



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1125 OF 2016

(FORMERLY HCC NO. 79 OF 1998)

DANIEL ONGANKI PAUL.....1ST PLAINTIFF

BORABU HOSPITAL LIMITED.....2ND PLAINTIFF

VERSUS

JOHN SILAS NYAMATO.....1ST DEFENDANT

CATHERINE NYAMATO.....2ND DEFENDANT

J U D G M E N T

1. The Plaintiffs commenced the instant suit vide a plaint dated 12th February 1998. The Plaintiffs claim was that the Defendants had during the year 1997 forcibly entered into the Plaintiffs land parcel LR No. 21982 situate within Nyansiongo Township Nyamira County and commenced cultivation thereon. The Plaintiffs in the suit sought judgment against the Defendants jointly and severally for:-

- (a) Declaration that the Plaintiffs are the lawful allottees of land parcel LR No. 21982 situate at Nyansiongo Market.**
- (b) A declaration that the Defendants are trespassers on land parcel LR No. 21982 situate at Nyansiongo Market.**
- (c) An eviction order do issue evicting the Defendants from land parcel LR No. 21982 situate at Nyansiongo Market.**
- (d) Costs of the suit.**
- (e) Any or further relief this Honourable Court may deem just and fair to grant.**

2. The Defendants filed a joint defence dated 16th March 1998. The Defendants denied that they had at any time entered onto the Plaintiffs land parcel LR No. 21982 and averred that they were lawfully in occupation of their land parcels Nyansiongo Settlement Scheme/129 and 187. They asserted they had no knowledge of LR No. 21982 which the Plaintiffs alleged belonged to them. The Defendants further averred that the Plaintiffs were non suited as they instituted the suit without leave as required under the provisions of the Land Adjudication Act; Cap 284 Laws of Kenya.

3. This case was part heard before Okongo, J. before whom PW1, Daniel Okangi Paul also a director of PW2 testified on his own behalf and on behalf of the 2nd Plaintiff. PW2 Edward Munoko Wafula, a Senior Land Registrar also testified before Okongo, J. whereupon the Plaintiffs closed their case. The 2nd Defendant, Catherine Moraa Nyamato testified as DW1 before me on her own behalf and on behalf of the 1st Defendant who had passed away before his evidence could be taken.

Evidence by the Parties:

4. PW1 testified that he resides on Plot No. 319 at Nyansiongo Settlement Scheme. He stated from 1985 he was looking for a plot within Nyansiongo Township where he could build a hospital complex. He stated when he went to see the Commissioner of Lands on the issue, the Commissioner of Lands advised him to identify a vacant plot and then make an application for allotment. The Plaintiff stated that he made a letter of application dated 29th March 1995 (“PEX.1”) which was duly received at the office of the Commissioner of Lands. The Commissioner of Lands requested for a site inspection as per letter dated 22nd September 1995 addressed to the Land Officer, Kisii (“PEX.2”) and the Land Officer Kisii vide a letter dated 16th October 1995 affirmed the land was vacant and was then under cultivation. The witness testified that following the submissions of the ground report a PDP was prepared and the Commissioner of Lands approved the

issuance of a letter of allotment to the Plaintiff. The allotment was for unsurveyed plot at Nyansiongo for a term of 99 years from 1st December 1995 and the area of the land was 1.260Ha. (“**PEx.8**”). The Plaintiff stated he accepted the terms of the allotment and paid the necessary charges relating to the allotment and the survey and the title was processed and he was issued with a Grant No. 71949 together with the deed plan dated 11th June 1996. The Plaintiff stated that after he was issued with the grant for the property, he went to take possession of the property but the Defendants prevented him from doing so. He stated that prompted him to institute the present suit. The Plaintiff contends that he followed the proper procedure in applying for the plot and was duly issued with a Grant to the suit property which has never been cancelled. He stated he was entitled to the reliefs sought in the plaint.

5. Under cross examination the Plaintiff admitted that at the time he was allocated the Plot it was under cultivation but he did not know whether it was the defendants who were cultivating the same. The Plaintiff further admitted that the PDP for the plot was done on his application. The Plaintiff further stated that he did receive a letter dated 24th December 2003 from the Commissioner of Lands which indicated that the property allocated to him had overlapped on plot No. **Nyansiongo/187** which was private property. The letter demanded that he returns the Grant that had been issued to him. Additionally the Plaintiff revealed that he also received another letter dated 15th February 2001 from the Commissioner of Lands informing him there was an error in the creation of the suit property. The Plaintiff denied receiving a letter dated 9th February 2001 from the Director of Surveys which indicated there was encroachment of the plot allocated to him on land parcel **187** which was a private property. The Plaintiff reiterated that he was not allocated his plot on private land but on Government land.

