



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC SUIT NO. 112 OF 2008

ROSA CHERWON.....PLAINTIFF

VERSUS

BEN MUKHOLI WAMAKOTE.....1ST DEFENDANT

MARTIN OSANO OSUMBA.....2ND DEFENDANT

(AS CONSOLIDATED WITH ELC. NO. 71 OF 2012)

ESTATE OF ANAKARET WAMALWA NAMUSOLE

Represented by FRANCIS WAMALWA.....PLAINTIFF

VERSUS

BEN MUKHOLI WAMAKOTE.....DEFENDANT

JUDGMENT

THE BACKGROUND

1. This judgment is on two consolidated suits namely **Kitale ELC No. 112 of 2008** and **Kitale ELC 71 of 2012**. The suits were consolidated by consent of the parties on **3rd April 2017**.

2. Both the consolidated suits involve the parcel of land known as **Makutano /Sumerwa Block 1 /Bwake/ 175** claimed by the plaintiff in **Kitale ELC No. 112 of 2008** and **Makutano/ Sumerwa Block 1/ Bwake/176** claimed by the plaintiff in **Kitale ELC No. 71 of 2012** with the defendant being the same party in both suits.

CASE IN ELC SUIT NO 112 OF 2008

3. The plaintiff vide an amended **Plaint** dated **5th February 2018**, filed her claim against the defendants for orders that;

(a) **An order that the Defendants do move out of the plaintiff's land comprised in Title No. Makutano/Suwerwa Block 1/ Bwake/ 175 failing which the Defendants and their agents, servants, family members or anybody claiming under him to be forcefully evicted from the said land;**

(b) **Kshs. 172,000 as the mesne profits against the 1st Defendant;**

(c) **An order that the boundary between parcel No. 174 and 175 be established by the County Surveyor , Trans- Nzoia;**

(d) **Costs**

(e) **Interests.**

4. The plaintiff's case is that at all material times with effect from **15/7/1998**, she has been the registered owner of land comprised in Title No. **Makutano/Suwerwa Block 1/ Bwake/ 175** measuring **3.230 hectares**; that both the plaintiff and the 1st defendant were at all material times members of **Bwake Farm**, L.R No. **2149** and which, though bought by many members including the parties to this suit, had been registered in the name of **Ayub Makabila** and partners; that the said Bwake Farm was subdivided among its members and title deeds were issued and that the subdivision process resulted in some members being shifted from portions of land which they had previously occupied; that following the said subdivision, the 2nd Defendant became the proprietor of parcel No. **Makutano/ Suwerwa Block 1/ Bwake/ 174**; that overtime the boundary between parcel No. 174 and 175 got interfered with, and it clearly defined on the ground, and the 2nd defendant has encroached into part of parcel No. 175; that following the subdivision, the plaintiff's plot No. 175 turned out to be the one occupied by the 1st Defendant who was supposed to move out and occupy the plot allocated to him pursuant to the subdivision but to date has refused to.

5. The 1st Defendant on his part filed a statement of defence denying the claim on 4th February 2009. In the said statement of defence, he averred that the plaintiff has never been a member of Bwake Farm L.R No. 2149 and that she obtained her title by fraud and or misrepresentation.

6. The 2nd Defendant was enjoined pursuant to a direction made by the court on 19/10/2017.

ELC SUIT NO 70 OF 2012

7. The second suit before the Court is **Kitale ELC No. 70 of 2012** which was filed by **Francis Wamalwa Namusole** the administratrix of the estate of **Anakaret Wamalwa**. The claim by Francis Wamalwa Namusole is detailed in the Complaint he filed therein dated **7th May 2012** and filed on **9th May 2012**. Francis Wamalwa Namusole states he filed the suit therein pursuant to a grant of letters of administration intestate issued to him on **8th February 2010**; that at all material times the late Anakaret Wamalwa Namusole was the sole registered owner of Title No. **Makutano/Suwerwa Block 1/Bwake/ 176** measuring 11 acres vide a title deed issued on **26th March 2003**; that both the plaintiff and the defendant were at all material times members of Bwake Farm and after subdivision of the said farm, each member was supposed to take possession of his/ her respective portion; that the subdivision process resulted in some members being shifted from portions of land previously occupied by them; that following the said subdivision, the suit property comprised of Title No. **Makutano/ Suwerwa Block 1/ Bwake/176**, turned out to be the one occupied by the defendant who was supposed to move out and occupy the plot allocated to him; that the defendant has refused to move out of Title Number **Makutano/Suwerwa Block 1/Bwake/176** and is therefore a trespasser in the said suit property. The plaintiff sought for orders that:-

(a) An order that the Defendant do move out of the plaintiff's land comprised in Title No. MAKUTANO/SUWERWA BLOCK 1/ BWAKE/ 176 and failing which the defendant and his agents, servants, family members or anybody claiming under him to be forcefully evicted from the said land.

