



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 140 OF 2013

MARK JOSEPH SIMIYU KISEMBE.....1ST PLAINTIFF

SAMUEL ODUORI CHUMBA.....2ND PLAINTIFF

MICHAEL FRANCIS CHEMONGES KITIYO.....3RD PLAINTIFF

VERSUS

MICHAEL KIMTAL.....1ST DEFENDANT

DAVID WEKESA SITUMA.....2ND DEFENDANT

LENA NALIAKA MULIRO.....3RD DEFENDANT

MATHEW PIERRE NGICHABEE SISENDA.....4TH DEFENDANT

THE COUNTY LAND REGISTRAR TRANS-NZOIA COUNTY.....5TH DEFENDANT

THE CHIEF LAND REGISTRAR.....6TH DEFENDANT

THE ATTORNEY GENERAL.....7TH DEFENDANT

JUDGMENT

Introduction

1. The plaintiffs originally filed a plaint dated **16/10/2013** which they later filed an amended plaint dated **8/6/2015** on **10/6/2015**. The 1st and 2nd defendants filed joint statement of defence and counter claim on **30/6/2015**. The plaintiffs' emended to the defence and defence to counterclaim by the 2nd defendant was filed on **17/7/2015**. The 5th, 6th and 7th defendants filed joint defence on **16/1/2018**. The plaintiffs filed reply to 5th, 6th and 7th defendants' defence on **26/1/2018**. The hearing of this suit proceeded on **13/11/2018, 14/11/2018, 21/11/2018, 29/11/2018** and **20/3/2019**.

The Plaintiffs' Case

2. In the amended plaint the plaintiffs sought the following orders against the defendants:-

(a) A declaration that parcel of land formerly LR. No. 2116/XV111/44 and now title number Kitale Municipality Block 10/50 belongs to the plaintiffs and the 1st and 2nd defendants, whether by themselves or their servants or agents or any person claiming through them, are not entitled to remain on the suit property

(aa) A declaration that the issuance of certificate of lease in respect of title number LR. No. Kitale Municipality Block 10/50 to the 4th defendant upon conversion of parcel of land known as LR No. 2116/XVIII/44 is illegal and unlawful hence void for all purposes.

(ab) A declaration that the transactions or dealings between the 1st, 2nd, 3rd and 4th defendants in respect of land formerly known as LR. No. 2116/XV111/44 and now title number Kitale Municipality Block 10/50 is null and void.

(ac) Cancellation of registration of the 2nd defendant as the proprietor of parcel of land title number Kitale Municipality Block 10/50 or any subdivisions therefrom and the register in respect thereof be rectified and the plaintiffs be registered as the proprietors thereof.

(b) A permanent and mandatory injunction restraining the 1st and 2nd defendants, whether by themselves or their servants or agents or any person claiming through them, from entering, trespassing or otherwise interfering with the plaintiffs' quiet possession and enjoyment land title number Kitale Municipality Block 10/50 and directing and compelling them to pull down, break or remove the fence, building materials or any other structures on the suit land.

(c) Costs of this suit together with interest thereon.

(d) Any such other or further relief as this court may deem appropriate.

3. The plaintiffs' case is that they together with one Raphael Wafula Kabende (now deceased) were allocated a parcel of land known as LR. No. 2116/XVII/44 Kitale Municipality in 1991 after the same was repossessed from 4th defendant for default in payment of rates to the then Kitale Municipal Council and that upon allocation they were issued with title No. **Kitale Municipality Block 10/44**. The plaintiffs aver that they together with Raphael Wafula Kabende (now deceased) lived on the same premises and after his demise they have been in quiet and continuous possession enjoyment and use of the suit land since then. However the 1st to 4th defendants in conjunction with 5th and 6th defendants unlawfully caused another certificate of lease bearing the number **Kitale Municipality Block 10/50** to be issue in respect of the land formerly known as **LR. No. 2116/XVII/44**. It is averred that the 4th defendant did not have any title to pass to the 3rd defendant and therefore the 3rd defendant did not have any title to pass to the 1st defendant. It is further pleaded that the 5th and 6th defendants erred in endorsing or registering the transaction between the 4th defendant and the 3rd defendant. It is alleged that owing to fraud on the part of the defendants the transaction between the 3rd defendant and the 1st defendant and that the said transactions are null and void. The particulars of fraud are stated in the amended plaint.

4. It is alleged that 9/10/2013 the 1st and 2nd defendants wrongly entered into and took possession of **LR. No. Kitale Municipality Block 10/50** and thereafter wrongfully remained in possession and trespass thereof and they are in the process of wasting the suit property and adversely affecting the environmental conditions thereon by subdividing, fencing off and are amassing building material in the land with the intention of settling thereof without having acquired any right to possession occupation or ownership of the suit land.

