



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 323 OF 2017

KAMAU MBOGO.....PLAINTIFF

VERSUS

SETTLEMENT FUNDS TRUSTEES.....DEFENDANT

JUDGEMENT

1. By a plaint dated the 3rd March 2017, the Plaintiff herein instituted the present suit against the Defendant seeking for orders that:

- i. A declaration that the excision of 4.4 acres out of Nyandarua/Ol Aragwai/215 and subsequent creation of Plot LR Nyandarua/Ol Aragwai/613 and its transfer to the Defendant was illegal and unlawful.
- ii. An order directing the Defendant to transfer LR Nyandarua/Ol Aragwai/613 to the Plaintiff.
- iii. Costs of the suit.
- iv. Any other further relief the Court may deem fit and just to grant.

2. Together with the Plaint, the Plaintiff filed an application dated the 4th May 2017 under certificate of urgency wherein he sought for inhibition orders against the Defendant, pending the hearing of the suit. On the 26th September 2017 a ruling was delivered allowing the said application dated 4th May 2017 wherein an order of inhibition inhibiting any dealings over LR Nyandarua/Ol Aragwai/613 was issued as against the Defendant.

3. On the same day, the 26th September 2017, judgment was entered against the Defendant since they have not filed any papers, and a date for formal proof was fixed wherein the matter proceeded for hearing on the 23rd April 2018.

Plaintiff's Case.

4. PW 1, Kamau Mbogo Mucheke testified to the effect that in 1963 he was allocated block No 215 by the Settlement Fund Trustees wherein he was issued with an allotment letter dated 7th December 1963 with its annexures which he produced as Pf exhibit 1 (a-c)

5. That after he was issued with the said letter, he had been shown the beacons wherein he took possession of the land and started utilizing it. Later, vide a letter dated the 9th December 1981, herein produced as Pf Exh 3, the Settlement Fund Trustee had assured him of the ownership of the land.

6. It was his further evidence, that later when he went to survey his land, he had found that the Settlement Fund Trustee had sub divided it thereby excising 4.4 acres from therein, with the result that plot No. 613 was created.

7. That he had procured an area Map of suit land from the Surveyor, which map clearly showed the position of his parcel of land being block No. 215. Block No. 613 was not indicated on the map. The RIM was produced as Pf exhibit 2.

8. When referred to Pf exhibit 2, the Plaintiff stated that his land had extended across the road wherein he had marked with an 'x'. That after the subdivision of No. 215, there was another map which now showed the position of No. 613 after excision, which RIM he produced as exhibit 4.

9. He also produced the green card for parcel No. 613 as exhibit 5.

10. The Plaintiff testified that the excision of his land had been unlawful because it had been done with reasons that the resulting land had been reserved for Murungaru Primary School which school existed on another piece of land in town.

11. That he used to graze on his land which comprised No. 613, but currently, there was a school called Daraja Mbili Primary school constructed on his land.

12. That he had written to the Settlement Fund Trustee via a demand letter dated the 3rd March 2016 herein produced as Pf exhibit 6, seeking for the transfer of No. 613 in his name. He also produced his recorded statement dated the 3rd March 2017 as Pf Exh 7 and also sought that the court returns his title to him and for costs of the suit.

13. When questioned by the Court, the Plaintiff responded that when he had been allotted the land, he had paid the whole loan but that he had left the receipts at home.

14. The next witness PW2, Robert Kiprotich Kimei testified that he was a surveyor in Ministry of Lands Nyandarua North and that he had been summoned testify in regard to parcel of land Nyandarua/Ol Aragwai 215 and 613 respectively.

15. When he was referred to exhibit 4 (RIM), he testified that he could see the position of parcel No 613 which was created in 1984.

16. He however testified that he did not know how it was created although it indicated that it had been erroneously included in parcel No. 215.

17. When the witness was referred to the green card for parcel No. 215, he testified that the same was created in 1974 and that it had initially belonged to Settlement Fund Trustee, which was normal, before it was transferred to Mr. Kamau Mbogo on the 30th April 1975.

18. That by the time parcel No. 613 was being created, parcel No. 215 had already been transferred to Kamau Mbogo. The Green card was marked as Exhibit 8

19. The Plaintiff thus closed his case and filed his submissions on the 27th July 2018.

Plaintiff's Submissions

20. It was the Plaintiff's submission that having been allotted parcel No. LR Nyandarua/Ol Aragwai/215 by the Settlement Fund Trustee, he had met all terms of the said allocation wherein the Defendant had discharged the land in his favour. That from the abstract of the title for Nyandarua/Ol Aragwai/215, it was clear that the Defendant had transferred to him all its interest over the said parcel of land wherein the subsequent registration had conferred to him all the rights under the then Section 28 of the Registered Land Act as was held in the case of Adrian Gilbert **Muteshi vs William Samaoe Ruto & 4 Others [2013] eKLR**.

21. That he was thus entitled to exclusive proprietary rights over the land from the time of its registration on the 30th April 1975. That the boundaries to his land were guided by the RIM herein produced as Pf Exhibit 2

22. Subsequently while the land was still registered in the Plaintiff's name, on the 11th January 1985, the Defendant excised 4.4 acres from Nyandarua/Ol Aragwai/215 and registered it as Nyandarua/Ol Aragwai/613 in its name which was unlawful as at the time, the Plaintiff was the only one who was legally entitled to sanction such excision.

23. That despite service to the Defendant, they had failed to file documents and/or appear in court to defend the case hence the Plaintiff's evidence and/or claim remained unchallenged and uncontroverted and as such the court ought to find that failure by the Defendant to defend the case admitted, the Plaintiff's claim.