(b) Kshs. 330,000 as the mesne profits against the defendant

(c) Loss of user at the rate of Kshs. 55,000 per year with effect from 2013 until the final determination of the suit.

(d) Costs

(e) Interests

8. The Defendant filed a statement of defence dated 5th June 2012 in response to the claim by Francis Wamalwa Namusole. He denied the claim and further averred that the title deed No. Makutano/Suwerwa Block 1/Bwake /176 dated 26/3/2007 was irregularly and unlawfully issued to a deceased person. He prayed for the plaintiff's suit to be dismissed with costs.

THE EVIDENCE

The Case by Rose Cherwon

9. The hearings of the consolidated suits took place on diverse dates between 3rd April 2017 and 12th July 2017. The Plaintiff in **Kitale ELC 112 of 2008** called two witnesses in support of her case. She called (**PW1**), one expert witness, **Mr. Emmanuel Mutange** a Surveyor at Trans Nzoia County. PW1 gave oral testimony and averred that he received court orders dated 7/3/2014 which required him to use the ground map to establish the extent of certain plots and establish whether the defendant occupies the whole or part of Plot Number 175. He stated that the said survey exercise was carried out on 20th March 2014 and a report was filed. He produced the report dated 25/ 3/ 2014 as **P. Exhibit 1**. PW1 stated that they received another court order dated 22/4/2015 which directed him to use an appropriate map to establish the boundaries between plot No. 162 and 176. He confirmed carrying out the said exercise on 16/7/2015 and that the report was filed in court on 27/7/2015. He produced the report as **P. Exhibit 2**.

10. PW1 was cross-examined by the counsel for the defendant, and he confirmed to be working under the county surveyor. It was his testimony that from the survey exercise he carried, the defendant was entitled to **6.92 acres** and that he had a short fall of **0.92 acres**. He further stated that **Plot No. 175** had a shortfall of **2.1 acres** and that **Plot No. 176** had a shortfall of **0.67 acres**. He admitted to not being able to explain the shortfall but explained that he would do a further analysis.

11. He further stated that the owner of parcel No. 176 had encroached into the other parcel No. 162 by 20 meters, and that parcel No. 162 had encroached into plot No 176 by 15 meters.

12. PW1 was referred to the survey report produced as **P. Exhibit 2**, and he stated that he scaled the map down to the ground and did not compare the figures with the title deeds.

13. The second witness was the plaintiff (PW2) who stated that her uncle one Chelala Rono divided his share of the land amongst four people the plaintiff included. That she is the proprietor of the suit land in issue. She produced the title deed as **P. Exhibit 3**, and the green card as **P. Exhibit 5**. She stated that the 1st defendant chased her from the suit land and has been utilizing her land to her detriment. PW2 prayed for the reliefs sought in her plaint.

14. Upon cross-examination by the counsel for the 1st defendant, PW2 confirmed that she is not a member of Bwake Farm but her uncle who gave her the land, one Mr. Chelala Rono alias William Rono was. She stated that her uncle gave her a piece of land but remained with his and that the defendant had his own land different from what the plaintiff was claiming.

The Case by Ben Mukholi Wamakote

15. The defendant (DW1) testified in furtherance of his case. It was his testimony that he is a member of **Bwake Farm** and that he has lived in Bwake Farm since **1968**. He stated that he was given **7 acres** and that he has a title showing that his plot is No. **162** measuring **7 acres**. He further confirmed that a Mr. William Chelali Rono was a member of Bwake firm but stated that he could not ascertain whether the said Mr. Rono gave the plaintiff any land.

16. DW1 testified that he does not reside on plot No. 175 and that he resides between plot No. 162 and plot No 176. He further stated that the surveyors visited Bwake Farm sometimes in 2015 and showed them the boundaries. That the said survey report showed that he was halfway inside 162 and halfway into 176. It was his evidence that he was not on plot No. 175 and was just a neighbor to plot No 175.

17. Upon cross-examination by counsel for the plaintiff, DW1 stated that his land is 7 acres and that his 'boma' is in plot No. 176. It was his evidence that one Francis Wamalwa came to the land in 2007 after subdivision was done and land allocated to his late father one Anakaret who was a member of Bwake Farm. He stated the said plot No. 176 had Francis's 'boma' and also the defendant's 'boma'.