The 1st and 2nd Defendants' Joint Statement of Defence

5. In their joint statement of defence and counter claim the 1st and 2nd defendants deny the plaintiffs' claim and aver that the suit as presented does not demonstrate any valid cause of action and should be struck out summarily; that plot No. **Kitale Municipality Block 10/44** has never existed and no record thereof are held at Trans-Nzoia land registry; that Raphael Wafula Kabende has never been in possession of a parcel bearing that number. They denied that the plaintiffs had been in quiet and continuous possession since 1991. They also denied the particulars of fraud and state that they have never trespassed upon or threatened to enter or subdivide the plaintiffs' land **Kitale Municipality Block 10/50** or that they have no right to occupy the suit land or, further, that they are causing environmental degradation thereon. They also object to the claim against the 3rd to 7th defendants terming it as improperly filed. In particular they aver that the 3rd to 7th defendants were unprocedurally enjoined and the claim against them is incurably defective.

The 2nd Defendant's Counterclaim.

6. The counterclaim of 2nd defendant states that he purchased **LR. No. 2116/XVII/44** from the 1st defendant for valuable consideration and that the 1st defendant had purchased the same from one Lena Naliaka Muliro, the 3rd defendant. He thereafter proceeded to have the land registered in his name and converted under the Registered Land Act into **LR. No. Kitale Municipality Block 10/50** and, having complied with all the required legal procedures, was issued with a certificate of lease in his name. He accuses the plaintiffs having trespassed on the said land, interfering with his right of ownership and quiet possession and commencing development thereon. He denies that **Kitale Municipality Block 10/50** is the same land as **Kitale Municipality Block 10/44** which the plaintiffs claim to own. He accuses the plaintiffs of changing tune midway in these proceedings to lay claim upon **LR. No. Kitale Municipality Block 10/50** and describes that apparent change of direction as an afterthought and as a matter of convenience. He seeks a declaration that the plaintiffs' suit against the 1st and 2nd defendants be dismissed and a declaration be issued declaring that the suit land is **Kitale Municipality Block 10/50** which belongs to him and that an injunction be issued restraining the plaintiffs or any person claiming through them from in any way interfering with his quiet enjoyment and use of the land, costs of the suit and of the counterclaim.

The Plaintiffs Reply to Defence and Defence to the Counterclaim by the 2nd Defendant

7. In their reply to defence and defence to counterclaim filed on 17/7/2015 the plaintiffs joined issues with the 1st and 2nd defendants on the matters contained in the amended joint defence statement of defence and reiterated the contents of the amended plaint. They aver that LR. No. **Kitale Municipality Block 10/44** existed and that it has records at the lands office; further they state that the 1st and 2nd defendants in collusion or connivance with the other defendants clandestinely tried to tamper with the records thereof by having it registered as LR. No. **Kitale Municipality Block 10/50**.

8. In the defence to counterclaim they maintain that **LR. No.2116/XV111/44** is the same parcel of land known as **Kitale Municipality Block 10/50** which belongs to them to the exclusion of the defendants or any other person. They maintain that they were allocated the land following its repossession by the Kitale Municipal Council from the previous allottee, one **M.P.N. Lisende** and that that land never belonged to either the 3rd defendant, the 4th defendant or Joseph Muliro as alleged and that the 1st defendant's dealings with any of the three is of no legal effect. They further maintain that if Joseph Muliro owned any parcel of land then the same must have been **Kitale Municipality Block**

10/41 and not **Kitale Municipality Block 10/44** or **Kitale Municipality Block 10/50**. They deny that the 2nd defendant legally purchased the land or that it was converted into **Kitale Municipality Block 10/50**. They maintain that since they have been on the suit land since 1991 if indeed the land was registered in the 2nd defendant's name then his registration and ownership thereof is unlawful and subject to their right of being in possession or actual occupation. They also aver that if **LR. No. 2116/XV111/44** (which according to them is now known as **Kitale Municipality Block 10/44**) was converted into **Kitale Municipality Block 10/50** that conversion was fraudulent and in violation of the plaintiffs' right and interest over **title number Kitale Municipality Block 10/44**. They denied trespassing into **Kitale Municipality Block 10/50** or that they have unlawfully commenced any developments thereon on the basis that they have been in occupation thereof since 1991 and therefore not interfered with any right of ownership and quiet possession on the part of the 2nd defendant's. They instead accuse the 1st and 2nd defendants of trespass on the said land. They agreed with the 1st and 2nd defendants as per **paragraph 17** of the amended joint defence and counterclaim that **LR. No. Kitale Municipality Block 10/50** is the same as **Kitale Municipality Block 10/44**.

The 5th, 6th and 7th Defendants' Defence

9. In their joint defence the 5th, 6th and 7th defendants deny the plaintiffs' claim and aver that the registration of the 1st, 2nd, 3rd and 4th defendants as owners of **LR. No. Kitale Municipality Block 10/50** was done on the basis of genuine documents presented to them in good faith. They deny that the registration of the 2nd defendant as proprietor of **Kitale Municipality Block 10/50** was fraudulent. According to them **Kitale Municipality Block 10/50** is what used to be known as **L.R No. 2116/XV111/44**. They also maintain that they were not served with a notice of intention to sue.

Reply to 5th, 6th and 7th Defendants' Defence

10. In their reply to 5th, 6th and 7th defendants' defence the plaintiffs filed aver that the 5th and 6th defendants' act of registration of the 1st, 2nd, 3rd and 4th defendants of owners of **Kitale Municipality Block 10/50** was in good faith and maintain that the 5th, 6th and 7th defendants were properly enjoined to the suit.

