



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
LAND CASE NO. 107 OF 2012

FRED K. SABAI.....1ST PLAINTIFF
RICHARD KIPSOI.....2ND PLAINTIFF
DANIEL KAPKARA.....3RD PLAINTIFF
DANIEL CHEMAKET.....4TH PLAINTIFF
ELIUD SICHEI.....5TH PLAINTIFF

VERSUS

DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICE, TRANS-NZOIA.....1ST DEFENDANT
ATTORNEY GENERAL.....2ND DEFENDANT
PETER CHEMASWET.....3RD DEFENDANT
NATHAN JINDET NDIWA.....4TH DEFENDANT
JAMES BOIYO BELLO.....5TH DEFENDANT
ROBINSON CHESBOL.....6TH DEFENDANT
BARNABA K. KITEYWO.....7TH DEFENDANT
WILFRED M. CHEPROT.....8TH DEFENDANT
JUMA WILLIAM CHEMOSIT.....9TH DEFENDANT
PETER KIBARAK KIBET.....10TH DEFENDANT
JOHN KAPKARA MASAI.....11TH DEFENDANT
STANLEY KIPKOECH.....12TH DEFENDANT

JUDGMENT

1. By a plaint dated 17/7/2012 and filed in court on 18/7/2012, the plaintiffs sought the following orders against the defendants jointly and severally:-

(a) A permanent injunction restraining the defendants and/or servants jointly and severally from excising their land and/or resettling 3rd parties on the respective land.

(b) Costs.

The Plaintiffs' Case

2. The plaintiffs' case is that they are the bona fide allottees of Land known as plot numbers 695-715 Kitalale Phase II Settlement Scheme; that they have been peacefully occupying their respective shares since 1996, that without any justifiable cause the 1st and 3rd defendants issued a notice of intention to interfere with the plaintiffs' quiet possession of the land and settle the 3rd, 4th, 5th defendants and other unidentified people on the plaintiffs' parcels of land.

The 1st and 2nd defendants' defense

3. The 1st and 2nd defendants filed a defense dated 3rd November, 2013, denying the claim in particular they denied that the plaintiffs' are the allottees of the suit land and aver that the suit land was allocated to several people including the defendants.

The 3rd, 4th, 5th, 6th and 7th Defendants' Defence and Counterclaim

4. The 3rd, 4th, 5th, 6th and 7th defendants filed a joint defence and counterclaim dated 31st July, 2012. In that defense and counterclaim they state that the 3rd defendant is the lawful allottee of plot number 703; the 4th defendant of plot 707; the 5th defendant of plot 708; the 6th defendant of plot number 700; and the 7th defendant of plot number 704; that all those were allocated on 18th August 2000, and letter of allocation issued, which letters have never been revoked; that If it is true that the plaintiffs' are in possession then they obtained it by use of false and unlawfully. In the counter claim the defendants reiterate the contents of their defense and claim the following orders;

a) That they be declared the lawful allottees of plot numbers 703, 707, 7008, 700 and 704, Kitalale Settlement Scheme Phase

II.

b) A mandatory injunction requiring the plaintiffs' in the main suit and all those claiming under them to vacate the said parcels of land and in default they be evicted at their own costs.

The Plaintiffs' Reply to Defence and Defence to Counterclaim

5. In reply to defence and defence to counterclaim dated **20/9/2012** the plaintiffs' reiterated the contents of the claim and denied that the defendants were allotted **1 ha** plots. They also denied that they occupied the land illegally or by the use of force.

The 8th, 9th, 10th 11th and 12th Defendants' Defence and Counterclaim

6. The 8th, 9th, 10th 11th and 12th Defendants filed a joint defence and counterclaim dated **17/7/2015**. In that defense they aver that the 8th defendant was allotted plot **697**, the 9th defendant plot number **699**, the 10th defendant plot number **702**, the 11th defendant plot number **712**, and the 12th defendant plot number **714**; that all the allocation were done on **18th August 2000** and letters of allocation issued for their 1ha, plots which letters have never been revoked; that plaintiffs' obtained possession of the land by use of force and have been threatening a breach of the peace whenever the defendants' require them to vacate.

