



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 143 OF 2016

NELLY AYANAE.....PLAINTIFF

VERSUS

MARKLEVIS EKUTAN.....1ST DEFENDANT

JENNIFER NANGOK.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. In the plaint dated **19/9/2016**, the plaintiff prays for judgement against the defendant for:

- (a) A permanent injunction against the 1st and 2nd defendants whether by themselves, their servants or agents restraining them from trespassing on the plaintiff's land known as Land No. LDW/ NAKWAMEKWI/2/012.
- (b) An order declaring that the Plaintiff is the owner of land No. LDW/NAKWAMEKWI 2/012.
- (c) General damages for trespass.
- (d) Costs of the suit plus interest in (3) as from the time of filing suit.
- (e) Costs of this suit.

THE PLEADINGS

The Plaintiff

2. It is the plaintiff's case that she is the registered owner of all that parcel of Land No. **LDW/NAKWAMEKWI/2/012**. The plaintiff states that on **8/9/2016** the defendants without any color of right trespassed into parcel of land No. **LDW/NAKWAMEKWI/2/012** belonging to the plaintiff and demolished plaintiff's structures. The plaintiff states that on **11/9/2016** the defendants assaulted her where she reported the demolition, trespass and assault to Lodwar Police Station vide **OB No. 26/8/9/2016** and **15/11/9/2016** where the defendants were charged in **Criminal Case No. 558 of 2016** at Lodwar Law Courts. The plaintiff further avers that the defendants have deposited building materials in the suit property with intentions of commencing construction. It is the plaintiff's contention that the defendants have continued to trespass on her land has not heeded calls to desist therefrom hence this suit.

The Defence

3. The defendants filed their joint statement of defence dated **5/11/2016** and filed on **7/11/2016** denying the claim. In the defence the defendants alleged fraud and misrepresentation in the allocation of land No. **LDW/ NAKWAMEKWI/2/012** to the plaintiff.
4. The defendants averred that the suit land was irregularly given to the plaintiff after **September 2015** without involvement of the 2nd Defendant and without notice yet it is the same land in which the 2nd Defendant has been staying since **1966** when she was given the same by her son in law one **EDWARD EKHAL** who had married her eldest sister namely **ANNA AKIDOR** (who is now deceased).
5. They claimed that the plaintiff colluded with the Turkana Country Management Board to issue ownership documents to the plaintiff over land that was already occupied by the 2nd Defendant since **1966**.

6. They further claimed that the criminal case in Lodwar Law Courts is not related to the suit herein.

7. The defendants prayed that the suit be dismissed with costs.

The Plaintiff's Evidence

8. **PW1, the plaintiff**, testified on **17/10/2018** and on **7/3/2019**. She stated that the 1st defendant is her brother and the 2nd defendant is her mother. She further stated that she got the suit land sometimes in **1978** and has lived thereon since. According to **PW1**, she was issued with a receipt (**P. Exhibit 1**) upon payment of **Kshs 5,000/-** as survey fees to the defunct Turkana County Council. She further stated that in **2015**, she paid a further **Kshs. 19,000/-** as exhibited by **P. Exhibit 1 (b) and (c)** beings fees for application for development permission. She testified that she was later issued with letter stating that the suit land had been demarcated and a map which she produced as **P. Exhibit 2(a) and 2 (b)** respectively. She testified that sometimes in **2016**, a dispute arose between her and the defendants over the suit land which was resolved by the chief and elders where the suit land in issue was found to be the plaintiff's. She produced a letter addressed to the 1st defendant as **P. Exhibit 3**. **PW1** averred that upon being heard by the County Land Management Board, the 1st defendant was ordered to vacate the suit land. **PW1** produced a report from the County Land Management Board as **P. Exhibit 5**.

9. On cross examination, **PW1** maintained that she is the owner of the suit land though she admitted that she was not brought up in the suit land.

10. **PW2, Davis Munialo, the Director of Physical Planning** testified on **7/3/2019**. His evidence is that the suit land does not have an allotment letter and that in the absence of an allotment letter, a survey plan is used to determine ownership. According to **PW2**, the suit land is community land and all land in Turkana County being community land is managed by the Turkana County Government.

11. **PW3, Enock Ekilan** testified on **7/3/2019** in furtherance of the plaintiff's case. He adopted his witness statement dated **27/2/2019** as his evidence in chief. He stated in his evidence that he is the Assistant Chief of **Nakwamekwi**. He contended that the plaintiff brought a land dispute to his office where he summoned both the defendants and the village elders to assist in alternative dispute resolution (ADR) as is the norm with land issues Turkana County. He stated that after serious deliberations, it was established that the Plaintiff was the rightful owner of the suit land.

12. The plaintiff then closed her case.

Evidence for the Defence Case

13. **DW1, the 1st defendant** testified on **18/2/2020** and on **19/2/2020** and adopted his written witness statement dated **8/10/2019**. He stated that he was not privy the suit land's documents until **2016** when he learnt that **PW1** had taken **PW2's** land; that he followed up with the County Surveyor and all the documents thereto were nullified as per **D. Exhibit 3**; that they went to the Ministry of Lands where they were referred to the Chief Officer of Lands; where **PW2** was summoned; that **PW2** directed the Chief Surveyor to nullify all documents from the lands office relating to the suit land until the dispute was resolved; **DW1** admitted to not being in occupation but stated that **DW2** is in occupation.

14. **DW2, the 2nd defendant** herein testified on **19/2/2019** and reiterated what **DW1** had stated. She stated that the suit land is hers, having been given to her by his late son in law one Mr. Edward Ekal; that she raised all her children in the suit land. However on being cross-examined by Mr. Asa, she conceded to not knowing if she sold her plot to pay fees for the 1st Defendant. She also admitted to not challenging the board's decision.

15. **DW3, DW4 and DW5** were **Edward Ekal, Christopher Epeyon Lochampa and Tioko Alfred** respectively. They reiterated the defendants' testimonies in furtherance of the defence case.

SUBMISSIONS

16. Submissions were filed on behalf of the plaintiff on **11/3/2020** and on behalf of the defendants on **22/6/2020**. I have considered those submissions which principally dwell on facts in this case.

DETERMINATION

Issues for Determination

17. The main issues for determination in this matter are:

(a) Who is the rightful owner of the parcel of land known as LDW/NAKWAMEKWI/ 2/012?

(b) What Orders should then issue?

18. The issues are addressed as hereunder:-

(a) Who is the rightful owner of the parcel of land known as . LDW/NAKWAMEKWI/2/012?

19. From the evidence of the parties herein, the dispute over the suit land began sometimes in **2016** when the plaintiff purported to obtain ownership documents over the suit land. The plaintiff has tendered evidence of how she obtained the suit land and the defendants have also explained why they lay claim over it.

20. I have examined the documentary evidence produced by the plaintiff and particularly **P. Exhibit 5** which is a report from the Turkana County Land Management Board. According to the said self-explanatory report, the suit land in issue was determined to be the plaintiff's subject to the deliberations between the parties and the government officials being the chief and village elders. The defendants have faulted the Assistant Chief and the village elders over their decision. I note that elders have a good perspective of the facts on the ground, considering the fact that the suit land is community land.

21. It is noteworthy that the defendants never challenged the decision of the Turkana County Land Management Board.

22. Based on the material placed before me, I find that the plaintiff has proved her case on a balance of probabilities. On the other hand, the defendants were at pains to prove fraud on part of the plaintiff as they had pleaded.

(b) What Orders should issue?

23. The upshot of the foregoing is that the plaintiff's claim succeeds and I therefore issue the following orders:

(a) A permanent injunction be and hereby issued against the 1st and 2nd defendants whether by themselves, their servants or agents restraining them from trespassing on the Plaintiff's land known as Land No. LDW/ NAKWAMEKWI /2/012.

(b) An order of declaration is hereby issued declaring that the Plaintiff as the owner of land No. LDW/NAKWAMEKWI /2/012.

(c) Each party shall meet their own costs of this suit as all the parties are family members.

Dated, signed and delivered at Kitale via electronic mail on this 27th day of October, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.