



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 52 OF 2016

NOEL ENGESA NJORO.....PLAINTIFF

VERSUS

JULIUS KORINGURADEFENDANT

JUDGMENT

INTRODUCTION

1. In the plaint dated **8/3/2016**, the Plaintiff prays for judgement against the Defendant for:

(a) A declaration that the plaintiff and/or to interfere with the plaintiff is the lawful owner of plot number 830 Zea Settlement Scheme which is within Trans-Nzoia county.

(b) A permanent injunction restraining the defendant, his agents, servants and all those claiming under him from entering, tilling, ploughing, leasing and/or planting any crop on the suit land and from interfering in any manner with plot number 830 Zea Settlement Scheme

(c) Costs of this suit

(d) Any other relief that the court may deem fit to grant.

PLEADINGS

The Plaintiff

2. It is the plaintiff's case that upon her application the Settlement Fund Trustees allotted her **Plot No. 830** measuring approximately **2.4 Ha** at Zea Settlement Scheme within Trans Nzoia County and she paid for the land and was shown the boundaries thereof. The plaintiff states that the defendant trespassed onto the said land in the year **2013** ploughed it and planted crops thereon. The defendant repeated the same action in the year **2014** and **2015**. The defendant, while doing these actions laid claim on the land and has not heeded calls to desist therefrom hence this suit.

The Defence and Counterclaim

3. The defendant filed his defence on **24/3/2016** denying the claim and later amended it on **30/3/2016**. In the amended defence and counterclaim the defendant alleges fraud and irregularity in the allocation of plot number **830** to the plaintiff.

4. He first claims that plot number 830 forms part of plot number 17 both being in Zea settlement scheme.

5. Later on in the defence and counterclaim he avers that the plot was irregularly hived off from the defendant's plots numbers 15,16 and 17 which the defendant purchased on various dates from their original allottees while they had their beacons already installed and that plot number 830 was never been demarcated on the ground.

6. Further on in that pleading the defendant states that plot no 830 was inserted between plots numbers 17 and 18 without his involvement and or knowledge. The defendant avers that he purchased the said land from one Monica Ngari Muchoma who was the first allottee of the land and that the defendant has been in quiet user and possession thereof to date.

7. The defendant prays for a declaration that he is entitled to uninterrupted possession and user of plots numbers 15, 16 and 17 as originally

demarcated an order of injunction against the plaintiff to restrain her from interfering with those plots, and costs of the suit.

8. The plaintiff filed a reply to defence and counterclaim on **30/9/2016** joining issues with the defendant on his defence and counterclaim. She denied that plot number **830** is part of plot number 17 and maintained that they are two different plots.

The Plaintiffs' Evidence

9. **PW1, the plaintiff**, testified on **18/10/2017**. She adopted his statement dated **29/8/2016** and reiterated the matters in the plaint. She applied for the land in her own handwriting and never kept any copy of the application. The Lands and Settlement office responded vide a letter dated **11/1/2013 (PEXh 1)** and informed her that she had been allocated plot number **830** measuring approximately **2.4 ha**. She testified that she later paid for the land in instalments. She produced the receipts as **PEXh 2(a) and 2 (b)**. She testified that at the time she was shown the land by surveyors from the lands office in **2013**, the suit land was vacant. Later she went to the land and found that it had been cultivated. She was informed by workers on the land that they were working for one Julius. Her advocate at that juncture wrote to the lands office asking for the owner and in its written response dated **10/3/2016 (PEXh3)** the Lands Office stated that the land belongs to the plaintiff. However the plaintiff agreed that she has never utilized the land and the defendant, who has a parcel of land lying next to it has consolidated the two parcels and is carrying out farming on them.

10. **PW 2 Francis Obiria Oseko, the County Land Adjudication Officer** testified on **18/10/2017**. His evidence is that he keeps the settlement records in respect of the suit land; that the plaintiff was allotted **2.4 ha.**; that she paid the amounts demanded for the allotment in two instalments and that there are copies of the payment receipts produced as **PEXh 2(a) and (2b)** in his file record; that in **2004** when the area map was established plot number **830** was in the map; that he asked the Director of settlement for discharge of the land after the plaintiff paid all the demanded dues; that the discharge was received from the headquarters office and has not been issued to the plaintiff.

11. With that the plaintiff closed her case.

Evidence for the Defence Case

12. **DW1, the defendant** testified on **26/9/2018** and adopted his written witness statement filed on **11/11/2017**. His evidence matches substantially with the contents of his defence and counterclaim. In brief, he states that he purchased plots numbers **15,16** and **17** at different times; that plot number **17** was bought from one Monica Ngari Muchoma; that the arable part of plot number 17 is 5 acres, that the swampy part is **1.5** acres; that the riparian area for the three plots that he owns is about 5 acres; that there is a dyke that separates the arable and swampy areas, that he moved into the land after he was shown the beacons to the land in the year **2000**; that he has developed that land; that there have been many attempts by different people to acquire his lands, one of them being the plaintiff's husband who came along bearing a letter of allotment and alleging he had been allocated land there in exchange for his **5** acre parcel in Nairobi; that after that he was served with the court process in this suit; that his enquiries at the Nairobi lands office revealed that plot number **830** did not exist; that he was also informed at the lands office that the last allocation of land in the scheme was in **1997**.

