



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 893 OF 2015

DAVID MUHANGI KUNG'U.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

PS, MINISTRY OF LANDS AND SETTLEMENT.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed suit seeking an order directing the Permanent Secretary, Ministry of Lands and Settlement to issue to him a title deed in respect of Plot no. 446 Karati Settlement Scheme formerly known as Koinange, measuring 49.5 hectares. The Plaintiff also seeks general damages, special damages, interest at court rates, loss of income and the costs of the case.
2. The Plaintiff claims that he was allocated a permanent improvement in the settlement scheme with an area of 1415 hectares in 1968 for a consideration of Kshs. 21,280 plus interest at 6.5%. He claims that between 1968 and 1975 he bought the permanent improvement ("PI") from the Ministry of Lands and Settlement under the Z project area. The PI which he bought was in an area also referred to as an interim temporary town which was intended to be occupied temporarily by people who were waiting to be allocated land in that area. After these people were allocated land in Ol kalau, Ol jororok, Gitabush and other areas, the temporary town remained vacant in 1968. The Plaintiff then applied for the land from the government through the Settlement Fund Trustees (SFT).
3. The Plaintiff claims he paid the purchase price together with interest in full. The Plaintiff relied on many letters he exchanged with various government ministries. The Plaintiff's claim is that despite making full payment, the Defendants have failed to issue a title over the land leading him to suffer harm.
4. The Plaintiff initially filed **Nairobi HCCC No. 2027 of 1999**. The court file went missing at some point. It seems that this suit was later transferred to the Environment and Land Court (ELC) and given the case number appearing above.
5. The Plaintiff gave evidence in this matter. He stated that he lives on his land which is Plot number 446 Karati Settlement Scheme in Nyandarua ("the Suit Property"). He adopted his witness statement as his evidence in chief. He claims that he has been residing on the Suit Property for more than 49 years. He applied to purchase the Suit Property in 1968 from SFT at the agreed purchase price of Kshs. 21,280 which he fully paid to SFT together with interest.
6. He claims that as a result of the Defendants' failure to issue a title deed to him, unknown persons invaded the Suit Property. He reported the invasion to the Office of the President and the Permanent Secretary following which investigations were conducted which established that the persons had trespassed on his plot. He is apprehensive that his land may be subdivided and sold to unknown people.
7. The Plaintiff relied on various documents in support of his claim. The letter dated 23/7/1971 addressed to the Plaintiff informed him that his application for the PI had been accepted and that SFT was offering the PI for sale to him at Kshs. 14,000/=. The letter asked the Plaintiff to confirm whether the offer was acceptable to him bearing in mind that he had been in occupation of the said PI for a long time.
8. The Ministry of Lands and Settlement's letter of 21/11/1979 confirms that the Plaintiff accepted the offer of the PI vide his letter of 30/7/1971. Based on the fact that he had been in occupation from 1968, the Plaintiff was directed to pay SFT the sum of Kshs. 21,280 being payment for the PI plus interest up to September 1979.
9. In the letter of 22/9/1998, the Director of Land Adjudication and Settlement asked the Nyandarua District Land adjudication and Settlement Officer to establish the total area occupied by the PI; the status of the plot in the Lands Office; whether the Township had been planned by the District Physical Planning Officer and whether plots had been allocated and titles issued. The letter also sought to know if it was possible to excise the PI from the town plot and issue a title directly to the Plaintiff.

10. The Divisional Land Settlement Officer responded via the letter of 29/9/1998 confirming that the total area occupied by the PI and the excision was 49.5 hectares while stating that the development on the land comprised a hides and skins factory, a cattle dip; and that there was some agriculture with potatoes, beans and napier grass planted on part of the land measuring 14 acres while the grazing area and land with trees occupied 15 acres. The letter recommended that a title be issued to the Plaintiff since the PI had been sold to him together with other developments.
11. The receipt issued by the Lands Office for the loan repayment for Plot no. 446 (PI) Karati Settlement Scheme shows the Plaintiff paid the sum of Kshs. 80,000 on 25/2/1999. The copy of the banker's cheque for Kshs. 80,000 is endorsed with remarks that it was paid by David M. Kung'u against PI Number 446 of 49.5 hectares Koinange Town/ Nyandarua/Karati Settlement Scheme.
12. On 13/10/1999 the Plaintiff instructed G.G. Wanjie & Company Advocates to demand that the persons who had trespassed upon his land vacate the land failing which auctioneers would be sent to evict them.
13. The letter dated 21/9/2000 from the Office of the Permanent Secretary, Secretary to the Cabinet and Head of Public Service requested the District Commissioner, Nyahururu to investigate the issue of trespassers invading the Plaintiff's land and squatting on it. It would appear as if the Plaintiff did not get any help, for another letter was written on 21/11/2000 asking the District Commissioner, Nyahururu to give the Plaintiff audience so that the issue of the trespass to his land could be resolved.
14. The letter dated 13/10/2003 from the District Commissioner, Nyandarua sought the intervention of the District Officer, South Kinangop in establishing the circumstances leading to the occupation of the Plaintiff's land. The letter requested the District Officer to find out if the persons named in the letter had documents supporting their occupation of the Suit Property.
15. The Plaintiff also relied on the letter dated 27/5/2015 from the Office of the Director of Public Prosecutions requesting the OCS Njambini Police Station to forward to him the file relating to the Plaintiff's complaint of being threatened with pangas and restrained from cutting trees on his land.
16. The Defendant called one witness who works at the Department of Land Adjudication and Settlement who testified that the Plaintiff originally occupied part of the Suit Property for his sheepskin trade at a nominal rent of Kshs. 10 from 13/11/1967. That the Plaintiff applied for allocation of permanent improvement (PI) of Mackecan House in Karati Settlement Scheme measuring 1.6 hectares through his letter of 18/3/1969.
17. The Defendants claim that the Plaintiff's application for the PI measuring 1.6 hectares was approved but that this continues to form part of the 49.5 hectares and has never been excised from Koinange Township Plot N. 446 measuring 49.5 hectares.
18. The Defendant maintains that the Plaintiff is only entitled to 1.6 hectares since he is also a beneficiary of another agricultural plot which is number 542 in the same Karati Settlement Scheme. The Defendant contends that the Plaintiff could not have been allocated two agricultural plots in the same scheme as that would have been in contravention of the settlement plot allocation policy prevailing at that time.
19. The court notes that no evidence was adduced to confirm that the Plaintiff was also allocated Plot number 542 in the same Karati Settlement Scheme. On cross examination, the Plaintiff denied having any land in Nyandarua when he was cross examined by the Defendant counsel. The Defendant did not produce the settlement plot allocation policy referred to by the witness.
20. The Defendant argues that townships such as Koinange township were administered by the Commissioner of Lands for purposes of planning, survey and allocation under the Government Lands Act and not the Department of Land Adjudication and Settlement.
21. The Defendant produced several documents. The letter dated 13/9/1971 addressed to the Plaintiff confirmed that SFT was selling the former manager's house to him at Karati Scheme No. 258. The letter stated that the house was sold for Kshs. 14,000/= out of which he was to pay a deposit of Kshs. 1,400/= and the balance would be registered as a charge payable over a period of 30 years with interest at the rate of 6.5% per annum.
22. The letter stated that the value of the land and the legal fees would be determined by the Commissioner of Lands after settling how the sum of Kshs. 14,000/= would be paid. The letter of 29/11/1971 threatened to sell the house to somebody else if the Plaintiff failed to accept the offer. The Defendant also produced the letter dated 21/11/1979 which confirmed that the Plaintiff had accepted the offer for the PI. The letter asked the Plaintiff to pay Kshs. 21,280/= to SFT.
23. The letter dated 22/3/1999 from the Director of Land Adjudication and Settlement refers to the discussion between the Plaintiff and the Director's office and further states that SFT accepted payment of Kshs. 80,000/= from the Plaintiff as a deposit towards the purchase of a portion of plot number 446.
24. The letter stated that the Plaintiff had been made aware that the statement to the effect that the allocation of the PI to him was subject to finalization of issues relating to the allocation did not confirm the allocation to him and so the issue of the Plaintiff paying for the whole plot did not arise.
25. The Defendant's letter of 13/6/1999 addressed to the Director of Lands and Settlement states that the PI was for excision of 1.6 hectares only and that the plot was still registered under SFT. The letter did not recommend excision since it would result in more than half of the township being allocated to the Plaintiff.
26. The letter mentions that Koinange Township was planned by the Department of Physical Planning in March, 1964 and that the development plan was approved by the Commissioner of Lands on 20/5/1964. Unfortunately, neither plan number 50/64/12 nor the

Commissioner's approval referred to in the letter were produced in evidence.

27. The Defendant also relied on the letters dated 15/6/1999 and 21/9/1999 urging that the Plaintiff should only be given 1.62 hectares to be excised from the Suit Property since it remained part of Koinange Township.

28. Another letter from the District Land Adjudication and Settlement Officer confirms that a visit was made on 10/5/2004 to verify the situation on the ground and it was established that the Suit Property had been subdivided and resultant plots allocated to the squatters occupying the land. The letter stated that the District Physical Planner had drawn a development plan of the area which reflected the squatter settlement program. It further states that the Plaintiff occupied one of the resultant plots which had a dilapidated building where the Plaintiff lived. Unfortunately, a copy of the physical planning development plan stated to have been attached to that letter was not produced in evidence.

29. The response dated 29/7/2004 sought to know the exact acreage and resultant plot number for the dilapidated building that the Plaintiff occupied. The Defendant did not produce the response to this letter which would have assisted the court determine the acreage and size of the land that the Plaintiff occupied vis –a- vis the land said to have been subdivided and allocated to squatters.

30. The court has considered the Plaintiff's submissions. He argues that he bought the Suit Property and that to date the Defendants have failed to issue a title to him as a result of which strangers have trespassed on his land and constructed temporary structures. The Plaintiff relies on the constitutional protection of property guaranteed by Article 40 of the Constitution.

31. In his submissions, the Plaintiff also introduced a claim for adverse possession having resided on the suit land for more than 12 years and relies on Section 38 of the Limitation of Actions Act. The court agrees with the Defendants that parties are bound by their pleadings; and that not having pleaded adverse possession in the Amended Complaint, the Plaintiff is estopped from raising this claim at the submissions stage since the Defendants did not have a chance to defend the claim for adverse possession.

32. The Defendant argues that the Suit Property which the Plaintiff claims forms part of Koinange Township within Karati settlement Scheme in Nyandarua County and that the land is still held by SFT as the town has not been excised.

33. The Defendant argues that the Plaintiff rented part of the house to carry out his sheepskin trade after which he applied for the PI which included the house and the land surrounding it but does not state the size of the land which the Plaintiff was to be allocated. It is also not clear why the 1.6 hectares the Defendants maintains is what the Plaintiff paid for was never transferred to him.

34. The Defendant further argues that the township has been allocated to beneficiaries who have developed their plots and that if the court grants the prayers sought by the Plaintiff, third parties who have invested in the area will be adversely affected.

35. The Defendant produced a copy of the official search conducted on 21/1/2004 which showed that SFT was registered as the proprietor of the land known as Nyandarua/Karati/446 on 28/1/1973. The Defendants did not produce a recent official search to confirm that indeed the Suit Property has been subdivided and allocated to squatters or other persons who they claim have developed and invested in the area.

36. The Defendant relies on the case of **Veronica Njeri Waweru and others v. City Council of Nairobi and 2 others** [2012] eKLR in which the court held that in an application under Article 40 of the constitution on ownership of property there has to be prima facie evidence on right to ownership in the absence of which no declaratory orders ought to be granted. The Defendant urges the court to dismiss the Plaintiff's suit.

37. The issue for determination is, has the Plaintiff proved his case on a balance of probabilities for the court to grant the orders sought in the Amended Complaint?

