



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 74 OF 1998**

**FRED POGHISYO TOMKOU.....PLAINTIFF**

**VERSUS**

**MOSES KAPEPUR.....1<sup>ST</sup> DEFENDANT**

**KAPENGURIA MUNICIPAL COUNCIL.....2<sup>ND</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff instituted this suit by way of a plaint dated 15/7/1998 which was filed on the 16/7/1998. In that plaint, the plaintiff sought the following orders against the defendants, jointly and severally:-

**(a) A temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants their servants and/or agents from entering subdividing, working on, alienating or in any other way interfering with the plaintiff's peaceful possession of unsurveyed commercial plot "N" Kapenguria Municipality.**

**(b) A declaration that plot no C10 and C11 comprising 0.0778 ha Kapenguria municipality and unsurveyed commercial plot "N" Kapenguria Municipality legally belong to the plaintiff.**

**(c) An order declaring the allotment of 20/5/98 of unsurveyed commercial plot "N" to the 1<sup>st</sup> defendant by the 3<sup>rd</sup> defendant is null and void.**

**(d) Costs of this suit.**

**(e) Interest on the above at court rates.**

2. In the plaint the plaintiff avers that he is the allottee and/or owner of two commercial plots Nos. C10 and C11 situate in Kapenguria Municipality having been allotted the same by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in 1964. He has developed the two plots by constructing two permanent buildings thereon. On or about April 1998 the 2<sup>nd</sup> defendant caused a development plan to be drawn which plan subdivided the plaintiff's plots into plots of 0.025 ha each. 2 plots named "H" and "N" were created. The 2<sup>nd</sup> defendant purported to allot plot no "N" to the 1<sup>st</sup> defendant vide an allotment letter which the plaintiff resisted as unlawful as he has been paying rent for the suit land hence this suit.

3. The defence of the 1<sup>st</sup> and 2<sup>nd</sup> defendants is that plots No. C10 and C11 exist while plot "N" also exists independently of the said C10 and C11. They categorically deny that plot "N" was excised from C10 and C11 or that the 1<sup>st</sup> defendant was lawfully allocated plot "N" which plot, they state, is clearly marked on the ground and that the plaintiff's suit is not only frivolous and vexatious but also an abuse of the process of the court. The 1<sup>st</sup> and 2<sup>nd</sup> defendants pray that the plaintiff's suit be dismissed with costs.

4. The 3<sup>rd</sup> defendant never filed any defence.

5. The parties by consent recorded herein on 20/7/1999 agreed that the District Surveyor do visit the suit land and establish the correct position of the boundary between plot No. "N" and plot No. C10 and C11. The District Surveyor subsequently filed a report on 18/11/99. The findings of the Surveyor were that plots Nos. C10 and C11 were developed as one block and that there was a distinct boundary between them and plot No. "N".

6. On 22/5/2002 the 1<sup>st</sup> defendant applied formally to have the report of the surveyor adopted by this court as its judgment and that the suit

be dismissed with costs.

7. On **28/10/2009** the defendant's counsel wrote to court stating that the suit had abated as the plaintiff had died one year previously. Subsequently the 1<sup>st</sup> defendant made an application, which was allowed by consent on **28/1/2013**, to substitute the plaintiff with one **Fred Poghisyo Tumkou** as the legal administrator to the deceased plaintiff's estate.

8. The hearing of this suit proceeded on **11/10/2018, 13/11/2018, 26/11/2018, 25/2/2019** and **2/4/2019**. The plaintiff testified and called one witness who the defence initially objected to (and was overruled by this court) as he is an officer in the County Government which was impliedly a party in this matter. The 1<sup>st</sup> defendant also testified and called one witness. Both **PW2** and **DW2** claimed to have authority to testify in this matter on behalf of the plaintiff and the defendants respectively but only **DW2** had an official letter dated 26/3/2019 from the County Legal Officer of the County Government of West Pokot, authorizing him to testify.

### **The Plaintiff's Evidence**

9. The plaintiff testified that he is the son of Daniel Tomkou who was allotted the suit land. He reiterated the matters contained in the plaint. According to him the two plots are situated adjacent to the road to Lodwar. When the tarmac road was being built between **1979** and **1980**, plot C11 was excised and reduced in size and the excised portion was absorbed by the road. His father then complained to the County Council concerning the excision and he was promised that he would be compensated using the **0.205** acres which was at the front of his plots. However in **1998** a person came bearing an allotment letter issued over the land that was meant to be issued to the deceased as compensation. The letter named the plot as "N". The plaintiff's father used to pay rates for plot numbers C10 and C11.

10. PW2, Robert Sehemu, the **Administrative Officer In Charge of Public Areas** in West Pokot, testified that the physical plan has plots Nos. C10 and C11 and has no plot named "N". According to him plot no C11 is the last plot in the physical masterplan. When cross examined he stated that the County Government of West Pokot had asked him to testify in the suit. According to his evidence on further cross examination the plot marked "N" does not exist in the records or on the ground. However when examined by the court he admitted that plot rent for plot "N" was paid at his office.

### **The Defendants' Case**

11. **DW1 Moses Kapepur**, the 1<sup>st</sup> defendant adopted his written statement filed in court on **13/2/2018** and produced documentary evidence including a letter of allotment from the Municipal Council of Kapenguria dated 30/12/94 and receipts for Kshs. 1000/=, 88/= and 500/=; according to him the Commissioner of Lands issued him with the letter of allotment. It had a PDP showing the location of his plot. He produced a certified copy of a part development plan as an exhibit. According to him, plot no "N" is separate but lies adjacent to plots no. C10 and C11 and plot "N" was duly surveyed.

