



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.97 OF 2015

JOHN CHELIMO SEGUTON.....PLAINTIFF

VERSUS

JOSEPH KITUR KIPLANGAT.....DEFENDANT

JUDGMENT

(Suit by plaintiff seeking eviction of defendant from land; plaintiff holding a title to the land; defendant claiming that plaintiff's title was acquired fraudulently and/or illegally; defendant claiming that it was him who was allotted the land and not the plaintiff; no evidence that defendant was allotted the land; no pleading of fraud or evidence of fraud against the plaintiff; no material to suggest that plaintiff's title is illegal; defendant making an alternative claim for adverse possession; defendant's possession not peaceful as he had been charged with for liable detainer thus interrupting his possession, plaintiff's title upheld; defendant's counterclaim dismissed).

1. This suit was commenced by way of a plaint which was filed on 19 March 2012 in the Chief Magistrate's Court at Nakuru and later transferred to this court. In his plaint, the plaintiff pleaded that he is the registered owner of the land parcel Nakuru/Teret/741 having been allotted the said land in the year 1994. He pleaded that in the year 2002, he discovered that the defendant has trespassed into his land, whereupon he was arrested and charged. It is pleaded that the defendant has refused to leave the plaintiff's land resulting into loss and damage to the plaintiff, and in the suit, the plaintiff has asked for the following orders :-

- (a) A declaration that the defendant is a trespasser in the land parcel Nakuru/Teret/741.
- (b) An eviction order against the defendant.
- (c) Mesne profits and/or damages.
- (d) Costs of this suit.
- (e) Interest on (d) above.
- (f) Any other relief that this Honourable Court may deem fit and just to grant.

2. The defendant entered appearance, and filed a defence, and counterclaim. He pleaded inter alia that they had a case before the Land Disputes Tribunal, and that the Tribunal decided that the suit land belongs to the defendant, only that the said decision was quashed by an order of certiorari. He pleaded that the plaintiff's title was acquired fraudulently and/or illegally, though no particulars were provided. In his counterclaim, he has contended that he has been in open, peaceful and quiet possession of the suit land for over 12 years and is thus entitled to be registered as its proprietor through the doctrine of adverse possession. He has therefore asked that he be registered as proprietor of the suit land in place of the plaintiff.

3. In his evidence, the plaintiff testified inter alia that he lives in Baringo and that he got this land after making an application to the Provincial Commissioner. He was then allotted the land in the year 1994 and he produced an allotment letter. He was then registered as proprietor of the suit land and issued with a title deed. In the year 2002 when he went to the land, the defendant chased him away and threatened to kill him. He reported to the police and the District Officer who held that the land belongs to him. He stated that the defendant was arrested and charged in court with a criminal case No. 678 of 2006. He testified that their dispute also went to the Land Disputes Tribunal who rendered a decision in favour of the defendant. He mentioned that he has been unable to reside on the land due to violence meted upon him by the defendant.

4. PW-2 was one Daniel Talam, a resident of Teret, where the land is situated. He stated that he and the plaintiff were allotted land by the

Government in the year 1996, through allotment letters issued in the year 1994. He testified that this land was given to squatters and that when the plaintiff went to take possession, he was chased away by the defendant. He mentioned that previously, a brother to the defendant (Stephen Kitur) occupied the suit land, but he was allocated another land, and he moved out, but brought his brother (the defendant) to occupy it.

5. PW-3 was Mr. Timothy Onamu, a Principal Executive Officer based in Kakamega Law Courts. He stated that he was based in Nakuru between 2007 and 2012. He testified that there was a criminal case against the defendant vide which the plaintiff produced his title deed as an exhibit, but the same got lost.

6. With the above evidence, the plaintiff closed his case.

7. The defendant on his part affirmed that he does indeed reside in the suit land and stated that he took possession in the year 1996. There before, he was a squatter in Ndoinet forest, and he alongside other squatters, were moved to Teret area and allocated land. He averred that there was a Committee of Elders whose task was to allocate land. He confirmed that allotment letters were issued, and stated that he was issued with one, which shows a land parcel No. 7131. He explained that titles were however issued through different numbers. He testified that the land was previously occupied by one Samuel Morogo, but it turned out that he was occupying the wrong land, and he was moved. He had built a house which he sold to the defendant. He stated that title deeds were issued in the year 1997 by President Moi and it is those who had financial capacity who went to collect them. He himself did not have money to attend, so he did not go and collect his title deed. He later came to learn that the plaintiff has title to the land that he occupied. He mentioned a hearing at the D.Os office which held that the plaintiff's title is a good title, and asked him (the defendant) to vacate, but he did not agree with this decision. He confirmed that he was charged with a criminal case and stated that he was acquitted. The matter was then referred to the Land Disputes Tribunal which held in his favour. He was of the view that the plaintiff only has a title but was never allotted the suit land. In cross-examination, he stated that although they were issued with allotment letters in the year 2002, they were moved 4 years later. He averred that the plaintiff was not among the group that was moved from Ndoinet.