6. PW2 Edwin Munoko Wafula, a Senior Lands Officer based in Nairobi testified that as per the records held in their registry. Grant No. **IR71949** of **LR No. 21982 Nyansiongo** is registered in the names of the Plaintiffs as tenants in common in equal shares. The witness affirmed the Grant was for a term of 99 years from 1st December 1995 with an annual rent of kshs.20,000/= . The witness stated that “**PEx.15**” – the Grant was in accord with the copy of the Grant held by the office save for the subsequent entries that had been made subsequent to its issue to the Plaintiff. He stated that the Grant has not been cancelled and further indicated it was not unusual at the time the Grant was issued to issue titles under Cap 281 (Registered Titles Act) or Cap 300 (Registered Land Act) in Townships.

7. Under cross examination the witness stated that he was not the custodian of documents that led to the creation of the grant in favour of the Plaintiffs. He however stated he had a copy of the caveat that was placed by the Registrar of Titles against the Grant issued in favour of the Plaintiffs. He stated he was unaware of correspondences written to cancel the title to the suit property stating that correspondences could be kept in the deed file or the correspondence file for the property. He stated he had only been summoned to give evidence on the ownership of the property.

8. DW1, Catherine Moraa Nyamato testified for herself and on behalf of her deceased husband, who was named as the 1st Defendant. She adopted hers and her late husband’s witness statements dated 31st March 2014 in her evidence. The witness placed reliance on the Defendants bundle of documents as per the list dated 23rd February 2013 and the same were admitted in evidence as “**DEx.1-20**” as listed. The Defendant highlighted the following letters;

- i) DEx.15 – Letter from the Ministry of Lands and Settlement dated 9th February, 2001.
- ii) DEx.16 – Letter from the Ministry of Lands dated 15th February 2001.
- iii) DEx.18 – Letter from the Ministry of Lands and Settlement dated 24th December 2003.
- iv) DEx. 20 – Letter from the Ministry of Lands dated March, 2008.

9. The witness stated that the above correspondences affirm that the Plaintiffs were allocated **LR No. 21982** in error and/or through a mistake as the plot the Plaintiffs were allocated overlapped over the Defendants land parcel **187 Nyansiongo Settlement Scheme**. The Defendant stated that the Commissioner of Land’s letter dated 9th February 2001 (“**DEx.15**”) affirmed that Plot No. **187** belonging to the Defendants was not within the Township but was rather private property. The Commissioner of Lands vide the letter confirmed the Plaintiffs Plot **LR No. 21982** had encroached onto their Plot No. **187**. The letter also confirmed the allocation to the Plaintiffs was by mistake and it was in error.

10. The witness further stated the letter from the Ministry of Lands dated 15th February 2001 (“**DEx.16**”) also affirmed land parcel **LR No. 21892** allocated to the Plaintiffs had encroached onto the Defendants land and the Commissioner of Lands demanded that the Plaintiffs surrender the Grant for cancellation. Further, the letter dated 24th December 2003 from the Ministry of Lands and Settlement, the witness stated confirmed the suit property belonged to the Defendants and that the allotment to the Plaintiffs was in error or by mistake. The witness further stated the letter by the Commissioner of Lands dated 10th March 2008 (“**DEx.20**”) setting out the history of the matter in dispute was clear that there was an error/mistake when the Plaintiffs were allocated the land.

11. The Defendant stated further that she has occupied the suit land since she was married in 1970 and that it was on the same land she buried her husband when he died.

12. In cross examination, the Defendant stated that it was only in 2003 that the Plaintiff attempted to enter into the suit land after he had obtained an ex parte judgment but he was repulsed and the ex parte judgment was subsequently set aside. The Defendant stated the total land they occupy was about 12acres while the Plaintiffs claim about 3.5acres. The Defendant stated that in 2003 they had complained against the Plaintiff for maliciously damaging their property. The Plaintiff was charged in a criminal case which the Defendant stated she did not know how it ended. The Defendant denied she was the one pursuing the cancellation of the Plaintiffs’ title. The Defendant further stated that their land was totally fenced and was fully developed.