The Plaintiffs' Evidence

11. The **PW1 Mark Joseph Simiyu Kisembe**, the 1st plaintiff testified that the plaintiffs applied for the plot in question, then known as **LR. No. 2116/XV111/44** on 2/2/1991 and produced the letter of application (**P. Exhibit 1**) as evidence. The response thereto recommended the allocation thereof to the plaintiffs. His evidence is that the plot had been allocated to one *Mathews P.N. Sisenda of P.O. Box 476, Kitale*, but he defaulted in payment of rates and rent which had accumulated to tune of **Kshs.810,000/=**. The list of defaulters was published in the Daily Nation newspaper of 13/5/2003 which called upon the defaulters to pay up. According to the 1st plaintiff the name of Mathew P.N. Sisenda appeared under the area known as *Section 18* and the particular plot number as *No. 44*. After acquisition of the plot, the lease was prepared in the names of *the plaintiff, Raphael Wafula Kubende, Davis Khamala Waliula and Samuel Oduori Juma* on 1/11/1991 in respect of parcel **No. Kitale Municipality Block 10/44**. He signed the lease before the lawyer and he then collected the lease from the District Land Registrar on 23/12/2005. He produced the original lease as **P. Exhibit 4(a)**, Memorandum of Registration of Lease as **P. Exhibit 4(b)** and certificate of lease as **P. Exhibit 5**. According to his evidence they took possession in November, 1995 and the 1st plaintiff is still in occupation of the land and he has been paying rates to the authorities. He produced a bundle of demand notices for rates [**P. Exhibit 6(a) and 6(b)**], clearance certificate [**P. Exhibit 6(c)**], receipts [**P. Exhibit 6(c)**] and site values rates receipts [**P. Exhibit 6(e)**]. He later came to learn that conversion occurred in the Block in which the plot was located, and that the plot was converted into **LR. No. 2116/XV111/50**. According to the witness a qualified surveyor visited the land on a date he can't recall and confirmed that the land previous allocated to him was indeed **plot No. 50** and that he and three others were in occupation thereof. However the current title number is **Kitale Municipality Block 10/50**. Referring to the conversion table at **page 17** of his bundle of documents filed on 18/7/2018. Led in evidence by his counsel he testified according to that table the original parcel number for **LR. No. 2116/XV111/47** is **44**. The government gave him a plot being **LR. No. 2116/XV111/44** and the number given to his lease is **Kitale Municipality Block 10/44**. If it went through the right conversion, he posited, it would become **No. Kitale Municipality Block 10/50**. He averred that the land was repossessed from one *M.P.N. Lisenda* as that is the name that appeared on the list in the notice. He did not know the names in full until he came to court. He agreed that the proper name of the person from whom the plot was repossessed is *Mathew Pierre Ngichabe Sisenda* who is the 4th defendant. He maintained that **plot No. 2116/XV111/44** was renamed plot **No. Kitale Municipality Block 10/50** and that the defendants should be restrained from interfering with that plot. He prayed that the counterclaim of the 2nd defendant be dismissed with costs.

12. Upon cross-examination by Mr. Kidiavai, he admitted that the name on the newspaper notice is not the same as the one in the plaint as belonging to the 4th defendant. He also indicated that he did not have a delivery book showing that the letter seeking the property was delivered to the Kitale Municipal Council and that there was no acknowledgment of that letter by the Town Clerk. He also admitted he did not have the minutes of the Town Planning Committee showing that it deliberated on that plot. He also admitted that he never got a response to his letter dated 25/3/1991 from the Commissioner of Lands. He stated that he has never engaged the Ministry of Lands over the issue of the number allocated to the suit land. He also admitted not having receipts showing that he paid monies to the government in respect of the suit land. He admitted that he did not have a transfer endorsed by the Kitale Municipal Council. On cross-examination by Mr. Wabwire he admitted that some of co-owners of the land are dead and some of them had sold their shares before they died. These were *Raphael Wafula and David Waliula*. He admitted that while applying for the land to the Council, he did not know that title had been issued under the RTA regime. He also did not obtain any allotment letter from Municipal Council. He maintained that the land was government land. He stated that he did not have any evidence that he paid money including stand premium, stamp duty and land rent to the government. Upon re-examination by Mr. Ingosi he maintained that *M.P.N. Sisenda* has not laid any claim to the land.

13. **PW2, Ben Wanyama Situma, Assistant Licensed Surveyor** testified on 14/11/2018. He stated that he practiced under the firm of Opiyo & Associates, Surveyors; that his mandate was to visit the site and verify who occupies the two plots, **Kitale Municipality Block 10/44** and **Kitale Municipality Block 10/50**. He further testified that he visited the land on 24/3/2015 in presence of *Deputy Registrar, Mark Kisembe, Michael Kitiwo, S. Njoroge and Margaret Sawe* and that the 1st and 2nd defendants were not present; he found that **Kitale Municipality Block 10/50** was originally named **LR. No. 2116/XV111/44**. Upon survey it acquired a survey plan **No. 56/34** and an RTA title in the names of *Mark Kisembe, Michael Kitiwo, S. Njoroge, Margaret Sawe, Samuel Oduor*. He also stated that *Raphael Kubende* had a

plot on the same land; the plot neighbored **Kitale Municipality Block 10/164** and **166** belonging to *John Etemesi* and **Kitale Municipality Block 10/48** belonging to one *John Mwaniki Kuria*. According to him the two plots used to be **LR. No. 2116/XV111/35** and **45** respectively and their owners acknowledged having the plaintiffs and their colleagues as neighbours since **1991**. He also visited **LR. No. 2116/XV111/47** and found the owner. She produced her title to that plot. He established that **plot No. 44** belonged to another person and not the 1st plaintiff. According to him from the conversion done by the Land Registry Nairobi plot **LR. No. 2116/XV111/44** became **No. Kitale Municipality Block 10/50** and the 1st plaintiff and his group were in occupation on the ground. He produced his report on the above matters as **P. Exhibit 7(b)**.

