



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 38 OF 2007

LAWRENCE SESE 1ST PLAINTIFF
NAHASHON MOGAKA 2ND PLAINTIFF
GERALD OKEYO 3RD PLAINTIFF
FERDINAND MOGERE 4TH PLAINTIFF
ERNEST BORURA 5TH PLAINTIFF
CHARLES NYANGAI 6TH PLAINTIFF
PATRICK OYUGI 7TH PLAINTIFF

VERSUS

JEREMIAH OTIENO OKENYE 1ST DEFENDANT
SETTLEMENT FUND TRUSTEES 2ND DEFENDANT

J U D G M E N T

1. The plaintiffs brought the present suit vide a plaint dated 4th April 2007 and the plaintiffs were suing on their own behalf and on behalf of members of Gesima Settlement Scheme and Rigoko Community. A total of 15 land parcel owners are shown to have given authority to the plaintiffs to institute the suit for and on their behalf.

2. The plaintiffs state that they and the 1st defendant were allottees of parcels of land by the 2nd defendant within Gesima Settlement Scheme. The plaintiffs further aver that apart from the individual plots allocated to members there were public utility plots set aside within the Gesima Settlement Scheme notably **Plot No. 812** measuring 4 acres and **Plot No. 812** measuring 1 acre which were intended for use by members of the public.

3. The plaintiffs claim the 1st defendant who was allocated land parcel **No. 45** within the scheme fraudulently caused the public Plots **812** and **813** to be amalgamated with his **Plot No. 45** thereby denying the other members of the scheme/community access to the use of the public plots where public services and utilities were being offered to the public. The plaintiffs further averred that the 1st defendant on or about 4th April 2006 caused the subdivision of land parcel **Gesima Settlement Scheme/45** into four

parcels Nos. **562, 563, 564** and **565** which were registered in the 1st defendant's name.

4. The plaintiffs prayed for judgment against the defendants jointly and severally for:

(a) A declaration that part of Gesima/Settlement Scheme/45 or any of its resultant subdivision upon which there is established water pump, cattle dip, Rigoko public Health Dispensary and Rigoko Pentecostal Assemblies of God measuring approximately 5 acres is public purpose land for the benefit of the plaintiffs as members of Gesima Settlement Scheme and is held by the 1st defendant in trust for himself and for them.

(b) This honourable court do order rectification of register of LR No. Gesima Settlement Scheme/45 (now comprised in its resultant subdivisions as Gesima Settlement Scheme/562, 563, 564 and 565) by limiting the acreage thereof by 5 acres which portion of land shall be registered in the name of the 2nd defendant in trust for the Gesima Settlement scheme.

(c) General damages.

(d) The defendants be condemned to pay costs of the suit.

(e) Any other or further relief this honourable court may deem fit and just to grant.

5. The 1st defendant filed a statement of defence dated 24th September 2007 which was amended on 6th August 2009 pursuant by the leave granted by **Musinga, J.** in his ruling of 20th July 2009. The 1st defendant through his defence admits being the allottee of land parcel **Gesima Settlement Scheme/45** which he has since subdivided into land parcels **561-565**. The 1st defendant states he was the registered owner of land parcel No. **45** but denies any knowledge of the creation and/or the existence of land parcels **812** and **813** claimed by the plaintiffs. The 1st defendant denies the particulars of fraud attributed to him by the plaintiffs and asserts that he was allocated his **Plot No. 45 Gesima Settlement Scheme** in 1964 and any claim by the plaintiffs against him if indeed one existed is statute barred. The 1st defendant avers the plaintiffs' suit against him is misconceived and does not disclose any reasonable cause of action against him and the same ought to be dismissed.

6. The 2nd defendant did not appear and/or file any statement of defence. The suit was part heard before **Makhandia J.** (as he then was) on 31st May 2011 when the 7th plaintiff testified as PW1. **Okong'o J.** took the 3rd plaintiff's evidence who testified as PW2 and the evidence of PW3 one Philemon Mokaya on 28th July 2014. The suit was fixed for further hearing on 12th May 2015 when the hearing was adjourned to 2nd July 2015 on the application of the plaintiffs. On 2nd July 2015 when the matter was fixed for further hearing before **Okong'o, J.** the plaintiffs sought for an adjournment which the court declined to grant and allocated time for hearing of the suit later in the day. At the allocated time Ms. Mutiria advocate who had held brief for Mr. Bosire advocate for the plaintiffs did not appear and the court permitted the 1st defendant to proceed to offer his defence. The 1st defendant testified as the sole witness for the defence and the trial was closed.