The Issues, Analysis and Determination:

13. The parties following the closure of the trial filed final closing submissions. I have reviewed the pleadings, the evidence and the documents tendered in support of the parties respective positions and I have considered the written submissions filed by the parties. The following issues emerge for determination:-

(i) Whether land parcel LR No. 21982 allocated to the Plaintiffs encroached onto the Defendants land parcel Nyansiongo Settlement Scheme/187?

(ii) Whether the Defendants were trespassers on the Plaintiffs land parcel LR No. 21982?

(iii) Whether the Plaintiffs were allocated land parcel LR 21982 by error and/or by mistake?

(iv) What reliefs and/or orders should the court grant?

14. Quite clearly the primary issue that arises for determination in the suit was whether the Plaintiffs were validly and lawfully allocated land parcel **LR No. 21982** and whether or not the allotment was made in error and/or by mistake. The Plaintiff testified that he was the one who scouted for and identified the plot for allotment. In the letter of application dated 29th March 1995, it is evident the Plaintiff is the one who identified the Plot which was said to be within Nyansiongo Township and the District Commissioner, Nyamira forwarded the application to the Commissioner of Lands. There appears to have been a flurry of activity during the month of September 1995 when the application was considered by the SPRO; DCL and the SLO who all gave favourable reports which led to the issuance of the letter of allotment to the Plaintiff dated 6th December 1995. It is therefore not in dispute that indeed the Plaintiff made an application to be allocated a plot within Nyansiongo Township and was in fact allocated a plot and had a title processed in his favour culminating in the issue to the Plaintiff of Grant number **IR 71949** of **LR No. 21982**. The issue was whether the plot allocated to the Plaintiffs was overlapped or superimposed on the Defendants land parcel **Nyansiongo Settlement Scheme/187**.

15. There is uncontraverted evidence that indeed Mr. J. S. Nyamato (deceased), 1st Defendant herein was allocated Plot Nos. 129 and 189 (new number 187) Nyansiongo Settlement Scheme as per **“DEx.2”** and **“DEx.8”**. In the letter dated 6th December 1995 (**“DEx.8”**) the Director of Land Adjudication and Settlement formally offered Plot No. **187** to the 1st Defendant. Inter alia under paragraph 2 and 3 thereof the letter stated thus:-

“The Government, through the Settlement Fund Trustees has offered you Plot No. 189 (new No. 187) of approximately 9.5acres Nyansiongo Settlement Scheme in Nyamira District.

In pursuant thereto, please note that you are required to report to the District Land Adjudication and Settlement Officer Nyamira District so that you are shown the plot boundaries and be issued with a letter confirming this before documentation.”

16. On 2nd January 1996 the District Land Adjudication and Settlement Officer, Nyamira wrote to the Director of Land Adjudication and Settlement (**“DEx.9”**) thus:-

LAND ADJ/SETTLEMENT OFFICE

P.O BOX 97,

NYANSIONGO

2ND JANUARY 1996

The Director of Land Adjudication Settlement,

P.O Box 30449,

NAIROBI

RE: SETTLEMENT PLOT NO. 187 – NYANSIONGO SCHEME

I am in reference to your letter Ref. No. LO/80/129/60 dated 6th December, 1995 addressed to Mr. J. S. Nyamato and copied to this office.

I confirm that Mr. J. S. Nyamato called in my office on 2nd January 1996 and he was shown the boundaries of the aforesaid Agricultural plot, which he accepted.

(K.J.N OMUGA)

For: DISTRICT LAND ADJUDICATION

AND SETTLEMENT OFFICER – NYAMIRA

Cc:

J. S. Nyamato,

Plot No. 187, Nyansiongo,

P.O Box 51079,

NAIROBI

/lbo

17. On 28th June 1996, the Director of Land Adjudication and Settlement wrote to the District Land Registrar Nyamira (“**DEx.12**”) clarifying the changes in the allocations and confirmed Mr. J. S. Nyamato (1st Defendant) was the registered owner of Plot No. **187** (old number **189** and directed the Land Registrar to effect the amendments in his records. The 1st Defendant was consequently issued a title deed for land parcel **Nyansiongo Settlement Scheme/187** on the 15th May 1998 (“**DEx.14**”). The final area list for **Nyansiongo Scheme No. 80** made on 22nd January 1982 included in the Defendants bundle of documents (not numbered) shows land parcels **129** and **187** were included in the scheme, and measured 8.7Ha and 4.0Ha respectively. These two parcels as per the records were allocated to the 1st Defendant.

