



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 3 OF 2014

JAMIN KADASIA LUBANG'A.....PLAINTIFF

VERSUS

FESTO LUKHANYO.....DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit vide a plaint dated 8th January 2014 seeking the following orders:

- (a) **A declaration that the plaintiff is the rightful and legal owner of all land parcel No. Block "A" Plot No. 10 Namanjalala Market.**
- (b) **An order of eviction do issue against the defendant from the suit property.**
- (c) **A permanent injunction do issue against the defendant or any other person whatsoever from in any other manner interfering with the suit property.**
- (d) **Damages for non utility of the suit property.**
- (e) **Costs of the suit.**
- (f) **Interest on (d) and (e) above at court rates till payment in full.**

Pleadings

2. After the plaint was filed the defendant filed his defence dated 12th February, 2015 on 18th February, 2015. The plaintiff filed his amended plaint dated 10/6/2015 on the same date. The defendant further filed amended statement of defence dated 13th November, 2017 on 14/11/2017. The plaintiff filed a reply to amended statement of defence dated 14th November, 2017 on the same date.

3. The main suit was heard on the 5/2/2018 and 8/3/2018. The plaintiff then filed his submissions on the 11/4/2018 and the defendant filed his on 28/5/ 2018.

The Plaintiff's Case.

4. According to the amended plaint, the plaintiff's case is that at all material time he was the rightfully proprietor of a parcel of land known as **Block A Plot No. 10 Namanjalala Market** valued at Kshs.400,000/= (hereinafter referred to as the suit property).

5. On 14/6/2012 he and the defendant executed an agreement which entailed the sharing of the suit property into equal portions each measuring at 25 feet by 100 feet.

6. The plaintiff was to occupy a portion adjacent to plot No. 11 while the defendant was to occupy the portion adjacent to plot No. 9. The plaintiff also averred that the agreement stipulated that the defendant would surrender **Plot No. Block D "A" No. 43 Namanjalala Market** to the plaintiff and that the transfer of the same to the plaintiff would be carried out on 18/6/2015. The plaintiff contention that the defendant failed or refused to surrender Plot No. Block D A No. 43 Namanjalala Market. The plaintiff averred that he has been in possession enjoyment and use of the suit property until about 3/9/2013 when the defendant and other persons violently entered the suit property and began using it.

7. The plaintiff avers that the defendant's occupation is illegal and that such continued occupation amounts to trespass upon the suit property which has denied him user thereof and occasioned him loss and damage. The particulars of the trespass are stated at **paragraph 5** of

the amended plaint.

The Defendant's Defence

8. The defendant denied the plaintiff's claim. According to the amended statement of defence he is the rightful owner of **Namanjalala Market Block A Plot No. 10** having bought the same from one Matayo Wasike in **1994**. By then the plot was known as **Plot No. 6** and the same plot was also later known as **Plot No. 13** in **1982**. The defendant averred that the plot was renamed as **Namanjalala Market Block A Plot 10**, the changes in plot number being due to the fact that every time a new chairman came into office he changed the numbering of the plot. The defendant averred that it is he and not the plaintiff who has been in possession of the suit land. However this contrasts with his averment at paragraph 8 of the amended defence which is to the effect that sometime in the year 2003 the Namanjalala market was surveyed and it was found that the defendant and the plaintiff "were indeed occupying the same **Namanjalala Market Block A Plot No. 10**" which is the suit land herein.

9. The defendant states that when the plots were initially allocated to the members of the Centre they were not surveyed and members were merely shown plot in which to construct. He averred that when he bought the plot from Matayo Wasike in 1994 the same had not yet been surveyed. However sometime in the year 2003 the Namanjalala market was surveyed and it was found that the defendant and the plaintiff were indeed occupying the same **Namanjalala Market Block A Plot No. 10** which is the suit land herein. However after reference to **paragraph 5** of the same defence it is the conclusion of this court that the occupation of the suit land by the plaintiff is expressly denied and that the occupation by the plaintiff in **paragraph 8** of the defence may be referring to the fact of a mere claim of ownership by the plaintiff.

10. The defendant avers that he and the plaintiff executed an agreement whereby it was agreed that they share the said **Namanjalala Market Block A Plot No. 10** equally between them with the plaintiff occupying the side adjacent to **Plot No.11** while the defendant occupied the side adjacent to **Plot No. 9**. In addition the defendant also surrendered his **Plot No. 43** to the plaintiff. The defendant's view is that the suit property should be shared equally between the defendant and the plaintiff as per that agreement.

