



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 142 OF 2014**

**PATRICK TOROINO MITINGI (Suing as the administrator of the Estate  
of TOROINO MITINGI.....PLAINTIFF**

**VERSUS**

**THE COUNTY GOVERNMENT OF WEST POKOT.....DEFENDANT**

**JUDGMENT**

1. By an amended plaint dated 22<sup>nd</sup> September 2016, the Plaintiff filed this suit against the Defendant and sought for the following orders:-

- (a) An order that parcel No. West Pokot/ Kishaunet/321 measuring 8.3 Ha. lawfully belongs to the Estate of Toroino Mitingi (deceased);
- (b) An order that 1.85 acres out of land parcel No. West Pokot/Kishaunet/321 was fraudulently registered in the defendant's names on title West Pokot/Kishaunet/16;
- (c) An order for the Land Registrar, West Pokot to rectify the register and revert 1.85 acres to the plaintiff's land parcel No. West Pokot/Kishaunet/321;
- (d) A permanent injunction restraining the defendants from interfering with the suit properties;
- (e) Alternatively, the 1.85 acres to be valued and the plaintiff to be compensated in monetary terms;
- (f) An order directing the defendant to surrender the portion given out by the deceased (Toroino Mitingi) comprising animal yard and market on land parcel No. West Pokot/ Kishaunet/32;
- (g) Costs of the suit;
- (h) Any other relief the court deems fit and just to grant.

2. In his claim, the Plaintiff averred that he is the administrator of the Estate of the late **Toroino Mitingi** and that the deceased (his father) owned land parcel No. **West Pokot/ Kishaunet/321** measuring **8.3 Ha**; that the defendant requested the late **Toroino Mitingi** to give the defendant a parcel of land on which to erect a community dispensary, animal yard and market out of LR No. **West Pokot/ Kishaunet/321** which land was indeed surrendered; that it was agreed that the defendant was to compensate the deceased with **four (4)** special plots within West Pokot County. The plaintiff further avers that when he followed up the matter and on **19/05/2005**, he was issued with a letter of allotment for a plot at **Aramaket**, and when he searched the position of the said land at the lands office, he discovered that it belonged to a third party; that on **17/4/2009**, the defendant through the officials of the dispensary agreed to pay the plaintiff **Kshs. 1,400,000/=** being compensation for the land where the dispensary is built but no money has ever been paid and that the defendant has attempted to evict the plaintiff and demolish his buildings in the suit land thus precipitating the present suit.

3. In the amended statement of defence and counterclaim dated **6<sup>th</sup> October 2016**, the defendant denied the plaintiff's claim. It was averred that parcels Nos. **16** and **319** were registered in the names of Pokot County Council in **1979** before parcel No. **321** was registered in the names of **Toroini Mitingi** in **1980** hence the claim that parcel No. **16** and **319** were carved out of parcel No. **321** cannot stand.

4. The defendant stated in the counterclaim that the plaintiff, his agents or relatives trespassed to land parcel No. **West Pokot/Kishaunet/16** hence they should be evicted. It was also averred that the plaintiff, his relatives, servants and/or agents on **11/9/2014** maliciously damaged or

destroyed posts and beacons worth **Kshs. 102,500/=**. Therefore, it is urged that the plaintiff's claim be dismissed with costs and the counterclaim be allowed.

#### **PLAINTIFF'S CASE**

5. **PW1**, the plaintiff herein testified on **31/5/2018** and stated that his father, the late **Toroino Mitingi** owned parcel of land know as **West Pokot/ Kishaunet/321** measuring **9½ acres** . He produced a copy of the green card and title as **P. Exhibit 2** and **P. Exhibit 3** respectively. He further stated that his late father entered into an agreement with the defunct Pokot County Council where the deceased gave part of his parcel of land for an exchange of four plots at Makutano Town sometimes in **1975**. **PW1** produced a copy of the agreement as **P. Exhibit 4**.

6. He told the Court that his father gave about **5 acres** from parcel No. **321** where the defendant has now erected a dispensary, an animal yard and a market.

7. He further testified that he went to claim plots on **19/5/2005** and was given an allotment letter to replace the **4 plots** at **Aramaket** which allotment letter he contended was signed by the clerk of Kapenguria Council. The same was produced as **P. Exhibit 5**.