7. The court directed the parties to exchange written closing submissions within 60 days of the date of closure of the hearing. The 1st defendant filed his submissions on 24th April 2017 while the plaintiffs' submissions were filed on 29th May, 2017. **Okong'o J.** having been transferred from the station over 18 months ago the task fell upon me to prepare and deliver the judgment.

8. The Evidence by the Parties;

The 7th plaintiff (PW1) testified he and the other 6 plaintiffs were neighbours at Gesima Settlement where they have all settled. The witness stated he knew the 1st defendant who was his immediate neighbour. He stated that they were all allocated land by the 2nd defendant in 1964/1965 and that they all occupy

their parcels of land and have title deeds. The witness testified that the land parcel allocated to the 1st defendant did not include land parcels **812** and **813** which he stated were reserved for water pump, pipes and cattle dip. The witness stated that land parcel **812** which measured about 4 acres was reserved for a cattle dip while parcel **813** which measured about 1 acre was reserved for a water pump. The witness stated that the 1st defendant's plot did not include the two public plots and that the public had been using the plots freely until 2004 when the 1st defendant fenced them off. PW1 further stated that when he sought clarification from the lands he found that the two parcel **812** and **813** had been included as part of the 1st defendant's land parcel **Gesima Settlement/Scheme/45**. PW1 produced as "**PEx.1**" an extract of the survey map for the area which he stated showed the 1st defendant's parcel **45** had "**swallowed up**" parcels **812** and **813**. The witness stated the 1st defendant indicated he bought the two plots from the 2nd defendant for kshs. 8,000/=. The witness further stated since the merge of the two plots into the 1st defendant's parcel No. **45**, he had no access to the cattle dip, water and the dispensary and sought orders that the 1st defendant be compelled to allow him access to the facilities and the costs of the suit.

9. PW1 on cross examination affirmed that he was not an allottee of the 2nd defendant but purchased his parcel of land Plot No. **76** from one Musisa Ombeyo. He further stated that his land does not share a common boundary with the 1st defendant's land but they are separated by a river. He stated he never knew whether land parcels **812** and **813** were ever registered and that he never ascertained with the 2nd defendant if they ever existed. He further stated that they discovered parcels **812** and **813** had been merged into parcel No. **45** in 2004 and on further follow up with the lands office, they learnt the 1st defendant had subdivided parcel No. **45**. PW1 further stated he never knew what the acreage of the 1st defendant's land was but was emphatic that the Rigoko Public Health Dispensary, the water pump and cattle dip were on parcels **812** and **813** which were subsumed into parcel No. **45**. He said he wanted to have unrestricted access to the public facilities.

10. PW1 stated that he wanted the two parcels of land to revert to the original status where they were accessible to the public as public utilities. The plaintiffs following a ruling made by **Musinga, J.** (as he then was) on 20th July 2009, amended the plaint on 29th July 2009 to the intent that their claim was for and on their own behalf as individuals and not on behalf of the community who were not a registered society or organization.

11. PW2, the 3rd plaintiff herein in his testimony stated that he was allocated land in Gesima Settlement Scheme in 1964 and that his land and that of the 1st defendant are separated by a road. The witness further stated that there were some public utility plots that were set aside for the cattle dip and water spring and that there has never been any dispute about these plots and no one had claimed these them. The witness denied having instructed any advocate to institute proceedings on his behalf. The witness further stated he did not know the 1st defendant's land parcel number and/or that the public utility plots were consolidated and merged with the 1st defendant's plot. The witness further stated the public health centre was put up by residents of Gesima Settlement Scheme and according to the residents the health centre was being constructed on government land.

12. PW3 like PW1 and PW2 was allocated land in Gesima Settlement Scheme in 1964 and his evidence was that at the time they were allocated land there were some plots reserved for public utility which comprised of a cattle dip and water spring. The witness stated that the 1st defendant's land shares a boundary with the public utility land. The witness however did not know the particulars of the public utility plots and was not aware that anybody holds title over the public plots.

13. After PW3 testified the plaintiffs stated they had two more witness including an expert witness. Further hearing of the suit was adjourned on 12th May 2015 on the application of the plaintiffs. On 2nd July 2015 when the suit was scheduled for further hearing the plaintiffs' application to adjourn the hearing was rejected by the court and the matter was allocated time for hearing at 11.30am. When the plaintiffs failed to turn up at the allocated time the court allowed the 1st defendant to present his defence.

14. The 1st defendant testified that the plaintiffs were his neighbours at Gesima Settlement Scheme where they were all allocated land by the government and issued with individual titles. The 1st defendant stated he was allocated land parcel **Gesima Settlement Scheme/45** and produced the area list used to allocate and prepare titles for all the members (“**DEx.1**”). As per the area list the 1st defendant stated his land parcel No. **45** measures 8.3Ha. The 1st defendant stated that land parcels **812** and **813** were not included in the area list and did not exist in 1964 when the plots were allocated. The 1st defendant stated that he has never laid any claim to land parcels **812** and **813**. The 1st defendant further testified that he consented to the putting up of a Health Dispensary on his land parcel No. **45** but averred that Rigoko PAG Church was put on his land without his authority. The 1st defendant produced a survey map (“**DEx.3**”) which shows the layout of his parcel No. **45**. The 1st defendant further testified that he resides on land parcel No. **45** which he has occupied since 1964 and has effected developments thereon. The defendant stated that in 2006 he subdivided his land into five (5) portions namely **Gesima Settlement Scheme/561, 562, 563, 564** and **565** as per the survey map produced as (“**DEx.4**”).

15. The 1st defendant produced copies of titles to parcel **45** and copies of title and copies of official searches for the subdivisions as “**DEx.5a-f**”. The 1st defendant denied that he combined Plot No. **812** and **813** to form land parcel No. **45** and asserted that the plaintiffs have no claim or interest to land parcel No. **45** and that there is no basis for the rectification of the register of land parcel No. **45** as sought by the plaintiffs who have their own individual parcels of land. He sought the dismissal of the plaintiffs’ suit with costs.

16. Analysis and determination of the issues:

After reviewing the pleadings, the evidence and the final submissions filed by the parties the issues identified for determination are as follows:-

(i) Whether there were land parcels LR Nos. Gesima Settlement Scheme/ 812 and 813 identified as public utility plots within Gesima Settlement Scheme?

(ii) Whether the 1st defendants land parcel Gesima Settlement Scheme/45 was created through amalgamation of land parcels 812 and 813?

(iii) Whether a case for the rectification of the register of land parcel 45 or the resultant subdivisions therefrom has been made out?

(iv) What reliefs, if any, should the court grant?

17. The entire case of the plaintiffs is predicated on the averment that at the time they, together with the 1st defendant were allocated land in Gesima Settlement Scheme there were some public utility plots that were set aside for public purposes and which the 1st defendant has since appropriated by having them merged or amalgamated with his land parcel No. **45**. The 1st defendant denies that land parcels **812** and **813** existed as separate land parcels or that they were set aside as public utility plots. The 1st defendant’s position is that he was allocated land parcel No. **45** in Gesima Settlement Scheme way back in 1964 and in respect of which he was issued with a title deed which he has since subdivided into five (5) subtitles and maintains the plaintiffs claims against him are unfounded as they have their own parcels of land and have no interest at all in land parcel No. **45** Gesima Settlement Scheme.

18. The plaintiffs apart from stating that there were public utility plots that were reserved for public use did not tender any specific evidence to show that indeed these plots were designated as parcels Nos. **812** and **813**. Although PW1 in his evidence stated that he had a survey map of Gesima Settlement Scheme which showed that parcel **812** and **813** were separate and distinct from the 1st defendant’s land parcel No. **45**, he did not produce the map as an exhibit. Instead PW1 produced a survey map (“**PEx. 1 and 2**”) which showed only parcel **45** and did not show parcels **812** and **813**. PW1 explained that the survey map was made after parcel No. **45** had allegedly “**swallowed**” parcels **812** and **813**.

19. The letter of allotment of parcel No. 45 made on 3rd December 1964 is clear that the plot was allocated to the 1st defendant. The survey map “DEx.3” tendered in evidence by the 1st defendant shows that parcel No. 45 shares a boundary with parcel No. 76 owned by PW1 and parcel 97 owned by PW2. The survey map does not show parcels 812 and 813. The 1st defendant further produced another survey map “DEx.4” which showed parcels Nos. 561, 562, 563, 564 and 565 which were the resultant parcels after parcel No. 45 was subdivided in 2006. PW2 and PW3 did not know the particulars of the public utility plots save that they started the same were in existence and were being used by the public. The 1st defendant in his evidence produced a copy of a letter dated 5th February 2004 from the District Surveyor, Nyamira (“DEx.2”) which confirmed him to be the owner of land parcel No. 45. The letter addressed to the District Officer, Nyansiongo was in the following terms:-

“I hereby confirm and certify that Mr. Jeremiah Otieno Okenye ID/No. 1608923 is the owner of parcel No. Gesima 55/45.

The ground position was verified and confirmed.”

20. The import of this letter is that the survey department were confirming the physical position of land parcel No. 45 on the ground which they had verified and confirmed. If there were any public utility plots, the survey department would have delineated them and set them apart. If indeed there were any public utility plots that were included in land parcel No. 45 then the same formed part of the said plot and the person allocated the plot became the owner. The fact that the owner of parcel No. 45 may have allowed continued use by members of the public of the facilities, could not affect his right of ownership. The plaintiffs tendered no evidence that indeed the alleged public utility plots were intended to be preserved for public use. There is nothing from the Ministry of Lands and Settlement to suggest this was the intention. The Settlement Fund Trustees who were named as the 2nd defendant in the suit did not appear and did not file any pleadings. Without any evidence from the Ministry of Lands and Settlement that indeed there were public utility plots or facilities that were set aside for the public, the title of the 1st defendant to parcel No. 45 has to be upheld particularly noting that the title was a first registration under Section 143 of the **Registered Land Act**, Cap 300 Laws of Kenya (now repealed).

143(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

21. The plaintiffs have not in my view demonstrated by way of any evidence that the 1st defendant caused the alleged public utility plots to be annexed to his parcel of land. The plaintiffs have also not provided any proof that there were public utility plots designated as Plot Nos. 812 and 813 Gesima Settlement Scheme. The area list for the plots within the scheme (“DEx.1”) does not show the existence of any such plots. The area survey maps (“DEx.3 and 4”) equally do not show any such plots. The 1st defendant was as far back as 1964 allocated **Plot No. 45** Gesima Settlement and that is the plot he was issued title to in 2003 which he subdivided in 2006 to produce parcels 561 – 565. Where was the fraud on his part? There was equally no evidence of any omission or mistake tendered on the part of the 2nd defendant. The Ministry of Lands and Settlement did not own up to any mistake or omission having been made while processing the titles. If anything the District Surveyor confirmed and verified the 1st defendant’s Plot No. 45 on the ground. If any omission or mistake had been made the surveyor would have picked the same during the ground verification. In the premises, I am not persuaded the plaintiffs have discharged their burden of proof as to the culpability of the 1st defendant. The burden of proof rested with the plaintiffs to prove their allegations under the provisions of Section 107 and 108 of the **Evidence Act**, Cap 80 Laws of

Kenya.

22. Section 107 and 108 of the **Evidence Act** provides:

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of prove lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

23. I have held that the plaintiffs have not proved that indeed parcels **812** and **813** existed as separate and distinct parcels of land and further that the plaintiffs have not proved any fraud against the 1st defendant and/or that there was any omission or mistake on the part of the 2nd defendant so as to invite the court to intervene and order the rectification of the register of land parcel **No. 45** Gesima Settlement Scheme. The plaintiffs accordingly have not discharged the burden of proof that rested on them.

24. In the result after my analysis and evaluation, of the evidence tendered by the parties, it is my finding that even though there may have been public utility service points within Gesima Settlement Scheme there is no proof that these were set apart as public utility plots. The court is alive to the fact that during resettlement of members of the public in farms previously held by the white settlers there are persons who were allocated parcels of land where Permanent Improvements (PI's) stood on those farms and on that account such persons paid extra amounts for those improvements. Whether that was the case as relates to the 1st defendant herein, is not clear but the point remains that his parcel of land No. **45** may have included such improvements. If that was the case, the plaintiffs would have no reason to impugn the 1st defendant's title. So much for the digression as the issue of (PI's) was not canvassed by the parties in their evidence but was alluded to by PW1 when he stated in his evidence that the 1st defendant had paid a sum of kshs. 8,000/=for the facilities.

25. Be it as it may be, the court after evaluation and consideration of the evidence adduced by the parties answers issues (i-iii) framed for determination in the negative. That it has not been shown that there were land parcels **812** and **813** reserved for public utility purposes within Gesima Settlement Scheme. That it has not been shown that the 1st defendant's land parcel **Gesima Settlement Scheme/45** was created through amalgamation of land parcel **812** and **813**. That no case has been made out for the rectification of the register of land parcel No. **45** or the resultant subdivisions therefrom.

26. The net result is that the plaintiffs have failed to prove their case against the defendants on a balance of probabilities. The plaintiffs' suit against the defendants is hereby ordered dismissed. The court has taken account of the fact that the plaintiffs and the 1st defendant are neighbours and will continue to be and for that reason exercises the discretion not to make any orders for costs. Each party to bear their own costs.

27. Orders accordingly.

Judgment dated, signed and delivered at Kisii this 28th day of July, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the 1st to 7th plaintiffs

Ms. Mireri for the 1st defendant

N/A for the 2nd defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE