



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 102 OF 2004

JOHN CHERUIYOT MURSOI.....PLAINTIFF

VERSUS

AUGUSTINE CHEPKWONY MOREI.....1ST DEFENDANT

JOHN CHEPKWONY.....2ND DEFENDANT

JUDGMENT

Introduction

1. The original plaintiff, **Kiptigoi A. Samoei** commenced this suit vide a plaint dated **19th October, 2004** and filed in court on the same date, seeking the following orders:

(a) **A declaration that Plot No.271 Chepkoiyo farm legally belongs to the plaintiff.**

(b) **Costs of the suit.**

(c) **Interest.**

(d) **Any other relief the court deems fit and just to grant.**

2. The original plaintiff having died, was substituted with his son **John Cheruiyot Mursoi** the current plaintiff, but the prayers remained unchanged.

The Plaintiff's Case

3. According to the plaint the plaintiff's case is that he is the owner of **Plot No 271 Chepkoiyo Farm** (the suit land) which is his entitlement by virtue of his shareholding in the farm; that the defendants have on several occasions claimed the suit land on the basis that the 2nd defendant was allocated the suit land by the Chepkoiyo farm directors which allegation the plaintiff disputes.

The Defendants' Defence

4. The 1st defendant filed his defence dated **1/11/2004** on **3/11/2004**. He denies the allegations by the plaintiff because he believes that it is the 2nd defendant who was lawfully allocated the suit property. He also draws the attention of this court to **Kitale SPMCC 273 of 2004** allegedly between the same parties as those in the instant suit.

5. The 2nd defendant filed his defence and counterclaim dated **1/11/2004** on the **3/11/2004**. His defence is that he was the lawful allottee of the suit property. In the counterclaim he avers that he has been in continuous possession of the suit premises and has utilized the same since **1986** and that in **March 2004** the plaintiff attempted to invade the plot, destroyed a fence and was charged with the offence of malicious damage to property in **Kitale SPMC Criminal Case No. 3055 of 2004**. He seeks a declaration that he is the lawful owner thereof and costs.

EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

6. **PW1** the plaintiff testified on **13/11/2006**. His evidence is that he was allocated **7 acres** of land in **1965**, of which he does not know the plot number or the year of survey. According to him the land was supposed to measure **15 acres** but once surveyed it was found to be **7 acres**. He went to the farm committee and they gave him another **3 acres**; he is in court over **0.9 acres** which is the land held by the 2nd defendant. He alleged that the 2nd defendant has grabbed the land and has used it for **4 years**. He admitted having filed and then subsequently withdrawn Case No. **Kitale SPMCC 273 of 2004**.

7. **PW2 Robert Millimo Wepukhulu**, testified on **6/5/2013**. His evidence is that he was the secretary to the farm since **1999**; that the plaintiff was allocated **Plot No 271** but the plot is occupied by the 2nd defendant.

The Defendant's Evidence

8. **DW1, John Chepkwony** testified on **18/7/2018**. His evidence is that his father who was the 1st defendant is deceased; that he was allocated **plot no 271** measuring **0.9 acres** by the directors of the Farm in **1986** whereupon he took possession of the land and began utilizing it. According to him the plaintiff attempted to invade the land in **2004** and was charged with a criminal offence. However when he gave oral evidence at the hearing of this suit on **31/10/2018** he stated that he purchased the land from one **Clement Chelengo**. He also owns plots numbers **270** and **248**; he paid **Ksh 200** as survey fees as well as registration, conveyance and inspection fees. He produced a letter from his local area chief as **DExh 6** in support of the allegation that the chief recognized his ownership of the land.

9. **DW2, Christopher Barasa** testified on **31/10/2018**. His evidence is that the plaintiff and the defendant are his neighbours, that he was one of the farm directors; that the 2nd defendant purchased **plot no 270** from two different persons, Joshua Kutuny and Clement Kiplerko; that it was not surveyed then; that he bought **20.5 acres** from Joshua and **9 acres** from Clement; that he also purchased **plot no. 248** from the plaintiff; that after survey **plot no 248** measured **12.7 acres** rather than the expected **14 acres**; that when the 2nd defendant complained, the directors resolved that the plaintiff should add the 2nd defendant the deficit of **1.3 acres**; that the directors therefore sat at a different meeting and carved **plot no 271** measuring **0.9 acres** from **plot no 270** hence creating a new plot no 271 from plot no 270. However plot 270 belonged to the 2nd defendant and he again complained when he realized that the parcel had been carved out of his own land. The matter was then referred to the DO Kaplamai who ordered that plot number 271 which the plaintiff had taken be surrendered to the 2nd defendant whereupon the plot was then allotted to the second defendant.

DETERMINATION

Issues for Determination

10. The issues that arise from the pleadings in this suit are as follows:-

(a) Whether the plaintiff was allocated the suit land?

(b) Whether the defendants trespassed on the suit land?

(c) What orders should issue?

11. The history of plot no 271 is shrouded in mystery.

12. DW2's evidence is that the plaintiff sold plot no 248 to the 2nd defendant. The transacting parties believed plot no 248 was 14 acres but upon measurement it was confirmed to be 12.7 acres. The 2nd defendant complained to the farm directors who resolved that the plaintiff should add the 2nd defendant 1.3 acres. It is not clear why the directors would carve out **0.9 acres** from a plot not owned by the plaintiff (**Plot No 270**) in order to create a new plot (No. 271) and subsequently give it to the 2nd defendant, or why the portion so carved out was not **1.3 acres** which was the size of land said to be owed by the plaintiff to the 2nd defendant. It has also not been established that **plot no. 270** had by the time of that purported excision, been sold by a different person to the 2nd defendant, such that he was entitled to object to its excision. It is also apparent that this version presented by DW1 and DW2 was not narrated in the letter dated 13/4/2004. That letter focuses on how the shortfall of land sold to the 2nd defendant by the plaintiff was to be compensated for.

13. The plaintiff's case is that **plot no 271** was allocated to him vide a letter of allotment dated **6/3/2003 (PExh 1.)**

14. The said allocation was acknowledged by **DW2** Christopher Barasa who said that the suit land was first allocated to the plaintiff and that later the District Officer ordered the said allocation to be revoked. **DW2** was a director in the Farm at the time of allocation. However **PW2** was a secretary at the farm at the time of allocation and he testified in favour of the plaintiff's allocation. The evidence of **PW2**, being the company secretary and thus the proper holder of the company records has greater weight that of **DW2**.

15. It is not clear by which authority the District Officer handled the dispute and made an order that the plot in question be "returned" to the 2nd defendant. However it is clear that the directors at the farm then found it fit to comply with the District Officer's order and that at least according to the evidence of **DW2**, they purported to re-allocate the same plot to the 2nd defendant hence the current dispute. However, in my view there was nothing to be "returned" to the 2nd defendant as the first allottee of plot no. 271 was the plaintiff.

16. I agree with the plaintiff's argument that there is no evidence that the letter of allotment (**PExh1**) was ever revoked. I have also noted the 2nd defendant's contradictory statements in his attempt to explain how he obtained the suit land.

17. First, he stated that he was allocated **plot no 271** measuring **0.9** acres by the directors of the Farm in **1986** whereupon he took possession of the land and began utilizing it.
18. Later, when he gave oral evidence at the hearing of this suit on **31/10/18** he stated that he purchased the land from one **Clement Chelengo**.
19. No evidence of purchase or allotment of the suit land to him was presented before this court by the 2nd defendant.
20. If the plot was carved out of land that had been purchased by the 2nd defendant (it was allegedly carved out of **plot 270**) then no evidence was presented that the defendant had bought or owned **plot no 270**.
21. A scrutiny of the receipts presented as **DExh 2, 4** and **5** shows that they were in respect of **plot no 271**. The earliest of those receipts is dated 23/12/2002. The plaintiff's letter of allotment is dated 6/3/2004. It can not be understood how the 2nd defendant could go about making payments in respect of plot no. 271 while the same had evidently not been allocated to him, for only a letter of allotment should have entitled him to effect payments.
22. The area list produced as **DExh 7** was not helpful in this regard as it does not show who owned **plot number 270**.
23. In my view the plaintiff put up a strong case which was even corroborated by evidence of the defence, that he was allocated the suit land and that he bore **PExh 1**, a valid letter of allotment over the land. The burden of proof then shifted upon the defendants to establish how the 2nd defendant acquired the land.
24. In particular, the onus of substantiating the claim of existence of any land sale agreement between the plaintiff and the 2nd defendant fell squarely upon the 2nd defendant.
25. If there were contractual relations between the plaintiff and the 2nd defendant it was upon the any of the two who was aggrieved to find the proper legal avenue for redress.
26. This court can not take as the truth the evidence that there was an arbitrary decree by the District Officer that parcel no. 271 be given to the 2nd defendant as that District Officer did not testify in this case and no minutes of the meeting he convened were presented to court by the defendants.
27. There is no evidence adduced by the defendant in this suit to convince me that the 2nd defendant bought land from the plaintiff, or that that land fell short of the desired size, or even that he was allocated the land by the company.
28. In the circumstances, I must take the letter of allotment to the plaintiff (**PExh 1**) which was not proved to be a forgery or otherwise invalid by dint of formal cancellation by the directors, to be valid and reliable evidence.
29. The only evidence that this court would accept from the defendant is that of a valid revocation of that letter of allotment, not by the District Officer, but by the company. None was presented.
30. In the final analysis I find that the suit land was validly allocated to the plaintiff. The plaintiff has therefore established his claim against the defendants on a balance of probabilities. On the other hand the 2nd defendant has failed to prove his counterclaim against the plaintiff.
31. I therefore enter judgment for the plaintiff against the 2nd defendant and issue the following orders:

(a) An order of declaration, declaring that Plot No.271 Chepkoiyo Farm belongs to the plaintiff.

(b) An order that the 2nd defendant shall give the plaintiff vacant possession of the suit land in default of which he shall be evicted.

(c) An order of permanent injunction restraining the 2nd defendant from in any way interfering with the plaintiff's ownership possession of Plot No.271 Chepkoiyo Farm.

(d) An order that the 2nd defendant's counterclaim has no merit and that the counterclaim is hereby dismissed.

(e) An order that the Deputy Registrar of this court shall execute all the necessary documents to effect the registration of the suit land Plot No.271 Chepkoiyo Farm in the name of the plaintiff.

(f) An order that the costs of the suit and the costs of the counterclaim shall be paid by the 2nd defendant.

It is so ordered.

Dated, signed and delivered at Kitale on this 29th day of January, 2019.

MWANGI NJOROGE

JUDGE

29/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

N/A for the defendants

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019