



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL CASE NO. 74 OF 2010

PHILIP AYAYA ALUCHIO:.....] PLAINTIFF

VERSUS

CRISPINUS NGAYO:.....] DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendant claiming the following reliefs:-

- (a) A declaration that the plaintiff is the lawful owner of title No. Kitale Municipality block 111/85.
- (b) A permanent injunction restraining the defendant or his agents from interfering with the suit land.
- (c) General damages for tress pass.
- (d) Eviction and demolition of structures on the land
- (e) Costs
- (f) Any other relief as this Honourable court deems fit to grant.

The defendant filed defence and counter-claim in which sought the following reliefs:-

- (a) Dismissal of the plaintiff's claim against him.
- (b) An order canceling and or nullifying title NO. Kitale municipality block 111/85.
- (c) A permanent injunction restraining the plaintiff(defendant) from evicting him and or demolishing his structures or claiming any right to the suit land.
- (d) Costs of the defence and counterclaim.

The plaintiff contends that Kitale municipality Block 111/85 hereinafter referred to as “the suit land” was allotted to him by the commissioner of lands on the 16th August,1994. He

duly paid the stand premium as well as other charges which were required of him. A lease was thereafter prepared in his name. He thereafter obtained certificate of lease for the suit land. The plaintiff contends that he has been paying rent and rates since then.

In 1996, the plaintiff fenced the suit land with bared wire. In the year 2010, he visited the suit land only to find that there was a pit latrine and brick house which had been erected on the suit land. He sought the intervention of the District Officer Kitale Municipality who wrote a letter to the defendant. The defendant through his lawyers Messrs M.S. Wafula & Co. Advocates responded to the District Officer's letter in which they maintained that their client (the defendant) was lawfully on the land pursuant to an allotment letter. The lawyers advised the D.O to advise the claimant (plaintiff) to seek legal redress arguing that their client will only listen to court orders to demolish the structures after the ownership dispute is settled. This is how the plaintiff ended up filing this suit.

The defendant on the other hand contends that the suit land belongs to him, the same having been allotted to him. The defendant contends that he was given an allotment letter and that he is in the process of obtaining a lease and certificate of lease. He contends that the title held by the plaintiff was obtained fraudulently and or by mistake as the defendant has been paying land rent and rates to the municipal council of Kitale and had even obtained approval for building plans which enabled him to erect a building on the suit land

I have gone through the pleadings herein as well as the evidence adduced by the parties as well as witnesses called by the plaintiff. The issues which arise for determination are firstly, who is the legal owner of the suit land? Secondly, is the defendant a trespasser to the suit land and if so, is the plaintiff entitled to general damages for trespass? Thirdly who between the plaintiff and the defendant is entitled to injunction orders? Finally which orders should be made as to costs?

The plaintiff testified and called two witnesses. The defendant on the other hand did not call any witness. The plaintiff PW1 is a retired civil servant currently engaged in business in Nairobi. He testified that he applied for allotment of a residential plot within Kitale municipality. He was successful and was allotted the suit land vide letter of allotment dated 16th August 1994 (exhibit 1). He later paid Kshs.20,990/= being stand premium and other charges as per the allotment letter. He produced a receipt dated 13.6.200 (exhibit 2). A lease was processed in his favour (exhibit 3) after which a certificate of lease was prepared and issued to him on 13th December 2001 (exhibit 4). The plaintiff has since been paying land rates and rent to municipal council of Kitale as confirmed by a bundle of receipts produced as exhibit 10. He also produced a bundle of demand letters from the municipality exhibit 11.

The plaintiff carried out an official search on 31.8.2010 and again on 22.8.2012. The official search certificates were produced as exhibit 7 and 9 (a) respectively. On each occasion he did a search, he was also given copies of green cards which he produced as exhibits 8 and 9 (b) respectively.

The search certificates and green cards show that he is the registered proprietor of the suit land. There are no encumbrances registered against the title.

The plaintiff called PW2 Aggrey Kavei an officer from the Lands Office Kitale. This witness confirmed that he is the one who signed the official searches produced by the plaintiff. Though he could not avail the original records of the suit land due to the short notice given to attend court, he nevertheless confirmed that according to the Lands office records, the plaintiff was the registered owner of the suit land and that the documents held by him were authentic.

The plaintiff also called PW3 Samuel Simiyu Okema who at the time of testifying

was working with the county Government of Trans-Nzoia. He was previously working for the defunct municipal council of Kitale as a deputy town clerk. He produced a valuation roll exhibit 15(a). The valuation roll was prepared in 2006 and contains all ratepayers within the then municipal council of Kitale. The name of the plaintiff is in the roll as one of the rate payers in respect of this suit land. The witness confirmed that the plaintiff has been up to date with payment of rates.