The Case Francis Wamalwa

18. The plaintiff in **Kitale ELC No. 71 of 2012** (PW2) testified and stated that his father one Anakaret (deceased) had land on Bwake Farm which had been allocated to him by virtue of his membership. That the land belonging to the deceased estate is **Makutano/ Suwerwa Block 1/ Bwake 176** measuring **11 acres**. He produced a title deed in this regard as **P. Exhibit 1**. He further stated that, after he got the said title deed, he went with the surveyor to Bwake Farm wherein he was shown where the suit land was. It was his evidence that the defendant was sitting on plot No. **162, 175 and 176**. He stated he reported the trespass to Kachibora Police Station wherein the defendant was arrested. That the plaintiff built a house and the defendant went to report to the D.O who arrested him again. It was the plaintiff's evidence that the defendant's houses are still in plot No. 176 and he is utilizing plot No. 175. According to the plaintiff, the defendant has been using 9.5 acres of plot no. 176 from the year 2007 until 2016 without any color of right. PW1 was of the view that the said usage by the defendant could have attracted Kshs. 5,000 per acre as rent.

19. After all the parties had closed their cases, the court directed for submissions to be filed. All the parties have filed their submissions which I have carefully considered.

DETERMINATION

The Issues and Determination

20. The issues then which arise are:

(a.) Whether the plaintiff in Kitale ELC No. 112 of 2008 and Kitale ELC No. 71 OF 2012 are the rightful owners of the suit land known as Makutano/ Suwerwa Block 1/Bwake/175 and 176 respectively.

(b) Whether the defendant has encroached onto land parcels known as Makutano/ Suwerwa Block 1/ Bwake/175 and 176.

(c) What orders should issue?

a. Whether the plaintiff in Kitale ELC No. 112 of 2008 and Kitale ELC No. 71 OF 2012 are the rightful owners of the suit land known as Makutano/ Suwerwa Block 1/Bwake/175 and 176 respectively

21. On the first issue, the Plaintiff in **Kitale ELC No. 112 of 2008** and **Kitale ELC No. 71 of 2012** tendered evidence in court that they are the registered proprietors of the suit land and produced title deeds to that effect. The Defendant did not controvert these pieces of evidence.

22. The facts in the consolidated cases herein are therefore that the plaintiffs in **Kitale ELC No. 112 of 2008** and **Kitale ELC No. 71 of 2012** are the registered owners of Title No. **Makutano /Sumerwa Block 1/ (Bwake) 175 and 176** respectively. The defendant is the registered owner of **Makutano/Sumerwa Block 1/ (BWAKE) 162**.

23. **Section 26(1)** of the **Land Registration Act** stipulates as follows.

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party or

(b) Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”

24. Section 24 (a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

25. I have perused the pleadings and the testimony of the defendant and note that the defendant did challenge the plaintiff’s certificates of title but did not prove that the titles of the land in issue were issued through fraud or misrepresentation.

26. It is now trite law that a valid Certificate of title held by a party is prima facie evidence that the person registered thereon is the absolute proprietor of the suit land. In **ELC NO. 65/2013, Christopher Kitur Kipwambok-vs- Vipulratilal Dodhia & 3 ORS; Justice Sila Munyao held** that Certificate of Lease just as a Certificate of Title was conclusive evidence of proprietorship.

27. This court in **Joseph Kazungu Mwangi V Joseph Odera Obwore & 11 others (2018) e KLR** while dealing with a similar issue held that **Section 26** of the Land Registration Act gives grounds upon which a title can be impeached and that a litigant must therefore present evidence before court to support his claim.

28. Based on the following provisions of the law and being guided by the above cited authorities, I am of the view that the plaintiffs being the registered owners of the suit land with vested rights and privileges are entitled to protection of the law.

b. Whether the defendant has encroached onto land parcels known as Makutano/ Suwerwa Block 1/ Bwake/175 and 176.

29. Having found that the plaintiffs in **Kitale ELC No. 112 of 2008** and **Kitale ELC No. 71 of 2012** are the rightful legal owners of the suit lands, it is therefore imperative that I deal with the issue of whether the defendant has trespassed on the plot No. 175 and plot no. 176.

30. The defendant in his evidence admitted to utilizing plot No. 176 but denied using plot No 175.

31. The plaintiff in **Kitale ELC No. 112 of 2008** stated in her evidence that the defendant had chased her from plot No. 175 and had even gone ahead to farm on it. This evidence was supported by Mr. Francis Wamalwa and I have no reason to doubt the same.

32. In his testimony **PW1** stated that the court order which required the county surveyor to use the ground map to establish the extent of certain plots and establish whether the defendant in occupation of the whole or part of plot number 175. The survey exercise according to **PW1** was conducted on **20/3/2014** and it established that Plot No. 162 belonged to Ben Mukholi, the 1st defendant herein and Plot No. 175 belonged to Rose Cherwon, the plaintiff and that **PW1** was unable to ascertain the ownership of Plot No. 176.

