



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 70 OF 2013**

**1. JOHN MUTURI NJUGUNA**

**2. PETER MAINA**

**3. JOHN NJUE KIBE**

**4. PETER WANJEMA MIGWI**

**5. PAUL NG'ANG'A MUGO.....PLAINTIFFS**

**VERSUS**

**1. MUNICIPAL COUNCIL OF ELDORET**

**2. UASIN GISHU COUNTY GOVERNMENT.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated 21<sup>st</sup> February, 2013 and amended on 22<sup>nd</sup> July 2013 and further amended on 20<sup>th</sup> July 2017 the Plaintiff sued the defendant herein for a declaration that the plaintiffs are the bona fide owners of parcel of land known as ELD 17/95/158A-plots No.2,9, 11, 12, 15 and 7 Shauri Yako estate and a permanent injunction restraining the defendant his agents and/or servants from interfering with the plaintiff's ownership and occupation of the said parcel of land. They also prayed for the costs of the suit.

2. PW1 stated that he bought the land on 27/7/10 and allotment letter dated 8/12/1995 was issued to him and Karanja. In February 2003, the defendant started fencing the said property. He produced a copy of the notice and allotment letter.

3. On cross examination, he stated that he purchased it from one Elsie Wamuyu and was given vacant possession. He conceded that he was supposed to develop the plot within 2 years. He also stated that he had not produced any receipts.

4. The 2<sup>nd</sup> plaintiff in his evidence stated that he was given an allotment letter dated 8/12/95. He produced a rates clearance certificate, a payment of consent to transfer. He also conceded that there was a notice by the Municipal Council and the County government for the regulation of the Shauri yako estate and that they were required to produce documents for purposes of processing titles which they did. On cross examination he stated that he was supposed to develop the plot within 2 years which he never did.

5. The 3<sup>rd</sup> plaintiff stated that he was the owner of plot number 7 having bought it from Njaramba who had previously bought it from Kimathi and produced a sale agreement to that effect. He stated that he was also given a consent to transfer which was produced.

6. On cross examination he stated that he did not have an acknowledgement from the National Land Commission and the County government on the issue of regularization he also did not a consent to transfer.

7. The 4<sup>th</sup> plaintiff stated that he was the owner of plot number 2 allotted to him by the Council in 2013 though he had not gotten a title. He also received a notice from NLC and the County government for regularization. He stated that he has been paying rates.

8. On cross examination he stated that he had not yet developed the property as per the conditions of the allotment letter which is within two years. He also admitted that he did not have the acceptance letter and that he did not pay the premium within the stipulated 90 days in the allotment letter.

9. At the beginning of the hearing the 5<sup>th</sup> plaintiff withdrew his case against the defendant.

10. The 6<sup>th</sup> plaintiff stated that he was allocated plot number 1 and was given an allotment letter in 1995. In 1998 he paid for the purchase price. He further stated that the Council fenced the plot in 2013. He also stated that he does not have title to the property. On cross examination he stated that he did not have an acceptance letter and that he paid the purchase price in 1998 which was not within the stipulated 90 days. The defence did not adduce any evidence to rebut the plaintiff's evidence.

11. Counsel for the plaintiffs submitted that their case was not rebutted and that the plaintiff's allotment letters through which they claim ownership are not challenged. They further submitted that they had proven their case on a balance of probability.

12. The NLC had taken up the issuance of title deeds for the area and once they are done, the plaintiff would be registered and the issued with title deeds.

13. The defendant's Counsel submitted that the plaintiffs' claim was time barred and should be struck out. They further submitted that the plaintiffs availed an assortment of agreements and allotment letters but no documents of title.

14. Further, that the underlying jurisprudence is that upon being given an allotment letter, an allottee must comply with the conditions set therein and be given title before getting proprietorship over the parcel of land.

15. Lastly that the plaintiffs failed to prove the tort of trespass as mandated by section 109 of the Evidence Act.

### **Analysis and determination**

The plaintiffs' case is that they are the bona fide owners of parcel of land known as ELD 17/95/158A-plots No.2,9, 11, 12, 15, 19 and 7 Shauri Yako estate. The plaintiffs produced letters of allotment, payment receipts, agreements, consents to transfer, rates clearance certificates, newspaper advertisement for regularization of land ownership which was a partnership between the National Land Commission and the uasin Gishu County government.

The issues for determination is as to whether the plaintiffs are bona fide owners of the suit parcels of land and whether they are entitled to the orders sought.

The plaintiffs gave evidence and produced documents to prove how they acquired the suit parcels of land either through allocation or purchase from the people who had been allotted the parcels. The plaintiffs further produced the rates payment receipts, consents to transfer, rates clearance certificates which were issued by the defendant.

If the plaintiffs were not bona fide owners, then the defendant could not have issued them with the consents and the clearance certificates. It is also on record that the defendant together with the National Land Commission have been regularizing land ownership in Shauri Yako estate within Eldoret town which the suit parcels of land fall. The plaintiffs have not been told by the two agencies that they are not the bona fide owners of the suit parcels of land.

The defendant did not tender any evidence to controvert the plaintiffs' evidence and state their position as to the status of the ownership of the suit parcels of land. Mr. Asego Counsel for the defendant opted not to call any witness even though the court had given him an opportunity to call his witnesses. He however cross-examined the plaintiffs leaving only the evidence of the plaintiffs on record.

In the case of **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited [2001] eKLR** it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. Further in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others 2009 eKLR** it was held that

*"it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."*

I am persuaded by this position that failure to tender any evidence makes the defence filed in court mere statements which have not been substantiated. As mentioned above, defendant's Counsel chose to cross-examine the plaintiffs rather than call witnesses, therefore the plaintiffs' evidence remained unchallenged.

In the case of **Irene Wangari Gacheru & 6 others v Attorney General [2017] eKLR**, Mativo J stated that the purpose of cross-examination is three-fold; **(a) To elicit evidence in support of a party's case; (b) To cast doubts on, or undermine the witness's evidence so as to weaken the opponent's case, and to undermine the witness's credibility; (c) To lay out a party's case and challenge disputed evidence. But once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses. Hence, failure to call witness leaves the petitioners evidence unchallenged'**

I agree with Mativo J. that once a party cross examines an opponent's witness then the best they can do is to call a witness to clear the issues raised during cross examination. I find that the plaintiffs have proved their case on a balance of probabilities and are therefore entitled to the orders sought in the plaint as prayed. I therefore make the following orders:

a) A Declaration is hereby issued that the plaintiffs are the bona fide owners of parcel of land known as ELDORET 17/95/158A - Plots NO. 2, 9, 11, 12, 15, 19 AND 7 Shauri Yako Estate and a permanent injunction restraining the defendants, their servants and or agents from interfering with the plaintiffs ownership and occupation of land.

b) Cost of the suit and interest

**DATED and DELIVERED at ELDORET this 13<sup>TH</sup> DAY of DECEMBER, 2018**

**M.A ODENY**

**JUDGE**

Judgment read in open court in the presence of Mr. Mogambi holding brief for Aseso for defendant and in the absence of Mr. Mwaniki for Plaintiff.

Mr. Koech: Court Assistant