38. The Plaintiff produced correspondence that confirmed that he applied for and was issued the PI. The letters make reference to 49.5 hectares. The Defendant did not challenge the Plaintiff's contention that he paid the sums initially demanded when he applied for the PI and the sum of Kshs. 21,280/= the Plaintiff claims to have paid to SFT.

39. The Plaintiff made a further payment of Kshs. 80,000 to SFT on 25/2/1999. All the payments made by the Plaintiff cumulatively show that he must have been paying for more than the 1.6 hectares contended by the Defendant. The sums paid by the Plaintiff show that he must have been paying for the 49.5 hectares which he was occupying and farming. It is doubtful that the Plaintiff could have paid all these sums from 1968 up to 1999 for the small plot that the Defendant now states was allocated to him after the subdivision.

40. The Plaintiff has been living on the land for more than 49 years and was farming on most of the Suit Property until the squatters invaded the land forcing him to seek the intervention of the government offices as shown by the many letters exchanged in relation to his complaint about the invasion of his land. He produced many letters from the department of Lands that dealt with issues of land adjudication.

41. The Defendants did not produce any evidence to support the allegation that the land the Plaintiff claims constitutes Kinangop Township. A part development plan would have shown what part of the Suit Property the proposed township ought to occupy or already occupies.

42. Part VIII of the Land Act sets out the provisions on the compulsory acquisition of public land. Section 111 stipulates that just compensation is to be paid promptly in full to persons whose interests in land have been determined.

43. Part IX of the Land Act deals with settlement programs. Section 134 of this Act empowers the National Government to implement settlement programmes to provide access to land for shelter and livelihood. Such settlement programmes would include provision of access to land to squatters and persons affected by causes that may lead to movement and displacement.

44. Under this Part, the National Land Commission is to reserve public land for the settlement programmes and where no public land is available, the board of trustees is to purchase or acquire land for the settlement scheme. Upon planning and survey, the settlement schemes are to be allocated to households in accordance with our national values and principles enshrined in the Constitution, the principles of land policy and requirements of natural justice.

45. Section 167 of the Agriculture Act established the SFT as a body corporate to purchase, hold, manage and dispose of movable and immovable property. SFT was empowered to enter into contracts it deemed necessary or expedient. The Agriculture Act was repealed by the Agriculture and Food Authority Act which came into force on 17/1/2014.

46. The First Schedule of the Agriculture and Food Authority Act does not mention SFT among the former institutions previously established under the Agriculture Act. The assets of the former institutions vested in either the Transition Authority or the successor companies to be incorporated by the former institutions which carried out commercial activity.

47. Since the SFT is still registered as the proprietor of the Suit Property, it means the assets of the SFT including the Suit Property ought to have vested in another body.

48. Section 135 of the Land Act establishes the Land Settlement Fund which bears some similarities to SFT as it existed under the Agriculture Act. The Land Settlement Fund Board of Trustees is responsible for the provision of access to land to squatters. The Fund is to be applied to the purchase of private land for settlement programs.

49. Based on the facts of this case, the court finds that the Plaintiff has established that he bought 49.5 hectares and has been in occupation of the Suit Property. Part IX of the Land Act sets out the mechanisms through which the government can acquire private land for purposes of resettling the squatters. This process ought to be followed in acquiring the Plaintiff's land for purposes of resettling the squatters who are on the Suit Property.

50. The Defendants are directed to ascertain the portion of the Suit Property on which they have resettled squatters and issue a title deed to the Plaintiff for the remainder of the land which he currently occupies. If the Government wishes to acquire the Suit Property for purposes of developing a Township, then it will have to pay just compensation to the Plaintiff for the part of the Suit Property that may be required for the settlement scheme under the Land Act.

51. The Defendants are directed to compensate the Plaintiff for the portion of the Suit Property which was allocated to squatters. The Plaintiff will have the costs of the suit.

Dated and delivered at Nairobi this 16th day of April 2018.

K. BOR

JUDGE

In the presence of: -

David Muhangi Kung'u - the Plaintiff

Ms. Fatma for the Defendants

Mr. V. Owuor- Court Assistant