



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 32 OF 2011**

**CHERIWOI C. LOITANGOLE.....PLAINTIFF**

**VERSUS**

**ROTINO MOIBEN.....1<sup>ST</sup> DEFENDANT**

**LUKE LOICHALEM.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In the amended plaint dated **4/1/2012** and filed on the same date the plaintiff herein seeks orders against the defendants jointly and severally as follows:-

**(a) An order declaring that the Plaintiff is the legal owner of Plot No. 272 measuring approximately 3.96 Hectares at Chepchoina settlement Scheme Phase 1 and that the defendants and those claiming under him do move out of the said plot and failing which they be evicted forthwith.**

**(b) An order of permanent injunction restraining the defendants and all those claiming under him from interfering with the plaintiff's quiet enjoyment of the suit land.**

**(c) Costs.**

**(d) Any other relief that this Honourable Court may deem justice and fit to grant.**

**The Plaintiff's Case**

2. The plaintiff's claim is that she was allocated suit land and she repaid the Settlement Fund Trustee (SFT) loan in respect thereof; however in 2010 while she was in the process of taking up possession of the suit land the 1<sup>st</sup> defendant without any colour of right or reasonable cause or authority forcefully entered onto the suit land, fenced it off and ploughed it ; soon after that the matter was amicably resolved and the 1<sup>st</sup> defendant vacated the suit land; however in the month of March in the year **2011** the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant trespassed into the suit land again, ploughed and fenced it off and threatened the plaintiff with violence to prevent her from taking up possession thereof. The plaintiff avers that the defendants are trespassers on the suit land and they should be evicted.

3. The 1<sup>st</sup> defendant filed a defence on **19/4/2011** and denied the claim. His defence states that he has no proprietary interest in plot number **227/445 Chepchoina Settlement Scheme** and that he was only hired by the 2<sup>nd</sup> defendant to plough the land; he avers that the 2<sup>nd</sup> defendant was allocated the land in 1994; he denies the threats of violence; he avers that he lives on the adjoining parcel and that the 2<sup>nd</sup> defendant has already lodged a complaint with the Ministry Of Lands regarding the apparent double allocation of the land.

4. The 2<sup>nd</sup> defendant successfully applied to be enjoined to the suit vide an application dated **20/7/2011**. He then filed his defence on the **3/5/2013**, also denying the claim. He stated that he is the bona fide allottee of the suit land having been allotted the land in 1994 vide a letter signed by the then Rift Valley Provincial Commissioner; that at that time the plot was known as plot No. 445 but now it is referred to as 272. He alleges to have taken possession thereof and that he has been in possession thereof to date and that after the land was allocated to him it was not available for allocation to the plaintiff. He also defends the 1<sup>st</sup> defendant saying he has been "*unlawfully joined*" to the suit as he was only hired to plough the land. Further he avers that he lodged a complaint regarding the alleged double allocation to the Ministry of Lands and gives notice of joinder of the Ministry to these proceedings. However as at the time of this judgment the Ministry had not been so enjoined.

## Evidence of the parties

5. The plaintiff testified on **26/2/2019**. Her evidence matched the contents of the plaint. She adopted her written statement as part of her evidence-in-chief. She also produced documents to support her claim. She produced a copy of a letter of offer dated **15/12/2009**; an original payment receipt for **Kshs. 5,410/=** dated **19/2/2010** as **P.Exh 2**; a demand notice dated **24/2/2011** and a surveyor's report prepared by the County Land Adjudication and Settlement Officer Trans Nzoia. The letter of allotment bears the plaintiff's name complete with her identity card number, as the addressee; it gives her plot number **272** measuring **3.96** Hectares at Chepchoina Phase 1 Settlement Scheme in Kwanza District. It requests her to report to the District Land Adjudication and Settlement Officer Kwanza District so that she is shown the plot boundaries and be issued with a letter confirming that before any further documentation. It requires her to pay **Kshs. 51,518.87** or the **10% deposit (Kshs. 5151.89)** for the plot failure to which the offer would be cancelled. The receipt shows that the plaintiff paid **Kshs. 5,410/-** for the plot. The payment receipt bears the stamp of the District Land Adjudication and Settlement Officer Trans Nzoia at the bottom. The plaintiff's evidence is that she was shown the land by a surveyor and that she took possession thereof and even ploughed, planted and harvested in the year **2010**. She avers that after the **1<sup>st</sup>** defendant trespassed on the land in the year **2011** the plaintiff went to her advocate who did a demand letter which the **1<sup>st</sup>** defendant never heeded. According to the plaintiff the defendant defied the orders of this court issued earlier on in the proceedings restraining the **1<sup>st</sup>** defendant from interfering with the land. The plaintiff avers that she does not know the **2<sup>nd</sup>** defendant and that his plot is located far away from the plaintiff's plot. She acknowledges that the **1<sup>st</sup>** defendant is her neighbour.

