



Eldo Amani Self-Help Group (Suing Through its Officials) Sammy Njuguna Wachira - Chairman) & another v Wanjau & another (Environment & Land Case 51 of 2016) [2024] KEELC 3434 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3434 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 51 OF 2016**

JM ONYANGO, J

APRIL 30, 2024

BETWEEN

**ELDO AMANI SELF-HELP GROUP (SUING THROUGH ITS OFFICIALS)
SAMMY NJUGUNA WACHIRA - CHAIRMAN) 1ST PLAINTIFF
STEPHEN KIRUNGA KAMAU - TREASURER 2ND PLAINTIFF**

AND

**CHRISTOPHER WANJAU 1ST DEFENDANT
MINISTER FOR LANDS UASIN GISHU COUNTY GOVERNMENT 2ND
DEFENDANT**

JUDGMENT

1. The Plaintiffs claim to be the owners of all that parcel of land known as Plot No. 17/96/65/85 Zone C Shauri Yako (hereinafter referred to as the suit property) having purchased the same for valuable consideration. They have sued the defendants for trespass upon the suit property and they seek the following reliefs:
 - a. A declaration that the plaintiff is the rightful owner of the land parcel known as Plot No. 17/96/65/85 Zone C Shauri Yako and s entitled to quiet, peaceful, uninterrupted ownership, occupation and possession as a matter of exclusive appurtenant rights thereof.
 - b. A permanent injunction against the defendants and their agents, restraining them from adversely interfering, alienating, transferring, selling and/or in any way with the plaintiff's exercise of exclusive quiet possession, occupation and appurtenant ownership of the suit land known as Plot No. 17/96/65/85 Zone C Shauri Yako.
 - c. Costs and interest of the suit.



2. Upon being served with the Plaint and Summons to enter appearance, the 1st defendant filed a Defence and Counterclaim. In the Defence he denies the plaintiff's claim while in his Counterclaim he claims that he is the true owner of the suit property and that it is the plaintiff who is a trespasser.
3. The 2nd defendant did not file any Defence. After the close of pleadings the case was set down for hearing and both parties testified although learned counsel for the Plaintiff failed to attend court on the date when the 1st Defendant testified and he therefore did not cross-examine the 1st Defendant's witness.
4. The Plaintiff subsequently filed an application to recall the 1st Defendant but after due consideration of the same, the court dismissed the application.
5. An application to review the order for dismissal was equally considered and dismissed. It is therefore mischievous of the plaintiff's counsel to submit that his client was prejudiced as he was not given an opportunity to recall and cross-examine the 1st Defendant.
6. The reasons why the plaintiff's counsel failed to cross-examine the 1st Defendant's witness are well known to the plaintiff's counsel and are captured in the two rulings delivered by the court on 23rd September 2022 and 25th September 2023.
7. In any event, it is clear from the proceedings of 7th December 2021 that the plaintiff's witnesses were present in court when the 1st Defendant's witnesses testified and their representative one Sammy Njuguna cross-examined the witnesses after the Plaintiff's counsel failed to attend court.

Plaintiff's Case

8. Be that as it may, the Plaintiff's case is that they bought the suit property from one Francis Kariuki Mwangi for the sum of Kshs. 350,000. The said Francis Kariuki Mwangi had in turn purchased the suit property from Barnabas Silew Cheruiyot who was the original allottee, having been allocated the plot by the Eldoret Municipal Council. The Plaintiff was shown the boundaries of the plot and they took vacant possession thereof.
9. On his part, the 1st Defendant maintains that he is the proprietor of the suit property having bought it from one Joseph Kipkemei Busienei in 2015. The said Joseph Kipkemei Busiweini who testified as DW1 told the court that he was allocated the suit property by the Eldoret Municipal Council in 1997 and he paid for it in 1998. He then took possession of the land and fenced it but his fence was demolished and some people trespassed on the land and constructed a church thereon. He subsequently sold the plot to the 1st Defendant on 22nd April, 2015 in order to raise money for treatment in India.

Defendant's Case

10. The 1st Defendant testified that when he purchased the plot from DW1, it was vacant and he later started developing it by constructing a foundation. He was however unable to continue with construction as he was served with court papers. Upon cross-examination by the plaintiff's witness, he stated that his plot was known as PDP 17/96/65 plot No. 85 Zone C which was the same as the one in the Plaintiff's letter of allotment.
11. After the close of the Defendants' case the parties filed their final submissions.

