



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 3 OF 2009

REUBEN NDARA.....PLAINTIFF

VERSUS

HELLEN CHEBET.....1ST DEFENDANT

FRANICS K. TENDET (suing as legal personal representative of

MAIBA CHEBOSI.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated **12/1/2009** in this suit the plaintiff sought the following orders:

- (a) **A declaration that the plaintiff is the rightful owner of 10 acres being Plot No. 822 Kitalale Settlement Scheme Phase II;**
- (b) **A permanent injunction restraining the defendants their servants and /or agents from interfering with the plaintiff's possession of the plot.**
- (c) **Costs.**
- (d) **Any other relief.**

2. It is the plaintiff's case that he is the owner of **Plot No. 822 Kitalale Settlement Scheme Phase II** (the suit land) and that the defendants have trespassed thereon claiming the land to be theirs hence the suit. According to him the 1st defendant's land is in Kitalale Settlement Scheme Phase 1 and the 2nd defendant does not own land.

3. The defendants filed a defence and counterclaim which they amended for the second time on **16/2/2017**. In the amended defence lastly filed they state as follows: that it is the plaintiff who has trespassed on their land which they refer to as **Plot Numbers 666 and 667, Kitalale Settlement Scheme Phase II**, each measuring **2.5 acres**, destroyed the fences and ploughed the land. The counterclaim seeks orders that the plaintiffs be declared the rightful owners of **Plot Numbers 666 and 667 Kitalale Settlement Scheme Phase II**, and a mandatory injunction restraining the defendant to give vacant possession of the suit land in default of which he be evicted.

4. The plaintiff testified on **8/4/2014** and later on **22/1/2018**. He claimed that he was allotted Plot Number **822** by the Settlement Fund Trustees. He produced a certified copy of a letter of allotment indicating that he has been allocated Plot Number **822** within Kitalale Settlement Scheme. However that letter is from the office of the Commissioner of Lands and not the Settlement Fund Trustees as claimed in his oral evidence. It is also addressed to Samuel Chesenye Ndara and not to the plaintiff.

5. The plaintiff averred that in **2006** the defendants invaded his land claiming that their plots were located thereon; they took **5 acres** of his land. Surveyors came and after inspection stated that the plaintiff was illegally occupying the land. The defendants then took the plaintiff to the Land Disputes Tribunal but the Tribunal ruled in the plaintiff's favour and ordered that the defendants do more to Phase I. The Tribunal ruling was adopted as an order of the court. However on cross examination he admitted that the decision of the Tribunal was later vacated.

6. Under cross examination the plaintiff disagreed with the report filed by surveyors who had been deployed by this court to the suit land to establish the actual position.

7. **PW2** also admitted that though the letter of allotment borne by the plaintiff was issued by the office of the Commissioner of Lands, that is not the office that normally allocates land in a settlement scheme. However he averred that the settlement officer can not cancel a letter of allotment issued by the Commissioner of Lands but the Commissioner of Lands can recall it yet the plaintiff's letter was never so recalled.

He also stated that the Kitalale Phase II allotments were issued between 2000-2004; he thus cast doubt on the plaintiff's letter of allotment that bears the date **5/11/1996**. The witness was also not able to tell whether **PMFI-1** was genuine or not. He also testified that the normal purpose of schemes is to provide land for landless Kenyans. He admitted that there is no file record for plot no 822 though it is captured in the register of allotments. On the other hand he confirmed that the letters of allotment for the defendants' plots no 666 and 667 are genuine.

8. PW3 a surveyor testified that he demarcated plot number 822 measuring 10 acres in Kitalale Settlement Scheme in 1987, that the parcel was moved from parcel number **LR 2065** and taken to **LR No 3023**. According to him the subdivision of Phase II was predominantly comprised of 10 and 5 acre plots and none were 2.5 acres in size. However he exhibited lack of awareness of much that may have subsequently happened in the scheme after he left. He produced no documentary evidence. In total his evidence is unreliable.