Analyses and determination.

24. Upon consideration of the Plaintiff's evidence, his submissions as well as the documents produced in evidence, I find the issues arising herein for determination as;

- i. Whether the Plaintiff was the registered proprietor of land Parcel No. Nyandarua/Ol Aragwai/215.
- ii. Whether land parcel No. Nyandarua/Ol Aragwai/613 was excised from parcel No. Nyandarua/Ol Aragwai/215
- iii. Whether the Plaintiff was the proprietor of parcel No. Nyandarua/Ol Aragwai/613

25. The Settlement Fund Trustees, which is a body of Trustees established pursuant to the provisions of Section 167 of the Agriculture Act, Cap 318, and is mandated to settle "settlers" on either un-alienated Government land or on land purchased from private owners by the Settlement Fund Trustee.

26. The Court of Appeal in the case of **Eliud Nyongesa Lusenaka & Another vs Nathan Wekesa Omacha**, [1994] eKLR held as follows;

The short answer to that proposition is that land owned by the SFT is not land owned by the Government. Under section 167(1) of

the Agriculture Act, the SFT is a body corporate with a perpetual succession and can acquire and own property on its own right and can sue and be sued. The interest of the Settlement Fund Trustees (SFT) is that of a chargee over the parcel of land that it owns.

27. Further, the Court of Appeal in the case of **Boniface Oredo Vs Wabumba Mukile, Civil Appeal No. 170 of 1989**(unreported) held as follows:

“The interest of the Settlement Fund Trustees is really that of a chargee. “It lends money for development to persons to whom it has allocated land and the repayment of such money is secured by a charge upon the property.”

28. The Plaintiff in this case testified that he was allocated Nyandarua/Ol Aragwai/215 by the settlement fund Trustee in the year 1963 and produced the allotment letter to that effect. That subsequently he was registered as its proprietor on the 30th April 1975 as was evidenced by an extract from the green card produced as Pf Exh 8 showing that indeed he was the proprietor of Nyandarua/Ol Aragwai/215 as at that date.

29. It is not in dispute that the suit property No.Nyandarua/Ol Aragwai/215 was registered on 25th November 1974 in the name of the Settlement Fund Trustees. According to the copy of the register that was produced by the Plaintiff, the suit property was transferred to the Plaintiff by the Settlement Fund Trustees on 30th April 1975 and charged. The Settlement Fund Trustees thus discharged the suit property on 9th December 1982 and transferred it to the Plaintiff wherein on the 30th April 1983, Nyandarua/Ol Aragwai/215 ceased being in existence as the same was subdivided by the Plaintiff giving rise to parcels No. 591 and 592. Up to this point, there is no argument that the Plaintiff was the proprietor of Nyandarua/Ol Aragwai/215.

30. According to the Plaintiff, the Defendant excised LR No. Nyandarua/Ol Aragwai/613 measuring 4.4 acres from Nyandarua/Ol Aragwai/215. This was done in the year 1984 going by the evidence of the Plaintiff’s witness PW 2.

31. I have however gained sight of the green card and/or register of parcel No Nyandarua/Ol Aragwai/613 herein produced as Pf exhibit 5 by the Plaintiff and note that the first entry in the said card was that land parcel No. Nyandarua/Ol Aragwai/613 was registered in favour of the Settlement Fund Trustee on the 11th November 2015. That it was registered as an independent parcel of land and that at no time had it been excised from Nyandarua/Ol Aragwai/215 otherwise the same would have reflected on the green card to parcel No Nyandarua/Ol Aragwai/215.

32. In view of the above observation, I am of the considered view that land registered in favour of the Settlement Fund Trustees with a view of allocating it to allottees and then charging it is and remains public land until a title deed is issued to an allottee.

33. The record is clear that the file in relation to parcel No. Nyandarua/Ol Aragwai/613 was opened in the year 1985, yet the documents relied upon by the Plaintiff being Pf exh 1(a-c) and Pf Exh 8 relate to the years 1963 and 1974 respectively.

34. The first entry in 1985 as per the green card Pf Exh.5, was in respect of the Settlement Fund Trustee, the Defendant herein, which means, according to the evidence and/or submission of the Plaintiff, that before the interest of the Settlement Fund Trustee was registered in 1985, the Plaintiff had already been allotted Nyandarua/Ol Aragwai/613 the suit property. I find this piece of evidence inconceivable. Indeed from the documents produced as evidence, it is clear that by the time the Settlement Fund Trustee was being registered as proprietor to Nyandarua/Ol Aragwai/613, the Plaintiff had already been registered as proprietor to Nyandarua/Ol Aragwai/215.

35. Indeed the law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1) of the Land Registration Act** provides as follows:

“the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

36. As it may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

37. The import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.

38. As it now stands, the Defendant is the holder of a title deed in respect to Nyandarua/Ol Aragwai/613 having been registered as the proprietor on the 11th November 1985. Going by the provisions of Section 26 (1) of the **Land Registration Act and in comparison to the evidence adduced herein, the said title has not been impeached and/or challenged.**

39. All said and done, I find that the Plaintiff has not discharged the burden of proof to demonstrate that he is the lawful allottee of the suit

property No. Nyandarua/Ol Aragwai/613 or that the same was excised from Nyandarua/Ol Aragwai/215. To this effect therefore his suit dated the 3rd March 2017 is herein dismissed with no costs.

Dated and delivered at Nyahururu this 11th day of February 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE