



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

PETITION NO. 15 OF 2013

CLARE NASIMIYU WANJALA.....PETITIONER

VERSUS

MOSES WAKWOMA KAKOI..... 1ST RESPONDENT

DANSON SITATI SIMIYU2ND RESPONDENT/APPLICANT

THE LAND REGISTRAR

TRANS-NZOIA COUNTY.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

J U D G E M E N T

1. The petitioner filed her petition in this court on **27/8/2013**. This petition was heard by the **Hon. Justice E. Obaga** on **16/12/2014** when the petitioner and the 1st respondent testified. Judgement was entered against the first and second respondents on **4/2/2015**.
2. Soon thereafter on **12/2/2015**, the 2nd defendant brought a notice of motion dated **12/2/2015** in which he successfully sought to set aside the judgement entered against him on **4/2/2015**.
3. While determining that application for setting aside the court found that the 2nd respondent was properly served and that the draft defence that the 2nd respondent annexed to his application raised triable issues. The 2nd respondent was given 14 days within which to file a response to the petition.
4. The 2nd respondent complied and filed his response to the petition on **26/6/2015**, nine days after the ruling that set aside judgement.
5. He also filed a list of witnesses alongside the response to the petition. It is apparent from the record that the witness statements of **Alfred Juma Kaliwanga** and **Albert Namukana** who are listed as the 2nd respondents' witnesses were filed on **26/6/2015** alongside the 2nd respondents' own statement.
6. In her evidence the petitioner had testified that in **1998** she had entered into an exchange agreement with the first respondent who was the owner of **Bungoma/Tongaren/552** whereby the petitioner was to take **2 acres** of the 1st respondent's land at Bungoma and the 1st respondent was to take **2 acres** of the petitioner **Plot No. 664 at Matunda, Kiminini** area. The said exchange took place and each party went

and took possession of the land they had preferred in the exchange arrangement. Later the 1st respondent claimed that the plot which he had taken up was not two acres as agreed but that it was **1 ½ acres**. He therefore demanded to come back to his former land at Bungoma. He later came and, according to the petitioner, evicted the petitioner from the Bungoma plot and destroyed her house. The petitioner subsequently filed a case at the Tongaren Land Disputes Tribunal. The Tribunal ruled that she should return to her former land at Matunda Kiminini. She stated during the hearing on 16/12/2014 that when she went back to her former land at Matunda, Kiminini, she found that the 1st respondent had sold it to the 2nd respondent though the 2nd respondent was not in occupation thereof.

7. The 1st respondent while testifying in the case admitted the exchange transaction. He caused an excision of **2 acres** from his Bungoma land for the petitioner who took possession. However when he took surveyors to the petitioner's Kiminini plot, he found it to be **1 ½ acres**. He then went to the Tongaren Land Disputes Tribunal which ruled in his favour. The petitioner was ordered to leave the 1st defendant's land and go back to her land at Matunda Kiminini.

8. All the above facts can be gathered from the evidence of the petitioner and the 1st respondent given in court on 16/12/2014.

9. It would have been expected that after the setting aside the judgement in this matter the 2nd respondent would have come to court and testified and called witnesses in his own favour. This was not to be. On the 7/2/2017 when the matter came up for full hearing the court noted that the 1st and 2nd respondents were properly served and that the 2nd respondent had filed a response to the petition. The court therefore gave a date for judgement in the matter in the absence of both respondents.

10. However it is noted that a defence if brought to the notice of the court must be considered even under the above described circumstances. For this reason the court examined the defence of the 2nd respondent to the petition. This is the defence filed on **26/6/2015**. In it the 2nd defendant expressed himself in 15 paragraphs. The gist of the defence is that the plot known as **Kiminini/Matunda/Block 7/664** measuring approximately **0.0809 Hectares** was his property which he acquired by way of purchase for a valuable consideration of **Kshs.42,000/=** from the owner a **Mr. Francis Namukana** in the year **1998** and the petitioner is a trespasser. This is a curious allegation given that the 2nd respondent does not seek any orders against the petitioner in the form of eviction. He avers that as at the time he bought the parcel of land, there were no titles. He states that a number of persons applied for survey and allocation of numbers, and title deeds were issued in the year **2007**. He draws a distinction between the land claimed by the petitioner and his land, saying that the petitioner claimed **Plot No. Elgon Investment Estate Limited Milele 664** while his is referred to as **Kiminini/Matunda Block 7/664**. His land measures **0.2 Hectares** while the petitioners is said to be **2 acres**. He accuses the petitioner of not being specific in her petition as to whether the 2nd defendant is the one "managing" her plot, and that she enjoined him in the proceedings without proper research. He avers that he did not know the 1st respondent and the petitioner and he had never had any dealings with them. He avers that the person from whom he bought the plot has not been enjoined as a party in this matter.

11. The 2nd respondent reiterates some of these facts in a statement signed by himself dated **26th June, 2015** and filed in court on same date. The 2nd defendant's averments of purchase of land and lengthy involvement in the process of survey and procurement of title are corroborated in the statements of his witnesses, **Alfred Juma Kaliwanga** and **Albert Namukana**. These statements were filed on **26/6/2015**. In addition the 2nd respondent annexed to his response a copy of land sale agreement between him and one **Francis Namukana** which is dated **19/10/1998**. He also annexed a copy of the title deed in respect of **Kiminini/Matunda Block 7/664**. The copy of title states that this land measures approximately **0.0809 Hectares** which is substantively less than the amount of land the petitioner claimed in her petition, that is, **2 acres**.

12. It would have been more advantageous for the determination of this case to have the 2nd respondent

appear in court to testify orally and produce the documents that he had filed.

13. However since this did not happen, this court is compelled to compare the contents of the 2nd respondent's defence, witness statements and documents with the petitioner's case without the benefit of his evidence-in-chief or cross examination.

14. In the case of *Hon. Daniel Toroitich arap Moi -vs- Mwangi Stephen Muriithi (Civil Appeal No. 240 of 2011 [EKLR])*. The court stated as follows:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine the evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof the claim is and must be dismissed. The standard of proof in a civil case on a balance of probabilities does not change even in the absence of a rebuttal by the other side”.

Notably the court in that case was sitting on an appeal against the decision of the High Court in a Constitutional Petition.

15. An analysis of the case of the petitioner vis a vis the defence of the 2nd respondent brings to the fore several important findings:-

One is that the size of the land claimed by the petitioner is materially greater than the land comprised of in the title **No. Kiminini/Matunda Block 7/664** which is claimed by the 2nd respondent.

Secondly, contrary to the 2nd defendant's averment in his statement of defence, the petitioner stated very clearly in her evidence in chief on 16/12/2014 that the 2nd defendant is not staying on her land. In her further statement before the court made on 7/2/2017 the petitioner, on being questioned by the court stated that there is no longer any dispute regarding the title to her land as it was finally registered in her name. It appeared that as at 16/12/2014 her only concern was that the 1st defendant and the chief should rebuild her houses which she alleged that the two had demolished.

16. Thirdly, it is clear that the 2nd respondent purchased his land on the 19th October, 1998 from one Francis Namukana and that he followed up on the process of survey and title till title was issued in the year 2007. Nowhere in her evidence does the petitioner state that she has met or dealt with the 2nd respondent. In her evidence-in-chief she stated that:-

“I hear that the Matunda plot was sold by the 1st defendant..... I now want the title in the name of the 2nd defendant cancelled so that I go back to my land”.

It is this alleged sale transaction that the 2nd defendant denies. Although the petitioner conducted a search in the Trans-Nzoia District Land Registry on 1/8/2013 on **Plot Number Kiminini/Matunda Block 7/664**, there is nothing to prove that the said Land Reference Number referred to her plot which she had exchanged for two acres to be carved out of the 1st respondents land. Indeed a close perusal of the application for official search dated 1/8/2013 shows that whereas the petitioner was intent on conducting an official search on a plot referred to as **Masaba/664** the outcome shown on the overleaf was in respect of **Kiminini/Matunda Block 7/664**.

17. The other fact worth of notice is that even if the decree of the Senior Resident Magistrates Court stated that the petitioner should go back to her land **Elgon Investment Estate Limited Milele Plot N. 664**, this decree could only have been obtained at the instance of the petitioner. In the exchange agreement between her and the 1st defendant the petitioner appears to have agreed that her land was that referred to as **Elgon Investment Estate Ltd Milele Plot No. 664**, a position she still held as at the date of

filing of her petition.

18. It is the duty of this court to make a finding as to whether **Title Number Kiminini/Matunda Block 7/664** is the same land referred to as **Elgon Investment Estate Ltd Milele Plot No. 664**.

19. The foregoing analysis demonstrates that there is no evidence on record that those two descriptions refer to one and the same plot of land. This is further buttressed by the fact that in a ruling of this court dated 30/7/2014 the court noted that the petitioner had settled on her land and her only concern was that the said land “is in the name of the 2nd respondent”.

20. There is little or no possibility that the petitioner could have remained peacefully settled on land registered in the name of the 2nd respondent without any alarm being raised by the 2nd respondent who is aware of this case. It is noteworthy that the 2nd respondent, even when he filed his defence, did not seek eviction of the petitioner from the land she admittedly occupied.

21. The upshot of all the foregoing is that the petitioner was from the inception of her petition gravely mistaken as to what land reference number properly described the land that she was occupying, hence this petition.

I therefore find that there was no transfer of the petitioner’s land to the 2nd respondent by the 1st respondent.

There is a claim of violation of rights of the petitioner in the body of the petition. The only prayer for damages for the destruction of the petitioner’s properties is prayer No. (iii). In her supporting affidavit the petitioner states at paragraph 8 that the 1st respondent finally came to the suit land and destroyed all her household goods and crops and also destroyed her houses whereupon she reported the matter to the police. No evidence of any entry into an Occurrence Book or other record was produced and the outcome of the alleged investigations into the incident if any, was not stated by the petitioner. There is therefore no evidence that the 1st respondent or the chief demolished the houses put up by the petitioner. Each party lost the developments they had erected on the plots they had gone to live on after the exchange transaction was effected. The prayer for *mesne* profits in the petition has no basis because each party was occupying their respective parcels which they were entitled to do as per the exchange agreement.

DETERMINATION

22. In the light of the findings above it is now ordered as follows:-

1. That the petitioner’s prayer No. (1) in the petition dated 27/8/2013 is denied as it is apparent that the Land Reference Kiminini Matunda Block 7/664 and Elgon Investment Estate Limited Milele Plot No. 644 do not refer to the same plot.

2. The order of eviction sought in prayer No. (ii) in the petition dated 27th August, 2013 is hereby denied for the reason that the 1st and the 2nd respondents are not in occupation of the petitioner’s plot of land.

3. The prayer No. (iii) in the petition dated 27th August, 2013 is hereby denied for the reason that both parties were validly settled on their respective plots as per entitlement under the exchange agreement. A claim for mesne profits is therefore not merited. Similarly a prayer for damages for destruction of the petitioner’s property is denied since she failed to prove her allegations of damage to her property by the respondents. The petition is therefore entirely dismissed.

23. However, in the light of each and every party’s role in this dispute as seen from the record, I will not order that the plaintiff meets the costs the defendants in this litigation. Even though the plaintiff’s mistake occasioned the filing of this petition, the defendants failed to assist the process of expeditious

disposal of the matter by their reluctance to shed light on the necessary facts in a timely manner.

For this reason I order that each party bear its own costs.

Dated, signed and delivered at Kitale on this 15th day of March, 2017.

MWANGI NJOROGE

JUDGE

In presence of:

The plaintiff and in the absence of the defendants who did not attend the hearing despite being served.

MWANGI NJOROGE

JUDGE

15/3/2017