9. DW1 Hellen Chebet testified that the plaintiff's wife is residing on Plot 822; that the plaintiff has trespassed on her plot; that though her allotment letter states that her land is in Phase 1 the land is in fact located in Phase II.

10. DW2 Francis Kipteka Tendet testified that his mother was allocated plot number 667 in Phase II and that the plaintiff lives on that plot; that the plaintiff has no land in Phase II.

DETERMINATION

Issues for Determination

11. However strange it may seem despite the discord in the numbering sequence, all the three plots exist contiguous to each other in Kitalale Phase II. That is the evidence of the Land Adjudication and Settlement Assistant, PW2.

12. The certified copies of the register produced as **PExh 4** produced by PW2 showed that the plots are in the records, though the witness stated that there is no file for Plot No. 822.

13. The evidence of PW2 who keeps the records has to be believed as the true position in this case.

14. The genuineness of the letter of allotment in the name Samuel Chesenyi Ndara for Plot No. 822 has not been verified in this suit. The size of Plot No. 822 is confirmed to be less than 10 acres. Indeed it is about 4.5 acres, according to PW2 who kept the records.

15. The main issue for determination in this suit are as follows:

(a) Does the plaintiff have locus standi to institute and prosecute this suit?

(b) Whether the defendants have trespassed on the plaintiff's plot or the plaintiff has trespassed on the defendants' plots.

(c) What orders should issue?

(a) Does the plaintiff have locus standi to institute and prosecute this suit?

16. A preliminary objection was filed on **24/4/2009** by the defendants stating that the suit should be struck out on the basis that the plaintiff lacks locus standi to commence and agitate this suit. Despite that objection having been filed, no letters of administration were produced to show that the plaintiff had locus standi to institute and prosecute this suit.

17. However the plaintiff attempted to counter this objection by averring in his evidence in chief that when his father died he went to the settlement office and they substituted his name for that of his deceased father.

18. The plaintiff admitted at the cross examination stage that his father died in 1998 before this suit was filed, but maintained that he had filed this suit on his own behalf. That notwithstanding the evidence produced in this case is a letter of allotment that shows his late father to be the allottee.

19. One important statement that **PW2** made is that the land has not been allocated in the plaintiff's name.

20. In my view, the letter of allotment having not been issued afresh in his name, he should be taken to be representing his late father's estate and thus there is merit in the defendants' claim that he does not possess locus standi to file and prosecute the suit.

(b) Whether it is the defendants who have trespassed on the plaintiff's plot or the vice versa.

21. A report filed by the surveyor in this court on **9/10/12** pursuant to orders of this court issued on **16/7/2012**. The reports states that the three plots exist. It states that the plaintiff is settled on plots no 666 and 667 which belong to the 1st and 2nd defendants respectively. I find that the plaintiff has not therefore proved that the defendants have trespassed on his land. I find that it is the plaintiff who has trespassed upon the defendants' respective plots.

(c) What orders should issue?

22. In the final analysis I find that the plaintiff's claim has no merit for the reason that he does not have *locus standi* and that he has not in

any event proved that there is trespass by the defendants upon plot number 822. I also find that the defendants have proved their counterclaim against the plaintiff on a balance of probabilities.

23. I therefore issue the following orders:

(a) The plaintiff's suit is dismissed.

(b) The defendants' counterclaim is allowed.

(c) The 1st and 2nd defendants are the rightful allottees of Plots Nos. 666 and 667 - Kitalale Settlement Scheme Phase II respectively.

(d) The plaintiff shall remove himself from Plots Nos. 666 and 667 Kitalale Settlement Scheme Phase II in default of which he shall be evicted.

(e) The plaintiff in the main suit shall bear the costs of the main suit and the costs in the counterclaim.

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

Mr. Kiarie holding brief for Arunga for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019