



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 77 OF 2013

HARUN MUCHAI KITHONGO PLAINTIFF

VERSUS

JOB KAGWE

PHILIP MWAURA DEFENDANTS

JUDGEMENT

INTRODUCTION

1. The Plaintiff Harun Muchai Kithongo is a resident of Lessos farm within Kitale Municipality. He is the registered owner of LR NO. Kitale Municipality Block 2/742. The plot is a sub division of Kitale municipality Block 2/732 which had been allotted to the plaintiff in 1993.
2. The defendants are sons of one Kagwe Wangungu who died on or around 28th July 1991.
3. The Plaintiff filed the suit herein seeking an order that the defendants do move out of plot No. Kitale Municipality Block 2/742 failing which they be evicted from the said plot. The plaintiff also prays for costs and interest of the suit.

PLAINTIFF'S CASE

4. In the mid 1980's the plaintiff applied to the municipal council of Kitale for a temporary occupation licence to enable him put up a timber yard. His application was allowed and he was allowed to put up a timber yard on temporary basis.
5. As the plaintiff went on with his business, he requested that he be allocated the land on a permanent basis as he had set up machinery on the site. The District Lands Officer Trans – Nzoia wrote a letter to the Commissioner of Lands indicating that they had no objection to the transaction being regularised as the Kitale Municipality was aware of the plaintiff's occupation of the plot.
6. The plaintiff's application was allowed and on 18th November, 1993 he was given an allotment letter. He was later granted a lease and a certificate of lease was processed and issued in his name.
7. The Plaintiff later sub-divided the land into a number of plots one of which is the subject of this suit. The plaintiff contends that the defendants have trespassed onto part of the suit land and that they have refused to move out of the land. This is the basis upon which he prays that the defendants do move out of the suit land or they be evicted from the land.

DEFENDANTS CASE

8. The Defendants contend that they are staying on the land which their parents were staying on

- during their lifetime. The defendants contend that the suit land had been allotted to their father in 1988 on a temporary basis by the municipal council of Kitale.
9. The defendants testified that the plot their father was allocated was next to the one which was too allocated by the same municipality to the plaintiff. The defendants testified that when their father died, the plaintiff started disturbing them as he wanted them to move out of the land. The defendants further testified that the plaintiff offered them alternative land which they rejected contending that it was swampy and therefore unfit for human habitation.
 10. The defendants called the assistant chief of Bidii sub-location and Chief Bidii location, DW3 Charles Lwambuli and DW4 Julius Onyancha respectively. The two testified that they were aware of the dispute between the plaintiff and the defendants and that they were aware that the plaintiff had offered to buy the defendants alternative land elsewhere but that they rejected the offer. The two however conceded that the defendants had no title to the suit land and that they had no right to remain on the same.

ANALYSIS OF EVIDENCE

11. The documents produced by the plaintiff show that on 28/8/1987, he applied to the Commissioner of lands for allocation of a piece of land where he was to put up a timber yard. He produced the letter dated 29/8/1987 as exhibit 1. On 2/9/1987 the District Lands Officer Trans-Nzoia wrote a letter to the Commissioner intimating that he did not have any objection to the plaintiff being allocated the land. This letter is plaintiff exhibit 3.
12. The plaintiff was later given an allotment letter in respect of an unsurveyed residential plot A – Kitale Municipality. The allotment letter was produced as exhibit 2. A lease was thereafter given exhibit 5. This was after he paid all the requisite fees as per the letter of allotment as shown in the 4 receipts he produced as exhibit 4. He paid all the rates to the municipality of Kitale as per exhibit 6.
13. The entire plot allotted to the plaintiff was 4 acres. He later sub divided it into smaller plots. One of such plots is the suit land which is LR Kitale Municipality Block 2/742. The land measures one acre. The plaintiff produced a copy of the certificate of lease in respect of the suit land exhibit 7.

14. It is clear from the defendants' list of documents that the defendants' father had been allocated a temporary plot to enable him put up a timber yard. The defendants father received approval of his application on 27th November, 1988 from the municipal council of Kitale. This letter was clear that the defendants father was to get in touch with the acting municipal Engineer to show him a vacant space where he was to put up a timber yard. The letter also cautioned the defendants father that the allocation was on temporary basis and that he was to be asked to move out if the plot was required for permanent development.

15. It is important to note that before the defendants father received a nod from the municipal council that they had allowed his application for a temporary plot, the plaintiff had already applied for allocation the previous year and he had also applied for allocation of the plot on a permanent basis from the Commissioner of Lands.

16. There is no evidence adduced by the defendants to show that the plot which had been allocated to their father on a temporary basis was adjacent to the one allocated to the plaintiff. The only evidence which suggests that the plot may have been adjacent to the plaintiff's is a letter from the municipal council of Kitale addressed to the District Commissioner Trans – Nzoia asking the DC to look for alternative land for the family of Kagwe Wangungu whose plot had been allotted to the plaintiff. The letter was written on 12/5/2004. This was well after the plaintiff had been given certificate of lease and even sub-divided the land into more parcels one of them which happens to be the suit land.

17. The issue which then arises for determination is whether the defendants are lawfully on the suit land. There is no evidence to suggest that the plaintiff obtained title to land fraudulently. The plot was public land available for allocation. The plaintiff applied for allocation and was granted an allotment letter followed by a lease and a certificate issued thereafter. There is no evidence

that, the defendants father attempted to have the portion he was occupying allocated to him. The Government could not allocate him land if he did not apply for it.

18. The municipal council of Kitale who were the custodians of the land on behalf of the Government did not object to the plaintiff being allotted the land. Infact even in their letter to the District Commissioner, they did not fault the manner in which the plaintiff obtained the land. The municipality was only concerned that the family of the late Kagwe Wangungu had been rendered landless and they were pleading with the DC to give them alternative land.

19. The plaintiff appears to have been aware of the predicament, the family of Kagwe Wangungu found themselves in. This is why he offered to buy alternative land for them. There is evidence from the assistant chief and chief of Bidii sub-location and location respectively that the plaintiff has offered the defendants land elsewhere but they have refused the offer.

20. The defendants themselves concede that they do not have title to the land and that the Government did not allocate the land to them. The 1st defendant Job Kagwe testified that if they are to move from the suit land, they should be given alternative land. The plaintiff has already given them an offer of alternative land. This is not because he is under any obligation to do so. He is purely doing so on humanitarian grounds.

DECISION

21. I find that the plaintiff has proved his case on a balance of probabilities. The defendants have no right to remain on his land. The defendants should take the offer extended to them by the plaintiff and move out of the land or they be evicted if they cannot voluntarily move out. The defendants are given 6 months to enable them to move out and harvest any crops growing on the land if any. Given the circumstances of this case, I do not find that it will be appropriate to order costs.

Dated, signed and delivered at Kitale on this 20th day of May, 2014.

E. OBAGA,

JUDGE

In the presence of Mr Kiarie for Plaintiff and both defendants in person. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

20/5/2014