11. The defendant denied all the particulars of loss and damage, averred that the prayers sought by the plaintiff are misplaced, misconceived, bad in law, fatally defective and unobtainable.

The Plaintiff's Reply to Amended Statement of Defence.

12. In his reply to the amended statement of defence the plaintiff insists that the defendant is not the owner and neither is he rightfully occupying the suit land. He denies that the plot he purchased from Matayo Wasike became Namanjalala Market Block A Plot No. 10. He states the land was never renamed in the manner described or alleged by the defended. He maintains that the defendant is a trespasser on the suit land. He states that the plot that the defendant alleged to have bought from Matayo Wasike eventually came to be known as Plot No.43, and that the defendant knew that his plot is No.43 but nevertheless trespassed into the suit property. The plaintiff averred that he is not claiming Plot No. 43 since the defendant had hidden material particulars regarding that plot which concealment led to a rescission of the agreement reached on 4/6/2012. The plaintiff denies that the agreement of 4/6/2012 was arrived at due to the realization that they were sharing the same plot and avers that it was due to the defendant's refusal to vacate from the suit property despite demand from the plaintiff.

EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

13. The plaintiff testified on 5/2/2018 and produced a letter 24/9/2007 from County Council of Trans-Nzoia as **P. Exhibit 1**. That letter reads as follows in part:

"24/9/2009

Jamin Kadasia Lubanga

Dear Sir,

RE: PLOT NO. 10; NAMANJALALA T/CENTRE

The information which are available (sic) in the County Council Offices shows that Plot 10 at Namanjalala Trading Centre belongs to Jamin Kadasia Lubanga.

According to survey and physical plan; (sic) Block "A" Plot no. 10 was officially allocated to Jamin Kadasia Labanga and so far there has been no change or transfer to the same (sic).

Any intrusion into this plot will be trespass into owner's property.

PW KAMWESSAR

CLERK TO COUNCIL

14. He also produced an "**identification letter for plot ownership**" certifying he is the owner of Plot No. 10 measuring 50 by 100 feet being a full plot that identified is purportedly signed by market Chairman, Secretary and Treasurer and which is dated **16th November, 2010. P.**

Exhibit 3 is a copy of an area list for Namanjalala market which shows that the plaintiff was an allottee of Plot No. 10. The exhibited area list bears the County Government of Trans-Nzoia Revenue Office stamp. It appears to show the ownership by members of plots in Block A, B, C and D in that Market. The plaintiff is listed as the owner of **Plot No. 10 in Block A**. The plaintiff also produced a Receipt No. 0189628 for plot allocation fee (Kshs.2000) and physical planning fee (Kshs.3000/=) issued on 16/8/2013. And a receipt of ground rent arrear and ground rent dated 20/1/2015 for the total sum of Kshs.2000/= paid to County government of Trans-Nzoia. He also produced another receipt dated 24/2/2016 for Kshs.1000/= and another one dated 18/1/2017 for the same amount being ground rent. The agreement dated 14/6/2012 was produced as P. Exhibit No. 5. It states that both parties have agreed that the defendant takes ownership of a ½ plot measuring 25 by 100 feet next to Plot No. 9 and that the plaintiff will take the other half plot which is next to Plot No. 11. The contents of the agreement also show that the defendant surrenders Plot No. 43 also in Namanjalala Market to the plaintiff. The defendant was to be reimbursed Kshs.1600/= being the cost of digging a latrine of which Kshs.600/= was paid on the execution of that agreement leaving a balance of Kshs.1000/=. The plaintiff and the defendant signed the agreement in the presence of two witnesses.

The Defendant's Evidence

15. The defendant testified on 8/3/2018 and adopted his statement dated on 10/2/2015 and filed on 18/2/2015. He produced a copy an agreement between him and Matayo Wasike for the purchase of a commercial house at Namanjalala Market on Plot No. 6 for Kshs.40,000/=. It is dated 13/11/1994.

16. The agreement provided for a certain mode of payment in its terms. The defendant averred that by the time it was sold to him it was called Plot No. 6 and it only became to be known Plot No. 10 when survey was done in the year 2003. He stated that each chairman who was elected came up with his own committee and changed plot numbers, hence the change of his plot number from **Plot No 6 to Plot No 10**.

