



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 7 OF 2013

JOSHUA NJUNGE NGANGA.....PLAINTIFF

VERSUS

WILSON CHEPKWONY.....1ST DEFENDANT

ALFRED WANYAMA.....2ND DEFENDANT

JULIA MUMBI.....3RD DEFENDANT

GEORGE WAGATIRA.....4TH DEFENDANT

JUDGMENT

1. By a plaint dated 23/1/2013 the plaintiff commenced this suit and sought the following orders against the defendants jointly and severally:-

(a) A declaration that the plaintiff is entitled to the exclusive and unimpeded right of use possession and occupation of all that parcel of land known as Plot No. 517 Tuwan Farm.

(b) A permanent injunction restricting the defendants or any other persons from trespassing, claiming, excessing or in any other way interfering and/or dealing with the suit land.

(c) An order of eviction do issue against the defendant or any other persons from plot No. 517 Tuwan Farm which belongs to the plaintiff.

(d) Costs of the suit.

(e) Interest on (d) above at court rates.

2. The plaintiff's claim is that he is the owner of **Plot No. 517** situated in Tiwan (sic) Farm within Kitale Municipality; that he was in peaceful possession and enjoyment and use of the suit land until **January, 2012** when the 1st defendant took control of the land leased to the 2nd, 3rd and 4th defendants caused them to trespass onto that land upon which they build a structure; according to the plaintiff the 2nd - 4th defendants have been using the said land since then thus denying him the user thereof as a result of which he has suffered loss and damage.

The Defendants' Defence

3. The defendants filed a joint defence dated 5/2/2013 on 6/2/2013 subsequently they amended their defence and counterclaim on 5/10/2015 following a consent order recorded by the parties on 29/9/2015. In that defence the defendants denied the claim and averred that the plaintiff was guilty of trespass. They stated that 1st defendant is the proprietor of the suit land and that on 1/1/2012 he leased it out the rest of the defendants for valuable consideration and they took possession thereof. In addition they alleged fraud against the plaintiff and asserted that John Wainaina Njoroge from whom the plaintiff alleged to have purchased the land was not the original proprietor. They termed the sale agreement between the plaintiff and John Wainaina Njoroge as fraudulent and executed without the knowledge and consent of the 1st defendant. In the counterclaim in which they sought a declaration that the 1st defendant is the lawful and absolute owner of the suit land and a permanent injunction restraining the plaintiff and his agents from interfering with the defendants' use and possession of the suit land.

The Plaintiff's Reply to Defence and Counterclaim

4. The plaintiff filed a reply to defence and defence to counterclaim on **22/9/2016** in which he joined issues with the defendants' amended defence and reiterated the contents of his plaint.

The Plaintiff's Evidence

5. **PW1** the plaintiff testified on **15/5/2014**. He narrated how he bought the plot from John Wainaina Njoroge and produced an agreement dated **10/6/2008** as **P. Exhibit 1**. He testified that he and John went to Chief Cheminingwa who asked for documents that is a share certificate and an agreement from Mr. Wainaina which the latter produced. He stated that the share certificate was No. **2114** issued on **3/2/2006** and was in respect of Plot No. **517**. The agreement was between John and the person who had sold him the plot. Thereafter the chief asked him to pay survey fees and he paid it to the chief who in turn sent his clerk to go and pay it at the D.C.'s (District Commissioner's) office; then the chief gave him a letter authorizing him to pay **Kshs.1000/=** to the D.C. He produced the receipt and the letter as **P. Exhibit 3(a)** and **(b)** respectively. He took possession and remained thereon for three months then he went away to Nyahururu. When he came back he found that his plot had been leased to the 2nd - 4th defendants by the 1st defendant. A church had been built on the land. When summoned to the chief's office the 1st defendant refused to attend; only the pastor to the church attended. Upon cross-examination he stated that he confirmed with the Tuwan Farm Secretary one Bruce that the land belonged to John. He conceded that the chief did not sign the sale agreement between him and John.

6. **PW2 Jackson Tuindo Zakayo Cheminingwa** testified on **25/10/2016**. He stated that the suit land belonged to the plaintiff who bought on **10/5/2008**. He stated that he recalls that in **2008** John came to his office wanting to sell his land at Tuwan and showed him a share certificate to confirm that he was a shareholder of Tuwan Farm having bought the same from one Francis Chelule Koech. The witness stated that the farm register for Tuwan Farm Limited was in his office and he confirmed that plot No. **517** was in the name of Francis Chelule Koech who had purchased the land from John Kipkoech Kilong the latter who is now deceased. Following that confirmation he gave the parties the greenlight to go on with the transaction and the agreement was drafted by Walter A. Aketch. He identified **P. Exhibit 1** as the agreement so drafted and stated that the plaintiff paid **Kshs.98,000/=**. Subsequently, the vendor surrendered the share certificate. He also acknowledged having written a letter (**P. Exhibit 3[b]**) authorizing the plaintiff to pay survey fees. According to him the plaintiff brought back to him the survey fees receipt and he deleted the name Francis Chelule Koech and replaced it with that of the plaintiff. However later on the plaintiff came to him in **2012**, complaining that a church had been constructed on his property and upon summoning the pastor to the church the pastor informed him the 1st defendant had leased the land to the church.

7. **PW3 Erastus Bruce Mwavali** testified on **25/10/2016**. He stated that he has been a director of Tuwan Farm since **1998**. That according to the record Plot No. **517** belongs to the plaintiff who bought it from John Wainaina. John had bought the plot from Francis Koech. Francis Koech had bought the plot from one Kilong. He disowned the defendants' documents as not emanating from Tuwan Farm.

8. **PW4 John Wainaina Njoroge** testified on **17/10/2018** and adopted his statement as part of his evidence-in-chief and admitted to having sold the land to the plaintiff. His narrative matched that of **PW2** and **PW3** in that he stated that he bought the land from one Francis Chelule. At that time the farm map was at the chief's office. He went and saw the map. He knew the plot was Chelule's and he was given a share certificate which he surrendered to the plaintiff when the latter bought the land. He identified the agreement marked **P. Exhibit 1** as genuine.

The Defendants' Evidence

9. **DW1 Zaccheus Kipkoech** testified on **17/10/2018**. He stated that he is the son of **Wilson Chepkwony** the 1st defendant. He produced a power of attorney as **D. Exhibit 1** and stated that he was by virtue of that power representing his father in the matter. He relied on his father's statement dated **13/9/2013** as evidence in the matter and averred that the plaintiff had encroached on the suit land which belongs to his father. According to him his father acquired the land in **1966**. He produced a copy of a cash sale receipt dated **1/3/1966** as **D. Exhibit 2**. It is for **Kshs.1030/=**. He averred that the Farm was bought by many people who included his father. Under cross examination he admitted the power of attorney was not registered at the lands office as required and that it is a general power of attorney. He also conceded that **Tuwan Farm 1966 Limited** is different from **Tuwan Farm Limited**. He said that when the land was bought from a white settler the company was re-named Tuwan Farm 1966 Limited.

10. **DW2 Pastor George Wagatira Gathurithi** testified on **17/10/2018** and adopted his statement dated **13/9/2013** as his evidence-in-chief. He stated that he is the pastor of Agape Fellowship Centre; that the church leased the land from 1st defendant at the cost of **Kshs. 3,500/=** per month and produced a lease (**D. Exhibit 8**) which he signed. He also produced receipts vide which the church paid rent to the 1st defendant as (**D. Exhibit 9**). His evidence is that five months after they entered into a lease agreement with the 1st defendant the plaintiff appeared and claimed the suit land. When cross examined he said he does not know anything about the history of the land before the date of the lease. However he averred that the land had no structures and was not fenced at the time the lease was entered into.

11. **PW3 Julia Mumbi Kimani** testified on the same date and adopted her statement dated **13/9/2013** as part of her evidence-in-chief. He produced receipts for various monies paid to the 1st defendant. In her opinion the land is owned by the 1st defendant whom she had known for about **20** years.

12. The last witness in the plaintiff's case was a judiciary staff member who produced the original file record for **Kitale CMCC No. 572 of 2007 - Wilson Chepkwony -vs- Gabriel G. Odhiambo**. In that case the 1st defendant herein sued one Gabriel G. Odhiambo for an order that Plot No. **513** and **514** belong to him, vacant possession of those plots and a permanent injunction. Judgment was delivered on that matter on **12/3/2018** in favour of the 1st defendant herein.

Submissions

13. No party filed their submissions despite having been granted sufficient time to do so.

Determination

Issues for determination.