Plaintiff's Submissions

12. In his submissions, learned counsel for the Plaintiff identified the following issues:



- i. Whether the Plaintiffs are the lawful, bona fide and legitimate owners of the suit land registration No. Plot No. 17/96/65 plot No. 85 Zone C Shauri Yako and are entitled to exclusive rights of ownership and appurtenant rights and interests as bona fide purchasers for value.
 - ii. Whether the 1st Defendant trespassed over the suit land.
 - iii. Whether an order of permanent injunction should issue against the 1st Defendant, his agents, servants and/or employees restraining him/them from encroaching, alienating transferring, disposing and in any other manner interfering with the plaintiff's exclusive rights to ownership, quiet possession, occupation and use of the suit property.
 - iv. Who should pay costs.
13. It was counsel's submission that the plaintiff had adduced cogent evidence to demonstrate that the plaintiff is the lawful proprietor of the suit property, The plaintiff's first witness explained that the plaintiff bought the suit property from one Francis Kariuki Mwangi who in turn bought the plot from the first allottee, one Barnabas Silew Cheruiyot. The said Francis Kariuki Mwangi occupied the land from 1997 to 2010 when he handed vacant possession to the plaintiff. He produced various exhibits including the letter of allotment dated 16th February, 1997 in the name of Barnabas Silew Cheruiyot, the sale agreement between Barnabas Silew Cheruiyot and Francis Kariuki Mwangi, consent to transfer addressed to the Town Clerk dated 17th February, 2002, a Lease Agreement between Francis Kariuki Mwangi and Jesus Alive Centre and a Request for Consent to Transfer to Eldo Amani Self Helep Group (1st Plaintiff) addressed to the Town Clerk as well as a Sale Agreement dated 11th June, 2010 between the Plaintiff and Francis Kariuki Mwangi.
 14. It was counsel's submission that the 1st Defendant's claim that he is the owner of the suit property is unproved, unbelievable and unfounded as he only trespassed on the suit property in 2016, removed the beacons and started constructing a foundation, prompting the Plaintiff to institute this suit.
 15. Counsel submitted that the Plaintiff had proved that the 1st Defendant had trespassed onto the Plaintiff's land and violated the plaintiff's rights of ownership, occupation and use and the plaintiff had suffered loss of user, damages and mental anguish. He thus urged the court to find in favour of the plaintiff and avert further injustice being perpetuated by the 1st defendant to the plaintiff.

1st Defendant's Submissions

16. On his part, the 1st Defendant's counsel submitted that the 1st defendant had proved that he was entitled to the suit property. He relied on the case of *Ali Gadaffi & another v Francis Muhia Mutungu & 2 Others* (2017) eKLR where the court placed reliance on the case of *Dr. Joseph N. K Arap Ng'ok v Moijo Ole Keiwa & 4 Others* Nairobi Civil Appeal No. 60 of 1997 (Unreported) where it was held that:

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance of the title document pursuant to provisions held”
17. He further relied on the case of *Ali Mohammed v David Gikonyo Nambacha & Another* (Kisumu HCCA No. 9 of 2009 where it was held that;

' Once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers an absolute



right of ownership or proprietorship unless it is challenged by the allotting authority or it is acquired through fraud, mistake or misrepresentation, or that the allotment was outrightly illegal or it was against public interest.

In other words, where land has been allocated, it cannot be reallocated unless the first allocation is validly and lawfully cancelled. There can never be an allocation unless the land is an alienated land”