14. Upon cross-examination by Mr. Kidiavai he stated that Plot No. **Kitale Municipality Block 10/44** used to be **LR. No. 2116/XV111/47** and **Kitale Municipality Block 10/50** used to be **LR. No. 2116/XV111/44**. He maintained that the person in occupation in plot No. **LR. No. 2116/XV111/47** was one Alice Maina and the title for **Kitale Municipality Block 10/44** referred to the land she occupies. He also maintained that the land registered under the name of David Situma was original **LR. No. 2116/XV111/44** which did not have any connection with **P. Exhibit 5**. He conducted a search in respect of **Kitale Municipality Block 10/44** and established that there existed no records thereof at the lands office. He indicated that on **Kitale Municipality Block 10/50** there were semi-permanent houses thereon and S. Njoroge and M. Sawe were in occupation. Some of the structures on the land were for the accommodation of workers; when he visited **Kitale Municipality Block 10/50** subdivision had taken place and there was already a survey plan. A copy thereof is annexed to his report and marked as “*Annex 1*”. However he did not establish who initiated that subdivision.

15. On cross-examination by Mr. Wabwire, **PW2** stated that he never took any photographs and that land comprised in **Kitale Municipality Block 10/44** belonged to somebody other than plaintiffs. That marked the close of the plaintiffs’ case.

The Defendants’ Evidence

16. DW1, Michael Kimutai Ndiwa, the 1st defendant testified that he came to know about the 1st defendant in **2013** after being served with summons in the instant case. He testified that one Joel, a son of the late Joseph Muliro had at one time asked him if he could secure a buyer of a plot that his mother, Lena Muliro, the 3rd defendant, intended to sell. He went to their home to confirm if indeed Lena, the mother, was intent on selling a plot, and he met her for the first time whereupon Lena informed him that her family had two plots that they intended to dispose of. She allegedly gave him the option of buying one of them. According to him he was shown the original title under **Cap 300** and obtained a copy thereof as well as a copy of grant of letters of administration in respect of the estate of Joseph Muliro in **Kitale Succession Cause No. 45 of 2002** in which she was administrator. Subsequently he conducted a search on **25/10/2012** at the lands office in Nairobi and confirmed that the title was valid. Then he went to Director of Survey’s Office and confirmed the deed plan emanated from there. He later met Lena and agreed on a price. Lena gave him the contacts of Sisenda and he called him. Sisenda said he was in Nairobi. He went to Nairobi and they met. He asked him whether he had relationship with the Muliro’s which he answered in positive and stated that he had sold them plot No. **Kitale Municipality Block 10/44 in 1986**. He also gave him a copy of the sale agreement dated **18/1/2013** between him and the Lena Muliro. He also testified that Sisenda gave him a copy of an earlier agreement between him and Joseph Muliro. On **10/6/2013**, **DW1** entered into an agreement with Lena Muliro for the sale of **LR. No. 2116/XV111/44** for Kshs. **6,000,000/=** (Kenya shillings six million only). According to him he had viewed the land and it was vacant with bushes. He later sold the same plot at a higher price of **Kshs. 9,000,000/=** (nine million) to David Situma Wekesa (the 2nd defendant) on **13/6/2013** and gave him the documents in respect thereof while they were still in the name of Sisenda. Subsequently, he introduced the buyer to the Muliro family who assisted the buyer with the completion of the transfer process. He further helped the buyer obtain conversion from the old Act to the new Act, that is, from **LR. No. 2116/XV111/44** to **Kitale Municipality Block 10/50**. According to his evidence as Mr. Situma developed his plot some people including the 1st plaintiff invaded the land and chased him away. The witness later came to learn that Mark Kisenbe, the 1st plaintiff, possessed another title for the same land and he went and enquired from the land registry why they had issued two titles to the same land. The answer from the land registry was that according to their records **Kitale Municipality Block 10/50** belongs to him, *David Situma*, and they recognised no other title. They also did not have any record the title held by the 1st plaintiff. **DW1** denied fraud and maintained that he conducted due diligence before registration. He denied that the plaintiffs were in possession as at **1991** and maintained the land was vacant in **2013**.