17. He averred that when the inspection was done in the year 1982 he was not in occupation of the plot but when he bought the plot Matayo Wasike gave him the inspection report a copy of which was produced as **D.Exhibit 2**. That inspection report lists Matayo Wasike at **No. 13** and the plaintiff at **No. 14** signifying that at the time of the report, they owned plots of those corresponding numbers. He says that in the year 1982 the plot was **No. 13** and in the year 1994 when he bought it, it became **No. 6**. It was defendant's oral evidence that upon survey, both parties in this case were found to be sharing one plot and that is why they got into an agreement so that each gets one half of the plot. He admits the agreement dated **4/6/2012** and avers that after that agreement was executed **Plot No. 43** which he had owned was given to the plaintiff. He averred that the plaintiff is the one who, by virtue of being a member of the market committee showed him Plot No. 43. He denied that plot No. 43 is still in his name. He disputed the area list produced by the plaintiff saying it is not dated and that it appeared to have been made much later after 1982, the year when the plots were allocated to the members. He denied being in occupation of Plot no. 43 and stated that it is occupied by the plaintiff who took it up after the agreement of 12/6/2012 was executed. He accused the plaintiff of fraud and stated that the two parties had agreed that they divide the plot into two portions and stay together thereon.

18. On cross examination he said he bought the plot in the year 1994 but he does not have any allotment letter. He also stated that the plots were not measured during the purported survey exercise but their size was merely estimated. He also added when the surveyor measured the plot he put the two plots together and the two parties later shared. He testified that he bought a built house. He said he does have any document to show that Plot No. 43 is in the plaintiff's name but he insists that he was shown that plot by the plaintiff. He said that even though he had built a latrine thereon, he retreated from his transaction with the plaintiff in respect of Plot No. 43 when he realized that the plaintiff was trying to defraud him. He averred that he did not get any documents from Trans-Nzoia Investment Company Limited. He testified that he cannot move to Plot No. 43 as he only knows the suit land on which he has lived for 30 years; the defendant he insists that the allocation to him of Plot No. 10 A that is half of the suit land, still exists.

19. On re-examination he stated that when he bought the land from Wasike it still had a bar-house and he still uses it as a bar to date; At no time has the bar business ever stopped. He states Plot no. 43 is not the one he bought in the year 1994. He insisted that the agreement 12/6/2012 requires the parties to share the suit land.

DETERMINATION

Issues for determination.

20. The issues that arise from the pleadings in this suit are as follows:

a) Has the defendant trespassed upon the plaintiff's property?

b) What orders should issue?

(a) Has the defendant trespassed upon the plaintiff's property?

21. The defendant's case is that he bought the suit land from a third party. His evidence which is not sufficiently controverted by the plaintiff is that he has been in occupation of the land for a period of 30 years. He avers that he purchased the plot that he is in occupation of while it still had some structures on it and that he has been continuously utilizing one of these as a bar for the last 30 years, having taken over the bar business from the person who sold him the plot. The plaintiff on the other hand, besides not showing that he has ever been in occupation of the land, has not demonstrated that he ever built any structures on the land. The defendant has also disputed the area list produced by the plaintiff saying it is not dated and that it appeared to have been made much later after 1982, the year when the plots were allocated to the members. I have examined the said list and confirmed that the defendant's allegations in this regard are true. The constant change of numbers was also explained by the defendant who stated that each time a chairman of the market was elected he changed the numbering of the plots. He produced the documents vide which he purchased the plot from Matayo Wasike. He denied owning plot number 43 and stated that it was the plaintiff who, by virtue of being a member of the market committee showed him Plot No. 43.

22. There appears to have been an attempt by the two parties herein at a transaction by which the defendant agreed that the suit property be subdivided into two whereupon he and the plaintiff would each occupy one of the resultant half plot portions. By that agreement the defendant would also surrender Plot No. 43 to the plaintiff. This transaction fell through. The defendant attributes this failure of the agreement to materialize to alleged attempted fraud on the part of the plaintiff. He avers that the plaintiff showed him the plot no 43 by virtue of his position as a member of the market committee though the defendant also admits to be a member at some point his evidence. It is not certain whether he was shown that plot while he was such a member. He stated that the discovery at the surveying stage that the plaintiff and the defendant shared the same plot number led to the agreement to divide the plot into two.

23. I have considered the plaintiff's evidence to be lacking in terms of details as to the origin of the agreement for subdivision. Apparently the plaintiff emphasizes on the strength of his case which appears to lie in the fact that he has some documents that date back to the year 2010. However I consider the history of the plaintiff's documentary evidence to be quite recent compared to the defendant's history of occupation and development of the suit land. In my view the suit land is unregistered land and the occupation of the defendant over a long period bears quite some weight compared to the plaintiff's documentary evidence which is not supported by any physical occupation.