8. DW-2 was Samuel Kiplangat Morogo. He testified that he used to occupy the suit land and that he was moved from it and the land was allocated to the defendant. He sold to the defendant a house that he had built on the land. He testified that there were other people who had occupied land that was not allotted to them. He averred that before being given land, one had to show the allotment letter and pay a fee for the title deed.

9. DW-3 was Davidson Kiprono Langat, who is also a resident of Teret. He testified that he came to know the defendant in the year 1996 when they were allotted land. He averred that they were squatters from Ndoinet. He was of the view that the land is owned by the defendant as he saw him being given the land. Cross-examined, he testified that it is not only people from Ndoinet who were given land. He also mentioned that the Lands Officer had a register and they followed this register in issuing title deeds.

10. DW-4 was David Sigilai. He testified that he was living in Ndoinet before being allocated land in Mauche (Teret). He was the Chairman of the people from Ndoinet, and they were giving out land together with the District Commissioner. He asserted that the defendant was allotted the suit land. He stated that he did not know the plaintiff before, and only came to know him, when the plaintiff came looking for the ground position of his land. He averred that title deeds were issued upon surrender of a card that they were given while at Ndoinet.

11. With the above evidence, the defendant closed his case. If invited counsel to file written submissions, which they did, and I have considered the same in arriving at my decision.

12. In this case, the plaintiff seeks the eviction of the defendant on the strength of a title deed that he holds. The defendant in his defence claims that this title deed is fraudulent and illegal, and in the alternative, he has asked that he be registered as proprietor of the suit land by way of adverse possession. Two issues thus arise being :-

(i) Is the plaintiff's title proper or is it illegal?

(ii) If it is, is the defendant entitled to the suit land by way of adverse possession?

Issue 1 : Is the plaintiff's title proper or is it illegal ?

13. On the first issue, I can see that the defendant's attack of the plaintiff's title is based on the argument that it is the defendant who is the legitimate allottee of the suit property. Counsel for the defendant referred me to the Land Act, 2012, Sections 4 and 7 thereof, the latter of which stipulates the method of acquisition of title. However, I am afraid that the Land Act, and even the Land Registration Act, 2012, are not applicable to this suit, as this suit was commenced when the two statutes were not in existence, and the matters in dispute arose before the said statutes had been enacted. Further, the allocation was done in the 1990s when the two statutes had not even been contemplated. I was also urged to refer to the decision of the Land Disputes Tribunal, which held for the defendant. I am afraid that I cannot do so, as that decision was made without jurisdiction, and the defendant himself in his pleadings, has confirmed that it was quashed by an order of certiorari. It is a nullity and it would be absurd for me to make reference to it.

14. On whether or not the defendant is the lawful allottee of the suit land, I was referred to the allotment letter produced by the defendant, and urged to hold that the defendant simply did not obtain title because of lack of funds. I was also informed that the allotment letter of the plaintiff bears a different number to what is shown in the title. I have seen the allotment letter of the defendant. It also does not bear a similar number to that which is in the title of the suit land. It cannot therefore be argued that the plaintiff's allotment letter is different from what is reflected in the title, and therefore improper, for if we use the same argument, then even the defendant's allotment letter cannot be upheld for the same reason. I cannot hold, on the strength of the defendant's allotment letter alone, that the defendant is the person who was allotted this land. Apart from this allotment letter, the defendant did not table any documentary evidence of his allotment of the suit land. There was mention of a register, which was being followed by the Land Officers, when issuing title deeds, but the defendant did not avail to me this register. I should presume that when allocating land, the Government must have been referring to some document or documents, including

registers of allottees, and what land they were allotted. I do not have the benefit of any such registers. If indeed the defendant wanted to demonstrate that the plaintiff is not a genuine allottee of the suit land, then these registers would have come in handy, but as I have said, the defendant did not avail them.

15. Given that position, I have nothing in writing, to demonstrate to me that the suit land was actually allotted to the defendant, and all that remained was issuance of a title deed to him, which was issued to the wrong person. In essence, I do not have any evidence that the title of the plaintiff was acquired by way of deceit or other fraud.

16. In fact, the defendant in his pleadings did not give any particulars of fraud that may have been perpetrated by the plaintiff in him acquiring his title. It is trite law that fraud must not only be pleaded, but must be proved as well, and the threshold of proof of fraud, as affirmed by the Court of Appeal in the case of **Urmila s/o Mahendra Shah vs Barclays Bank International Ltd & Another (1976-80) 1 KLR 1168**, is one beyond a balance of probabilities. It is not enough merely to say that so and so got a title fraudulently. The particulars of that fraud must be pleaded and evidence led to prove the same. As I have mentioned, no particulars of fraud were pleaded against the defendant, and I really do not have any concrete evidence, to inform me that the suit land was actually allotted to the defendant and not the plaintiff.

