REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 362 OF 2013

CHARLES LETOYA MAPELU ZAKAYO ……PLAINTIFF

VERSUS

SIMIREN SEGENY ……..DEFENDANT

JUDGMENT

(Plaintiff asserting that he is owner of a certain plot in Narok; plaintiff having an allotment letter not authenticated by the County of Narok; Records at County Offices showing defendant to be owner; plaintiff's suit dismissed)

A. INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of a plaint filed on 13 May 2013. In the plaint, the plaintiff has pleaded that he is the rightful, legal and beneficial owner of the parcel of land known as Plot No. 303 Block 7 Narok Town having been allocated by the Narok Town Council in the year 2005, and further through a renewal of allocation effected on 22 July 2010. It is pleaded that on 29 April 2013, the plaintiff paid the said plot a visit only to find that his fence has been pulled down and the defendant constructing a building. It is averred that a demand was made to the defendant to stop construction but this was ignored hence this suit. The prayers sought in the plaint are for :-

> *(a) A declaration that the parcel of land known as Plot No. 303 Block 7 Narok Town is rightfully owned by the plaintiff and that the defendant is a trespasser on the said land and the plaintiff is entitled to quiet enjoyment and possession of the same.*
>
> *(b) A temporary injunction do issue restraining the defendant whether by himself, his servants, agents, contractors and any other person other than the plaintiff from constructing, fencing, developing, entering, trespassing into the plaintiff's parcel of land known as Plot No. 303 Block 7 Narok Town or interfering in any way with the plaintiff's quiet enjoyment of the said land.*
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> *(c) A permanent injunction do issue restraining the defendant whether by himself, his servants, agents, contractors and any other person other than the plaintiff from constructing, fencing, developing, entering, trespassing into the plaintiff's parcel of land known as Plot No. 303 Block 7 Narok Town or interfering in any way with the plaintiff's quiet enjoyment of the said parcel of land.*
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> *(d) An order of eviction and demolition of illegal structures to issue against the*

defendant.

(e) Costs of this suit.

2. The defendant entered appearance and filed defence. In the defence, he has denied that the plaintiff is the owner of the Plot No. 303 Block 7 Narok Township (hereinafter, the suit property). He has denied that he has illegally commenced construction on the said plot as alleged. He has averred that the plaintiff is not entitled to any remedy. He has pleaded that the plaintiff has no interest in the said plot and has no right to a declaration that he is entitled to the said land. He has asked that the suit be dismissed with costs.

B. EVIDENCE OF THE PARTIES

3. The plaintiff testified that he is employed by the Narok County as Deputy Treasurer. He is also a businessman engaged in the real estate business. He testified that he was allocated the plot by the then Narok Town Council. He was given a letter of allotment which was directed returned, for new ones to be issued, and he was issued with the "renewed" letter of allotment on 22 July 2010. He produced in evidence this letter of allotment together with a rates demand dated 10 April 2013. He stated that the allotment letters were issued from a booklet which remained at the offices of the Town Council of Narok. The allotment letter is Serial No. 3545.

4. He stated that he took possession of the plot and fenced it sometimes in the year 2013 with posts and barbed wire. On 27 April 2013, he received information that his fence had been pulled down and when he went to the site, he found that it is the defendant who had pulled it down and was digging trenches for the foundation of a building. The defendant did not give an explanation why he was developing the plot and the plaintiff issued him with a demand letter which was ignored. In his list of documents, the defendant had exhibited a letter of allotment dated 7 July 1999 from the Commissioner of Lands, and on this, the plaintiff was of the view that it was not a proper one, for it does not specify the Block number though it gave the Plot No. 303. He testified that when he discovered interference with the plot, he sought assistance from the Sub-County Administrator but he was not assisted. He then moved to pay rates for the plot but his cheque was rejected because there was a contention over the ownership of the plot. He was advised that the plot belongs to the defendant who has a letter of allotment from the Commissioner of Lands.

5. In cross-examination, he stated inter alia that when he received his allotment letter, he was serving as Town Clerk of Narok Town Council. He agreed that allotment letters are issued by the Town Clerk and that in effect he issued an allotment letter to himself. He stated that he was not aware of any previous allocation of the land. He agreed that before he attempted to pay the rates on 13 May 2013, he had not made any previous attempts to pay rates.

6. After his evidence, counsel for the plaintiff requested for summons to issue to the County Secretary of Narok County, so as to produce the duplicate booklet for letters of allotment for Block 7 serial Numbers 3501 - 3550. Godfrey Ndubi Kwena, who is the Town Administrator of Narok County, came to testify on behalf of the County Secretary. Previously, he worked as the Town Clerk of Narok Town Council from the year 2011. He testified that he was unable to get the Booklet containing the Serial Number 3545. He checked on the handing over records, and he could not find this booklet having been handed over by the plaintiff, when he (the plaintiff) left office as Town Clerk. He testified that the plaintiff was Town Clerk upto December 2010.

7. In cross-examination, PW-2 testified that according to their records, the suit property is in the name of the defendant and not the plaintiff. He testified that when the Town Council noticed that several booklets of allotment letters were missing, it placed a notice in the Daily Nation newspaper of 13 May 2010, and the public was notified that these would no longer be valid documents. However, the booklet containing allotment letters Serial Numbers 3501-3550 was not among those advertised.

8. In re-examination, PW-2 testified that the public notice was issued by the plaintiff when he was still in office. He stated that the renewal allotment letters came in July 2010, after this public notice.

9. With the above evidence, the plaintiff closed his case.

10. The defendant testified as the sole defence witness. He testified that he is the owner of the suit property. He stated that his father organized for him to have the allotment letter and handed it over to him in the year 2004. He however did not produce the allotment letter in evidence. He did not follow up on the title but in the year 2012, he went to the pay for the rates and asked the Town Planner to point it out to him. He paid the rates in the year 2013, and tabled building plans which were approved.

11. In cross-examination, he stated inter alia that the allotment letter was issued in the year 1999 but his father gave it to him in the year 2004. He stated that it is his father who applied for the plot. His father was a councillor in the 1980s and 1990s.

12. With the above evidence the defendant closed his case.

C. SUBMISSIONS OF COUNSEL

13. Mr. Ndubi for the plaintiff reviewed the pleadings and evidence and inter alia submitted that the defendant's claim over the suit property is premised on a letter of allotment which was never produced in evidence. He nevertheless pointed out that the same only indicates Plot No. 303 but does not specify the Block where the plot is situated. He submitted that the defendant had deliberately evaded the scrutiny of the said letter of allotment and that the only inference that may be drawn is that it is not a genuine document. He also pointed out that the defendant had not produced any receipts for payments of stand premiums, but the receipts in his bundle of documents showed payment to the Town Council of Narok, and not to the Commissioner of Lands. He submitted that the land was held in trust by the Narok Town Council and that it was the Narok Town Council which was the allotting authority. He submitted that the rates records were altered to replace the name of the plaintiff with that of the defendant. He submitted that this was a classic case of manipulation of records and that the computer records was "garbage in" in the absence of the primary records. He asked that the plaintiff's suit be allowed.

14. Mr. Geoffrey Otieno for the defendant, submitted that the plaintiff's letter of allotment came after the defendant's and that as at the year 2010, the plot could not be allocated as it was already in private hands. He relied on the case of ***Rukaya Ali Mohammed vs David Gikony & Another, Kisumu High Court Civil Appeal No. 9 of 2004***. He also submitted that this court be guided by the evidence of PW-2 on the ownership of the land. He submitted that the plaintiff has not proved ownership of the suit property.