17. Upon cross examination by Mr. Wabwire he maintained that the original title for **LR. No. 2116/XV111/44** was issued on **18/2/1981** in the name of Mathew M. Sisenda. Upon cross examination by Mr. Ingosi, he stated that the land is about a kilometre from his official residence and that initially, he owned a parcel contiguous to it but had sold it earlier on in **2013**. He admitted that he was served with papers in **2013** when the suit was filed. However he could not remember LR. Number for the portion that he had sold and in his evidence on cross examination he appeared to think he sold it in **2012**. He also did not recall for how long he had been in possession of that land. He denied that the plaintiffs have ever stayed on the land or that there are any permanent buildings thereon. He maintained that he bought the land from Lena Muliro purely on the basis of the agreement between Joseph Muliro and Mathew Sisenda. The witness admitted that he purchased the suit land while the land had not yet been transferred to Lena. He stated that subsequently, Sisenda transferred the land in favour of David Situma notwithstanding that there was no agreement him (Sisenda) and Situma. According to him he bought the land on **10/6/2013** and sold it on **13/6/2013**. He denied that the sale was instigated by the fact that he was concerned that other people were in occupation thereof. According to him conversion was done in **1992** and he was not aware of the repossession of the land from Sisenda by the Municipal Council or that Sisenda had defaulted on rate payments. He admitted that according to the court order issued earlier on in these proceedings, it was reflected that the plaintiffs were in occupation of **Kitale Municipality Block 10/50** and that there was maize on the land. He admitted that the land is now subdivided into six portions.

18. DW2, David Situma Wekesa, the 2nd defendant testified that he purchased the suit land from the 1st defendant for **Kshs.9,000,000/=** after due diligence. He was aware that the title was in the name of Mathew Sisenda at the time he paid for the land; that the 1st defendant had bought the land but had not secured any transfer in his favour; that he was also aware that the land had not been transferred to Lena by the time he bought it and that the land was vacant at the time of purchase and the transfer thereof in his favour bypassed Lena and Kimtai. According to him conversion of the land from RTA to RLA occurred in **2013** and that the transfer to him was under the converted number. The transfer was effected on **19/7/2013**. A consent to transfer dated **22/7/2013** was obtained, stamp duty paid and he was issued with a title deed dated **22/7/2013** bearing the title No. **Kitale Municipality Block 10/50**. According to him County approvals for subdivision were obtained and subdivision was effected on the ground and beacons planted for each plot. Building materials were thereafter placed on the site, but the plaintiffs, after claiming that they own the suit land, obtained a court order restraining development of the plot. He denied any fraud in his transactions. He pointed out that the plaintiffs’ read **Kitale Municipality Block 10/44** while his read **Kitale Municipality Block**

10/50. While cross-examined by Mr. Ingosi he stated that he could not recall there was any maize on the land; however he soon thereafter corrected himself and said there was nothing on the land. As to whether there were structures on the suit land he indicated that there was an iron sheet house which he became aware of only after he bought the land but he did not know who was in occupation of the land before he bought it. According to him the 1st defendant never informed him whether he had ever utilized the land. The land has now been subdivided and new certificates of lease issued for resultant portions and therefore the description as **Kitale Municipality Block 10/50** is incorrect. He was not aware that the land had been allocated to the plaintiffs and or the plaintiffs used to stay there since 1992.

19. DW3, Nelson Odhiambo, the Land Registrar Kitale, testified that the green card (DExh 15) of the suit land was opened on 17/7/2013, the first entry was *Mathew Pierre Ngichabe Sisenda* who had also held the RTA title previously issued under the No. **LR. 2116/XV111/44**. The number **Kitale Municipality Block 10/50** was a result of conversion of the land from the RTA to the RLA regime. According to him the 2nd defendant was the next owner of the land having purchased it from Mathew P.N. Sisenda. He denied that the name of the 1st plaintiff appears anywhere in the records that he hold.

20. Upon cross examination by Mr. Kidiavai he testified that he has no record of repossession of the land by Kitale Municipal Council. He also stated that the land is now already subdivided.

21. Upon cross examination by Mr. Ingosi he identified the subdivisions as Plot Nos. **190 to 194** in the name of the 2nd defendant. He also confirmed that title No. **Kitale Municipality Block 10/50** is what used to be known as **LR. No. 2116/XV111/44** under the RTA regime. That marked the close of the 5th, 6th and 7th defendants' evidence.

DETERMINATION

22. The issues for determination

(1) *Who was the initial allottee of LR Number No. 2116/XV111/44?*

(2) *When did conversion from RTA to RLA occur in respect to LR Kitale Municipality 2116/XVIII/43 and what number did the land subsequently assume?*

(3) *Whose title documents are valid, the plaintiff's or the defendants'?*

(4) *Did the plaintiffs ever take up possession of the suit premises and are they still in possession and if so can any rights they claim by virtue of possession defeat the 2nd defendant's rights as sought in the counterclaim?*

(5) *What orders should issue regarding the suit and the counterclaim?*

23. The issues are addressed as herein under:

(1) *Who was the initial Allottee of LR Number No. 2116/XV111/44?*

24. The mysterious man *Matthew Pierre Ngichabe Sisenda* who owned **LR. No. 2116/XV111/44** never showed up to testify in court to assert his former claim to the title. Neither did *Lenah Muliro*, the 3rd defendant. The plaintiffs and the defendants – save the 4th - having not laid any claim to the initial allotment of the suit land, this court needs examine the issue to determine it as it is relevant to the rest of the issues for determination in that any subsequent title to the 4th defendant is claimed to have emanated from that allocation after a series of transactions.

