



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 94 OF 2017

FORMERLY NAIROBI CIVIL SUIT NO. 283 OF 2003

JAMES MATHUVA MUKUWA.....PLAINTIFF

VERSUS

NZAVI NGULUI DEFENDANT

JUDGMENT

1) By his amended plaint dated 16th July, 2007 and filed in court on the 26th July, 2007, the plaintiff prays for judgement against the defendant for:-

I. Permanent injunction restraining the defendant his representatives or assignees from occupying, dealing with the said property L.R No 464/1283 Nguu Settlement Scheme and/or interfering with the plaintiff's quiet enjoyment of his property until final determination of the suit herein.

II. A declaration that the plaintiff is the lawful allottee and owner of plot No. LR 464/1283 Nguu Settlement.

III. Cost of the suit

IV. Interest on (iii) above

2) The plaintiff has averred in paragraph 3 of his amended plaint that he is a member of Nguu Ranch Settlement Scheme in Makueni under membership number 565. He further pleads in paragraphs 4 and 5 of his amended plaint that on the 16th October, 2001, he obtained a letter of offer for plot number 1283 measuring 4.1 hectares or thereabout which offer he accepted by paying the requisite fees whereupon a title for land registration number LR 464/1283 Nguu Settlement Scheme was processed in his favour. He further pleads that the defendant has trespassed into the said land parcel number LR 464/1283 Nguu Settlement Scheme.

3) The plaintiff's claim is denied by the defendant vide his statement of defence dated 15th March, 2004 and filed in court on the 17th March, 2004.

4) The plaintiff's case was heard by Aganyanya J. as he then was. His evidence in chief was that the land where his property is situated was previously owned by the government. He said that the land was sold to Nguu Co-operative Ranch of which he is a member. He produced his membership card as Pexh no.1. He said that each of the 1600 members was allocated about 10 acres from the 4000 acre Ranch. He added

that he was allocated plot number 1283 after he made some payment. He produced the letter of offer and letter of acceptance as PExnos. 2 and 3 respectively. He said that he paid Kshs. 2,783 being 10% of deposit for the plot as can be seen from the receipt marked as PEx no. 4 . He went on to say that he later paid Kshs. 23,000 upon which he was issued with receipt marked as PExno.5 and later paid the remaining balance upon which he was issued with the receipt marked as PEx no. 6. He said that he was given a discharge of charge (PEx no. 7). He pointed out that he had been given some documents to sign after which he was advised to go back for a title deed. That when he later carried out a search at the lands office, he found out that he had been confirmed as the owner of plot No. Makueni/Nguu Ranch/1283(PExno. 8). He added that before the search, he paid Kshs. 620 for stamp duty (Exh.9) and Kshs. 250 for processing the title (Exh 10).

5) The plaintiff went on to say that when he went to the shamba after it was allocated to him, he found one Masila in the said shamba. He revealed that he sought assistance from the lands office whose personnel helped him to remove the said Masila from the land. He added that Masila was shown his plot which he proceeded to occupy. That upon entering into his land in early December, 2001, he put a semi permanent house and a permanent pit latrine. He ploughed the land and planted maize and beans which he harvested in early March, 2002. That as he was going to plough the land again, he was informed that there was a person who had built on it and on going there, he found that it was the person is the defendant herein. The plaintiff pointed out that the defendant had built a semi permanent house and planted crops in five (5) acres of his land.

6) The plaintiff said that he has no relationship with the defendant. That when the plaintiff tried to persuade the defendant in vain to vacate his land, he decided to file this case. He said that the land does not belong to Kyavi Mutua Thyaka. He pointed out that he found someone else on the land in the year 2001.

7) On being cross-examined by the defendant, the plaintiff told the court that the person whom he found on the shamba did not reveal to him who the owner of the land was. He further said that he was not aware that the government stopped allocation of land in the area in order to investigate various disputes and denied having grabbed the land from it's original allottee. He said that he didn't know Mika and neither did the latter tell him about the history of suit land. He added that did not see a house when he moved into the land and that the person whom he said he removed from the land did not show him any house. On being shown an allocation letter by the defendant , he said that it was in the name of Kyavi Mwema Thyaka whom he said did not know. He said that he was given the plot in question and he did not know whose it was before he got it. He said that he did not know that the land had been allocated to the defendant and neither did he know that his dispute with the defendant was under investigations by the government.

8) The plaintiff's evidence in re-examination was that he found one Masila on the plot. He reiterated that when he brought surveyors, Masila was shown his own plot.

9) The plaintiff called Thomas Monana Nyangau, a legal officer at the lands Office, land Adjudication and Settlement as his witness. Nyangau's (PW2) evidence was that his records show that plot number 1283 Nguu Ranch Settlement Scheme was first allocated to Kiavi Mutua Thyaka in 1995 who was offered 4.1 hectares which is equivalent to 10 acres. He went on to say that a person who is offered land is required to go to the nearest settlement office so that he can be shown the land. That if the allottee accepts the offer, he is required to pay 10% of the price within 90 days to enable the preparation of the discharge voucher. He pointed out after the prescribed period lapses without any reason being offered by the allottee for failure to accept the offer, the Settlement Fund takes back the land for redistribution. In the case of Mutua, Nyangau (Pw2) told the court that the record does not show that he accepted the offer. He went on to say that in the year 2001, the land was allocated to James Mathuva vide the letter of offer marked as Exh. 2. According to him, Mathuva paid 10 % of the purchase price (Exh. 4) and also accepted the offer through a letter (Exh 3).

10) Nyangau(PW2) further testified that they prepared legal documents and other ancillary documents (Exh 6) and that the records show that Mathuva paid Kshs. 23,000 on 8th August, 2002 (Exh5) and later

paid Kshs. 2,822/25 to complete the Settlement Fund Trustee Loan (Exh 11). He pointed out that a discharge of charge (Exh 7) was prepared and handed over to Mathuva. Nyangau (PW2) added that record shows that the plot belongs to the said James Mathuva. He however could not tell the court if a title deed had been issued even though there was a certificate of official search (Exh8) for plot number 1283 Nguu Ranch showing that it was registered in James Mathuva on 13th July, 2006 and a title was issued.

11) His evidence in cross-examination was that problems arose after the allocation and that a probe team was formed to look into those problems. He added that land with titles are out of the probe team's jurisdiction.

12) On the other hand, the defendant's evidence in chief was that plot number 1283 belongs to him after he inherited it from his parent Kyavi Mutua Thyaka who was a member of Nguu Society that owned the ranch which it subsequently subdivided amongst its members. He pointed out that Kyavi Thyaka was member 149 as can be seen from membership card produced in evidence as Dex no.1. He said that after Nguu Ranch was subdivided, members were invited to ballot and Kyavi Thyaka picked number 1283 whereupon he was issued with a letter of offer (DEx no2) by the District Commissioner, Makeni. He further testified that Thyaka paid Kshs. 1000 being survey fees and was issued a receipt (DEx 3). He said that another letter (DEx no 4) dated 2nd August, 1994 was issued. He produced a certificate (DExNo5) that shows that Thyaka Mutua acquired additional 2 shares on the 28th April, 1989 after paying Kshs. 1000. He said that Kyavi Mutua fell ill and subsequently died on 1st January, 1998 while undergoing treatment at Kathonzweni. The defendant produced Kyavi Mutua's certificate of death as DExno.6.

13) The defendant later changed his evidence as to how he came to inherit the land in question. He said that it was his father in law who was left by the deceased to take care of the land and that he got the land from his father in law after he married his daughter. According to him, his father in law had built a small house near where the defendant was born. He said that the plaintiff began to claim the land as his in 2001. That the plaintiff had already built a house on the land when the defendant met him. He added that on 7th April, 2003, he was summoned by the High Court in Nairobi and that during the hearing, the plaintiff claimed that his plot was 3488 and not 1283. He added that he plaintiff demolished his house and vacated the land. According to him, he expected the plaintiff to call him so to discuss the land issue as he was the one who preceded the plaintiff into the land. He said that the plaintiff had cultivated a portion of the land but the latter vacated after he quarreled with him.

14) The defendant further said that the document he had produced show that the plot was allocated to Kyavi Mutua. He pointed out that on the 17th September, 2007 and 24th October, 2014 he complained in writing to the Director of Lands and the District Surveyor, Makeni respectively, (see DEx No. 7 and 8) He said that he has never negotiated to exchange land parcel number 1283 with another parcel of land. He produced grounds report from – the lands office Kibwezi as DEx. No. 9.