7. In their counterclaim they pray for orders that the 8th defendant is the lawful allottee of plot **697**, the 9th defendant of plot number **699**, the 10th defendant of plot number **702**, the 11th defendant of plot number **712**, and the 12th defendant plot of number **714**, and in addition, a mandatory injunction requiring the plaintiffs' in the main suit and all those claiming under them to vacate the said parcels of land and in default they be evicted at their own costs.

8. For the purposes of the judgment in this suit the two counterclaims by both sets of defendants will be treated as one. In any event save for the plot numbers, the factual allegations therein are similar.

The 2nd 3rd, 4th and 5th Plaintiffs' Amended Reply to Defence and Counterclaim by 8th, 9th, 10th, 11th and 12th Defendants

9. In their amended reply to defence and counterclaim dated **12/8/2016** the 2nd, 3rd, 4th and 5th plaintiffs averred that they have no interest in the defendants' plot numbers **697, 699, 712 and 714** and that they are the owners of totally different plots allocated in 1996 as follows: the 2nd plaintiff plot number **713**, 3rd plaintiff plot number **715**, 4th plaintiff **709**, 5th plaintiff **696**; that they took possession in **1996** having been allocated the same by the office of the then Provincial Administration and the Provincial Land Adjudication and Settlement Office Nakuru; that they have been in occupation up to date; that the plots measure **10** acres each; they accuse the 1st defendant in collusion with the other defendants of having fraudulently subdivided and allocated the 2nd, 3rd, 4th and 5th plaintiffs' plots the 3rd to 12th defendants. In particular they accuse the 1st defendant for re-allocating land that had already been allocated, usurping the powers of the Provincial Administration and the Provincial Land Adjudication and Settlement Office Nakuru, making double allocations and allocating land without authority.

The Plaintiff's Evidence

10. The suit came up for hearing on **28/2/2017**. The plaintiffs' in the main suit had by then withdrawn their claim against the defendants'. The hearing was conducted only in respect of the defendants' counter claim but the plaintiffs' were granted leave to defend the counter claim and they had filed their defense on **12th August 2016**.

11. **CPW-1 Peter Chemaswet**, testified that he was given plot number **703** measuring **2.5 acres** by the Provincial Land and Settlement Adjudication Office on **18th August 2000**. In the year 2012, surveyors went and showed him his land but the plaintiffs' prevented him from using the land. He went to the Land Registrar to confirm that the land is his and there he was given a letter by the District Land Adjudication and Settlement Office dated **15th August 2012** which he produced as **PEXh-1**. He stated that the 1st plaintiff got plot number **701** measuring 5 acres, the 2nd plaintiff plot number **713** measuring 5 acres, the 3rd plaintiff plot number **715** measuring 5 acres, the 4th plaintiff plot number **709** measuring 5 acres, and the 5th plaintiff plot number **996** measuring 5 acres. However on the ground, the plaintiffs; took possession of **10** acres each. He stated that despite the order of injunction given by this court, the plaintiffs, are still in occupation. When cross examined by Mr. Wanyama, he admitted that, one of the conditions for the allocation was payment of **Kshs 3,000**, for which he had no receipt. He also admitted that another condition was that, documentation would be done once the payment is made in full. He stated that when he went to the site, he found one Lawrence Kipsoi (now deceased) on the land and that Kipsoi and his wife were not enjoined in this case.

12. **PW-2 Nathan Ndiwa** testified on the same date. He stated that, he was given plot number **707**, but when he went to the ground he found that the land was occupied by the 3rd plaintiff whom he claimed is entitled to plot number **715** which borders his plot. He produced his allotment letter as **PEXh-3**. On cross examination he admitted to having not paid as required by the special conditions in the allotment letter.

13. **PW-3** testified, on the same date. He stated that his plot number **708** and produced his letter of allotment as **PEXh-4**. He also admitted not having paid for the allotment and that the land is now occupied by one Daniel Ndiwa whose plot is number **715**.

14. **PW-4** testified on the same date. His evidence was that he was allocated plot number **700**. He produced a letter of allotment as **PEX-5** and stated that the 1st plaintiff, Fred Sabai occupies the land. He stated that he paid for the land on **21st January, 2002**. He produced two receipts as **PEX-6a and 6b**. On cross examination he averred that Fred Sabai's plot is number, **701**.