25. **PExh 1-6(a)** being the first documents that should have clarified the issue beyond doubt have do not give the court a clue on the issue.

26. The plaintiffs rely on a copy of the Daily Nation newspaper bearing the date **Tuesday May 13, 2003**. They aver that the Kitale Municipal Council advertised the identity of plots it intended to repossess vide that notice and the suit land was one of them. I agree that that notice bears Plots within Kitale Municipality. Under land in Section XVIII, plot number 44 appeared, and the proprietor was named as "*MPN Lisende*" of post office Box 476 Kitale. This contrasts with the names given by the Land Registrar, **DW3**, and "*Mathew Pierre Ngichabbe Sisenda*" which is the name of the 4th defendant in this suit.

27. There is little other evidence to go by regarding this issue save the evidence of **DW3, Nelson Odhiambo**, the **Land Registrar Kitale**. His evidence is that *Mathew Pierre Ngichabe Sisenda* held the original title previously issued under the RTA regime in respect of the suit land and it was under that regime assigned No. **LR. 2116/XV111/44**. Subsequently the same land title was converted to RLA and issued with the title number **Kitale Municipality Block 10/50**.

28. Among the documents of the 5th - 7th defendants is a copy of the Grant no IR 35164 for LR Kitale Municipality 2116/XVIII/44 in the name of *Matthew Pierre Ngichabbe Sisenda* of *Post Office Box 476 Kisii*. The deed plan annexed thereto positions the plot between LR Kitale Municipality 2116/XVIII/43 to the south west and LR Kitale Municipality 2116/XVIII/45 to the north east. It appears to have been issued on 18/2/1981 and registered in the registry of titles as IR 35164/1 on 5/3/1981. The 1st defendants also exhibited a similar copy, but this time endorsed on 25th October 2012 by one CK Ngetich, a Registrar of Titles as a certified true copy of the original, complete with the land registry's official seal. That is the only evidence that this court has before it on the issue at hand. The land registrar's evidence should be considered as coming from a custodian of government documents relating to land and I therefore hold that according to the only evidence before court, this court finds that the initial allottee of **LR Kitale Municipality 2116/XVIII/44** is *Matthew Pierre Ngichabbe Sisenda*.

(2) When did conversion from RTA to RLA occur in respect to LR Kitale Municipality 2116/XVIII/43 and what number did the land subsequently assume?

29. The plaintiffs became acquainted with the land while it was still known under the RTA regime as **LR Kitale Municipality 2116/XVIII/44**. They, as four persons, applied for allocation of the suit land under unclear circumstances vide a letter of application dated **2/2/1991**, and a positive recommendation in their favour was made by the council which was communicated by the Town Clerk to the Commissioner of lands in a letter dated **26/3/1991**. However the plot was allocated to another person afterwards. The plaintiff's evidence at this point falters in that they unsuccessfully attempted to rely on the newspaper notice to rent defaulters dated **13/5/2003** as their only evidence of the fact of allocation to a third party.

30. According to **DW1**, he was shown and given a copy of the original title under **Cap 300** by Lena Muliro when he visited her the first time to ascertain whether she was intent on selling any land. However it turns out in his further evidence that that could have been an error as the search he conducted using the title he was given which is evidenced by **DExh 1**, shows that the land was registered under the RTA and that the 4th defendant had confirmed it to him at their meeting that the land was registered under the RTA. According to the certificate of grant of letters of administration produced as **DExh 3** by **DW1**, the land was as at **2003** still under the RLA. **DW1** sold the land while it was still under that land law regime on **13/6/2013** and helped him to secure its conversion from the RTA to the RLA regime. A letter (**DExh 17**) produced by **DW3** shows that the land was converted to the Land Registration act and land Act regimes and a new number, **Kitale Municipality Block 10/50**, had been issued by **17/7/2013**. **DExh 23**, the transfer of lease form executed between the 4th defendant and the 2nd defendant shows that by **July 2013** the title had been converted to the new land regime. No conversion table has been exhibited by any of the parties. This court is therefore of the opinion that the conversion took place in the year **2013**. The conversion table not having been provided, this court is compelled to rely on the evidence of **DW3 (DExh 17)** which shows that the number of the suit land changed from **Kitale Municipality 2116/XVIII/44** to **Kitale Municipality Block 10/50**. That must be the correct number after conversion.

(3) Whose title documents are valid, the plaintiff's or the defendants'?

31. Section 24 of the **Land Registration Act, 2012** provides as follows:

“Subject to this Act-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

32. Section 25 of the **Land Registration Act** has the following provisions:

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

33. In the amended plaint the plaintiffs' claim is that they were allocated the suit land then known as **Kitale Municipality 2116/XVIII/44** in **1991** after the same was repossessed from the 4th defendant for default of payment of land rates due to the then Council and they were subsequently issued with the title documents produced as **PExh 4(a)** (lease) and **PExh (5)** (certificate of lease). The purported date of registration of the lease which is reflected on the lease differs from the date appearing on the certificate of lease. The Certificate shows that date of its registration of the lease (**PExh 4(a)**) to be **22/12/2004** while the lease shows the date of its registration as **22/12/1998**. This discrepancy has not been explained by the plaintiff's evidence.

34. The plaintiff's claim is that they acquired the land from the council. There is a big gap in the plaintiff's evidence as to how the land was transferred to them. **PW1**, the plaintiff's principal witness testified that the plaintiffs applied for the land in **1991** before the notice regarding default of payment of rates was advertised by the Council and that the council favourably recommended their request for allocation to the commissioner of lands. They aver that the plot was however allocated to the 4th defendant.

35. **1981** is the year the land was purportedly allocated to the 4th defendant. Straight from narrating how the plot was advertised by the Council and without providing any documentary evidence of the aftermath of the advertisement by the council, **PW1** plunged into a different narrative of how the lease was prepared in **1991**. If the plaintiff's acquired the land on the strength of the advertisement by the council in **2003**, then how could the preparation of the lease in the names of the plaintiffs in the year **1991** (or **1998** as the lease reads) be reconciled with that acquisition from the council? In this court's view, the two events are far apart in terms of time lapse and there is discord in the order

of occurrence and they can not be reconciled at all; the plaintiffs should have elected to follow one of the two claims but by equivocation they, like the proverbial beast that tried to follow two paths leading in diverse directions, risked their interest in the land. The obvious jeopardy in the path they trod is evident: they had to produce either an initial letter of allotment issued to them by the Commissioner of Lands or a transfer to them by the council, and they failed to produce any. Besides, their only evidence of ownership of the suit land that is, the purported lease and certificate of lease, were not acknowledged by the Land Registrar as being reflected in the Land Registry records.

36. What is to be made of the copies of rates demand notices **PExh 6(a)** and **PExh 6(b)** and the copy of rates clearance certificate (**PExh 6(d)**)? Are they evidence of ownership of the suit land on the part of the plaintiffs? In my view, only documents from the lands office certified by the Land Registry officials and registered in accordance with the relevant statutes should be, subject to the absence of any fraudulent acquisition thereof, construed as proof of ownership. In many an instance this court has witnessed documentary evidence of payments of rates to the devolved levels of government by the two sides in disputes leaving the court to seek further evidence of ownership elsewhere. Therefore in my view mere payment of rates would not amount to proof of ownership of the land.

37. The 1st defendant on the other hand produced a copy of the title for **LR Kitale Municipality 2116/XVIII/44** issued to the 4th defendant under the RTA. The same was certified by the Registrar of Titles. It was DW3's evidence that that title existed and that it was converted to the LRA regime to be renamed **Kitale Municipality Block 10/50**. The letter from the Chief Land Registrar to the District Land Registrar Kitale (**PExh17**) indicates that the 4th defendant was to be issued with a certificate of lease. For unknown reasons, that certificates of lease allegedly issued in the name of the 4th defendant and the 2nd defendant under the new land law regime were not produced as evidence by any of the parties and there is something that does not sound quite right about that. However there is intimation in the evidence on the record that a transfer of lease (**DExh 7** and **DExh 23**) was executed by the 4th defendant and registered in favour of the 2nd defendant.

38. Whether an actual transfer between the from the 4th defendant to the 2nd defendant was ever registered in the land registry Kitale will remain a matter of conjecture for a long time to come as **DExh 7** which is similar to **DExh 23**, and which should be the only firsthand evidence of registration from the Land Registrar, is not clear in that regard. The entries that would have given away the date and time of registration and the signature of the Land Registrar are not legible on that document as they have been cut out.

39. The purported lease issued in the name of the 1st defendant was not also produced ostensibly because the same had been surrendered vide the form of surrender of lease dated **10/4/2018** produced as **DExh 24** to the land registry to yield a subdivision of the title. This court did not therefore have occasion to view the lease issued to the 4th defendant under **LRA**.

40. There are therefore gaps that were not filled in by the defendants in this matter. The only recourse that this court has is to rely on the green card (**DExh 15**) produced by the Land Registrar in respect of **LR Kitale Municipality Block 10/50**. Entry number 2 thereof reflects the registration of the 2nd defendant as the lessee thereof.

41. However since according to the evidence of both sides the initial allotment was evidently issued to the 4th defendant, this court presumes that such lease was issued and subsequently surrendered to yield a subdivision of the suit land albeit irregularly during the pendency of this case.

42. The plaintiffs having failed to produce an allotment letter from the Commissioner of Lands or a transfer to them by the council, this court must consider the 4th defendant as the initial allottee of the suit land and that he transferred the same to the 2nd defendant.

43. On a balance of probabilities therefore and regardless of the gaps in evidence left by the defendants as related above, this court of the opinion that of the two sets of documents of ownership produced by the plaintiffs and the defendants, the defendant's documents emanated from the land registry and must be considered as having an edge over the plaintiffs' documents.

(4) Did the plaintiffs ever take up or remain in possession of the suit premises and if so can any rights they claim by virtue of such possession defeat the 2nd defendant's rights as sought in the counterclaim?

44. The plaintiffs aver at paragraphs **16, 19** and **21** of their reply to defence and defence to the counterclaim that they have been in quiet and continuous possession enjoyment and use of the suit land since **1991** and that if indeed the 2nd defendant was registered as owner of the land his ownership is subject to the plaintiff's right of possession or actual occupation.

45. First, from the material on record, it is evident that the plaintiffs are in occupation of the suit land. This court gave orders on **9/12/2013** directing the District Surveyor Trans Nzoia to visit plots including the suit land herein and ascertain who is in occupation. The findings in the surveyors report filed on **6/3/2014** attest to this. At the time of the said report there were signs that the defendants were only beginning their attempts at taking up of possession of the suit premises. The court in its ruling dated **30/4/2014** observed that the two parties herein are claiming the same plot on the ground and dismissed the 2nd defendant's application for an interim injunction against the plaintiffs.

46. The claim of allocation or transfer of the suit land to the plaintiffs having not been proved, the plaintiff's rights of possession must be justified in law if they are to defeat or detract from the 2nd defendant's right to title to the land. They must be rooted in some known principle of law. It could be trust or adverse possession. Adverse possession is not claimed by the plaintiffs. The plaintiffs also do not claim entitlement under any trust. **Section 28** of the **Land Registration Act** sets out the overriding interests that all registered land shall be subject to. It provides as follows:

“28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

(a) deleted by Act No. 28 of 2016, s. 11(a);

(b) trusts including customary trusts;

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(d) natural rights of light, air, water and support;

(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(f) deleted by Act No. 28 of 2016, s. 11(b);

(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law,

Provided that the Registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the Registrar deems necessary."

47. The plaintiffs have not demonstrated under the provisions above or under any other relevant law that their rights of possession may override the rights of the title holder. I must therefore reject their claim that the 2nd defendant's right to the title is subject to their right of occupation.

(5) *What orders should issue regarding the suit and the counterclaim?*

48. At the hearing, sufficient evidence was laid before court that the suit land had been subdivided. This suit was filed on **16/10/2013**. Surrender of lease for the purpose of subdivision was done vide **DExh 24** dated **18/4/2018**.

49. Clearly the defendants and particularly the 2nd defendant went behind the court process and dealt with the subject matter land without informing the court. Nevertheless much as I can not ignore that negative aspect of the 4th defendant's conduct, the plaintiffs have failed to establish their title to the land and in my view, nothing now turns on it. I must therefore dismiss the plaintiff's claim.

50. Turning to the counterclaim, the plaintiffs urge that it should be dismissed because the Land Reference **Kitale Municipality Block 10/50** was subdivided and does not exist, having been subdivided. However this court is unable to determine from the evidence on record on what date the same was subdivided.

51. The surveyor's report filed on **6/3/2014** shows that subdivision had commenced on the ground as at that date, and posts had been erected on the suit land to demarcate some resultant subdivisions. The scanty evidence does not support such a submission.

52. However, should the defendant be granted the prayers as sought in the counterclaim?

53. It is not for the court to unilaterally amend documents on behalf of the parties once the hearing has been concluded. It is correct that the 2nd defendant should have used the appropriate numbers in his prayers in response to the plaint if the suit land was indeed subdivided.

54. Nevertheless, I have considered that the plaintiffs' case having collapsed, this court is inclined to adopt a course that would ensure justice is done. The subdivisions are said to have emanated from the land allocated to the 4th defendant and sold to the 2nd defendant. The land records thereof existed. The conversion to RLA and the subdivisions thereof are recognized in the land records. In the case of **Paul Pkemoi Kide v Philip Kimutai Kibor & 2 others [2018] eKLR** this court extended an injunctive order to cover the subdivisions which had not been mentioned in the application. It observed as follows:

"13. However the application was not amended at any point in time to read the proper land reference numbers that exist at present. The effect of the subdivision of the land is that if the orders were granted as prayed there would be no order capable of being registered against the LR. 6125/10 as it does not exist. Though that is the case, the defendants acknowledge that LR. 6125/10 previously existed and the 3rd defendant's defence and counterclaim has linked it directly to some 6 subdivisions being LR 6125/11, LR 6125/12 LR 6125/13 LR 6125/14 LR 6125/15 and LR 6125/16.

14. The plaintiff entered into an agreement for purchase of the land while it was not yet subdivided. He knew it as a single parcel. It is not yet known whether the subdivisions overlap the land he occupies. It is therefore safe to issue an order that covers all the subdivisions."

55. In this case this court is also of the opinion that though the counterclaim was not amended to reflect the subdivision of the suit land an order may be made to cover all the subdivisions as they emanate therefrom.

56. I therefore issue the following final orders:

(a) The plaintiff's suit is dismissed.

(b) The 2nd defendant's counterclaim is allowed to the extent that:

(i) A declaration is issued that LR Kitale Municipality Block 10/50 and the subdivisions thereof belong to the 2nd defendant.

(ii) An order of permanent injunction restraining the plaintiffs from in any manner interfering with the 2nd defendant's quiet possession of the suit land.

(c) Each party shall bear their own costs of the suit and the counterclaim.

Dated, signed and delivered at Kitale on this 3rd day of October, 2019.

MWANGI NJOROGI

JUDGE

3/10/2019

Coram:

Before - Mwangi Njoroge, Judge

Mr. Ingosi for plaintiffs

Mr. Khisa for 1st and 2nd defendants

N/A for the 3rd, 4th defendants

Mr. Karani holding brief for Odongo for 5th, 6th and 7th defendants

COURT

Judgment read in open court.

MWANGI NJOROGI

JUDGE

3/10/2019