Submissions

13. Submissions were filed on behalf of the plaintiff on **25/10/18** and on behalf of the defendant on **21/11/2018**. I have considered those submissions which principally dwell on facts in this case.

DETERMINATION

Issues for determination

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

(a) Is the plaintiff the lawful owner of plot number 830 Zea settlement scheme?

(b) What orders should issue on the main suit and the counterclaim?

(a) Is the plaintiff the lawful owner of plot number 830 Zea Settlement Scheme?

15. I have considered the evidence of the parties. It points to the possibility that a complete range of allocation of plots in the Zea Scheme was conducted in the **1990s**.

16. Evidence points to the making of provision of large swathes of swampy land that lay next to a river that traversed across or lay next to the scheme. The defendant is of the opinion that that land was left unallocated for being swampy and riparian land. No conclusive evidence has been called by the defendant on that issue. The main issue to be addressed remains whether the plaintiff has established her case on a balance of probabilities.

17. The documentary evidence the plaintiff produced is wanting. The plaintiff's case is based on the allegation that the defendant occupies her land which is plot number **830**. However there was no map or surveyor's report to demonstrate this. Even the evidence of **PW2** can not assist the case of the plaintiff in showing where the plot number **830** is located.

18. The defendant attempted to produce a map that he alleged to have procured from the director of survey's office in vain as it was challenged by the plaintiff's counsel on various grounds.

19. **PExh 1** is a copy of a letter of offer. No schedule is attached thereto to demonstrate where her plot lies. Besides, after the letter of offer dated **11/1/2013**. I would believe that this doubled up as a letter of allotment for there is no other letter expressing the fact that land was allotted to the plaintiff.

20. The plaintiff produced a copy of a letter dated **20/5/2015** referenced: "ALLOCATION OF PLOT NUMBER 830 ZEA SETTLEMENT SCHEME." It does not originate from the office of the Director of Settlement like **PExh 1** purported to. It is clear that there is no signature affixed to that document by the alleged author. That letter refers to **PExh 1** and informs the Director of land Adjudication and Settlement that the plaintiff has been shown the boundaries of plot number 830 and that she has paid the required sums and that the land may be therefore discharged.

21. In view of the uncertainty surrounding the numbering arrangement whereby the defendant alleges that plot number 830 could not possibly be situated between plot number 16 and 18, it is my view that more evidence should have been adduced by the plaintiff to demonstrate that the interruption in numbering sequence was correct and that the suit land lies on the spot occupied by the defendant. This court is not satisfied that the evidence of the plaintiff which is on the record is sufficient to establish those facts and the defendant's long held possession should not be disturbed on the basis of that inadequate evidence.

22. The counterclaim is a distinct and separate claim from the main suit. Proof of the matters alleged therein is required even where the plaintiff's claim in the main suit has failed. Where no evidence is furnished to support the counterclaim it should be dismissed.

23. The plaintiff's evidence has confirmed that the defendant is in occupation of land situated in the scheme. The defendant has demonstrated that he has developed the land that he is in possession of.

24. From the photographic evidence whose production was not opposed by the plaintiff's counsel, the developments effected on the land that the defendant occupies are extensive and in my view, date back to many years ago.

25. However, though it was not denied by the plaintiff and I am convinced that the defendant is in occupation of plots within the scheme, no surveyor's evidence has been called to demonstrate that the plots he occupies are plot numbers 15, 16, and 17.

26. The closest the defendant came to establishing his counterclaim is the attempt to produce a map which was labelled **DMFI 3** and no more. The court cannot consider that document herein as it was not produced by an able person.

27. Evidence from **PW2** testifying for the plaintiff's case could have easily established this existence but, as fate would have it, he exceedingly applied an unhealthy dose of caution till he steered clear of establishing the existence of those plots occupied by the defendant, and in so doing, also failed to establish that plot number 830 is located on the spot occupied by the defendant.

28. This court would not know whether the failure to produce a map and a surveyor's report on the part of the plaintiff in such a crucial claim was due to the possibility that that document is adverse to her case. This court must decide the suit before it strictly on the basis of proof, and proof is by way of adducing evidence which the plaintiff and the defendant have respectively failed to furnish the court with.

(b) What orders should issue?

29. In the end I find that the parties have failed to furnish the court with evidence to establish their respective claims. This case is a classic example of what happens when the parties, believing that their word will hold and secure them a judgment in their favour, rely on no expert evidence in their cases. Justice on the other hand must remain aloof and allow each party in an adversarial setting to prove their claim to the extent required by law.

30. Consequently, I hereby dismiss both the plaint and the counterclaim.

31. Each party shall bear their own costs of the suit and the counterclaim.

Dated, signed and delivered at **Kitale** on this **20th** day of **February, 2019**.

MWANGI NJOROGE

JUDGE

20/2/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Teti for the defendant

N/A for the plaintiff

COURT

Judgment read in open court.

MWANGI NJORGE

JUDGE

20/2/2019