14. The issues that arise in this suit are as follows:

(1) Who owns plot number 517 Tuwan Farm?

(2) What orders should issue?

(1) Who owns Plot Number 517 - Tuwan Farm?

15. I will look at evidence of both use and records. The plaintiff alleges to have purchased the suit land. Witnesses from Tuwan Farm backed up his claim with their evidence. He has an original sale agreement dated **10/6/2008** between him and the alleged seller. The Chief (**PW2**) testified that he checked the records and traced the original ownership of the suit land to one John Kipkoech Kelong who had subsequently sold it to Francis Chelule Koech who later sold it to John Wainaina Njoroge before the plaintiff bought it. The chief stated as follows:

“I deleted the name of Francis Chelule Koech and replaced it with the name of Joshua Njunge Nganga.”

16. I consider the Chief as a competent witness because he stated without any evidence being called to contradict that evidence that the Tuwan Farm Register was then under his custody. The letter from the Chief, Municipality Location (**PEXh 3[b]**) appears to have authorized the plaintiff to pay the survey fees. The original survey fees receipt dated **11/6/2008** was in his possession. It bears the number of the suit land.

17. The chief's evidence was corroborated by that of the then secretary to the Tuwan Farm, Bruce Mwavali, (**PW3**) who from his position as Director of Tuwan Farm, dismissed the defendant's documents as not having originated from Tuwan Farm.

18. On the defendants' part the evidence was that the 1st defendant obtained a cash sale receipt dated **1/3/1966** issued by Tuwan Farm. However an attempt to produce as an exhibit in this matter a copy of a "farm member's certificate" dated **25/4/1974** failed for failure to lay a background and for the reason that it was issued by an entity other than Tuwan Farm Ltd.

19. The original file record in respect of **Kitale SPMCC No 572 of 2007** was produced as an exhibit in this case. In that file the 1st defendant claimed plots numbers **513 and 514**. The plaint in that case pleads that the 1st defendant's land parcel measuring **3.4 acres** was subdivided into several plots including **plots No. 513 and 514**. The defendant on the other hand purported that he had bought the two plots from a third party and the records at Tuwan Farm office had been amended to reflect him as the new owner. The evidence that the defendants in **Kitale SPMCC No 572 of 2007** produced is more or less of the same kind as that the plaintiff's in the instant suit: a copy of a letter from the chief authorizing payment of survey fees at the DC's Office, a survey fees receipt, and a written sale agreement for the two plots he purported to have bought; one extra document in that lower court case was a copy of a share certificate issued in **May 2007**. In this case no share certificate was produced. The agreement in **Kitale SPMCC No. 572 of 2007** however bore a stamp of Tuwan Farm in contrast to the one in the instant case which bears none. In **Kitale SPMCC No. 572 of 2007** the evidence of the 1st defendant herein, then the plaintiff in **Kitale SPMCC No 572 of 2007**, was that he was allocated **3.4 acres** which were *“demarcated into 52 plots from No. 512 to 578”*. **PW2 in Kitale SPMCC No 572 of 2007** also testified that the plaintiff was one of the *“101 original owners”* of the Tuwan Farm land, and that the plaintiff's land was divided into small plots of **7 metres by 21 metres** and that plot number **513 and 514** were among those subdivisions.

20. The kind of chaos that may have existed in respect of Tuwan Farm is evident when **PW2 in Kitale SPMCC No. 572 of 2007** testifies as follows.

“The records are with the Kitale splinter group. The details Exh P 3 are from the survey records of Kamwere Survey. Up to 2003 there have been two parallel offices.”

21. The only detailed history of the land that originally comprised the original Tuwan Farm was given by **DW3 in Kitale SPMCC No 572 of 2007**. **DW3** in that case was the same person as **PW3** in the instant case. He testified that the Tuwan Farm land was originally **347 acres**; that it had no boundaries save for trees; that footpaths rather than roads existed; that it became a slum; that the Government surveyor came in to subdivide it; that room had to be made for public utilities; that between **1990-91** every member gave out **31.7%** of their land for those utilities and a map was drawn and beacons placed; that some members were displaced; that a settlement committee was at hand to show persons their plots; that share certificates were issued out by Tuwan Farm Urban Project and that records were contained in a register showing plot numbers against the names or their owners. It was his evidence that original members were given plots depending on cumulative balance of land left after sale by original owners and deduction of land for public utilities.

22. What this court realizes at this point therefore is that two major factors affected the land sizes previously owned by the 101 original owners: one, informal land fragmentation and sale of resultant portions by those original owners to third parties, and two, the attempt by the local and other authorities to cause the Tuwan Farm area land to be a beneficiary of good planning, whereupon roads and other public utilities were deducted from each original landowner's entitlement through what came to be called the Tuwan Farm Urban Project.

23. The magistrate who dealt **Kitale SPMCC No. 572 of 2007** noted that:

“The plaintiff demonstrated that he paid Kshs. 1030/= required for each member of Tuwan Farm in 1966. He was issued with

certificate P.Exh 2. He did not recognize Tuwan Farm Urban Project. He denied having sold his plots or having been moved from the portions he was given.”

24. Herein lies the 1st defendant's problem. He would not recognize a project that was conceived in order to attempt to create order out of chaos that had developed over the years in Tuwan Farm, yet despite his disapprobation of that phenomenon, he never even passively followed up the exercise in order to be able to trace in which plots his land that remained would be contained. Meanwhile the plot in question was registered in John Kipkoech Kelong and remained vacant until purchase by the plaintiff. Occupation of the suit land by the 2nd and 3rd defendants commenced only after the plaintiff purchased it.

25. The 1st defendant was entitled to his opinion regarding the Tuwan Farm Urban Project. However, the project having recognized that persons were on the ground who had bought land from original landowners, it resulted to some simple species of mathematics to determine what land size each original landowner was entitled to after taking sale and deduction of **31.7%** from their land for public utilities purposes. It would appear that from the said arrangements the original owners and the subsequent buyers would benefit from good planning and contemporaneous processing of all title documents.

26. It is not contended by any of the parties that the 1st defendant does not have land in the Tuwan Farm. Indeed, the evidence of the defence in **Kitale SPMCC No. 572 of 2007** was that the 1st defendant herein had **148104** square feet. **D.Exh 14** in that case shows that following the application of the project mathematics alluded to earlier herein, the area considered as sold out of this was **4186** square feet, leaving a balance of **143918** square feet. The **31.7%** deducted for public utilities amounted to **45622** square feet, leaving the 1st defendant what was recorded as **9101** square metres.

27. In my view the 1st defendant may, out of his surfeit of distaste for the Tiwan Urban Project, not have participated in the exercise which reduced some landowners' entitlement, moved some, and completely displaced others.

28. Had he participated, the column titled "No of plots" in **D.Exh 14** produced in the lower court case record would have had some entries. His signature would have appeared on the last column of that exhibit also, and certain plots may have been registered under his name.

29. **D.Exh 13** would have also reflected his names against the so many plots that emanated from the subdivision of his remaining land.

30. Considering the myriad movements and adjustments that were prompted by provision of land for public utilities and the regimentation of plot sizes, it is likely that insistence by the 1st defendant herein that the land comprised in **plot number 517** is his can not be supported except by very concrete evidence. This is what he lacks. **D.Exh 13** (area list) produced in **Kitale SPMCC No. 572 of 2007** shows that **plot number 517** was listed as belonging to one **John Kipkoech Kelong**, as was testified by **PW2** and **PW3** herein.

31. Losing land is a painful thing in this country where land is highly valued, almost more than gold for sentimental, economic or status symbol reasons. Care should be taken in all circumstances that nobody ever loses his land where they deserve a judgment or decree in their favour. However, a court of law, blessed with blissful blindness to all extraneous matter save relevant evidence, must as a rule always go by the facts proved by parties and in many cases the slapdash approach by lawyers to cases whose mention tugs at the heartstrings of their clients will forever be the subject of the court's abysmal deprecation. Litigation lawyers must in such suits cast off the slough of lethargy, jettison all cavalier attitude, assiduously pursue satisfactory evidence and concatenate it into a creditworthy piece if they are to give value to their clients, otherwise the court will only pitifully amidst readings at the judgment stage empathize with a litigant whose counsel has not done the necessary and still deliver its objective judgment in the suit and silently wish him better luck next time.

32. Evidently from the above, I have spent considerable time and effort on the 1st defendant's evidence, more than even on the plaintiff's, and painstakingly attempted to examine from numerous angles the 1st defendant's claim that the suit land is his, for while the plaintiff came with an agreement and was recognized by the officials of Tuwan Farm, the 1st defendant has no agreement and his documents were not recognized. Consequently, I failed to find an iota of merit in the 1st defendant's claim. There would be great difficulty in shunting aside the record that shows that the original owner was one John Kipkoech Kelong without any good reason to doubt the bona fides of that record. This court can not substantiate any holding that the 1st defendant owns **plot number 517** against all the evidence on the record including that which he *himself* has produced. I would have expected a plethora of genealogical records setting out or at least showing this court by way of logical deduction that **plot number 517** directly emanated from the 1st defendant's specific entitlement left over from sale and deduction for public utilities. None was forthcoming.

33 What I find seeping through the 1st defendant's evidence is a plea to roll back time to a certain point, and see his entitlement as it was before subdivision, deduction and sale, and place him somewhere, or where he was then. A resolution of this matter can not be that simple. The inescapable fact is that Tuwan Farm is no longer in the form of a few large disorganized and unplanned chunks of land under the names and ownership of the 101 original owners but has been turned into hundreds of plots with numerous owners names record against them. Emphasis was made of the fact that "Tuwan" is a Kalenjin word meaning "*me and you*" and that all the original members of Tuwan Farm emanated from the Kalenjin ethnic group with no exception. However, owing to sales and transfers over the years it is also no longer possible to categorize the Tuwan Farm land as owned by one homogeneous demographic group and use that conclusion as a premise for an unconstitutional holding that any other non-conformant person may not own land in the Farm whereas he has proved a purchase, for indeed evidence from the subordinate court case record produced portrays Tuwan Farm now a cosmopolitan setting. In my view, the 1st defendant's entitlement - which going by **D.Exh 14** in the lower court case appears to amount to **9101** metres squared - may still lie somewhere among the hundreds of plots that resulted from the subdivision of the land, but he has to demonstrate that those plots belong to him by way of evidence on a balance of probabilities to win a decree from this court's unrelenting eye that is strict to exact. This court will not condone guesswork from any litigant. The 1st defendant has failed to produce evidence that his entitlement of **3.4 acres** was "**demarcated into 52 plots from Nos. 512 to 578**". Indeed going by **D.Exhibit 13** in **Kitale SPMCC No. 573 of 2007**, none of the plots named - 512 - 522 reflect the 1st defendant's name. A curious fact is that save for plots Nos. 513 and 514 that were claimed by the 1st defendant herein vide **Kitale**

SPMCC No. 573 of 2007, none of the other plots (515 - 522) are said in this case to have been rightfully sold by the 1st defendant to those named as current owners to warrant their remaining on the record unquestioned. The implication of this is enormous - that the 1st defendant may ultimately claim from numerous other persons plots already recorded as theirs, just as in the instant suit, and possibly file an avalanche of suits against them. Well, those potential claims are left for another day. What is inconceivable is that an owner who had taken possession of 3.4 acres lost trace of how the land was subdivided into plots and failed to follow up on his registration as the owner of the resultant plots.

34. In this case then this court is left with nothing else but to consider the evidence on record, and it suggests that one John Kipkoech Kelong originally owned the suit land, that he transferred it to one Francis Chelule Koech who transferred it to John Wainaina Njoroge who transferred it to the plaintiff herein.

35. I therefore hold that the suit land belongs to the plaintiff.

(2) What orders should issue?

36. Having found that the suit land belongs to the plaintiff this court now issues the following orders:

(a) A declaration is hereby issued declaring that the plaintiff is entitled to the exclusive and unimpeded right of use, possession and occupation of all that parcel of land known as Plot No. 517 Tuwan Farm.

(b) A permanent injunction is hereby issued restraining the defendants or any other persons from trespassing, claiming, accessing or in any other way interfering and/or dealing with the suit land.

(c) The defendants and any other persons claiming under them shall be evicted from plot No. 517 Tuwan Farm.

(d) The defendants shall bear the costs of the suit.

It is so ordered.

Dated, signed and delivered at Kitale on this 7th day of March, 2019.

MWANGI NJOROGE

JUDGE

7/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga holding brief for Waweru for the plaintiff

N/A for defendants

Zakayo s/o Wilson, 1st defendant present

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

7/03/2019