



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

LAND CASE NO. 136 OF 2017

(FORMERLY HCCC NO. 156 OF 1995-MERU)

ROSE NJIRU.....PLAINTIFF

VERSUS

NICHOLAS MUTHURI.....DEFENDANT

JUDGMENT

1. By a plaint dated 28/7/1995 M’Nceeri M’ Rutere the original plaintiff in this suit sued the defendant, Nicholas Kathurima, and prayed for the following orders against the defendant:-

- (a) A declaration that the plaintiff is the right owner of parcel number RUIRI/NKANDO/576 & 676. (sic).
- (b) A permanent injunction restraining the defendant from interfering with the suit land.
- (c) Costs and interest.
- (d) Any other or better relief that this honourable court may deem fit to grant.

THE PLAINTIFF’S CASE

2. In the body of the plaint, the plaintiff stated that he had been the lawful owner of all the parcels of land known as **Kiirua/Nkando/576 and 676** under **Kiirua/Nkando Adjudication Area**; that the defendant filed a case before the Land Adjudication Committee which suit was later referred to the Minister and the defendant was on **20th December, 1994** unlawfully and illegally awarded the plaintiff’s twenty acres from the suit land; that the plaintiff has extensively developed the suit land by building five permanent houses (shops), one permanent dwelling house, connecting piped water and planting sugarcane and bananas.

3. The plaintiff claims that the defendant is now encroaching on his parcel of land hence rendering this suit necessary and in spite of repeated notices of intention to sue having been given the defendant has failed/refused or neglected to make amends.

The Defendant’s Defence and Counterclaim

4. The defendant filed a lengthy 5 page defence and counterclaim on **29/8/1995**. On **23/7/2001** an application was filed seeking the substitution of the original plaintiff who died during the pendency of these proceedings with one **Samuel Kananda** but the same appears to have been abandoned, for later on, an application dated **29th October 2007** was filed on the same date seeking orders of revival substitution of the deceased plaintiff with one **Rose Nyiru**. That is the name that appears on the grant of letters of administration attached to the application. However as seen from the pleadings the name used by the parties to refer to the plaintiff is “**Rose Njiru.**”

5. On **21/2/2008**, the defendant filed an amended defence and counterclaim dated **16/2/2008**. The defence drastically reduced the length of the original defence to just a few paragraphs. In that amended defence and counterclaim, the defendant denied all the allegations in the plaint.

6. In the amended defence the defendant denied that the plaintiff has ever been the lawful proprietor of the suit land either under written law or customary law; that the plaintiff took law in his own hands, trespassed and remained onto the suit land unlawfully; that the plaintiff has not been the lawful owner of land parcel **Nos. Kiirua/Nkando/576 and 676**; that the dispute before the land adjudication committee was adjudicated, that the Minister’s decision was issued on appeal; that the Minister’s decision was final and is not capable of challenge in the manner sought in the plaint. The defendant denies that the plaintiff is entitled to the orders sought.

7. In his counterclaim the defendant reiterates the contents of his defence and contends that he is the owner of land parcel **Kiirua/Nkando/676** measuring **30 acres** or thereabouts which land was awarded to the defendant by a decision made in **1994** during the land adjudication process, which decision remains unchallenged, and that he is therefore entitled to the land. The defendant avers that consent of the Land Adjudication Officer to present the counterclaim has been obtained. He seeks orders of eviction of the plaintiff in the original suit from **parcel number Kiirua/Nkando/676**, a permanent injunction and costs.

The Plaintiff's Reply to Defence and Defence to Counterclaim

8. A reply to amended defence and counterclaim was filed on **28/2/2008** in which the plaintiff denied the contents of the defence and counterclaim.

The Plaintiffs' Evidence

9. The plaintiff first testified on **2/7/2008**. However, after a long interregnum, the case proceeded to hearing on the **27/4/2017** when **PW2** partially testified and was later stood down the same day. On that date the High Court referred the matter to this court and the case later began *de novo* on **20/2/2018**. It is not necessary to replicate in this judgment the evidence the two witnesses gave on those two earlier dates as it was overtaken by events.

10. On the **20/2/2018** the plaintiff adopted her statements dated **20/11/2017**. She stated there was a case involving the suit land up to the Minister's Appeal level. She testified that the appeal decided that **13.95** acres be given to her husband while the defendant was given **30** acres; thereafter, this case was instituted by her husband. She avers that the land was not subdivided that her family still uses the whole land; that she went to the Lands Office to block the issuance of the titles but she would not know where the owner of Plot No. **Kiirua/Nkando/676** got its title; that Plot No. **Kiirua/Nkando/576** is in the Lands Office; that it has been issued in the name of M'Rutere, her deceased husband; that the land comprised in Plot No. **Kiirua/Nkando/576** has not been subdivided. She has not prevented the defendant from accessing the land and she has not seen him. However she avers that the whole land belongs to her and that there is a river at the boundary.

11. Upon cross examination she stated that she does not know where the boundary of Plot No. **Kiirua/Nkando/676** is. She testified that the defendant has never been on the land and that she has been farming and has built on the land. She testified that she filed succession proceedings and later got involved in this suit.

12. In her statement she states that the land was given to her husband through balloting in **1969** and then it was **43.05** acres and it was known as **Kiirua/Nkando/576**; that upon being given the land she and her family occupied the same in **1971** and developed it and have lived there to date. She avers that in **1970s** a dispute began when the defendant claimed the land and that the dispute was heard before the Committee and the plaintiff's family won. She averred that when they entered the land after balloting it was not occupied; this dispute was heard before Nkambo Land Adjudication Committee of **1984** when it was decided in favour of her husband. It was also heard before the Land Arbitration Board following an objection of the defendant in **Arbitration Board case No. 13 of 1985** which stated that the defendant be given **20** acres of land; that her husband being aggrieved by that decision took up the issue with the Land Adjudication Officer who set aside the arbitration award and reinstated the land to her husband once again. The defendant being aggrieved then appealed to the Minister who gave the defendant **30** acres and her husband **13.5** acres; that is the decision that prompted the filing of this suit. It is her submission that the entire land should have been given to her husband and none should have gone to the defendant.

13. **PW2, Julius N'Icaba Kiruki** testified for the plaintiff. He said he knows the plaintiff. He adopted his statement dated **20/11/2017** as his evidence-in-chief. He testified that the plaintiff has occupied the land from **1971** to date. His land is about one kilometre from the suit land. However his knowledge regarding the other cases before the Committee and the Arbitration Board and the Minister was quite scanty. He testified that the plaintiff does not have any other land.

14. **PW3, M'Ikiugu M'Imanya** adopted his witness statement dated **20/11/2017** as his evidence-in-chief. He averred that the plaintiff's husband was his neighbour who took up the land in **1969** after the balloting and he assisted him to put up the boundary. After that a water group was created, water was installed in the land and trees were planted. There was wildlife and they asked the authorities concerned with wildlife to deal with the animals. He averred that since **1971** he has not heard anybody else complain about or enter the land to work on it. He does not know Nicholas, the defendant, and she does not know if there was any other dispute relating to the land. That the plaintiff's children and grandchildren were born while the plaintiff was in occupation of the suit land.

The Defendant's Evidence

15. **DW1** was the defendant. He adopted his statement dated **30/11/2017** as his evidence-in-chief and reiterated that **Plot No. Kiirua/Nkando/676** is his. He produced a copy of the title for **Kiirua/Nkando/676** as **D. Exhibit 1**. He avers that there was a process of adjudication before the title was issued. He testified that there was **Case No. 171 of 1991** which went up to Minister's Appeal level. He testified that he used to go to the land and the plaintiff would chase him away.

16. Upon cross examination he avers that there was no balloting as alleged by the plaintiff and the government just gave the people the land through the Ministry of Lands. He avers that a committee shared out the land on behalf of the Ministry during the year **1971** or thereabouts and that there was no gathering of land. He avers that he was never heard by the Committee and Arbitration level and so he appealed to the Minister as he wanted to get all the land. In that appeal, it was decided that **Plot No. Kiirua/Nkando/676** measuring **30** acres is his and the balance measuring about **13** acres was the plaintiffs. Later officers from Ministry of Lands went to subdivide the land. He averred that the Minister's decision gave him land touching the water and tarmac and that similarly, the plaintiff's land also abuts the water on one side and tarmac on the other. He produced photographs of the land. He testified that he does not need the plaintiff's portion which just borders his land.

17. **DW2** was **Korir Eric Kipkemoi**, the Sub-County Land Adjudication and Settlement Officer who testified on **22/2/2018**; he testified that he has custody of the County land adjudication records; he produced the Land Adjudication Officers records as **D.Exh. 2**; he testified that

there was an appeal between the defendant and the plaintiff's husband at the end of which it was decided **Parcel No. Kiirua/Nkando/576** be divided into two portions of **30 acres** and **13.95 acres**. **30 acres** went to the defendant **13.95 acres** went to the plaintiff's husband. He stated that there was a letter written in **1995** indicating that the decision has been implemented. He also indicated there was a letter from Director of Land Adjudication and Settlement office dated **27/2/1995** to the District Surveyor and the records show that the decision was implemented and the adjudication was finalized. He denied that he was the one who heard the appeal before the Minister.

18. The plaintiff filed her written submissions on **16/3/2018**. She cited the case of **Regina –vs- Secretary of State for the Home Department Ex-parte Doody (1994) 1 AC 531** from which she cited the following passage:

“I accept without hesitation that the law does not at present recognize a general duty to give reasons for an administrative decision. Nevertheless it's equally beyond question that such a duty may in appropriate circumstances be implied.”

She also relied on the case of **Kenya Airport Authority –vs- Mitubell welfare Society and 2 Other (2016) eKLR**. The plaintiff submits that the Minister's averments were not backed up by entries in the land adjudication record. He also faulted the Minister for alleging in his decision, without giving reasons, that the plaintiff's husband used his influence as a Committee member to influence the decision in the award the Land Adjudication Officer made.

19. She faulted the Minister's decision for failing to provide reasons for holding that the Land Adjudication Officer did not address himself to good evidence when he dismissed the Arbitration Board. She expressed doubt that there was any evidence in favour of the defendant being considered to be so strong as to deprive the plaintiff's husband of his land.

The Defendant's Submissions

The defendant filed his submissions on **6/4/2018**. He submitted that the **Land Adjudication Act** sets out the procedure for resolution for all disputes arising in an adjudication area by way of Committees, Arbitration Boards, Land Adjudication Officer and appeals to the Minister aiming at expediting the resolutions of the disputes. He submits the Minister's decision is final but concedes that such decisions can be legally challenged for want of jurisdiction, abuse of process and non-adherence to rules of procedure. He submits the decision of the Minister remains final as long as it has not been challenged for any non-compliance with the governing Act and that it can not be challenged in the manner sought in this suit. He submitted that it could only be challenged by way of application for judicial review for orders of certiorari and prohibition and the Minister could not be faulted for making findings on the basis of the evidence before him. Lastly he said that the Adjudication Register had to be completed in accordance with the decision for the Minister who last handled the disputes under the Act. He submitted that in this case the register has been closed and the titles to the suit land have issued. He states that the plaintiff offered no evidence to show that the two parcels **576** and **676** are hers and that the only evidence regarding the decision of the Minister and the implementation thereof produced in this proceedings is from the defendant. He submits that the adjudication process determined ownership of the suit land in the proportions given in the appeal decision. He dismissed the evidence of the plaintiff's witnesses as unhelpful and averred that this was not a claim brought under the doctrine of adverse possession. He stated that the parties' rights to their respective portions of the suit land had been ascertained and that the court should uphold his counter-claim.

DETERMINATION.

20. The main issue for determination in the instant suit is who between the plaintiff and the defendant is the lawful owner of all those parcels of land known as **Kiirua/Nkando/576** and **676**.

21. It is common ground that: the two parcels of land fall under the same land adjudication area and that they were subjected to the Land Adjudication Act, and that the dispute between the parties underwent the processes that are provided for by the Land Adjudication Act up to the level of an appeal before the Minister as provided for by the Act.

22. It is acknowledged by both parties that the appeal before the Minister was determined in favour of the defendant whereupon the plaintiff was given **13.95 acres** and the defendant was given **30 acres**. The copy of proceedings in the appeal was produced as **D.Exh 3** by the Land Adjudication Officer. They show that the process of the dispute was as follows: that the original entries showed that the defendant was the rightful owner; that in a Committee case, the plaintiff was awarded the entire land; that the defendant objected in and in an Arbitration Board proceedings, he was awarded **20 acres** and the plaintiff **23.95 acres**; that the plaintiff, dissatisfied took up the issue with the Adjudication Officer who awarded him the entire parcel and that after this, the defendant appealed to the Minister, giving rise to the decision in **D.Exh 3**.

23. It is clear to this court that the entire land parcel originally bore parcel number **Kiirua/Nkando/576** measuring **43.95 acres**. In the process of the implementation of the decision made on the appeal to the Minister **30 acres** were hived off from parcel number **Kiirua/Nkando/576** to create a new parcel which was deemed the entitlement of the defendant, and which was assigned parcel number **Kiirua/Nkando/676**. The defendant's contention is that the decision of the Minister is final and not capable of challenge as sought in the plaint. After the decision was implemented the plaintiff's parcel retained its number **576**.

24. The plaintiff averred that she does not know how title to **parcel number 676** came about. However I have considered the evidence of the parties in totality and found that it came from the implementation of the appeal decision. **Korir Eric Kipkemoi**, the Land Adjudication Officer testified that there was a letter in the land adjudication record which indicated that the decision had been implemented. He also stated that there has not been any challenge to the appeal decision.

25. The plaintiff avers in his plaint that the Minister unlawfully awarded the defendant **20 acres** from the suit land. This is not supported by the plaintiff's evidence which seems to suggest that the size of the land awarded to the defendant out of her land was **30 acres**. This is the evidence that the defendant also agrees with. It is also the evidence that is in accord with the contents of **D.Exh 3**.

26. I have noted that no particulars of illegality are set out in the plaint which is quite brief, and this *per se* is a limiting factor that the

plaintiff imposed on herself from the very inception of the suit, for she is bound by her pleading.

27. The plaintiff has also placed considerable reliance on the submission that the Minister did not state reasons for his decision. To me the plaintiff's contentions are answered by an examination of the appeal decision. It appears from the contents of the appeal decision that the Minister considered the evidence that had been given in the earlier proceedings in the dispute and relied on it in his decision; I also find that the same is well reasoned and these contentions are thus easily dispelled.

28. The provisions of **Section 29(1)** of the Land Adjudication Act state that the Minister's decision is final. I replicate them here as follows:

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final."

29. In my view the dispute herein revolves around the issue of ownership of the land. There are statutory mechanisms for resolution of such disputes on the issue of ownership of land in a land adjudication area and to which the **Land Adjudication Act** has been applied. The mechanisms culminate in an appeal under **Section 29** of the Act. That section provides that the Minister's award is final. This court can not sidestep the provisions of that section and grant the plaintiff land she is otherwise not entitled to out of the suit land. It would appear that the task was completed when the appeal decision was made. I therefore find that the plaintiff is the lawful owner of plot number **Kiirua/Nkando/576** while the defendant is the rightful owner of plot number **Kiirua/Nkando/ 676**. The plaintiff's occupation and use of parcel number **Kiirua/Nkando/ 676** has therefore been in contravention of the appeal decision and therefore unlawful.

30. The upshot of the foregoing is that I find that the plaintiff's suit has no merit and I hereby dismiss it with costs. I also find that the defendant's counterclaim has merits and I enter judgment in the counterclaim for the plaintiff therein against the defendant therein and issue the following orders:

a. An order of eviction of the plaintiff from the defendant's land parcel number Kiirua/Nkando/676.

b. An order of permanent injunction restraining the plaintiff in the main suit from interfering with the defendant's possession of land parcel number Kiirua/Nkando//676.

c. Each party shall bear their own costs of both the suit and the counterclaim.

Dated, signed and delivered at Kitale on this day of 2018.

Dated, and signed at Kitale on this 1st day of August, 2018.

MWANGI NJOROGI

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 29th day of August, 2018 in open court in the presence of:

Mr. Omari holding brief for Ringera for plaintiff

Mr. Kirimi holding brief for Kiome for defendant

C/A Mutua

MWANGI NJOROGI

JUDGE

ENVIRONMENT AND LAND COURT, KITALE.