



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 4 'B' OF 2012

FLORENCE CHEPKWEMOI NGEYWA.....PLAINTIFF

VERSUS

JAMES NYABONGO.....1ST DEFENDANT

JACKSON T.Z. CHEMININGWA.....2ND DEFENDANT

JUDGMENT

Introduction

1. The original plaint was filed in this suit on **20/11/2012** against 1st defendant. The plaintiff was later amended and filed on **20/5/2013** against the 2 defendants. In the amended plaint, the plaintiff sought orders which I replicate verbatim herein below as follows:-

- (a) **An eviction order be issued against the 1st defendant.**
- (b) **That a restraining order be issued against the defendants whether acting by themselves, their agents their servants and/or their employees from interfering in any way with the plaintiff's peaceful use and occupation of the suit property.**
- (c) **Any further or other orders which the court may deem fit in the circumstances to grant.**
- (d) **That the costs of the suit be borne by the defendants.**

The Plaintiffs' Case

2. It is the plaintiff's case that she is the absolute registered owner of **Plot Number 5170** within Tuwan Farm Urban Project in Kitale (herein after referred to as the suit property) having acquired ownership thereof by way of purchase vide an agreement dated 20/9/2010 which was witnessed by the 2nd defendant; that the 1st defendant trespassed on the suit property and erected a structure thereon and has thereby interfered with the plaintiff's enjoyment and use of the suit land, and has defied demands that he vacates the suit land hence this suit.

The Defendants' Defence

3. The defendants filed their amended joint defence on **12/7/2013**. They aver that plot number **5170** is non-existent having been subdivided into plots numbers **5070/1** and **5170/2**. They aver that if any purchase price was paid by the plaintiff then it must have been in respect of purchase of plot number 5070/1. The defence avers that the 1st defendant purchased for valuable consideration from its owner, and has been in occupation of plot number 5070/2. The 1st defendant admits that the plaintiff once cultivated plot number 5170/2 but with his permission and with the plaintiff's knowledge that the same belonged to the 1st defendant. He avers that he is the rightful owner of the said plot.

Reply to Amended Joint Defence

4. The plaintiff filed a reply to amended joint defence dated **25/7/2013** joining issues with the defendants on the contents of their amended defence.

5. **PW1, Florence Chepkwemoi Ngeywa**, testified on **17/6/2014** and produced documentary evidence, including two land sale agreements, a share certificate, and various letters.

6. Her evidence is that she purchased the suit land from one Peter Koech vide an agreement dated 20/9/2010; that Peter had purchased the

land from one Kipketer Mitey; that the purchased plot was 58 by 20 metres and had a 2 roomed house constructed by Peter; that she took possession in **2002**; that Peter took her to Tuwan Urban Farm Ltd where she was issued a share certificate; that she had a prior dispute with one Matayo Jembeli but Matayo sold the land to one Jane Njeri who then sold the land to the first defendant; the 1st defendant then constructed a mud structure and erected two permanent structures on the suit land. Attempts to have the local administration and FIDA resolve the matter were not successful and the 1st defendant defied various summons. According to the plaintiff the plot had not been subdivided, but the 1st defendant came and subdivided it into two parts and took more than half thereof. According to the plaintiff the 2nd defendant is sued because he is the one who cancelled the first agreement and turned against the plaintiff in favour of the 1st defendant. The evidence of the plaintiff is that in the second agreement the 2nd defendant inserted a digit, “2”, to read “5170/2” and countersigned thereon. The 2nd defendant is also alleged to have erased the amendments after the plaintiff protested. The 2nd defendant is also said to have made erasures on the share certificate.

7. PW2, Peter arap Koech Simotwo, testified on **18/6/2015**. He stated that on 18/4/83 he purchased from one Kipketer Mitey a 58 by 20 feet plot in Tuwan Farm, took possession thereof, constructed a semi-permanent house where he lived with his family until 1999 when he began selling the land to the plaintiff who paid in instalments till she completed payments in **2010**; that their agreement was then executed before the area Chief and that he has never sold any land to the 1st defendant.

8. PW3, Protus Chemosi Kangi testified on **30/1/2018**. He adopted his statement dated **14/1/2014** as his evidence-in-chief. He testified that at PW2’s instance he looked for and secured a buyer - PW1- in respect of PW2’s land in Tuwan Farm since PW2 desired to move from the area. He testified that there is, still standing on the suit land, a structure on the land that was erected by PW2 and that PW2 had lived there. He was not aware of any subdivision of the plot. In cross examination he averred that he was present when the surveyor and an elder named Wilson came to show the plaintiff the plot. However according to PW3, the 1st defendant came and built permanent structures on the land after this suit was filed. According to the witness the plaintiff had rented the semi-permanent structure to another person.