33. It was his further evidence that the order had ordered use of appropriate map and that they used 50 metres tape measure, a registered map of the area (RIM) for **Makutano/ Suwerwa Block 1/ Bwake and** a scale rule. The survey as per P. Exhibit revealed that Plot No. 176 measured 10.2 acres as ground acreage and 10.87 as map acreage; Plot No. 162 had 6.92 acres as map acreage and 6.0 acres as ground acreage while Plot No. 175 had 7.98 acres as map acreage and 5.9 acres as ground acreage.

34. **PW1** stated that they received another court order dated 22/4/2015 which directed the use an appropriate map to establish the boundaries between Plot No. 162 and Plot No. 176 and the survey exercise was carried out on 16/7/2015 and found that there was a difference between the map boundary and ground boundary in that the registered acreage is more than the ground acreage. **PW1** confirmed that the defendant has built his homestead on Plot No. 176.

35. It therefore follows that the defendant has trespassed on the suit lands.

c. What orders should then issue?

36. The plaintiff in both **Kitale ELC No. 112 of 2008** and **Kitale ELC No. 71 of 2012** have prayed for an order that the Defendant do move out of the plaintiff’s land comprised in **Title No. Makutano/Suwerwa Block 1/Bwake/175** and 176 respectively, failing which the Defendants and their agents, servants, family members or anybody claiming under him to be forcefully evicted from the said land. They have also prayed for mesne profits to a tune of Kshs 172,000/= and Kshs. 330,000/= respectively.

37. Upon carefully consideration of the issues, I am of the view that the plaintiffs are owners of their respective parcels of land and the Defendants do not have any right to be on the suit lands. Consequently, a portion of the claims in the plaints in **Kitale ELC No. 112 of 2008** and **Kitale ELC No. 71 of 2012** are merited. However the prayers for mesne profits and costs in both cases must be declined for reasons. First, no proper evidence was led to establish mesne profits by the plaintiffs. Secondly, it appears that there was failure on the part of the persons subdividing the original parcel to establish clear boundaries and ensure that the allottees or beneficiaries in the farm did not exceed their respective boundaries.

38. The upshot of the foregoing is that I therefore enter judgment in favour the plaintiffs against the defendants and I issue the following orders:

- a. **The County Surveyor Trans Nzoia shall re-establish the boundary between parcels Nos. Title No. Makutano/Suwerwa Block 1/Bwake/174 and Title No. Makutano/Suwerwa Block 1/Bwake/175**
- b. **After the boundary in (a) is so re-established the 1st and the 2nd defendant shall vacate the portions of land which form part of LR No. Title No. Makutano/Suwerwa Block 1/Bwake/175 which they have trespassed on within 45 days and in default of compliance they shall be forcibly evicted.**
- c. **The County Surveyor Trans Nzoia shall re- establish the boundary between Title No. Makutano/Suwerwa Block 1/Bwake/162 and Title No. Makutano/Suwerwa Block 1/Bwake/176.**
- d. **After the boundary in (c) above is so re- established the 1st defendant and anyone claiming under him shall vacate the portion of land which forms part of Title No. Makutano/Suwerwa Block 1/Bwake/176 and which he has trespassed upon within 45 days and in default of compliance they shall be forcibly evicted.**
- e. **In carrying out the survey exercise the County Surveyor shall use the two reports filed in this court dated 25th March 2014 and 29/4/2019 and shall cause all the boundaries of the parcels numbers Title No. Makutano/Suwerwa Block 1/Bwake/162, Title No. Makutano/Suwerwa Block 1/Bwake/174, Title No. Makutano/Suwerwa Block 1/Bwake/175, and Title No. Makutano/Suwerwa Block 1/Bwake/176 to be properly re-established and aligned.**
- f. **The County Surveyor shall point out those boundaries to all the parties herein and each party shall only assume possession of their rightful portion thereafter.**
- g. **If there be any shortfall in the area of land in the aggregate acreage of the mentioned land parcels then the County Surveyor shall as far as is practicable distribute that shortfall *pro rata* among all the portions involved having regard to their Registry Index Map plot sizes.**
- h. **Each party shall bear their own costs of the consolidated suit.**

It is so ordered.

Dated, signed and delivered at Kitale on this 19th day of November, 2019.

MWANGI NJOROGE

JUDGE

19/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for the plaintiffs

Mr. Bisonga holding brief for Nyakundi for the defendant

COURT

Judgment delivered in open court.

MWANGI NJOROGE

JUDGE

19/11/2019.