6. **PW2 Simon Wesalo Okwako** testified on the same date. His evidence is that he is a Land Adjudication and Settlement Assistant with duties to survey land; he received an order from this court dated **28/9/2018** requiring him to confirm the position of parcel numbers **272** and **445** in the Chepchoina Settlement Scheme; that he visited the land on **18/8/2018**; that he prepared a report. He also attached a certified copy of a map to that report. Both the report and map were produced as **P.Exh 4(a)** and **P.Exh 4(b)** respectively. **PW2** also testified that after visiting the ground he found that plot number **272** is occupied by the **1<sup>st</sup>** defendant who has fenced it off together with his plots. **PW2** confirmed that plot No **272** is allocated to the plaintiff, that it is **3.96 Ha** and that it falls within the **Chepchoina Settlement Scheme Phase 1**. He also found that plot number **445** is occupied by the family of Joyce Rotino who is now deceased although in the records it is allocated to one Musa Lotulia; that it is a half kilometre away from the suit land and measures **2.0 Ha**. When shown **D.Exh.1** in cross-examination by Mr. Samba, he stated that the same was subject to verification by the District Settlement Office since it is the Director of Land Adjudication and Settlement who should issue allotment letters; he averred that allocation by the provincial administration, as it was known then, was done when the survey had not been done and that the land was surveyed after it was purchased from the Agricultural Development Corporation (ADC) by the Settlement Office. According to him the two plots mentioned in this suit are therefore different; the numbers do not refer to the same plot.

7. **DW1 Loichalem Luke** the **2<sup>nd</sup>** defendant, testified on **26/2/2019**. His evidence is that he lives in Central Pokot; that he is a teacher; that when he applied for land he was given a letter of allocation (**D. Exh. 1**) which he produced as evidence in the case. He avers that a surveyor called **Isaac Kabue** took him to the land which he referred to as plot **445**. He then hired labour and cleared the land and utilized it for farming purposes between **1995** to **2000**. In **2010**, he and the **1<sup>st</sup>** defendant ploughed the land but the plaintiff came and claimed the land before they could plant on it; he then complained to the lands office. He avers that he is still in occupation of the suit land. He admitted that the **1<sup>st</sup>** defendant fenced off all the suit land but that the **1<sup>st</sup>** defendant has no claim to the land. On cross examination he admitted that he never applied for the land personally and that a Member of Parliament, **Philip Rotino**, gave him a letter; he also admitted that he has never paid any money for the allocation. He admitted that he did not have evidence that plot number **445** was converted into plot **272**. With that evidence on the record, the defence closed its case.

## Issues Arising

8. The main issues for determination in this suit are as follows:

*(a) Do plot numbers 272 and 445 being plot numbers in the Chepchoina Settlement Scheme refer to one and the same plot?*

*(b) Who is the proper allottee of the suit land?*

*(c) What orders should issue?*

*(a) Do plot numbers 272 and 445 being plot numbers in the Chepchoina Settlement Scheme refer to one and the same plot?*

9. Regarding this issue I have noted that the defendants have failed to bring any evidence to court to adequately demonstrate that the plot numbers **272** and **445** refer to one and the same plot in the **Chepchoina Settlement Scheme Phase 1**.

10. On the other hand the expert evidence of **PW2** has settled the question by stating that they do not refer to one and the same plot. I must believe the evidence of **PW2** who is the custodian of the records relating to the suit land at the county level. The two numbers do not therefore in my view refer to the same plot.

*(b) Who is the proper allottee of the suit land?*

11. In relation to this issue the defendants rely on a letter of allotment which was faulted by the District Land Adjudication and Settlement Assistant for having been issued by the former Provincial Administration. **PW2** stated and I believe him to be correct that such a letter was subject to verification by the Settlement Office before the holder could obtain land. He also stated that the letter was issued before any survey was conducted by the Settlement Office. The defendants never brought any evidence to court to disprove these assertions. Besides, the **2<sup>nd</sup>** defendant has acknowledged that he has never paid for the land. Even if the merits of the two letters of allotment were to be compared his letter would fare badly against the plaintiff's for that very reason, for it is clear that payment signifies acceptance and commitment by the

allottee. It would also be adversely affected by the confusing evidence regarding circumstances surrounding its issuance: the 2<sup>nd</sup> defendant's admission that it was not issued to him by the Settlement Office but by a politician, which also contradicts his earlier statement made in this case that the same was issued by the Provincial Administration. The 1<sup>st</sup> defendant has also failed to demonstrate that he ever accepted the offer of land. His claim to the land is very weak compared to the plaintiff's. It can not stand. I find that the 2<sup>nd</sup> defendant is not the proper allottee of the land. The proper allottee of the land is the plaintiff. She is entitled to possession yet the land is in the possession of the defendants.

## **CONCLUSION**

### **(c) What orders should issue?**

12. The upshot of the foregoing is that the plaintiff has established her claim against the defendants on a balance of probabilities. I enter judgment in favour of the plaintiff against the defendants jointly and severally and issue the following orders:

**(a) An order of declaration, declaring that the Plaintiff is the proper allottee of Plot No. 272 measuring approximately 3.96 Hectares at Chepchoina settlement Scheme Phase 1.**

**(b) The defendants and those claiming under them shall vacate Plot No. 272 measuring approximately 3.96 Hectares at Chepchoina settlement Scheme Phase 1 in default of which they be evicted forthwith.**

**(c) An order of permanent injunction restraining the defendants and all those claiming under them from interfering with the plaintiff's quiet enjoyment of the suit land.**

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

It is so ordered.

**Dated, signed and delivered at Kitale on this 13<sup>th</sup> day of May, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**13/5/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the Plaintiff

N/A for the Defendant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**13/5/2019**