15. **PW-5** testified that his plot is number **697** which is occupied by Eliud Sigei the 5th plaintiff. His bid to produce a copy of letter of allotment failed and the same was marked as **PMFI-7**. On cross examination he stated he applied for the land orally and that he never paid the sum stated in the allotment letter.

16. **PW6 William Juma Chemosit** testified that he was allotted plot number **699** but he never took possession of the same as there was another person by the name Mose, who is not a party in this suit, in occupation thereof.

17. **PW7 John Kapkara Masai** testified that he was allocated **5** acres. However he had no letter of allotment because the same had gotten burnt. He produced a police abstract (**PEXh-9**) and stated that the 2nd plaintiff that is Daniel Kapkara and the 3rd plaintiff Richard Kipsoi took his land. On cross examination he did not have details of his plot number, or even when the letter of allotment burnt or when the 2nd and 3rd plaintiff took possession of his plot.

18. **PW-8 Stanley Koech** stated that his plot is number **714**; that he paid **Kshs 6,000** for processing of title deed. He produced a letter of allotment **PEXh-10a** and receipt **PEXh-10b** and stated that Richard Kipsoi the 2nd plaintiff has prevented him from taking possession of the land.

The Defendants' Evidence

19. **DW1, Francis Obiria Oseko**, Land Adjudication Officer, Trans Nzoia County testified on 20th November 2017. He adopted his statement filed on 3rd December 2013 as his evidence in chief. He produced a copy of the extract of the register for Kitalale Settlement as **DEX-1**. It shows the entries to be as follows:-

695,	1.0ha	Thomas Kimachas
696,	2.0ha	Eliud Sichei
697,	1.0ha	Wilfred M. Cheprot
698,	2.0ha	Joseph Chesebe
699,	1.0ha	Juma William Chemosit
700,	1.0ha	Robinson Chesbol
701,	2.0ha	Fred Sabai
702,	1.0ha	Peter Kibarak Kibet
703,	1.0 Ha	Peter Chemaswet
704,	1.0ha	Barnabas K. Kiteywo
705,	2.0ha	Lawrence Kipsoi
706,	2.0ha	Ndiwa Kapkara
707,	1.0ha	Nathan Jindet Ndiwa
708,	1.0ha	James Boiyo Bello
709,	2.0ha	David Chemaket
710,	1.0ha	Samson Kiboi
711,	24.0ha	Hesam Investments
712,	2.0ha	John Kapkara Masai
713,	2.0ha	Richard Kipsoi
714,	2.0ha	Stanley Kipkoech
715	2.0ha	Daniel Kapkara.

20. He stated that the Provincial Land Adjudication Officer, Rift Valley issued letters of allotment to the allottees. He explained the procedure to be that once the letters issue, the allottees go to the Land Adjudication Office with their identity cards and original letters where upon files are opened for the allottees. The original allotment letters are retained and sent to Nairobi. Once payment required is made, the files are sent to Nairobi for processing of discharge and transfers, to enable the issuance of title. He stated that in 2004, it was discovered that the allocations had been done while the scheme was still a gazetted forest and that to date the process has never been finalized. Upon cross examination by Mr. Wanyama, he confirmed that forest land can only be allocated upon surrender, and that the surrender has yet to be done. He added that the scheme was prepared for 1199 parcels, that the scheme plan has not been produced and that the conditions on the letters of allotment have never been waived. In his view, failure to pay within the specified time causes the offer to lapse. However the office of the Director of Land Adjudication is known to exercise leniency. He admitted that after discovery, of the land to be forest land, payments were stopped as from 2005 but produced no documentary evidence to support that fact. However he stated that the files are locked up until the forest land is officially degazetted. He acknowledged different government entities to which he attributed the presence of old and new numbers in his register. In his evidence on cross examination he admitted that the Commissioner of Lands and the Office of the President have powers to allocate land. Upon re-examination, he stated that the 2nd to 5th plaintiffs did not collect their letters of allotment and that their allotments have not been revoked. All of them however are entitled to 5 acres each. He stated that unless payment is made, transfer cannot be effected and that the process of degazettement is underway. Lastly he stated that elders of the community are not allowed to allocate land.

21. When re-examined by Mr. Odongo, DW-1 stated that he is not aware of any objection to the allocation by the Kenya Forest Service and that offers of land were merely suspended upon, discovery that the land is still gazetted. Allottees on the other hand should occupy land on the basis of what was allotted to them.

22. DW-2, Richard Namin Kipsoi testified that he lives on plot number 713, and has been there since 1996 and that the land has not yet been degazetted. On cross examination by Mr. Ngeywa he stated that he had been allocated the land by the Provincial Administration. However PE^{xh}-2, was issued by the Provincial Settlement Officer through the District Land Adjudication and Settlement Office.

23. DW-3 Daniel Kapkara, adopted his statement dated 12th August 2016 as his evidence in chief and stated that, his plot is number 715 which he has occupied from 1996 to date. On cross examination by Mr. Ngeywa he stated that he does not yet have an allotment letter and that the land was given to him by the District Commissioner.

24. DW-3 Eliud Sichei adopted his statement dated, 12th August, 2016 as his evidence in chief and stated that the land was shared out by a committee of Sabaot elders at the behest of the District Commissioner. He produced a copy of a letter dated 12th June 1995 as DE^{xh}-1A and stated that he has lived on the land for close to 20 years now. That letter is apparently written by the District Commissioner Trans Nzoia District to the Secretary Sabaot Elders Council. It licences them to organize a council meeting on 13/6/1995. Part of the approved agenda read as follows:

“Progress report of Kitalale.”

25. He acknowledged that the land is still forest land. Upon cross examination by Mr. Ngeywa he stated that the land was to be given to the Sabaot people by the government and that his plot is number 696 measuring 5 acres.

26. He stated that the ones whose letters were so retained were 699, 700, 703, 704, 707, 708, 710, 711 and 714. He produced the files in respect of the originals so retained as DE^{xh}-2-10 in that order. He also produced original letters whose owners have not collected them in respect of plot numbers, 696, 705, 706, 712, 713 and 715 as DE^{xh}-11-15 respectively.

Submissions

27. None of the parties filed their submissions in this matter.

Determination

28. I have considered the pleadings and the evidence of the parties. The issues that arise in this suit are as follows:

(1) Whether this court should declare who are the lawful allottees of plots nos. 703,707,708,700, and 704 in the light of the revelation that the suit land is still undegazetted forest land.

(2) Who are the proper allottees of the suit land?

(3) What orders should issue?

(1) Whether this court should declare who are the lawful allottees of plots nos. 703,707,708,700, and 704 in the light of the revelation that the suit land is still undegazetted forest land.

29. The revelation by both parties in this suit - and among the concurring parties is the District Land Adjudication and Settlement Officer Trans Nzoia, a government office - that the land in Kitalale Phase 2 is still undegazetted forest land makes it necessary to review the nature of the prayers sought in the counterclaim.

30. The counterclaim seeks that the counterclaimants be declared the lawful allottees of the suit land. In my view their admission that the land is still under the mandate of the forest department makes it not necessary to proclaim the legality of the allocation.

31. However this court can declare, so far as is practicable and for the sake of maintaining order on the ground, the persons identified by the 1st defendant as having an interest in the suit land, at least pursuant to allocations by a government agency or government agencies.

(2) ***Who are the proper allottees of the suit land?***

32. The overwhelming evidence in this suit shows that some of the land was allocated to the original plaintiffs in the year **1996**. It appears that a committee of Sabaot elders were involved in the push to have the land allocated to the Sabaot community. However it is doubtful from the record that they could have influenced the size of the individual allocations.

33. The role of the Sabaot elders diminished considerably after the Land Adjudication and Settlement Office set in and began redistributing the land. In the process some of the persons who had been allocated land by the former Provincial Administration lost some of their land as their earlier allocations were reduced.

34. Apparently, other persons not earlier on settled on the land were included in the new Land Adjudication Office allocations when Kitalale was officially turned into a scheme, hence leading to a change of the informal boundaries and the lessening of plot sizes of land previously allocated to the original allottees. The original plaintiffs in this suit fall under that affected last category that tried to maintain the *status quo* by filing this suit.

35. I am of the view that the original plaintiffs having withdrawn their claim their position was reduced to that of defending the counterclaim. Even in their defence position, their position is still rendered weak by lack of letters of allotment.

36. I have considered the evidence of **DW1, Francis Obiria Oseko** the Land Adjudication Officer, Trans Nzoia County who testified on **20th November 2017**.