12. **DW2 Wilson Akori** an employee of the Ministry of Lands Physical Planning and Urban Development West Pokot County testified and adopted his written statement filed on **2/4/2019**. He stated that he has worked at that office since **1990**; that plot no "N" is separate and distinct from plots Nos. C10 and C11; that he recognized **DExh 1** as the allotment letter vide which the 1<sup>st</sup> defendant was allocated the land; that the plot "N" was not carved out of plot No. C10 or C11; that **PW2** is only a clerical officer in his office and that **DW2** is the sole person granted authority in writing to testify in this suit. While under cross examination by Ms. Arunga for the plaintiff, he stated that each of the plots No. C10 and C11 measures 50 by 100 metres while Plot "N" measures 0.025 ha.

13. I find this evidence regarding plot size in respect of plots C10 and C11 quite untenable even on a cursory glance as the deceased has not been demonstrated to be capable of constructing a block that would fill 100 metres by 200 metres, yet evidence by PW1 and the survey report filed in the record testify to the fact that the two plots C10 and C11 are fully developed with permanent houses.

14. While under further cross-examination DW2 stated that the owners of plots that were affected by the road construction activities of the **1970s** were compensated by the national government when the road took a part of their plots and this applied to the deceased in respect of plots Nos. C10 and C11. Interestingly enough the witness named KeNHA as the government agency instrumental in compensating them which I believe is erroneous, unless compensation was belatedly done, as that state corporation which was established under the Kenya Roads Act 2007, was not in existence in the **1970s**.

### **Preliminary Issues Regarding Parties**

15. The offices of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were abolished by virtue of the political and administrative realignments wrought by the Constitution of Kenya 2010, the County Governments Act and the repeal of the old lands statutes.

16. This court was not moved by either the plaintiff, which is a grave omission on the part of a party who has approached court with a claim of this nature, or by the defendant, to effect amendments to reflect the changes in the law. However, each side called a witness alleged to have been sent by the County Government and in my view substitution ought to have been effected by either party to reflect the constitutional and administrative changes.

17. Since the provisions of **Order 1 Rule 9** of the Civil Procedure Rules are such that no suit may be dismissed solely on the basis of misjoinder or non-joinder of parties this suit must be sustained by ordering the appropriate amendments. Those provisions read as follows:

**"9. Misjoinder and non-joinder [Order 1, rule 9.]**

**No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the**

matter in controversy so far as regards the rights and interests of the parties actually before it.”

18. Order 1 rule 10(2) of the Civil Procedure Rules provides as follows:

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

19. In line with the provisions of the rules set out above, the amendments I order in this suit are as follows:

(a) The name of the 2<sup>nd</sup> defendant, the Municipal Council of Kapenguria shall be substituted with that of the County Government of West Pokot.

(b) The name of the 3<sup>rd</sup> defendant that is the Commissioner of Lands shall be substituted with that of the National Land Commission.

#### DETERMINATION

20. Issues for determination

(a) Whether plots C10 and C11 and plot no “N” belong to the plaintiff.

(b) Whether the allotment of plot no. ”N” to the 1<sup>st</sup> defendant by the 3<sup>rd</sup> defendant is null and void.

(c) Whether an injunction should issue against the 1<sup>st</sup> and 2<sup>nd</sup> defendants restraining them from interfering with plot no “N” in any manner.

(d) What orders should issue?

*(a) Whether plots C10 and C11 and plot no “N” belong to the Plaintiff*

21. The evidence brought to this court by both parties has convinced it that the plots Nos. C10, C11, and “N” are three distinct plots. The parties in this case agree that plots no. C10 and C11 belong to the plaintiff. The only outstanding issue is whether plot “N” belongs to the plaintiff.

22. The claim to the plot named “N” was supported only by the plaintiff’s oral evidence to the effect that his father was promised the suit land as compensation for the loss of part of plot number C11. The plaintiff never showed that that alleged promise was made in writing. The plaintiff never produced a letter of allotment of the suit land from either the 2<sup>nd</sup> defendant or the 1<sup>st</sup> defendant. I therefore find that the evidence of the plaintiff is so weak that it can not support that claim. I would dismiss the plaintiff’s allegation that he owns plot “N”.

*(b) Whether the allotment of plot no. ”N” to the 1st defendant by the 3rd defendant is null and void.*

23. The plaintiff has not adduced sufficient evidence to demonstrate that the allotment of plot number “N” to the 1<sup>st</sup> defendant is null and void. The plaintiff’s assertion that that allocation is void not having been proved, this court, can not declare that allotment to be void.

*(c) Whether an injunction should issue against the 1st and 2nd defendants restraining them from interfering with plot no “N” in any manner*

24. The upshot of the findings on the two previous issues is that this court has found no basis laid before it for the issuance of an order of injunction restraining the defendants from dealing with the suit land in any manner whatsoever.

*(d) What orders should issue?*

25. Consequently, I find that the plaintiff has failed to establish his claim on a balance of probabilities against the defendants and therefore this suit ought be dismissed.

26. I therefore issue the following final orders:

(a) The plaintiff’s suit herein is dismissed.

(b) The plaintiff shall bear the costs of the suit.

It is so ordered.

**Dated, signed and delivered at Kitale on this 18<sup>th</sup> day of July, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**18/7/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi holding brief for Samba for defendants

N/A for the plaintiff

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**18/7/2019**