18. Joseph Kipkemoi Busienei (DW1) produced the letter of allotment dated 16th February, 2016 and receipt for payment of Kshs.40,000 to demonstrate that he was the legitimate allottee of the suit property. Conversely, even though the Plaintiff stated that the allottee of his land was one Barnabas Cheruiyot and he had a letter of allotment in his name, the same was merely marked for Identification but it was never produced as an exhibit. Furthermore, no receipt was produced by the Plaintiff to show that the said Barnabas Cheruiyot paid for the plot. It was counsel’s contention that having failed to produce the letter of allotment and receipt in the name of Barnabas Cheruiyot, the Plaintiff had failed to prove that he was the owner of the suit property as he could not have acquired a better title than the one belonging to the person from whom he bought the said plot.
19. Additionally, counsel pointed out that the receipts for payment of land rates produced by the plaintiff described the land as land as Plot No. 17/96/65 plot No. 85 Shauri Yako without indicating that it was in “Zone C”, which is a departure from its pleadings.
20. Counsel also submitted on the question of fraud which was raised by the 1st Defendant in his submissions and contended that the court could not pronounce itself on this issue as the plaintiff neither pleaded nor proved any fraud on the part of the 1st Defendant. He relied on the case of *Ndolo v Ndolo* (2008) 1KLR G& F 742 and *Lucy Nchebeere v Rose Ndululu Muse & Another* (2021) eKLR for the proposition that fraud cannot be inferred from the facts and that it must be specifically pleaded and proved.
21. Counsel concluded by submitting that the Plaintiff having failed to meet the necessary threshold could not be granted a permanent injunction. Conversely, he urged the court to grant the reliefs sought by the 1st Defendant in the Counterclaim as the same had been proved.

Analysis And Determination

22. Having carefully considered the pleadings, evidence on record and the submissions file by the Plaintiff and 1st Defendant, the following issues arise for determination;-
 - i. Whether the Plaintiffs are the lawful, bona fide and legitimate owners of the parcel of land known as Plot No. 17/96/65 plot No. 85 Zone C Shauri Yako and whether they are entitled to exclusive rights of ownership and appurtenant rights and interests thereof.
 - ii. Whether the 1st Defendant trespassed over the suit land.
 - iii. Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff.
 - iv. Whether the 1st Defendant is entitled to the reliefs sought in the Counterclaim.
 - v. Who should bear the costs of this suit?
23. I will now determine each of the above issues. With regard to ownership of the suit property, it is not in dispute that both the Plaintiff and 1st Defendant claim ownership of the suit property herein. On the one hand, the Plaintiff set out to prove that it had lawfully acquired an interest in the suit property by way of purchase from one Francis Kariuki Mwangi who in turn purchased it from the original allottee, one Barnabas Silew Cheruiyot. He claimed that he had a letter of allotment in the name of the said



Barnabas Silew Cheruiyot but even though the said letter of allotment was marked for identification, the same was not produced as an exhibit. The Courts have on various occasions pronounced themselves on the evidentiary value of documents that are marked for identification without being produced.

24. In the case of *Kenneth Nyaga Mwiye v Austin Kiguta & 2 Others* (2015) eKLR, the court held as follows:

“23. in the instant case we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent’s case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight. The records show that the trial court relied on the document “MFI 2” that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of *Michael Hausa v The State* (1994) 7-8 SCJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision”

25. What this means is that the Plaintiff did not produce any document that the court could rely on to award the suit property to the plaintiff. This being a dispute over ownership of the suit property, it was incumbent upon the parties to prove their right to the suit property by production of the relevant ownership documents of title or a valid allotment letter. As was stated in the case of *Dr. Joseph N. K Arap Ng’ok v Moiyo Ole Keiwa & 4 Others* Nairobi Civil Appeal No. 60 of 1997 (Unreported) for the proposition that:

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance of the title document pursuant to provisions held”

Furthermore, in *Rukiya Ali Mohammed v David Gikonyo Nambacha & Another* (Kisumu HCCA No. 9 of 2009 where it was held that;

‘Once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers an absolute right of ownership or proprietorship unless it is challenged by the allotting authority or it is acquired through fraud, mistake or misrepresentation, or that the allotment was outrightly illegal or it was against public interest.

In other words, where land has been allocated, it cannot be reallocated unless the first allocation is validly and lawfully cancelled. There can never be an allocation unless the land is an alienated land”

26. The Plaintiff did not lead any evidence to disprove the letter of allotment issued to Barnabas Silew Cheruiyot from whom the 1st Defendant bases his interest in the suit property. The failure by the Plaintiff to call the allottee from whom it claims its title or an Officer from the County Government as the successor of the Eldoret Municipal Council to shed light on the authenticity of the allotment letter issued to the said Barnabas Silew Cheruiyot did not help his case.

