



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 103 OF 2013

MICHAEL KIPCHUMBA.....PLAINTIFF

VERSUS

FESTO ASANGO.....DEFENDANT

JUDGMENT

1. The plaintiff filed this suit against the defendant vide a plaint dated **19/7/2013** in which seeks an order declaring that he is the legal owner of **Plot Number 60 Kapomboi Cypus Trading Centre** and that the defendant and those claiming under him do move out of the suit plot, remove or demolish their structures failing which they be evicted and their structures demolished forthwith at their own cost. He also seeks an order of permanent injunction restraining the defendant and all those claiming under him from interfering with the plaintiff's user and quiet enjoyment of the suit plot and costs of the suit.

2. According to the plaint the plaintiff exchanged land with one **Ekuman Ekeno** whereby the plaintiff took **Plot No. 60** which was Ekuman's and Ekuman took **Plot No. 21** which used to be the plaintiff's. The said plots had been allocated to them by the defunct County Council of Trans Nzoia. After the exchange, the records at the County Office were changed to reflect the transaction and each took possession and paid the land rates for the plot they got. When the plaintiff began developing his new plot, the defendant laid claim over it alleging that he had been allocated the same, a claim the plaintiff states is false. The defendant then forcefully and without any authority entered illegally on the said plot demolished the plaintiff's structures and erected his own and has been in occupation thereof to date and threatened the plaintiff with dire consequences to prevent the plaintiff from attempting to regain possession.

3. The defendant filed a defence on **3/9/2013** denying the claim. The defendant avers in that defence that he is the owner of **Plot No. 60** while the plaintiff owns **Plot No. 12** at the centre. He states that the transaction between the plaintiff and one Ekuman Ekeno was revoked and denies that the plaintiff ever took possession of or developed Plot No. 60 and adds that he has been legally in occupation of that plot since the year **2007** which he acquired lawfully and the plaintiff has no proprietary interest in the land.

The Evidence of the Plaintiff

4. The plaintiff testified on 19/1/2015. He reiterated the matters set out in the plaint. He produced an allotment letter dated 24/9/2007 which shows he had been allocated Plot No. 21 as *P.Exh 1*. He also produced a letter of allotment dated 24/9/2007 (*P.Exh 2*) showing that Ekuman Ekeno had been allocated Plot No. 60. Both letters bear two lines across their face and also a handwritten and signed memo dated 8/10/2012 with the words "*sec change*". He testified that the clerk to the council advised the secretary to effect the changes on both allotment letters and subsequently he was issued with an allotment letter for Plot No. 60 bearing his name. (*P.Exh 3*) while Ekuman got an allotment letter for plot number 21 (*P.Exh 4*). He started paying rent for Plot No. 60 and produced receipts (*P.Exh 5*). Previously he had been paying rent for plot No. 21 and this was evidenced by receipts (*P.Exh 6*) while Ekuman's previous payments for Plot No. 60 were evidenced by receipts (*P.Exh 7*). Ekuman began paying for Plot No. 21 after the exchange as evidenced by receipts (*P.Exh 8*). The exchange agreement was produced as *P.Exh 9*. The plaintiff testified that he had gone to the council offices where it was clarified to him that the defendant's plot is Plot No. 3.

5. PW2, Ekuman Ekeno testified on 19/6/16. His evidence corroborated that of the plaintiff in all respects. He added that the plaintiff was evicted by the defendant from the plot he got upon the exchange.

6. With that evidence on the record the plaintiff closed his case.

The defendant's evidence

7. The defendant testified on the 31/7/2017. He produced a letter of allocation in respect of Plot No. 3 in his name which is dated 24/9/2007 (*D.Exh1*) he never produced an allocation letter in respect of Plot No. 60. He stated that he owns two plots, Plot No. 3 (which he classifies as Commercial) and 60 (which he classifies as residential) at the centre and that he has been paying county government rates for the said plots. He only produced receipts in support of payments for Plot No. (*D.Exh 2(a)-(c)*). He produced a plot rates clearance certificate for Plot No. 3 dated **29/10/2012**. He further produced a copy of a letter dated 13/11/12 (*P.Exh4(a)*) purportedly from the clerk to the defunct County Council

addressed to the Assistant Chief Kapomboi Location which seems on the face of it to be denying the claim over the plot by the plaintiff and a copy of another letter dated **19/11/12** (*P.Exh 4(b)*) from the clerk to the council addressed to the District Commissioner Kwanza District alleging that the letter of allotment in favour of the plaintiff in respect of Plot No. 60 was obtained fraudulently. He averred that Ekuman had no plot to exchange by 2012 because he had allegedly sold his plot on 19/3/2009 to one Joseph Simiyu Wanjala and the plot that he sold was in any event residential. He produced a copy of the alleged agreement between Ekuman and Wanjala as *D.Exh.5*. He alleged that it was the County Council which removed the plaintiff's structures from the suit land. Under cross examination by the plaintiff he averred that there were two plots numbered 60, one commercial and one residential; that the plaintiff wanted to exchange the commercial one with his residential plot but as seen on *D.Exh.5* the commercial plot had been sold, and that Ekuman sold half his plot and remained with a half of it in the year 2009.

