



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL SUIT NO. 91 OF 2011**

**EPHALINA AGITSA AYUYA MAINA ..... PLAINTIFF**

**V ERSUS**

**OTHIM OOKO .....DEFENDANT**

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

1. The Plaintiff is a retired teacher who is now engaged in private business. She brought this suit seeking an order of eviction against the defendant whom she contends is occupying 0.4 of an acre which forms part of LR. NO. Waitaluk/Mabonde Block 7/Koiyo/84 which she bought on 11/4/2005 from one Erick Kiptoo Chepkoiyo.
2. The defendant is also a retired Civil Servant who contends that he is residing on 0.4 of an acre which he bought from the same person who sold land to the plaintiff. The defendant contends that he bought the 0.4 of an acre from Erick Kiptoo Chepkoiyo in 1999.

**PLAINTIFF'S CASE**

3. The plaintiff testified that on 11/4/2005, she entered into a sale agreement with one Erick Kiptoo Chepkoiyo in which the vendor sold her his entire interest in LR NO. Waitaluk/Mabonde Block 7/Koiyo/84 which measured around 0.6200 hectares which is about 1.5 acres. She paid Kshs.550,000/= for the entire land. She produced a sale agreement (exhibit 2). She thereafter processed and obtained title deed in her name. The title deed was produced as exhibit 1. She also produced a green card exhibit 4 which shows the history of the suit land.
4. The plaintiff testified that before she bought the land, she conducted a search which showed that Erick Kiptoo Chepkoiyo was the registered owner of the land. She testified that when she bought the land, there were no structures on it but that later, the defendant put up a semi permanent house on the 0.4 acres which forms part of her land. The defendant has since refused to move out of the 0.4 acres he is occupying prompting the plaintiff to move to court seeking to evict him from the land he is occupying.

**DEFENDANT'S CASE**

5. The defendant testified that in 1999, he bought 0.4 of an acre from Erick Kiptoo Chepkoiyo at Kshs.117,000/=. He testified that the seller prevented him from taking possession until 6/1/2004 when the seller allowed him to take possession at the intervention of the area chief. He produced a sale agreement which he entered into with the seller (defence exhibit 1).
6. The defendant waited for the seller to take him before the land control board for consent to subdivide the land. The defendant later learnt that the seller had sold his entire parcel of land to the plaintiff who had obtained title to the same. He contends that the registration of the entire land in the name of the plaintiff was fraudulent in that he was not informed when the plaintiff was

processing title to the land. He prayed that the plaintiff's suit be dismissed with costs.

### **ANALYSIS OF EVIDENCE**

7. There is no doubt that the suit land which is 1.5 acres is registered in the name of the plaintiff. The plaintiff obtained title on 15/8/2006 upon transfer of the entire interest of the vendor to herself.
8. The defendant contends that he is in occupation of 0.4 of an acre and that the plaintiff has fenced her portion which is the balance after his share of 0.4 acres is taken into account. The defendant did not want to come out clearly on the details of the agreement between him and the vendor Erick Kiptoo Chepkoiyo. A look at the evidence of the defendant's witnesses particularly DW2 Joseph Koech shows that the defendant had initially wanted to buy the vendor's entire land which was 1.5 acres. He paid some amount but was unable to clear the balance. This witness testified that when the defendant went to him in 2004 complaining that the vendor had refused to give him possession, he accompanied the defendant to the vendor's home where he sought to know why he was refusing to give the defendant possession. The vendor told him that he had declined to allow the defendant to take possession because the defendant had failed to clear the balance of the purchase price. It is during this meeting that it was decided that the vendor gives the defendant land equivalent to the amount he had already paid him.
9. The evidence of DW2 is corroborated by that of DW3 Harrison Kavita Kitonyo who testified that he was present when it was decided that since the defendant was unable to pay for the entire 1.5 acres, he should be given land equivalent to the amount he had paid the vendor.
10. The Defendant did not produce the agreement which was entered into on 8/11/1999. What he only produced was the agreement dated 6/1/2004 in which the vendor acknowledged having been paid 117,000/= earlier on 8/11/1999. It is clear that the vendor was being forced by the Provincial Administration to give 0.4 of an acre to the defendant. The area chief even wrote a letter to the lands office asking them to cancel the title which had already been given to the plaintiff and issue the defendant with title in respect of his 0.4 of an acre.
11. It is very clear that the agreement of 6/1/2004 was forced down the throat of the vendor. The defendant had already failed to meet the terms of the agreement of 8/11/1999. It is apparent the vendor wanted to sell his entire interest and not to subdivide it to suit the defendant. This is why the vendor went ahead to sell the 1.5 acres to the plaintiff.
12. The question which arises for determination is whether the defendant is entitled to retain the 0.4 of an acre he is occupying. As I have said before in this judgement, the defendant had failed to meet the terms of the agreement of 8/11/1999. The defendant later went and coerced the vendor into signing another agreement dated 6/1/2004 which gave the defendant 0.4 of an acre. I do not think that the defendant has any right to claim 0.4 of an acre based on the agreement of 6/1/2004. The entire land has already been sold to the plaintiff who has obtained title to the same. There was no evidence adduced to show that the plaintiff was involved in any fraudulent activities which would have vitiated the contract entered between her and the vendor. The plaintiff having obtained her title in a genuine manner after the defendant's failure to buy the land, it will be unfair for the court to find that the defendant is entitled to remain on the 0.4 of an acre.

### **DECISION**

13. The defendant never obtained the agreement of 6/1/2004 in a free and fair manner. He was never taken before any land control board for consent. His only remedy can be a claim for what he paid the vendor. He should not remain on the land which has already been bought by the plaintiff who has title to it. I find that the plaintiff has proved her case on a balance of probability. I order that the defendant should move out the 0.4 of an acre he is occupying within a period of 3 months failing which he shall be evicted without any further recourse to the court. The defendant shall also pay costs of this suit.

Dated, signed and delivered at Kitale on this 30th day of April, 2014.

**E. O. OBAGA,**

**JUDGE**

In the presence of M/S Munialo for Plaintiff and Defendant in person. Court Clerk - Kassachoon

**E. OBAGA,**

**JUDGE**

**30/4/2014**