27. On the other hand, the 1st Defendant called DW1 who testified and produced the letter of allotment as well as the receipt of payment of Kshs.40,000 as proof that he complied with the terms of allotment. He further stated that he took possession of the plot, fenced it and constructed a foundation but he was unable to continue with the building as he fell sick. He subsequently sold the plot to the 1st Defendant on 22nd April, 2015 in order to raise funds for his treatment in India. He admits that at some point



some people trespassed onto his land and constructed a temporary church. This evidence ties up with the Plaintiff's evidence that the plot was leased to a church for some time.

28. However, since it is the plaintiff who filed suit, it was incumbent upon him to prove his case. It is trite law that he who alleges must prove. The *Evidence Act* is very clear regarding the burden of proof. Sections 107,108 and 109 are pertinent on this issue and they provide as follows:

“S.107 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.

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

S. 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

29. Based on the evidence before the court, it is the finding of this court that the Plaintiff has failed to prove that they are entitled to the suit property.

30. Moving on to the second issue, the Plaintiff alleged that the 1st Defendant had trespassed on the suit property. As correctly submitted by counsel for the Plaintiff, trespass has been defined by *Clerk and Lindsel on Torts*, 18th edition at Pg 23 as:

“ any unjustifiable intrusion by one person upon land in possession of another”

31. PW1 alleged that they purchased the suit property from Francis Kariuki Mwangi who in turn bought it from the initial allottee Barnabas Silew Cheruiyot. He produced the sale agreement between the plaintiff and the said Francis Kariuki Mwangi. PW1 and PW2 produced a number of documents including a lease agreement between the plaintiff and Jesus Alive Centre, receipts for payment of rates, a request for consent to transfer the suit property and a sale agreement dated 11th June, 2010. However, it bears repeating that the allotment letter supposedly issued to Barnabas Silew Cheruiyot was never produced as an exhibit.

32. In order for one to prove trespass, he must first prove that he is the owner of the property on which the trespass is alleged to have taken place. In this case, the court has already found that the plaintiff failed to prove ownership of the suit property and therefore the plaintiff's claim of trespass against the Defendants must fail.

33. I will now proceed to determine whether the 1st Defendant has proved his Counter Claim against the Plaintiff. As stated earlier in this judgment, the 1st Defendant produced an allotment letter dated 16.2.1997 to show that the suit property was allocated to one Joseph Kipkemoi Busienei who subsequently sold it to the 1st Defendant on 22.4.2015 as indicated in the sale agreement which was produced by DW2. He also produced a receipt issued by the Eldoret Municipal Council for KShs.40,000 being the consideration paid for the plot.

34. This evidence was not satisfactorily controverted by the Plaintiff as he did not produce any evidence to prove that the 1st Defendant's root or title was tainted and therefore the allotment of the plot to Joseph Kipkemoi Busienei is valid. Conversely, the court was not shown any valid allotment letter issued to Barnabas Silew Cheruiyot and therefore no interest in the suit property passed to the plaintiff.



35. In *Katana Kaluma & Another v Municipal Council of Mombasa & Another* (2019) eKLR the court relied on the case of *Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Ltd* 1949 1KB 322 336-337 where Lord Denning opined that:

“In the development of our law, two principles have striven for mastery. The first one is for the protection of property, no one can give a better title than he himself possesses. The second is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a good title.”

36. The first principle has held sway for a long time but it has been modified by Common Law itself and statute so as to meet the needs of our own times.

37. The first principle is also known as the Nemo dat quod Non Habet principle. Having weighed the evidence adduced by the plaintiff against the evidence adduced by the 1st Defendant, the court is satisfied that the Plaintiff has failed to prove its case to the required standard. On the other hand, the 1st Defendant has proved his case on a balance of probabilities.

38. Consequently, I dismiss the plaintiff's case and enter judgment for the 1st Defendant on his Counterclaim as follows:

- a. The Plaintiff's case is dismissed.
- b. A declaration is hereby issued that the 1st Defendant is the lawful owner of land parcel No. Plot No. 17/96/65 plot No. 85 Zone C Shauri Yako.
- c. The plaintiff shall bear the costs of the suit and 1st Defendant's Counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 30TH DAY OF APRIL, 2024

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J.M ONYANGO

JUDGE

In the presence of;

Mr. Ogongo for the 1st Defendant

No appearance for the Plaintiff

Court Assistant: Mr. Brian K.