17. The applicable law in this matter is the Registered Land Act (repealed) and the provisions of Section 143 are operative. The said section provides as follows :-

143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

18. Under Section 143(1), I can only cancel the title of the plaintiff, if satisfied that the same was obtained by way of fraud or mistake. I have already mentioned that no particulars of fraud were given to me and I really have nothing before me which informs me that the plaintiff was not supposed to be issued with title to the suit land. The burden of proving such lay on the defendant, who claims that the title of the plaintiff is not genuine, and I am afraid that he has not given me any hard evidence and substantive material, which clearly informs me that the plaintiff was not supposed to be given title to the suit land, and that instead, the same was supposed to be issued to the defendant.

19. Given the above reasons, I am unable to hold that the title of the plaintiff is a fraudulent title which is liable to being cancelled. I am also afraid to inform the defendant that he has not given me any tangible evidence which informs me that he is the one who was to be issued with title to the suit land. As I mentioned, and it is worth repeating, the defendant has not referred me to any register, or any document, which says that title to the suit land was supposed to be issued to him. Even assuming that he simply did not get his title deed because he did not attend at the Presidential function where titles were issued, for lack of fare, the issuing authority must have been following a list, and such list has not been given to me.

Issue 2 : Is the defendant entitled to the suit land by way of adverse possession ?

20. In his counterclaim, the defendant contended that he is entitled to the suit land by way of adverse possession. It is trite law, and I need not quote any authority, that for one to prove a claim for adverse possession, one must demonstrate that he has been in quiet, open, peaceful, and uninterrupted possession of the land being claimed, for a period of at least 12 years, without the permission of the title holder. This is captured in the latin maxim, *nec vi, nec clam, nec precario*, meaning without violence, without secrecy and without permission. The claimant must also prove the necessary *animus possidendi*, or intention to possess. From the evidence that I have, the possession of the defendant has not been without violence and it cannot be said to have been peaceful and uninterrupted. The plaintiff in his evidence, stated that he is unable to get possession of the land because of the violent nature of the defendant. Even if I was to discard this evidence, the defendant's possession has not been peaceful or uninterrupted for the following reasons.

21. It is not disputed that the plaintiff was arrested and charged with the criminal offence of forcible detainer through Nakuru Criminal Case No. 678 of 2003. Although he was acquitted, the fact that steps were taken to arrest and charge him, remove any presupposition that his possession was peaceful. The fact of his arrest also interrupts his peaceful possession. I have seen that the defendant was acquitted of the offence of Forcible Detainer, on 7 March 2006. Time could start running afresh after this period, but his counterclaim was filed in the year 2012, and it cannot be said that he has accumulated the 12 years required from the year 2006. I am therefore unable to hold that the defendant has acquired title to the suit land by way of adverse possession.

22. I really have no reason not to affirm the plaintiff's rights as given in Section 27 of the Registered Land Act, which provides as follows :-

27. Subject to this Act -

(a) 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...

23. Having not been persuaded that the plaintiff's title is liable to be cancelled, and the defendant having not proved his claim for the land under the doctrine of adverse possession, then I must hold that the plaintiff is entitled to enjoy all rights relating to the said land, and this includes the right of ingress and egress, and the right to exclusive possession of the land. I am sorry for the defendant, who claimed to be landless, but the rights of the plaintiff over the suit land must be upheld. If indeed the defendant was entitled to be allocated some land, then he can pursue that with the relevant authorities, but he cannot be allowed to remain on the plaintiff's land. He needs to vacate the suit land

and the best I can do is to allow him a 3 month window to do so. If he will not have moved out within these 3 months, then orders of eviction may issue against him and his agents/assigns and all who are in possession of the land pursuant to the claim of the defendant.

24. The plaintiff had a claim for mesne profits but no evidence was led as to any loss that he may have incurred by the continued occupation of the land by the defendant. I therefore make no award over this head.

25. On costs, the plaintiff has succeeded and I have no reason to depart from the principle that costs will ordinarily follow the event. The plaintiff shall therefore have the costs of the suit and of the counterclaim.

26. I believe that I have dealt with all issues in this case and now make the following final orders :-

(i) That a declaration is hereby issued that as between the plaintiff and defendant, it is the plaintiff who is entitled to proprietorship of the land parcel Nakuru/Tinet/741.

(ii) That a declaration is hereby issued that the defendant is a trespasser in the said land parcel Nakuru/Tinet/741.

(iii) That an order is hereby issued that the defendant do vacate the land parcel Nakuru/Tinet/741 within 3 months of this judgment, and in default, an eviction order to issue and be executed.

(iv) That the plaintiff shall have the costs of this suit and of the counterclaim.

27. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27th day of February 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Ngamate holding brief for Mrs. Ndeda for the plaintiff.

Mr. R.K Langat present for the defendant.

Court Assistant : Janepher Nelima

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU