



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 11 OF 2012**

**SIMIYU KITUI MUTOKO *alias***

**JOHN SIMIYU ..... PLAINTIFF**

**VERSUS**

**WANYONYI MABUKA ..... DEFENDANT**

**J U D G M E N T**

**INTRODUCTION**

1. The plaintiff is the beneficial owner of **20 acres** comprised in **Parcel No. 5766** commonly known as **Tulwet Farm**. The plaintiff bought this property from one **Kimalel Arap Chumo** on **24/12/1973**. The defendant is a purchaser of **0.4 of an acre** (suit land) from one of the sons of the plaintiff called **Geoffrey Wanyonyi Simiyu**. The plaintiff brought this suit against the defendant seeking an order of eviction against him and or his agents and a permanent injunction restraining him from dealing with the suit land in whatever manner.

**PLAINTIFF'S CASE**

2. The plaintiff testified that he is the beneficial owner of 20 acres which he bought from Kimalel Arap Chumo on 24/12/1973. He produced an agreement between him and the said Kimalel Arap Chumo [Exhibit 1]. He also produced a copy of an area list showing that he is Member **No. 60** at Tulwet Farm. His son Geoffrey Wanyonyi Simiyu sold part of the 20 acres to the defendant without his consent. He stated that his son has his own land elsewhere and that the defendant should be evicted from the suit land.

**DEFENDANT'S CASE**

3. The defendant testified that in the year **2012** he bought a total of **0.4 of an acre** from **Geoffrey Wanyonyi Simiyu** and **Esther Namalome Simiyu**. He bought **0.3 of an acre** from **Geoffrey Simiyu** and **0.1 of an acre** from **Esther Namalome**. He produced a sale agreement [Defence Exhibit 1]. He paid a deposit of **Kshs.70,000/=** and the balance of **Kshs.62,000/=** was paid on **2/9/2012**. When he brought materials ready to build on the suit land, he was served with summons in this case. He denied that he invaded the plaintiff's land.

4. The defendant called DW2 Geoffrey Wanyonyi Simiyu who testified that he is the plaintiff's son from

the first house. The plaintiff had four wives. The plaintiff had bought 20 acres of land at Tulwet Farm. The plaintiff later subdivided the 20 acres into five portions. He gave each of his four wives 4 acres each and he remained with 4 acres for himself. DW2 was the only son from the first house. One of his sisters fell sick. His mother authorized him to sell part of their portion so that they could raise money for her treatment. This is how he sold 0.4 of an acre to the defendant. Her sick sister however passed on.

5. DW2 testified that the plaintiff had allowed his step brother to sell part of the land given to his step mothers and that even the plaintiff had sold two acres to marry his fourth wife. He contends that the plaintiff is discriminating against the first house which was one of the houses which were behind the purchase of 13 acres at Misemwa. The 13 acres at Misemwa were sold after which the plaintiff bought 20 acres at Tulwet Farm.

6. DW3 Esther Namalome Simiyu is the mother of DW2 and wife of the plaintiff. She testified that she is the one who authorized his son to sell 0.4 of an acre to the defendant. She is the first wife of the plaintiff. They had started off life at Misemwa where they had 13 acres which they bought in bits through proceeds from maize farming. The 13 acres were later sold and the plaintiff went and bought 20 acres at Tulwet Farm. She authorized her son to sell the 0.4 of an acre to defendant so as to raise money for treatment of her daughter who was working in Lodwar. Unfortunately the daughter died after the family had incurred a huge medical bill. She contends that the plaintiff wants to take land from her and give it to children from the other houses.

### **ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION**

7. There is no contention that the plaintiff is the beneficial owner of 20 acres at Tulwet Farm. There is also no contention that the plaintiff has four wives. There is evidence on record that the plaintiff subdivided his land into five portions. He gave each of his wives 4 acres each and reserved 4 acres for himself. DW2 produced an agreed sub-division plan reached on 23/1/2009 before the local assistant chief and elders. The family members of the plaintiff and the plaintiff himself signed this agreement. The plaintiff did not contest it in his evidence. The plaintiff admitted in cross-examination that he had indeed permitted at least one of his sons to sell land designated for his mother to a third party. He had himself sold two acres belonging to his third wife because her sons had differed with her. Now the issue which emerges for determination is whether a wife to one of the plaintiffs who had been shown her portion could lawfully sell part of it to a third party.

8. Though the plaintiff argues that he had given his four wives 4 acres each to help them sustain themselves by growing crops on it, I do not think that there is anything wrong if one of the wives decided to sell part of it for a worthy cause. In the instant case, the son of the plaintiff's first wife had been authorized by her mother to sell a portion of their land so as to raise money to assist in paying hospital bills for her ailing daughter. The plaintiff is not contesting that his daughter from the first house was ailing and that she indeed passed on. The plaintiff had given the first house four acres. There is no way he would have taken back the four acres from the first house. The first house sold a portion of their land. There is evidence that a son from the other house has sold a portion of land given to his mother. The plaintiff admitted as much in cross-examination. He did not raise any objection. He cannot be heard to object to the sale by a son from the first house. To allow this is to encourage discrimination. There is evidence that the first and second wives of the plaintiff were instrumental in purchasing 13 acres at Misemwa. This is the land which was sold and the proceeds thereof used to purchase 20 acres at Tulwet Farm. The plaintiff is now seeking to prevent the first wife from selling part of her portion. This is unfair and no court of law can let that happen.

9. The plaintiff had pleaded in his plaint that he wanted the defendant to be evicted from 0.2 of an acre. The evidence on record has shown that the defendant indeed bought 0.4 of an acre. I have found that the defendant lawfully bought the 0.4 of an acre. The plaintiff cannot therefore seek to have him evicted from the 0.2 of an acre.

### **DISPOSITION**

10. For the reasons given hereinabove, I find that the plaintiff's suit is misconceived. The same is hereby dismissed with costs to the defendant.

Dated, signed and delivered at Kitale on this **26th** day of **January, 2016**.

**E. OBAGA**

**JUDGE**

In the presence of M/s. Bett for Plaintiff and Mr. Ndarwa for Mr. Kaosa. Court Assistant – Isabellah.

**E. OBAGA**

**JUDGE**

**26/01/16**