was issued with a title deed and entry No 2 states that "*surrender to the government of Kenya in exchange for new Grant IR 82519"*. Further in the deed plan dated 15th October 1999 there was clear demarcation of the Trust Land and the Forest Reserve.

This shows that due procedures were followed and adhered to according to the law in the alteration of boundaries and the exchange of the plaintiff's Molo land with the suit land. It is further on record that the plaintiff wrote to Kenya Forest Service informing them of the 1st defendant's trespass and sought for compensation and the Forest Service responded vide a letter dated 13th November 2013 acknowledging that the land had been de- gazetted and transferred to the plaintiff and the process had been done lawfully. The letter stated as follows:

Kenya Forest Service

Karura, Off Kiambu Rd

P.O. Box 30513-00100

NAIROBI, KENYA

13th November 2013

MAP/2/KFS/VOL.111/34

The Ecosystem Conservator,

Nakuru County,

P.O. BOX 25

ELBURGON

The Ecosystem Conservator,

Elgeyo Marakwet County

P.O. Box 397

ITEN

SURRENDER OF L.T. NO. 8327/185 MOLO (INDEGENOUS FOREST) IN LIEU OF NEW GRANT L.R. NO. 22209, KAPTAGAT FOREST

Reference is made to Mr. Silvester Keittany's letter dated 14th June, 2013 but received in my office on the 8th of November, 2013 on the above subject.

A perusal at records held by the Kenya Forest Service dating back to the year 1994 reveals:

(1) Authority to transact the exchange of 4.763 Hectares of a parcel known as Nyota L.R. No. 8375/185 and a part of Kaptagat Forest was sanctioned by the then Permanent Secretary, Ministry of Environment and Natural Resources and later this transaction exchange approved by the then Minister of Environment, Honourable Henry K. Kosgey. This is evidenced vide their letter's to the then Director of Forestry and Chief Conservator of Forests. These letters are attached for ease reference.

(2) The process of consummating the exchange was commenced by the proprietor of Nyota L.R. No. 8327/185 measuring approximately 4.763 hectares surrendering his title deed to the Commissioner of Lands to pave way for the allocation of New Grant to the Forest Department. On its part the Forest Department ceded a portion of forest land in Kaptagat Forest Block known as L.R. No. 22209 of approximately 17.34 hectares.

(3) The process to gazette Nyota L.R. No. 8327/185 and degazette part of L.R. No. 22209 commenced with the drawing of boundary plans delineating the two parcels in exchange. These boundary plans were transmitted to the Director of Surveys for checking and authentication and were registered as BP Nos. 175/363 and 175/364. Then as required by the forest law gazette notice numbers 1421 and 1422 of 8th March, 1999 were published to inform the Kenyan Public of the Minister's intention to declare Parcel:- Nyota,

L.R. No. 8327/185 as a forest area. Also of the Minster's intention to alter boundaries of Kaptagat Forest to exclude Parcel No. 22209 from Kaptagat Forest. After the expiry of 28 days, without any objection being raised on this transaction exchange legal Notice Nos. 54 and 55 of 28th May 1999 were published and thus finalized this exchange.

(4) The gazette portion which was an addition to Marindas Forest Block was eventually reallocated to the CCF through a letter of allocation No. Ref. No. 36200/35 of 29th December, 1999.

(5) The Chief Inspector of Forests immediately paid title levies amounting to Kshs 5,970 for procession of title and Mr. Kegode has been tasked to pursue this tittle.

From the foregoing it is clear that the exchange transaction between Forest Department and Mr. Silvester Kaitanny, where Mr. Kaittany surrendered Parcel, known as L.R. No 8327/185 measuring approximately 4.763 hectares (11.8 acres) and Forest ceded approximately 17.34 hectares of parcel known as L.R. No. 22209 was fully consummated and above board.

Thus, you are under instruction to implement this exchange forthwith.

D.K MBUGUA,

DIRECTOR

Encls.

(1) Authorization by Permanent Secretary and Minister

(2) Copy of letter of allotment as New Grant and Payment of premium of Kshs 5,975/=

(3) Copies of Gazette Notice Nos. 1421 and 1422 of 8th March, 1999.

(4) Copies of Legal Notice Nos. 54 and 55 of 1999 of 28th May 1999.

This was a transaction for exchange of land between Kenya Forest Service a government entity and private individual. It was not an allocation of land but exchange where the plaintiff's land had been acquired by the government. The Forest Service acknowledged that the transaction was above bode and proper procedures were followed leading to the completion of the exchange transaction with a title deed being issued to the plaintiff.

The above letter explains why the 2nd Interested Party did not defendant the suit as they would have been conflicted by their earlier admission that they entered into an exchange of land agreement which was above board.

The defendant alleged that the plaintiff's title was procured fraudulently and unprocedurally due to fact they were in possession and proper procedures of acquisition were not followed. These allegations remain as such as the 1st defendant did not lead any evidence to show the impropriety.

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

It follows that due process having been followed in the alteration of the boundaries and exchange transaction being above board that the plaintiff is the indefeasible owner of the suit land.

It also beats logic that the 1st defendant alleged fraud but it is on record that the defendant made an application to Re- amend and amended defence to include a claim for adverse possession which application was dismissed as it was brought when the plaintiff had already testified and closed his case. It is trite law that for a party to succeed in a claim of adverse possession then it must acknowledge the title that he/she is adverse to.

In the case of **Wellington Lusweti Barasa & 75 others v Lands Limited & another [2014] eKLR** where the court held that:

"a party cannot plead adverse possession and at the same time assert cancellation of the same title by way of fraud. The two

orders cannot be made in the same suit, for to sustain a claim for adverse possession, there must be a title, to which the party claims possession that is adverse to that of the title holder".

The 1st defendant's attempt to introduce a claim for adverse possession shows that it acknowledges that the plaintiff is the rightful owner of the suit land. Or was it a case of clutching on straws or desperate measures?

On the issue whether the suit land was vested to become the property of the 1st defendant, looking at Legal Notice No 30 of 2002, dated 8th March 2002, Section 3(1) b provides that:

"After the creation of the tea and fuel wood growing zones, the land shall be vested and become the property of the Corporation for purposes of this order."

This Legal Notice does not specifically speak to or mention the land that shall be vested. There were many Nyayo Tea Zones in the country and the land in question having been legally acquired by the plaintiff would not form part of the land to be vested in the 1st defendant.

Further the Legal Notice No. 265 of 1986 did not vest any land on the 1st Defendant but it only cultivated such land in consultation with the Conservator of Forests, in trust and through the Kenya Forest Services hence they did not have any proprietary interest in the suit land. If they had any then they should have protected such interest during the process of alienation which was in the public domain through gazette notices.

The government could not keep both the Molo land and the Kaptagat land without compensation to the plaintiff. This would go against the plaintiff's right to land and where there is compulsory acquisition prompt and adequate compensation. The issue of public good can only apply where the law has been followed. The 1st defendant cannot raise the issue in disregard of the plaintiff's right to land. There are laid down procedures for acquisition of land and due adequate payment.

On the issue whether the 1sts defendant has trespassed on the plaintiff's suit land, having found that the plaintiff is the rightful owner of the suit land, the continued occupation and utilization of the suit land without the plaintiff's permissions amounts to trespass. The 1st Interested party vide a letter dated 9th November 2019 also confirmed that they had received complaints from the plaintiff on the trespass by the 1st defendant but the 1st defendant never responded to the complaint.

The 1st interested party the National Land Commission vide that letter the Chairman stated that they had done a valuation of the suit land by their Chief Valuer who gave the suit land a value of Kshs 369, 795,500/ (Three Sixty Nine Million Seven Ninety Five Thousand Five Hundred Only) The valuation indicated that the normal carrying capacity of 600 to 640 trees per acre.

PW2 a Sub County Agricultural Officer carried out a valuation of the crops under production for the period between 2003 to 2019 and gave a figure of Kshs. 93,656,000/ as mesne profits.

It is trite law that no evidence is required to be adduced before damages to trespass on land can be awarded. In the case **of Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR** the court held that once trespass to land is established it is actionable per se and no proof of damage is necessary for the court to award general damages.

The plaintiff prayed for mense profits and general damages for trespass, in the case of **Maina Kabuchwa v Gachuma Gacheru [2018] eKLR** the court held that

In respect to issue no. (d), it is trite law that where a party claims for both mesne profits and damages for trespass, the Court can only grant one and not both. Mesne Profits, which is defined as the profit of an estate received by a tenant in wrongful possession between the dates (see Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case ***Peter Mwangi Msuitia & Another Vs Samow Edin Osman (2014) e KLR****, the Court of Appeal held as follows:*

"As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded..."

The court can only grant one and not both mesne profits and general damages. Looking at the valuation report by PW2 the same is in respect of the mesne profits but I will award general damages as it is trite that the court cannot award both.

The plaintiff has been denied the use of his land for many years and he has been in correspondence with government offices who have not been able to assist in the resolution of the dispute even though they acknowledged that the transaction was done procedurally.

In the case of **Ajit Bhogal v Kenya Power And Lighting Co. Ltd [2020] eKLR**, an award of Kshs 20,000,000/- for trespass was found to be reasonable. Taking into consideration the length of time for the trespass which has denied the plaintiff the use of the suit land, and also taking into account the acreage involved and the kind of profits the 1st defendant is reaping on the suit land, I find that an award of Kshs 50,000,000. (Fifty Million only) would be reasonable compensation to the plaintiff.

The plaintiff also claimed for special damage of Kshs 16millon for 2000 trees cut down by the 1st defendant but this limb was also not proved to the required standard.

On the issue of punitive damages I will rely on the case of **Rookes v Barnard (1964) 1 All ER 367,** where the Court held that:

> ***'exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.***

From the evidence on record I do not find that this limb of the claim has been proved therefore not awardable.

I have considered the pleadings, the evidence, the submissions of counsel and the relevant authorities and find that the plaintiff has proved his case on a balance of probabilities and make the following specific orders.

a) A declaration is hereby issued that the Plaintiff is the absolute and indefeasible owner of Land Reference No. 22209 (I.R 82519).

b) A declaration is hereby issued that the 1st Defendant whether by itself or its servants or agents or otherwise howsoever as trespassers are not entitled to remain on the suit property unless it legally adheres to the requirements for acquisition of private property as set out in part VIII of the Land Act, 2012 Laws of Kenya.

c) A permanent mandatory injunction restraining the 1st Defendant whether by itself or its servants or agents or otherwise howsoever from trespassing onto the suit property.

d) General damages for trespass for loss of use of the suit property for Kshs. 50,000,000/-.

e) Costs of the suit plus interest to be paid by the 1st defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF DECEMBER, 2021.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.