37. I am persuaded that in the former allocation regime was characterized by lack of order and that the unification of allocations by the Provincial Administration and the Provincial Land Adjudication Office brought order to the scheme. The latter office is the one mandated by the law to administer over such settlement schemes.

38. **DW 1** gave a very elaborate and orderly account of how the allocations were done. The list that he produced regarding plots numbers **695 to 715** included both the plaintiffs in the original suit and the counterclaimants.

39. This court would lack any justification for upholding the allegations of the plaintiffs regarding their alleged allocations in the **1990s** as the most substantive allocations, which were properly documented, were done in the year **2000**. Among the beneficiaries of these were the plaintiffs in the original suit. Despite the inclusion of new allottees, those plaintiffs were not completely displaced as to be rendered landless.

40. In my view the plaintiffs have not been denied land by the 1st defendant. What happened in the year **2000** is that previous allocations that were not properly documented were revisited, and land was subsequently distributed more equitably among most of the citizens who were allocated portions subdivided in the nature of a formal scheme recognized by a government office mandated to administer such a scheme.

41. The allegation by the plaintiffs in the original suit accusing the 1st defendant's office of usurping the powers of the Provincial, Administration and the Provincial Land Adjudication and Settlement Office Nakuru, making double allocations and allocating land without authority do not therefore have any basis.

42. In this suit I would go by the evidence of **DW1** as the most reliable evidence.

43. I therefore find that in accordance with that evidence, the persons whose names are listed alongside the plots numbers listed herein below are the persons recognized by the 1st defendant as having interest in those plots:

- i. 697, 1.0ha **Wilfred M. Cheprot**
- ii. 699, 1.0ha **Juma William Chemosit**
- iii. 700, 1.0ha **Robinson Chesbol**
- iv. 702, 1.0ha **Peter Kibarak Kibet**
- v. 703, 1.0 Ha **Peter Chemaswet**
- vi. 704, 1.0ha **Barnabas K. Kiteywo**
- vii. 707, 1.0ha **Nathan Jindet Ndiwa**
- viii. 708, 1.0ha **James Boiyo Bello**
- ix. 712, 2.0ha **John Kapkara Masai**

x. 714, 2.0ha Stanley Kipkoech

44. This concludes this long running dispute. As stated before the court cannot proclaim these to be the legal owners as it was revealed before the conclusion of the suit that the land is still undegazetted forest land.

45. I will also take it to be the correct position, for the purposes of this case only as testified by DW1, that though failure to pay within the specified time causes the land allocation offer to lapse the office of the Director of Land Adjudication is capable of exercising leniency, and that after discovery that the land was forest land, payments were stopped as from 2005. Failure to pay the dues in the letter of allotment at this stage is not fatal to the offer owing to the foregoing.

CONCLUSION

(3) What orders should issue?

46. I therefore enter judgment for the plaintiffs in the counterclaim against the defendants in the counterclaim and issue orders as follows:

(a) The persons whose names are listed alongside the plots whose numbers are listed herein below are the persons recognized by the 1st defendant as having been allocated and as having interest in those plots in Kitalale Settlement Scheme Phase II:

- i. 697, 1.0ha Wilfred M. Cheprot
- ii. 699, 1.0ha Juma William Chemosit
- iii. 700, 1.0ha Robinson Chesbol
- iv. 702, 1.0ha Peter Kibarak Kibet
- v. 703, 1.0 Ha Peter Chemaswet
- vi. 704, 1.0ha Barnabas K. Kiteywo
- vii. 707, 1.0ha Nathan Jindet Ndiwa
- viii. 708, 1.0ha James Boiyo Bello
- ix. 712, 2.0ha John Kapkara Masai
- x. 714, 2.0ha Stanley Kipkoech

(b) A mandatory injunction shall issue requiring the defendants to the counterclaim and their family members and anyone else claiming under them to vacate the said parcels of land mentioned in order (a) above and in default they be evicted at their own costs.

(c) Each party shall bear their own costs of this suit.

Dated, signed and delivered at Kitale on this 31st day of January, 2019.

MWANGI NJOROGE

JUDGE

31/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyama for defendants in the counterclaim and the plaintiff in the main suit.

Mr. Karani holding brief for Ngeywa for the plaintiff in the counterclaim

Mr. Wabwire for 1st and 2nd defendants

COURT

Judgment read in open court.

MWANGI NJORGE

JUDGE

31/01/2019