24. I have also considered the fact that the plaintiff's discontent with accepting plot number 43 is simply that there were county government rates arrears outstanding in respect of that plot and that he would have challenges of indebtedness to the county if he took up the plot. I find this to be an insufficient reason for his attempt to justify his backtracking on the agreement.

25. The question that arises is whether this court should consider the plaintiff's recent acquisition of documents in relation to the land to override the possessory rights of the defendant and thus render it possible for this court to hold that the defendant is trespassing on a plot which he has been in occupation of for the last 30 years. I find that this is contrary to the interests of justice, especially considering that the plaintiff appears to have been economical with the truth in this matter.

26. The agreement between the parties does nothing to change the above observation for in that agreement there was an element of give and take in regard to both parties. Though the plaintiff bore documents relating to the suit land I must reiterate that the suit land is not registered land and the weight that the court would have otherwise given to a certificate of title over the land in the plaintiff's name does not arise in this case. The plaintiff states as follows in his further statement dated 14/11/2017:

“The first indication of my plot was plot number 14. And indeed a resurvey was done but (sic) it was once whereby I was allocated plot number 10 and the defendant was allocated plot number 43. Upon being granted the official letters I wanted to develop the property but the defendant entered the premises.”

27. Without any good explanation emanating from the evidence of the plaintiff, this court is at a loss as to how can a survey conducted in the year 2003 dispossess a party of land he has occupied since 1994.

28. The fact that both parties found themselves holding the same plot number after survey process while the defendant had held physical possession over a long period is evidence of a chaotic and unstructured management of the market land issues bordering on babel whereby one could find himself issued with a number of a plot which he has never been in occupation of, inconveniencing many persons having interest in the market plots and giving rise to litigation such as the instant suit. It bespeaks a problem that transcends the conduct and aspirations of the two parties herein, a problem of possible incompetence or in the alternative, bad faith, on the part of the very authorities that have in their hands the responsibility of managing that land for the benefit of the parties. However such authorities are not enjoined in this suit for the apportionment of any blame in this judgment.

29. In my view it is quite unconscionable to have a holder who has been in continuous possession of, or conducted business on a market plot for an excess of thirty years within the context of unregistered land, to be informed that another member has assumed ownership of the plot by virtue of arbitrary and senseless change of plot numbers by persons who call themselves the committee, and that as a mark of that new ownership, the records at the county government office now reflect that that new person is the payer of rates and rents.

30. In my view there must be recognition and prioritization of rights of the persons in actual occupation of the land before any such action is taken to enable them vie for the opportunity to make their long occupation recognized and documented, otherwise society would be risking possible breakdown of law and order as aggrieved members attempt to apply the law of the jungle to assert either their claim of right by way of long occupation and user without documents or right by way of recent acquisition of documents without occupation. This is the situation that the two parties find themselves in in this case.

In the end I find that the plaintiff has not proved that the defendant has trespassed on his plot as alleged.

CONCLUSION.

(b) What orders should issue?

31. I have found that the plaintiff has not established any act of trespass against the defendant in this suit on a balance of probabilities. Ordinarily the plaintiff's claim should fail, but in this case I have noted that in his defence the defendant is not averse to the implementation of the agreement into between the two parties herein on 4/6/2012.

32. Indeed at paragraph 10 of the amended defence he avers that the plot should be shared equally between them. He also conceded to having given the plot no 43 to the plaintiff as per the agreement. However, the full details regarding plot number 43 are not clear. Besides, I have found that the chaotic situation on the ground may have been contributed to by the conduct of the offices managing the market land issues and not the two parties herein. It is quite unfortunate that no official from the Market Committee or from the County Government of Trans Nzoia was called to testify in this matter to set the record straight concerning some issues.

33. However, based on the evidence on the record this court is able to make a determination concerning the suit land. I therefore find that it would be in the interests of justice that the suit land be shared equally between the two parties.

34. I therefore issue orders as follows:

(a) That the suit land that is Block A Plot No. 10 Namanjalala Market be shared equally between the plaintiff and the defendant herein;

(b) That after subdivision of the suit land, the plaintiff shall be allocated the half-plot portion neighbouring plot no 11 while the defendant shall be allocated the half-plot portion bordering plot number 9;

(c) Each party shall bear their own costs of this suit.

It is so ordered.

Dated Signed and Delivered at Kitale this 14th day of June, 2018

MWANGI NJOROGI

JUDGE

14/6/2018

Coram:

Before Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

N/A for the defendant

COURT

Judgment read in open court in the absence of the parties.

MWANGI NJOROGI

JUDGE

14/6/2018