



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO.54 OF 2004

HELLEN CHEROTICH..... PLAINTIFF

VERSUS

JOAN C. CHAMBAA

JAMES MALINGA

STEPHEN KIBET CHEROP..... DEFENDANTS

J U D G M E N T

1. The plaintiff, **Hellen Cherotich**, brings this suit against the three defendants viz **Joan C. Chamba**, **James Malinga** and **Stephen Kibet Cherop**, seeking a declaratory order that she is the legal owner of plot **No.904 Kitalale Settlement Scheme** and an injunction order restraining the defendants and / or their agents or parties claiming title through them from entering or interfering in any way with the said property.

2. In the plaint dated **5th May 2004**, it is pleaded that at all material time to the suit the plaintiff has been the legal allottee of the said plot **No.904 Kitalale Settlement Scheme** measuring one (1) hectare or thereabout from the Government of Kenya, having paid the necessary fees and being shown the property which she took possession of, occupied and put it into use. However, sometimes in the month of **April 2004**, the defendants without any lawful order or excuse trespassed into the property, demolished a house and denied the plaintiff use and occupation thereof. She therefore prays for the orders sought herein.

3. The defendants' statement of defence dated **24th May 2004**, is essentially a denial of the plaintiff's claim and a contention that the plaintiff was allocated a plot which is distinct from the suit property. In their written submissions, the defendants refer to a plaint dated **17th March 2014**, and implies that this claim is based on it. However, there is no such plaint in this record. The appropriate plaint for avoidance of doubt is the one dated **5th May 2004**.

4. At the hearing of the suit, the plaintiff (**PW1**) testified that the suit property was allocated to her by the Government of Kenya in the year 2000. She produced the letter of allotment dated **18th August 2000**(P.Ex.1) and said that the property measures one (1) hectare and that a sum of kshs.4,375/= was required for the allocation. She produced the necessary receipts dated **5th November, 2001** (P.Ex.2 a- b) and indicated that she entered into occupation after the payment of the required amount.

5. She (Plaintiff) further testified that at a later stage she was confronted by the second and third defendants who asked her to vacate the property for reason that it belonged to the first defendant. They alleged that she was a "land grabber" and that she had been allocated plots No.1116 and 1118. She denied the allegations and contended that she does not bear letters of allotment regarding the

aforementioned two plots.

6. As for the defendants, the second defendant, **James Malinga Kapsandui** (DW1), testified that the first defendant was his sister and the third defendants his brothers. That, the suit property was allocated to them through the first defendant who is in South Africa but executed a power of Attorney (D.Ex.4) in favour of the second defendant for the purposes of this suit. That, the suit property was allocated to them by the Ministry of Lands & Settlement on the **18th August 2000**. He (DW1) produced the necessary allotment letter (D.Ex.1) and payment receipts for survey (D.Ex.5a – b). He said that the property was pointed out to them in the year 2001 while it was unoccupied.

7. He (DW1) went on to testify that the present dispute started in the year 2003 when the plaintiff's husband wrote to the Ministry of Lands claiming that the suit property belonged to him. A copy of the letter was received by the first defendant who subsequently received a letter dated **5th June 2003** (D.Ex.6) from the Ministry of Lands confirming that the property belonged to her. Another letter dated **9th October 2008** (D.Ex.2) from the **Director of Land Adjudication and Settlement** addressed to the **District commissioner (D.C)** Trans-Nzoia, further confirmed that the suit property belonged to the first defendant while a plot No.1118 belonged to the plaintiff and a plot No.1116 belonged to the plaintiff's husband.

8. It was further the testimony of **James** (DW1), that they were summoned to appear at the D.C's office with necessary documents. The plaintiff was also summoned and she produced documents showing that she was the owner of a plot which was not the suit property. The defendants documents showed that the suit property belonged to them. **James** (DW 1) contended that the record was set straight at the D.C's office but later they received summons for this case.

9. Francis Obiria Oseko (DW 2), an employee of the Ministry of Lands and based at the Trans-Nzoia County Lands Office as an **adjudication and Settlement Officer**, testified that the settlement record, respecting the Kitalale Settlement Scheme in which the suit property is situated indicated that the property was initially allocated to the first defendant and later to the plaintiff at the same time in the month of **August the year 2000**. He said that this was a case of double allocation for which corrective mechanism was put in place but no step was taken to provide an alternative plot to either the plaintiff or the first defendant. He referred to a plot No.1118 which had been allocated to another person. He could not tell whether that other person was the plaintiff's husband. He indicated that the mistake pertaining to the double allocation of the property was yet to be resolved by the lands office.

10. The issue for determination as emerges from the pleadings, the submissions by both sides and the evidence is basically whether the ownership of the suit property is vested in the plaintiff for her to be entitled to the declaratory orders sought herein.

In **Matalinga & Others Vs Attorney General (1972) EA 518**, the High Court in Nairobi held that before a declaration can be granted there must be a real and not a theoretical question in which the person raising it must have a real interest and there must be someone with a present interest in opposing it.

11. Herein, both the plaintiff and the defendants are claiming an interest in the suit property. The plaintiff was therefore required to establish by necessary evidence her alleged legal or beneficial ownership of the property over and above the defendant's alleged claim of ownership.

By its very description, the property is situated at a settlement scheme which was like all other settlement schemes intended to benefit landless individuals through a process which in most cases involved the **Settlement Fund Trustees** (SFT), a body corporate having perpetual succession and a common seal established under the **Agricultural Act** (Cap 318 LOK) with powers to sue and be sued in its corporate name and which could purchase any land for purposes of re-sale.

12. Any land acquired by the Settlement Fund Trustees out of the Agricultural Settlement Fund established under the Agricultural Act (see, S.168 (1) of the Act) was treatable as public land available for allocation to deserving citizens of the country. Indeed, the Settlement fund Trustees was the statutory

corporation empowered to settle deserving citizens on land purchased by itself from private individuals or on un-alienated public land.

13. In such instances, the interest of the Settlement Fund Trustees is that of a changee over land that it owns. It lends money for development to persons to whom it has allocated land and the repayment of such money is secured by a charge upon the property(see, ***Eliud Nyongesa Luseneka / Another vs Nathan Wekesa Omacha Civil Appeal No. 134 of 1993 at Kisumu and Boniface Oredo Vs Wabumba Mulale Civil Appeal No.170 of 1989***).

In this case, no documents were presented by the plaintiff or the defendants to identify the original owner or owners of the suit property. No record from the Land Registry was availed in that regard. It would not therefore be far-fetched to assume that the property was either unalienated public land or land purchased by the the SFT for purposes of settling landless people.

14. Whatever the case, the question to be asked is whether the allocation process undertaken by the SFT was complete in order to pass to the plaintiff an interest in the suit property to the exclusion of any other person including the defendants. According to the settlement officer (DW2), the process was on going when an error in the form of double allocation was detected. The error impacted negatively on the plaintiff as well as the defendant as each of them was somehow allocated the material suit property.

It was however, indicated by the settlement officer that as at the time of the detection of the error the plaintiff was in occupation of the material property but had not been granted legal ownership thereof.

15. The Settlement officer said that no step was taken to fetch an alternative property for either the plaintiff or the defendants. He also said that efforts to fetch an alternative plot for the defendants was in progress thereby implying that the intended allocation of the suit property to the plaintiff was viewed as being more credible as compared to that of the defendants and hence representing the official position. This meant that the allocation of the property to the defendants was erroneous hence the so called double allocation.

16. The letter of allocation exhibited herein by the plaintiff (i.e. P.Exh.1) is dated **18th August 2000** and was from the Provincial Land Adjudication and Settlement Officer based in Nakuru, one, **I. R. Lelkutwo**. It clearly confirmed that the plaintiff was allocated the material property No.904 at Kitalale Settlement Scheme. She was required to pay SFT dues amounting to Kshs.3,000/= and a further Kshs.1,375/= for the processing of the title. In that regard, she produced two payment receipts No.037126 and No.189403 (P.Ex.2 a-b) for Kshs.4,500/= dated **5th November 2001**.

17. A similar letter of allocation (D.E 1) bearing the same date (**18th August 2000**) was also issued to the first defendant , **Joan C. Chambaa**, by the same Provincial Land Adjudication and Settlement Officer. Necessary payments were thereafter effected by the first defendant vide payment receipts dated **12th November 2001** and numbered 037148 and 189435 (D.Ex.5 a-b) for the total sum of shs.5,500/=.

18. Almost two (2) years after the allocation of the property to both the plaintiff's and the defendants, an officer from the Land Adjudication and Settlement Department at Nairobi, one **G. V. Masinde**, writing on behalf of the Director of Land Adjudication and Settlement vide a letter dated **9th October, 2003** (D.Ex.2) indicated to the District Commissioner, Trans – Nzoia District, that there was double allocation of the suit property and that the first defendant has already taken possession by putting up structures. The letter also indicated that the plaintiff later went to the property and took possession thereof although she had been allocated a different property No. 1118.

19. The letter was not copied to the plaintiff. She vehemently denied that property or plot No.1118 was allocated to her and contended that it does not belong to her. He husband was mentioned in the letter (D.E.2) but she denied that plot No.1116 belonged to him.

Although the name of the plaintiff's husband featured in the letter and these proceedings, he was not enjoined as a party to the suit nor did he appear as a witness for the plaintiff. So, whatever he may have

had or done in relation to the said plot No.1116 or even plot No.1118 was irrelevant in his case.

20. The plaintiff disowned the letter (D.Ex.2) and contented that she was not aware of it. She maintained that she and not the defendants was in actual possession of the suit property and that she was the first person to be allocated the same.

21. In as much as the letter (D.Exh.2) indicated that the plaintiff was in possession of the suit property prior to the year 2003, it also indicated that the possession was erroneous as she (Plaintiff) had been allocated another property. However, there was no evidence of such allocation by way of say, a letter of allotment or copy thereof. It must therefore be presumed that the plaintiff's possession of the suit property was pursuant to the letter of allocation given to her i.e. P.Exh.1 and the payment of the required amount by herself on 5th November, 2001.

22. The allocation made to the defendants was subsequent to that made to the plaintiff as evidenced by the dates appearing on the payment receipts produced by both parties (i.e.P.Ex.2a-b and P.Ex.5a-b). This subsequent allocation was a big blunder on the part of the settlement office and that is why the settlement officer (DW2) indicated herein that efforts are being made to allocate an alternative plot to the defendants.

The talk of “**double allocation**” was a cover up and a “**red herring**” for the errors committed by the land adjudication and settlement department which cannot be visited on the plaintiff and in particular in the absence of evidence that she was allocated a different plot other than the suit property.

23. It is surprising that against all that back ground, the plaintiff or even the defendants did not deem it fit to enjoin the land adjudication and settlement department as a party to this suit yet it was responsible for the mess leading to the present case. None of the allocation documents produced by the plaintiff and the defendants were proved to be forgeries. Therefore, neither the plaintiff nor the defendants could be blamed for the blunder caused by the aforementioned government agency.

24. What has come out from all the evidence herein is that the suit property was firstly allocated to the plaintiff rather than the defendants and that by the time the present dispute arose the property was already in actual possession of the plaintiff thereby granting her beneficial or equitable ownership thereof arising from her acquisition of the property from the previous owner i.e. the Government of Kenya, through the Settlement Fund Trustees.

Asking this court to refer the matter to the Ministry of Lands for a solution to the mess it created would be tantamount to justifying its recklessness towards innocent members of the public.

25. It is therefore the finding of this court that the plaintiff is vested with beneficial or equitable ownership of the suit property pending its formal registration in her name. She has thus established a right or interest over the property in exclusion to the defendants and would be entitled to a declaratory and injunction order against the defendants in terms of prayer (a) of the plaint. It is accordingly ordered.

Each party shall bear their own costs of the suit as they were not to blame for the circumstances leading to the suit.

J. R. KARANJA

JUDGE

14.7.2015

[Delivered & Signed this 14th day of July, 2015].