D. DECISION

15. I have considered the pleadings, the evidence and submissions of counsels. The claim of the plaintiff is that he is the owner of the suit property, which is Plot No. 303 in Block 7 of Narok Township. His claim is premised upon a letter of allotment serial No. 3545 which he produced in evidence. He does not have any certificate of title, or any other document to demonstrate proprietorship. The question that arises is whether through the allotment letter serial No. 3545, the plaintiff has demonstrated sufficient proof of ownership of the suit property.

16. It will be observed that the letter of allotment of the plaintiff could not be authenticated as the duplicate booklet, from where it was derived from, could not be traced in the records of the County Government of Narok, the successor of the Town Council of Narok. This booklet was at some point in the custody of the plaintiff, but the plaintiff never handed it over, at least according to the records at hand, when he ceased being the Town Clerk of the Town Council of Narok ; its whereabouts remain unknown. Interestingly, several other booklets of allocation of plots also went missing while the plaintiff was still in office as Town Clerk, and these were advertised as lost by the plaintiff. However, the particular booklet containing the plaintiff's allotment alleged allotment letter was never advertised as lost. We will never know whether this booklet actually contained the allotment letter of the plaintiff or not. Suffice it to say that PW-2 , an officer of the County Government of Narok, and himself a former Town Clerk, could not authenticate the allotment letter of the plaintiff. He stated that in the absence of the booklet, he can only refer to other records, particularly the computer records, and the same show that the suit property is

registered in the name of the defendant who is noted to be the rate payer.

17. The defendant himself did not make any counterclaim to this suit. His defence however, is that he is the proper allottee of the suit property, on the basis of an allotment letter issued in the year 1999 by the Commissioner of Lands. When giving evidence, he however opted not to produce the letter of allotment that is said to be in his favour. I therefore do not have the benefit of any documentary evidence that the suit property was allotted to the defendant by the Commissioner of Lands as alleged. I cannot say that his allotment letter is earlier as it has not been tested in evidence and therefore I do not see the applicability of the case of ***Rukaya Ali Mohamed*** (cited in ***R v City Council of Nairobi & Another ex parte Christopher Mwangi Kioi & 3 Others*** (2014) eKLR), where it was held that the Commissioner of Lands could not subsequently allocate land where he had already issued an allotment letter that had been complied with.

18. It will be observed that the plaintiff has tabled an allotment letter which cannot be authenticated and which is contradicted by the records at the Narok County offices, whereas, the defendant has not tabled any allotment letter. None of the parties have any certificate of title deed or certificate of lease to the said property. If I had seen, any, then pursuant to the provisions of Section 26 of the Land Registration Act, I would have presumed that the person indicated in the certificate of title, is the proper owner of the suit property. But as matters stand, none of the parties has really tabled overwhelming evidence of ownership of the suit property.

19. In this suit, the plaintiff has asked that he be declared the owner of the suit property. I am afraid that in absence of his allotment letter being authenticated, and in absence of any record at the County of Narok that he is entitled to the suit property, and in absence of any certificate of lease or certificate of title deed, he has failed on a balance of probabilities to prove that he is the owner of the suit property. In as much as the defendant has not done much to prove that he is the owner, the onus was always on the plaintiff to prove that he is entitled to be declared the owner of the suit property, which I am afraid the plaintiff has failed to do.

20. There was no counterclaim filed by the defendant, and in absence thereof coupled with the gap in evidence that would prove prima facie, that he is entitled to the suit property, I hesitate to issue any declaration that he is, on a balance of probabilities, the proprietor of the suit property. The only thing that I can say, is that the plaintiff has not demonstrated that he has a better title than that of the defendant over the suit property. The core issue in this case is whether the plaintiff is entitled to the suit property and from the evidence, I have already held that he has not demonstrated that he is entitled to the same.

21. The totality of the above is that the plaintiff has failed to prove his case on a balance of probabilities. His case is hereby dismissed with costs.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 14th day of May 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr Keboga holding brief for Mr Ndubi for plaintiff.

Mr Geoffrey Otieno for defendant

Court Assistant : Janet.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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