8. DW2 Jonathan Wafula Motende testified on 4/12/2017 and adopted his statement. His evidence is that he is the chairman of Kapomboi Cyprus Centre since 2006; that in that centre there are two plots numbered 60; that one is commercial and one residential; that Ekuman owned the latter; that he sold it to one Joseph Wanjala and retained a half; that the defendant was given Plot No. 3 and later asked for a plot for a petrol station and was given Plot No. 60 whereupon he took possession of the plot. He stated that he would need to sign against an exchange agreement but he never witnessed an exchange between the plaintiff and Ekuman.

9. DW3 Philip Soita testified on 4/12/17. His evidence is that **being a surveyor**, the County Council gave him the task of measuring plots and identifying beneficiaries at the centre; that he drew a map (*D.Exh 6*); that he showed Ekuman Plot No. 60 (residential) and showed Plot No. 60 PSS to the defendant. According to him the plots could be assigned any number.

10. DW4 Joseph Wanjala Simiyu testified on 4/12/2017. His evidence is that he bought a residential plot from Ekuman Ekeno vide the agreement produced as *D.Exh.5*. When cross examined by the plaintiff he averred that he bought only half the plot. That the transacting parties never went to the County Council offices but to the market chairman.

11. Susan Ngera, the Chief Officer, Lands, County Government of Trans Nzoia testified on **24/10/2018**. Her evidence is that according to the county government records the defendant is the allottee of Plot No. 3 while the plaintiff is the allottee of Plot No. 21 and that Ekuman Ekeno is the allottee of Plot No. 60. The exchange of plots between the plaintiff and Ekuman is reflected in the land records in her office exactly as narrated by the plaintiff and PW2 in their evidence in this case. The defendant has no letter of allotment for Plot No. 60 up to date. According to her the records show that the plan that was submitted showed that the plot exchanged was commercial. When cross examined by the plaintiff she admitted that only one plot at the Centre bears number 60, and that it is of commercial use and that it abuts plot number 3.

Determination

Issues for determination

12. The following issues arise for determination in this suit:-

a. Did the exchange of land involving plot number 60-commercial between the plaintiff and Ekuman Ekeno occur and if so was it sanctioned by the county council?

b. How many plots bear the number 60 at the Kapomboi Centre?

c. Who was the rightful allottee of plot number 60-commercial?

d. What orders should issue.

(a) Did the exchange of land involving plot number 60-commercial between the plaintiff and Ekuman Ekeno occur and if so was it sanctioned by the County Council?

13. The exchange agreement was not disputed by the defendant.

14. The letters of allotment issued to the plaintiff and Ekuman Ekeno were endorsed at the County Council Office for the purpose of the exchange and the Chief Land Officer of the County Government of Trans-Nzoia, the successor to the County Council of Trans-Nzoia confirmed that the exchange was reflected in the County Government records and I find her evidence to be credible. The plaintiff has also produced receipts showing that he has been paying land rates for plot number 60. It is therefore the case that the exchange of the land between the plaintiff and Ekuman involving plot number 60 took place and that it was approved of by the County Council and appropriately recorded.

(b) How many plots bear the number 60 at the Kapomboi Centre?

15. The market chairman's evidence was that there are two plots that bear number 60 at the centre, one of commercial user and one of residential user. He never produced any evidence to that effect.

16. However he avers that Ekuman had already sold plot number 60 which had been allocated to him and which was residential.

17. I have looked at *P.Exh 9* and I find that at the time of the exchange, plot no. 60 was identified in that agreement as a commercial plot. The Chief Land Officer of the County Government has however testified that there is only one plot that was given the number 60 and that it is a commercial plot. I have no cause to doubt her evidence. It is sworn evidence and she is the keeper of the records and she was summoned by the court purposely to shed light on that issue before judgment issued in this matter. I find that there is only one plot in Kapomboi Cyprus

market which bears number 60.

(c) Who was the rightful allottee of Plot No. 60-commercial?

18. The defendant never produced an allotment letter for plot number 60 bearing his name, or any documents showing that he had been paying rates or rents in respect of plot number 60. The plaintiff produced documentary evidence that plot number 60 was allocated to Ekuman Ekeno. No evidence was called to prove that the letters that the defendant produced marked as *D.Exh 4(a)* and *4(b)* were genuine. Their history was not narrated. This court finds that *D.Exh 4(a)* and *4(b)* are not genuine. Consequently the only conclusion that this court arrives at is that Ekuman Ekeno was the rightful allottee of commercial Plot No. 60 and that this is the plot that he exchanged with the plaintiff in order to get Plot No. 21.

(d) What orders should issue?

19. In the final analysis I find that the plaintiff has established his case on a balance of probabilities against the defendant and I enter judgment in his favour against the defendant and I issue the following orders against the defendant:

(a) A declaration that the plaintiff is the proper allottee of commercial plot number 60 Kapomboi Cypus Trading Centre and that the defendant and those claiming under him have no right or interest in the said plot.

(b) That the defendant and/or all those claiming under him shall vacate and demolish or remove their structures from plot number 60 Kapomboi Cypus Trading Centre, in default of which they be evicted and their structures demolished at their own cost.

(c) An order that the defendant shall give and the plaintiff shall take vacant possession of plot number 60 Kapomboi Cypus Trading Centre.

(d) A permanent injunction restraining the defendant and all those claiming under him from interfering with the plaintiff's user and quiet enjoyment of plot number 60 Kapomboi Cypus Trading Centre

(e) The defendant shall bear the costs of this suit.

It is so ordered.

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

MWANGI NJOROGE

JUDGE

2131/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Michael Kipchumba in person present

N/A for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

31/01/2019