15) The defendant's evidence in cross-examination was that Kyavi died in 1998 while himself occupied the land in 2001. He said that he had not produced anything to show that Kyavi Mutua Thyaka had bequeathed the land to him. He pointed out that Mwanziu Kyavi who is his father in law is the administrator of the estate of the late Kyavi. On being asked whether he knew if Mwanziu has letters of administration, the defendant replied in the negative. He however, said that he got the letters that he produced in evidence from Mwanziu. He reiterated that the late Kyavi was a member Nguu Co-operative society and that DEX no 1 was his membership card. He said that Kyavi accepted in writing the offer of plot number 1283. He added that Kyavi was not able to pay 10% that was required and agreed that the same remains unpaid todate.

16) He said that Kyavi had paid for survey fees on 24th may, 1993 and added that he did not cross-examine Nyangao(PW2) whose evidence was that land would be allocated to other people in cases where the original allottees defaulted in paying 10% of the purchase price. He said that he did not hear Nyangao (PW2) tell the court that plot number 1283 was allocated to James (plaintiff) and that Kyavi was to be allocated plot number 3288. He further said that he did not hear the plaintiff say that one Masila Mulandi

who is the defendant's neighbour had trespassed into the plaintiff's plot number 1288. He further said that he did not hear the plaintiff say that he had cultivated the land in question for two (2) seasons before the defendant moved in. According to the defendant, all what he heard the plaintiff say was that the latter found him having constructed on one side of the land.

17) The defendant's evidence in re-examination was that he was not the administrator of Kyavi's estate. He admitted that Masila Mulandi used to cultivate on a portion of the land in question. He reiterated that they did not pay the required 10% fee.

18) The defendant called Mwanziu Kyavi (DW1) and Paul Mutunga Munyanya (DW2) as his witnesses. The former's evidence in chief was that he owns a shamba number 1283 which has no title. He said that the land in question belonged to his late father from whom he inherited it. He revealed that it is Amos who resides on the plot after it was allocated to him by Mwanziu's father who died in 1998. He clarified that he was the one who handed over the land to Amos. Mwanziu (DW1) said that it is the same land that Mathuva claims belongs to him. He revealed that he was yet to obtain letters of administration for the estate of his late father.

19) His evidence in cross-examination was that Amos is his son in law. He said that he did not apply for letters of administration for the estate of his father who died in 1998. He said that he was the one who gave Amos Plot number 1283. He revealed that he is the only son of his father and that he has 2 sisters who are married. He added that his sister's agreed that he could get the land even though they did not do so in writing. He said that the land was being cultivated by his father and that it was his father who showed him the land in question.

20) Paul Mutunga Munyanya's (DW2) evidence in chief was that he first saw Amos in the suit property in 1995. He said that Amos is his neighbour. That when he moved into his shamba, he found Mzee Kyavi cultivating on the suit property. He added that after Amos moved in 1995, he never saw anyone move into the suit property. He revealed that he is yet to pay for his own parcel of land. He attributed his failure to pay for the land due to a dispute between the squatters and members of the Ranch. He said that he never heard of James Muthava nor has he ever seen him cultivating on the land. He added that he does not know one Masila Mulandi. He said that he learnt from the surveyor that Mathuva's land is 3488.

21) His evidence in cross-examination was that he does not know James Mathuva and neither has he ever seen the said Mathuva is the land in question. He reiterated that he does not know Amos Masila. He said that even though he is yet to pay for his parcel of land, other land owners have paid for their plots even though he has no record of those who have paid.

22) The plaintiff's and the defendant's advocates on record filed their written submissions on the 16th September, 2017 and 3rd November, 2017 respectively. The advocate for the plaintiff was of the view that the issues for determination were :-

1. Is the plaintiff the lawful allottee and registered owner of the Land Parcel No. Makueni/Nguu Ranch/1283 formerly Plot no. 1283 – Nguu Ranch Settlement Scheme?

2. The plaintiff having met the requisite conditions for the allotment the Plot No. 1283 is he entitled to the registration and ownership of the Land Parcel LR Makueni/1283 Makueni/Nguu Ranch/1283 Settlement Scheme now registered as LR No. Makueni/1283 Makueni/Nguu Ranch/1283.

3. Did the defence witness No. 2 Mwanziu Kyavi have the capacity to give the plot No. 1283 Nguu Ranch Settlement Scheme to the defendant herein as the administrator of the estate of Kyavi Mutua (deceased)? Did the land belong to the estate?

4. Did the defendant trespass into the suit parcel of land can he be allowed to remain thereon?

23. On the other hand the defendant's counsel identified there(3) issues for determination. These were:-

1. Does the disputed Parcel No. 1283 Nguu Settlement Scheme belong to the plaintiff or Defendant?

2. Was the allocation of Parcel no. 1283 Nguu Ranch Settlement Scheme done according to the laid down procedures and do members have indefeasible title?

3. Can the Plaintiff who has been away for more than 16 years and who acquired title in unclear circumstances evicts the defendant who has stayed and developed the said parcel for more than 15 years?

24) In my view the issues can be reduced into two (2) namely

1. Is the plaintiff the lawful allottee and registered owner of land parcel number 464/1283 Nguu Settlement Scheme.

2. Did the defendant trespass into the suit property?

25) Regarding the first issue, the plaintiff's counsel submitted that the plaintiff has shown how we came to be allocated plot number 1283. The counsel added that the plaintiff's evidence is reinforced by Morara Nyangao, the officer from the Adjudication and settlement office Ardhi house. The counsel pointed out that the defendant testified that he was in occupation of the suit property after his father in law, Mwanzui Kyavi (DW1) allowed him to do so. The counsel pointed out that the defendant had no documents to prove ownership and could not confirm if the land was paid for as per the letter of allotment.

26) The counsel went on to submit that the Mwanzui Kyavi (DW1) is not the administrator of the estate of Thyaka Kyavi and had no capacity to bequeath that which he did not have the capacity to do.

27) On the other hand, the defendant's counsel submitted that the plaintiff contradicted himself in that he initially said that he had been allocated plot number 3488. The counsel went on to submit that even though both parties have shown that they have original documents relating to the suit properly however, it was Kyavi Mutua Thyaka who was the original allottee. The counsel relies on the case of ***Salome Warware VS George Muna & Another [2015]eKLR***. The counsel submitted that Nyangao (PW2) did not demonstrate that they notified the defendant who was the original allottee about the re-allocation of the suit property.

28) From the evidence before me, it is clear that a person who was offered land in Nguu Ranch Scheme was required to accept the offer and also pay 10% of the purchase price within 90 days to facilitate preparation of voucher. There is no dispute that the late Kyavi Mutua Thyaka was offered parcel number 1283 in 1995. He neither accepted the offer nor did he pay the 10% deposit as there is no evidence to that effect. The defendant himself as well as Mwanzui Kyavi (DW1) have admitted this fact. It is also on record that the same parcel of land was subsequently allocated to the plaintiff who proceeded to meet all the conditions required of him. The plaintiff was subsequently issued with a title deed for the suit property. Even though the defendant has averred in paragraph 10 of his defence that plot number 1283 was allocated to the plaintiff through fraud, he has not adduced evidence to prove the particulars of fraud pleaded in the defence. Neither has he sought for a prayer for the cancellation of the title in question. In my judgement, my finding is that the plaintiff is the lawful allottee and the registered owner of land parcel number 464/1283 Nguu Ranch. Under section 25(1) of the Land registration Act, "*the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration ... , shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging there, free from all other interests and claims whatsoever subject ...*"

29) In addition to the above, it came out clearly that the defendant told the court that he was allowed by Mwanzui Thyaka (DW1) to occupy the suit property. Neither the defendant nor Mwanzui, Thyaka (DW1) is an administrator of the estate of Kyavi Mutua Thyaka who was originally allocated the suit land but failed to fulfil the condition for the allocation. If this was true, then the two intermeddled with the estate of

a deceased person.

30) On the issue of whether or not the defendant has trespassed into the suit land, it is clear from the evidence of the plaintiff that the defendant is in occupation of the suit property.

31) The defendant cannot be heard to say that he is on occupation of the suit land on the authority of Mwanzui Thyakya (DW1) who himself has no letters of administration in respect of the late Kyavi Mutua Thyaka's estate. In any case, the suit property is now registered in the name of the plaintiff, an issue that has not been challenged by the defendant in his evidence.

32) Arising from the foregoing, it is my finding that the plaintiff has on a balance of probabilities satisfied this court that he has a cause of action against the defendant. In the circumstances, I hereby proceed to enter judgement for the plaintiff and against the defendant in terms of prayers (i) (ii), (iii) and (iv) of the amended plaint.

Signed, dated and delivered at Makueni this 19th day of February, 2018

MBOGO C.G

JUDGE

In the presence of;

Ms Kyalo holding brief for Mr. Mulandi for the defendant

Moriasi & co. Advocates for the plaintiff Absent

Plaintiff present

Defendant present

Mr. Kwemboi Court Assistant

MBOGO C.G

JUDGE

19/2/2018