Whether land parcel LR No. 21982 overlapped and/or encroached on land parcel 187 Nyansiongo Scheme?

18. The office of the Director of Surveys and the Ministry of Lands are by law the custodians of all the records relating to registered land and unalienated land. In the instant matter both the office of the Director of Surveys and the Ministry of Lands and Settlement have exchanged correspondences which affirm the Plaintiffs land parcel had encroached and/or overlapped the Defendants land parcel **Nyansiongo/187**. The documentary evidence availed by the Defendants indeed establishes that the Plaintiff was allocated land parcel 21982 Nyansiongo in error and/or by mistake on the presumption that the land formed part of the land reserved for Nyansiongo Township. I reproduce hereunder “**DEx. 15, 16 and 18**” which clearly leave no doubt that the allocation of **LR No. 21982** was a result of an error or mistake in the identification of the parcel of land on the ground.

19. The following were the contents of the letter dated 9th February 2001 (DEx. 15) from the Director of Surveys to the Commissioner of Lands.

The Commissioner of Lands

P.O Box 30089,

NAIROBI

RE: ENCROACHMENT OF PARCEL NYANSIONGO/187 OF CHEPNYALIL, NYAMIRA DISTRICT

We have investigated a case of encroachment on parcel Nyansiongo/187 by new lease holders. The encroachment as we understand it, was occasioned by wrong identification and assumption made over the Chepnyalil Township boundary.

It had been assumed that parcel 187 was part of the township which is not true. As a result of this assumption, part development plans were drawn and subsequently allocations made over the same private land. In a few cases leases were processed. Since the encroachment has been established, I would advise that the lease agreements and letters of offer for the rest of the affected PDP's be withdrawn and cancelled.

Enclosed find the relevant plans for you final decision.

K. Mwero

For: Director of Surveys

Encl.

20. By this letter the Director of Surveys unequivocally stated that land parcel number 187 was not part of the township and had been encroached upon. He recommended the withdrawal and cancellation of the leases/grants or letters of offer that may have been issued on the basis of the erroneous assumption.

21. The Commissioner of Lands definitely acting on the advise of the Director of Surveys wrote to the Plaintiffs the letter dated 15th

February 2001 drawing their attention to the mistake/error and notifying them of the cancellation of the Letter of Allotment dated 6th December 1995. The Commissioner of Lands requested the Plaintiffs to surrender the Grant for cancellation. The contents of the letter were as hereunder:-

Daniel Onkangi Paul &

Borabu Hospital Ltd,

P.O Box 144

NYANSIONGO

RE: COMMERCIAL PLOT – LR NO. 21982 – NYANSIONGO

This has reference to the above plot allocated to you vide letter ref. 74182/T/9/IV of 6th November, 1995.

I wish to bring to your attention the fact that the above plot was erroneously created to private freehold land outside the Nyansiongo Township boundary. Investigations have revealed that the Part Development Plan drawing No. NYR/949/95/4 was based on wrong identification and assumption of the extent of the Township boundary thereby leading to the erroneous allocation.

The grant of the Plot LR No. 21982 is outside the jurisdiction of this office and as it encroaches on private property LR No. Nyansiongo Settlement Scheme/187 the letter of allotment ref.74182/T/G/IV of 6th December, 1995 is hereby cancelled. The grant (IR71949) for the same should be surrendered immediately.

Z. A MABEA

For: COMMISSIONER OF LANDS

N.O.O

Director of Surveys

NAIROBI (Refer your ref. AE/2/C/VOL. 6/53 of 9th February, 2001)

Director of Physical Planning Department

NAIROBI (Please cancel all the PDPS erroneously drawn on private land LR Nos. Nyansiongo Settlement Scheme/parcel 187 and 129)

Mr. John S. Nyamato

P.O Box 30085,

NAIROBI

22. The Commissioner of Lands again as a follow up wrote the letter dated 24th December 2003 to the District Commissioner Nyamira seeking his assistance in having the Plaintiffs surrender the Grant for **LR No. 21982** for cancellation. This letter was copied to the Plaintiffs and the 1st Defendant. The content of the letter was as follows:

The District Commissioner

Nyamira District,

P.O Box 2

NYAMIRA

RE: ENCROACHMENT OF LAND PARCEL NYANSIONGO SETTLEMENT SCHEME/187 BY LR NO. 21982

The survey of Nyansiongo Settlement Scheme was finalized and published in January 1982. Land parcel 187 was thereafter registered in favour of John Silas Nyamato.

Due to an oversight an erroneous Part Development Plan No. NYR/949/95/4 was prepared in 1995 which caused a survey of land LR 21982 to be undertaken. This survey overlapped onto Nyansiongo/187 and is the cause of land dispute.

The survey of LR 21982 arose out of misidentification of the extent of Nyansiongo (Chepnyalil) Township boundary.

We have requested Mr. Daniel Okangi to surrender the grant (LR 71949) for LR 21982 for cancellation vide our letter 184951/of 15th February 2001. We will be glad if you use your office to have the document returned.

In case he intends to contest the matter in a court of law, he should serve us with the relevant plaints. Enclosed also is the Director of Surveys letter AE/2/C/VOL 6/53 of 9/2/01 for your perusal.

J. K. MATHENGE

For: COMMISSIONER OF LANDS

Cc:

District Officer,

Borabu Division,

P.O Box 1

NYAMIRA

Mr. John S. Nyamato

P.O Box 30085

NAIROBI

Mr. Daniel Onkangi Paul & Borabu Hospital Ltd,

P.O Box 144

NYANSIONGO

23. On the basis of the aforesaid correspondences, I am satisfied that the allotment of **Uns. Commercial Plot - Nyansiongo** to the Plaintiffs on 6th December 1995 was made in error and that the resultant processing of the title in respect of land parcel **LR No. 21982** in favour of the Plaintiffs was pursuant to that error or mistake. The PDP that supported the allocation was erroneous as the portion it identified formed part of land parcel **Nyansiongo Settlement Scheme/187** which was already registered and did not form part of Nyansiongo Township. The title deed for parcel **187** issued to the 1st Defendant shows that the register for this parcel of land was opened on 21st May 1982. It could not therefore be said to have been unalienated such that the same was available to be allotted to the Plaintiffs in December 1995. On the basis of my evaluation of the evidence, it is my finding and holding that land parcel **LR No. 21982** overlapped and encroached on **Plot No. 187 Nyansiongo Settlement Scheme**. There was no available land for allotment where the Plaintiffs were allotted land. The land did not fall under Nyansiongo Township so that the Commissioner of Lands could have the authority or mandate to allocate the land. The allotment made to the Plaintiffs was null and void as the Commissioner of lands lacked the authority or power to make the same. The land fell under the mandate of the Director of Land Adjudication and Settlement and he had already allocated Plot No. **187 Nyansiongo Settlement Scheme** to the 1st Defendant.

24. Having found and held that it was the Plaintiffs who had encroached onto land parcel **187**, it follows that the Defendants could not be in trespass on their own land. The Plaintiffs land parcel **21982** in my view does not exist on the ground as the same was superimposed on land parcel **187** which was already in existence and had been occupied by and allocated to the 1st Defendant. The 1st Plaintiff unwittingly or willingly was the author of the predicament which has befallen him as he appears to have been the one who identified what he said was a vacant plot and applied to be allocated the same without verifying with the Settlement Fund Trustees (SFT) whether or not the land had been allocated. As it is the Plaintiffs now hold a **“paper title”** without any corresponding land on the ground. The Plaintiffs appear to have ignored the advise of the Commissioner of Lands to surrender the Grant once the error/mistake was detected. May be, if they obliged they would have mitigated their losses and/or even implored the Commissioner of Lands to find for them some alternative plot on which to execute their project. As the saying goes **“that is now water under the bridge”** and the parties have to live with the consequences.

25. The net result is that the Plaintiffs have failed to prove their case on a balance of probabilities and cannot be entitled to the reliefs sought in the plaint. I accordingly order the Plaintiffs suit to be dismissed and I award the costs of the suit to the Defendants.

26. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF JULY 2019.

J. M. MUTUNGI

JUDGE