9. PW4, Emanuel Mutange an employee of Government of Kenya in the capacity of Registered Surveyor testified on **25/4/2018**. He averred that he is a Government Surveyor; that plot number 5170 does not exist as per the Survey Office records; that however, on the ground it is said to be located within plot number 4490 which was reserved for sewerage services in 2009; that some residential houses are built on plot number 4490; that only 4953 plots were surveyed in 2009; that plot number 5170 measured approximately 0.024 ha.; that there were two structures thereon, one semi-permanent and the other permanent; that two persons claimed ownership; that he is not aware whether the proper procedure was followed in acquisition of the land; that he is not able to tell why the directors of Tuwan Farm set aside the land for sewerage purposes while there were still people on it.

10. After calling the evidence outlined above the plaintiff closed her case.

11. DW1, James Nabongo Nyakenya testified on **7/2/2019**. He stated that he purchased plot number 5170/2 measuring 11.5 by 7 metres from one **Jane Njeri Mwangi** in the year **2004** and produced an agreement dated **7/1/2004** in respect of the alleged transaction. On his part three persons witnessed the agreement. According to him there was a caretaker on the land at the time of purchase. The 1st defendant took possession of the plot in 2004 and has been in possession ever since without any disturbance. He built a permanent house thereon in **2012**, finished construction in **2015**; before then he had erected semi-permanent structures on the land and resided thereon with his family. According to him he conducted a due diligence exercise before purchase of the plot.

12. DW2, Jane Njeri Mwangi testified on **21/2/2019**. She averred that she sold the 1st defendant a plot in the year 2004 after residing thereon for two years. She acknowledged **D.Exhibit 1** and the agreement vide which she sold the plot. According to her there was a small house on the plot while the same was sold to her, and no one ever claimed the plot while she was there. She produced a share certificate reading her name and a transfer in respect of plot number 5170/2. However, on cross examination she failed to reveal the identity of the person who sold her the land; she also failed to produce the agreement or a consent to subdivide the plot; according to her she was not concerned with who was living on the other plot. She alleges to have conducted a due diligence exercise prior to the purchase.

13. DW3, Jackson Tuminda Zakayo Cheminingwa testified on the same date He adopted his written statement dated **19/2/2019** as his evidence-in-evidence in this suit. His evidence is that he used to be a senior chief at Kitale town; that Tuwan was under his administrative jurisdiction; that he had custody of the register for Tuwan Farm; that the Plaintiff and Peter Simotwo appeared before him for the preparation of an agreement; that that Peter did not know the plot number of the land he wished to sell and the chief’s clerk took the two parties to the plot. It turned out from the site visit that there were two persons in occupation. DW3 therefore instructed his clerk to prepare the agreement and indicate that the plaintiff’s share be indicated as plot number 5170/2. Thereafter the plaintiff began claiming the entire plot. Upon cross examination he admitted that he was not a director at the Tuwan Farm; that according to the Tuwan Farm register the land belonged to Njeri and Peter; that at the time of purchase by the plaintiff the land had not been surveyed; that the area list was brought to him by the farm directors and he used it to indicate the plot number on the agreement.

DETERMINATION.

Issues for Determination.

14. The issues for determination in this matter are as follows:

(a) Did the plaintiff purchase plot number 5170 of plot number 5170/2?

(b) What orders should issue?

(a) Did the plaintiff purchase plot number 5170 of plot number 5170/2?