The Defendant in his defence contended that he was granted a lease on the suit land. He produced the lease document as defence exhibit 1. He also produced a letter of allotment dated 18th May 1995 defence exhibit 5. The defendant also produced demand notice for rates from municipal council of Kitale dated 23.4.2012 defence exhibit 3 and payment receipt for Kshs.7500/= made on 23.4.2012 defence exhibit 2.

I have gone through a copy of a lease produced by the defendant. The document was not attested and is incomplete. It does not bear stamp of the persons who ought to have signed the same. The person who is said to have appeared before the attesting person is one Sarah Kibet. In an ideal situation it should have been the defendant. I therefore find that the document produced by the defendant is not a lease. The defendant is not a rate payer according to the valuation roll produced before court. The payment for rates which he made on 23.4.2012 was specifically meant for this case as the payment was made after this suit had been filed. If at all he made payment to the municipal council of Kitale, then the same was wrong because he was not a rate payer.

The defendant claimed in his defence that he has been paying rates since 1995 but he could not produce any of those receipts. He even claimed to have sent a banker's cheque in payment of the stand premium and other charges which cheque was returned to him. He did not adduce any evidence to that effect. The defendant even claimed that he obtained building approval plans but no such evidence was adduced. I find that the suit land belongs to the plaintiff. The defendant's documents are suspect and have not been authenticated.

On the issue as to whether the defendant is a trespasser, I have no difficulty in finding that he is a trespasser. The Plaintiff has succeeded to show that he has title to the suit land. The title itself amounts to constructive possession of the suit land by the plaintiff. Besides this, there is evidence that the plaintiff moved to the suit land and fenced it using a barbed wire. This in itself is an act of possession.

The defendant moved into the suit land and erected a building on it. The defendant does not deny this. The defendant had not title to the land. He was not a licensee of the plaintiff. The defendant came into the property without consent of the plaintiff and without colour of right. He has since remained on it. He has constructed on it. He is clearly a trespasser who is continuing to trespass.

A letter by the defendant's lawyer in response to the one which was written by the District officer Kitale Municipality exhibit 14 shows that the defendant is adamant on staying on the suit land.

The defendant has constructed on the plaintiff's land. This in itself is damage and wastage of the plaintiff's land. The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage?. It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately before and immediately after the trespass or the cost of restoration, whichever is less. See **Hostler – VS – GreenPark Development Co. 986 S. W 2d 500 (No. ct App. 1999).**

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass.

There was no evidence adduced on the nature of house which the defendant has constructed on the suit land. The court is at a disadvantaged position in reaching at a cost which might be reasonable for restoration of the property to its former state. However as I have found that the plaintiff is entitled to general damages for trespass, I will award a nominal sum of Kshs. 100,000/= as general damages for trespass. This cost will go towards restoration of the suit land to its former state.

The defendant claimed for cancellation of the plaintiff's title and protection by way of injunction against demolition of his house. There is absolutely no basis upon which the court can order cancellation of the plaintiff's title. The plaintiff obtained title to the suit land legally. The plaintiff is a trespasser to the suit land. He cannot therefore benefit from an injunction. I find that the defendant's counter-claim lacks merit so is his defence which is hereby dismissed with costs.

The defendant had attempted to raise the issue of adverse possession in his defence. There is no evidence adduced which can sustain the claim of adverse possession and in any case the claim was not brought as required by the law pertaining to claims of adverse possession.

I find that the plaintiff has proved his case on a balance of probabilities. He is entitled to the prayers he seeks in the plaint. The plaintiff shall benefit from an injunction to protect him from the continued trespass of the defendant. In sum therefore, I make the following orders:-

- (1) A declaration that the plaintiff is the lawful owner of the suit land.
- (2) General damages for trespass in the sum of Kshs. 100,000/=.
- (3) Eviction and demolition of structures on the suit land.
- (4) An order dismissing the defendant's counter-claim with costs.
- (5) The defendant to bear costs of the plaintiff's claim.
- (6) The defendant is given three months to demolish his structures on the suit land failing which the plaintiff shall be at liberty to demolish the same without further recourse to court.

Dated, signed and delivered at Kitale on this 28th day of January, 2014.

In the presence of Mr. Wamwayi for plaintiff and Mr. Wafula for defendant and Court clerk – Kassachoon.

E. OBAGA

JUDGE