8. It was **PW1's** evidence that he later went to the allocated land and found one **William Lodeya** had constructed on the land and upon lodging a complaint with the Municipal, he was asked to negotiate with the officials of Kishaunet Dispensary. Further, he testified that he met with the dispensary committee on **17/4/2009** and it was agreed that the plaintiff be paid **Kshs. 1,400,000/=**. He produced an agreement to that effect as **P. Exhibit 6**. He stated that he was not paid the said monies and he went back to the Town Clerk who wrote a letter to the C.D.F. He stated that when his efforts of getting back the monies failed, he resorted to filing this suit.

9. **PW1** stated that he has erected structures about **1.85 acres** away from the dispensary and that the dispensary lies on **1.85 acres** which portions of land are on parcel No. **16** registered in the names of the defendant.

10. **Henry Lumasayi** testified on **31/10/2018**, as **PW2** and stated that he has been the County Surveyor, West Pokot County for over **15 years** He confirmed to having the extract of the map for parcels No. **321** and No. **16**. He stated that the boundaries indicated in the extract map were drawn in **January 1978**. He further stated that from the map, the animal yard which he marked as **'A'**, the market yard as **'B'** and the dispensary as **'C'** as being within parcel No. **16**. He produced the map as **P. Exhibit 14**.

11. On cross examination, he stated that as per the adjudication record, boundaries had not changed since adjudication was done and that as per the records, parcel No. **16** remained the property of the defendant.

#### **DEFENDANT'S CASE**

12. The defence called **Benard Nyakundi**, the Deputy Land Adjudication and Settlement Officer, West Pokot County, as **DW1** in furtherance of its case. He stated that as per the adjudication record, parcel No. **16** was allocated to the defendant in **1976** and the Executive Officer signed the record on **28/12/1976** and that the Chairman signed it on **29/12/1976**.

13. It was his evidence that part **14** of the adjudication records with regards to parcel No. **16** shows that an objection was raised by one **Kalemunyang Lotwei** which objection was heard and dismissed and that the said **Lotwei** lodged an appeal which was also dismissed. He produced a copy of the adjudication record as **D. Exhibit 3**.

14. **DW1** produced an adjudication record for parcel No. **321** as **D. Exhibit 4** and confirmed that the same was allocated to **Toroini Mitingi**. He stated that as per that record, there was no objection raised with regards to the said parcel of land.

15. Accordingly, **DW1** clarified that as per the Green Card, (**D. Exhibit 1**) for plot No. **16**, the register was opened on **19/11/1979** and title has not been issued as it has a restriction which was lodged by an undisclosed individual. Further, that as, per the Green Card, (**D. Exhibit 2**), for plot No. **321**, the same shows that the title was issued to **Toroino Mitingi** on **18/8/1980** and that the Green Card was prepared on **19/11/1979**. **DW1** maintained that as per the search certificate which he produced as **D. Exhibit 9**, the said plot, No **321** has no restrictions.

16. **DW1** therefore maintained that as per the records, the defendant is the proper owner of plot No **16**.

17. The defence called **Jackson Langat Yayarlima** the CEC for Lands, Housing and Urban Development as **DW2**. He relied on his witness statement as his evidence-in-chief. He testified that he was not aware of the arrangement between the plaintiff and the defendant.

18. With that, the defence closed its case.

#### **SUBMISSIONS OF COUNSELS**

19. In his written submissions filed on **2/12/2019**, counsel for the plaintiff submitted *inter alia* that the exhibits produced clearly demonstrated that there was an agreement between the parties for compensation and/or payment. She submitted that the defence was unable to explain why **P. Exhibit 4**, the letter dated **27/10/1975** was issued or as to why **P. Exhibit 6** in the agreement dated **17/4/2009** was written by the locational committee and yet none of the committee members was called to testify. She submitted that based on the correspondences between the plaintiff and the location committees which were produced in court, the plaintiff had proved his case to the required standard.

20. Counsel for the plaintiff Ms. Arunga relied on the case of **Hitenkumar Amritlal -vs- City Council of Nairobi [1982] eKLR**. She asked that judgment be given in favour of the plaintiff with costs.

21. The defendant filed its submissions on 2/12/2019 where Counsel submitted that the plaintiff had admitted to occupying part of land parcel No. 16 and should therefore be evicted. Counsel further submitted that, DW1 had confirmed in his testimony that parcel No. 16 and 321 were adjudicated and records certifying the correction of information were signed on 28/12/1976 by the Executive Officer and on 29/12/1976 by the Chairman both of Adjudication Committee, West Pokot.

22. Mr. Barongo Counsel for the defendant submitted that, as per the adjudication records in regard to parcel No. 16, the said records showed there was an objection raised but the same was dismissed on 22/6/1978 and that no claim was ever filed until 2018 by the plaintiff herein. He submitted that the plaintiff's claim is time barred under Section 7 of the Limitation of Actions Act. Counsel maintained that, as per the adjudication records, during his lifetime **Toroini Mitingi** never raised an objection that the defendant had encroached into his parcel of land.

23. In response to the letters from the local administrative authorities which were produced and relied upon by the plaintiff, counsel argued that none of those documents emanated from any agent of the then Pokot County Council which is the registered owner of parcel No. 16.

24. It was then submitted that, if there was any agreement between the plaintiff and any committee or body, the same did not bind the then Pokot County Council and the same amount to a conspiracy to defraud Pokot County Council of its land reserved for a trading centre. With that, counsel for the defence urged the court to dismiss the case with costs and allow the counterclaim with regards to parcel No. 16 where it was alleged that the plaintiff has constructed a homestead and which public land registered in the names of the defendant.

### ANALYSIS AND DETERMINATION

25. Having considered the available evidence and the submissions herein, the court finds the issues for determination are as follows;

*(a) Has the Defendant encroached onto the Plaintiff's parcel No. 321 by 1.85 acres and fraudulently registered the same in its name in parcel no. 16?*

*(b) Is the suit barred under the Limitation of Actions Act, Cap 22 Laws of Kenya?*

*(c) Is the Plaintiff entitled to the prayers sought and alternatively is the Defendant entitled to the prayers in the Counter-Claim?*

*(d) Who is to bear the costs of the suit?*

26. On the first issue, there is no doubt that the parcel No. 321 is registered in the name of **Toroini Mitingi** while parcel No. 16 is registered in the name of the defendant. The issue that arises here is the alleged encroachment by the defendant. PW2, the West Pokot County Surveyor while giving his testimony produced an extract map of plots No. 16 and 321 as **P. Exhibit 14**.

27. According to him, the boundaries are as shown in the extract map original and that the same were drawn in **January 1978**. He admitted to visiting the site and stated that he found that the plaintiff's homestead is located in plot No. 16. He thus prepared a report which was produced as **D. Exhibit 6**.

28. Accordingly, PW2 stated that he annexed a sketch map to the report which map as indicated herein before revealed that the plaintiff's homestead, the dispensary and the staff houses marked as **key 1, key 2 and key 3** respectively were on parcel No. 16.

29. This then begs the question, who among these parties has encroached on another's parcel of land?

30. From the surveyor's report, the plaintiff has clearly encroached on parcel No. 16 which is registered in the names Defendant. PW2, made it clear that the boundaries were original having been made in **1978**. It is a mystery why the plaintiff is claiming for compensation when it is obviously clear that he is the trespasser in this case.

31. With regard to the second issue, the defendant has raised a very crucial issue to whether the suit is barred under the **Limitations of Actions Act Cap 22 Laws of Kenya**.

32. From the evidence on record, is evident that the Plaintiff's claim is in respect of the encroachment of the property which is a claim on trespass. It is evident that trespass is a **tort** and under **Section 4(2) of the Limitation of Actions Act**, this claim cannot stand.

33. **Section 7** of the said Act provides that;

**"An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims to that person".**

34. As per the Green Cards produced in court as **D. Exhibit 1** and **D. Exhibit 2**, it is clear that the parcels of land in issue, that is, plot No. 16 and plot No. 321 were registered sometimes in **1978**. It has been established that the late **Toroini Mitingi** passed on in **2005**, more than **25 years** after the parcels of land in issue were registered and no complaint as to the encroachment by the defendant was ever raised in his lifetime. It therefore follows that, the suit here is therefore caught up by **Limitation of Action Act and the same is time barred**.

35. On the last issue, having found that indeed it is the plaintiff who has trespassed on the defendant's parcel of land, it follows that the suit by the plaintiff should be dismissed with costs and the counterclaim by the defendant should succeed to the extent of eviction of the plaintiff from parcel No. 16.

36. The plaintiff has therefore failed to prove his claim on a balance of probabilities. I therefore enter judgment for the defendant and I issue the following final orders.

(a) **The plaintiff's suit is dismissed with costs.**

(b) **The counterclaim by the defendant is allowed with costs to the defendant in the main suit.**

(c) **The plaintiff shall remove himself from parcel No. 16 within 180 days from the date hereof and in default be forcibly evicted.**

**It is so ordered.**

**Dated, signed and delivered at Kitale this 3<sup>rd</sup> day of March, 2020.**

**MWANGI NJOROGE**

**JUDGE**

**3/3/2020**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Temba for Ms. Arunga for plaintiff

Ms. Chebet holding brief for Barongo for defendant

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**3/3/2020**