15. I have examined the evidence available in this matter. Though the plaintiff claims that her plot was No. **5170** and had not been subdivided by the time of its sale to her, both the share certificates held by the plaintiff and the 1st defendant read plot number **5170/2**.
16. However upon closer scrutiny it will be seen that the plaintiff's share certificate, which bears the date **13/10/2010** has an erasure by way of white-out, and that the complete plot number before the white-out was applied was **5170/2**. At the bottom thereof is a caution that the certificate is made without any erasure or alteration whatsoever. That share certificate appears to have been made after the parties executed the agreement dated **20/9/2010**.
17. I have examined the sale agreement vide which the plaintiff bought her land. It is devoid of any measurements of the plot that she purchased. It only mentions some structures on the land and lumps the price of the land and improvements into one sum of **Kshs. 50,000/=**.
18. There are also some erasures which convert plot number **5170/2** on that agreement to be plot number **5170**. The plaintiff avers that she began the process of purchasing the land in the year **1999** and that she completed paying for the same in the year **2010** whereupon she and the seller executed an agreement dated **20/9/2010**. There being no agreement in **1999** between them, what land was being sold in that year?
19. The evidence of the Chief who was said to be in custody of the area list explains that there were two entries on the area list in respect of plot no **5170**, and so he instructed his clerk, who was writing down the agreement, to indicate the plaintiff's share as Plot **5170/2**. **D.Exh 5**. The area list the chief relied on in giving instructions during the making of the agreement, was not challenged. It corroborates the chief's evidence that there were two names indicated against plot no **5170**.
20. In my view there is no evidence save the statements made by PW1 and PW2 to demonstrate that the plaintiff commenced the process of purchase of the land in **1999**. The only documentary evidence the plaintiff has brought to court demonstrates that the earliest written agreement entitling her to any land was made in the year **2010**, 6 years after the agreement produced by the 1st defendant.
21. On the other hand, the share certificate produced by the defendant, which bears the name of the person who sold the plot to him, has no erasures whatsoever and it is dated **14/9/2002** while his agreement with the seller is dated **7/1/2004**. That agreement mentions of a half plot, referred to as plot number **5170/2** and whose size is said to be **35** by **21**, without indication as to whether the unit of measurement is metres or feet. In my view there is ample evidence to demonstrate that the 1st defendant commenced the process of purchase of the land in **2004**.
22. The land owned by Peter had to be identified. Peter had bought the land vide an agreement with Kipketer in **1983**, produced as **P.Exh 1(a)**. That agreement is in Swahili language and has no translation. What this court can make out from its terms is that the portion sold appears to be 58 feet by 20 feet and the total consideration payable, including for improvements on the land, is Kshs. **3750/=**. Whether this land size reduced for any reason after Peter Koech bought it can not be known from the evidence on record.
23. I must also observe that Peter Simatwa could not have taken the plaintiff to the Tuwan Board of Directors before the completion of the payments for the land and that completion must therefore be taken to have occurred in the year **2010**. Indeed the order of events in the plaintiff's evidence is that she was taken to the board after payments were fully done. No wonder then that the plaintiff's share certificate reads the date **13/10/10**. If that certificate was issued by the directors with reference to the records held by the company, then it must be held to be correct in its stipulation of the plot size unless the contrary is demonstrated, which the plaintiff has not done.
24. None of the parties have demonstrated the standard plot size in Tuwan Farm, or that there was indeed a standard size, or that **5170/1** or **5170/2** necessarily implies that the plot is a half plot, or that it implies that it is the descendant of another plot. However, in my view the mere number **5170/2** on that certificate denotes a subdivision.
25. The plaintiff lamentably allowed lethargy to be part and parcel of her approach in dealing with the disputes affecting land which she claimed to be hers. It can be noted from her evidence in chief that her dispute was originally with one Matayo Juma Jembeli; later on Matayo sold the land to Jane Njeri who sold the land to the 1st defendant. No tangible evidence of these disputes is availed by the plaintiff, but coming from her I must believe that to be credible evidence.
26. If the 1st defendant took possession of the land in 2002 as the plaintiff states in her evidence, it is questionable why the plaintiff waited for **10** long years without lodging any claim against the 1st defendant.
27. Besides, it is also a very unsatisfactory state of affairs that she failed to enjoin **Jane Njeri Mwangi** and **Matayo Juma Jembeli** to these proceedings, yet all along she had knowledge of their involvement in the encroachment and possible subdivision of her plot. In my view that is a pointer that the plaintiff may have already known of subdivision of the land long before lodging this claim. The question is why she waited so long to seek justice and why she omitted parties who appear to be necessary parties for the purpose of the resolution of this dispute.
28. Lastly her evidence is negatively affected by the erasures appearing on the faces of the share certificate and the sale agreement. In my view that documentary evidence does not corroborate her oral evidence in material respects, especially with regard to the dimensions of the plot that she is said to have purchased from Peter. This contrasts sharply with the 1st defendant's agreement which contains measurements of the plot he bought.
29. The plaintiff should revisit her agreement with Peter to ascertain what Peter sold her, and if Peter knew of any subdivision that may have occurred between **1999** and **2010** as is intimated by the plaintiff's own documentary evidence.
30. The upshot of the foregoing is that I find that the plaintiff has failed to establish her claim against both defendants on the required balance of probabilities. This suit should be dismissed with costs.

31. I must also caution that dismissal of the suit should not be taken to be approval to the allocation of land to, among others, any of the parties in this case while there is expert evidence on the record that that land was reserved for a public amenity, namely, a sewerage system, and any attempts to process titles to those plots must be viewed with caution in the light of this court's decision in **Jimmy Gichuki Kiago & another v Transitional Authority & 7 others [2019] eKLR (Kitale ELC Land Case No. 2 of 2011)**.

32. For clarity, I issue the following final orders:

(a) **This suit is dismissed.**

(b) **The plaintiff is to bear the costs of this suit.**

Dated, signed and delivered at Kitale on this 13th day of May, 2019.

MWANGI NJOROGE

JUDGE

13/5/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi for Bungei for plaintiff

Mr. Ambutsi for defendant (absent)

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

13/5/2019