



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC NO. 752 OF 2017

(Formerly Machakos High Court ELC No. 47/2016)

CHARLES GATONYE GICHINGA.....PLAINTIFF

-VERSUS-

WAITITU OLE SAYIORE.....1ST DEFENDANT

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED.....2ND DEFENDANT

JUDGMENT

(1) Charles Gatonye Gichinga the Plaintiff seeks the following reliefs from Waititu Ole Sayiore (1st Defendant) and Kenya Electricity Transmission Company Limited (2nd Defendant).

- a) A declaration that he is the owner of the 5 acres of land as he presently occupies and as pointed out in 1984.
- b) In the alternative, the 1st Defendant do pay the Plaintiff Ksh. 25 million being the value of the land, developments on buildings thereon and whose exact value will be determined at the time of judgment.
- c) An order compelling the 2nd Defendant to stop any payments if at all to the 1st defendant and or await the determination of this suit.
- d) Costs of the suit.
- e) Any other relief this Court deems fit to grant in the circumstances.

(2) The Plaintiff's case is as follows. On 5/7/1984, he purchased five (5) acres of land from the first Defendant. The first Defendant's land was number 9 Empakasi Ranching. The purchase price was Kshs. 25, 400/=. The Plaintiff paid the entire amount.

(3) The agreement for the sale of land provided that the defendant would transfer the land to the Plaintiff. The Defendant has never done so yet the Plaintiff has been in occupation of the suit land since the date of the purchase. He has built a semi-permanent structure for himself and the family. He has also been tilling the land.

Lately, the first Defendant has encroached onto the land causing him worry. He now prays for the transfer of the land or a refund of the market value of the land which is Ksh. 25 million.

(4) In support of his case, the Plaintiff filed the following;

- (i) A witness statement dated 29/6/2016.
- (ii) A sale agreement dated 5th July, 1984.
- (iii) A valuation report dated 17th December, 2014.

(iv) A property damage report by the second Defendant dated 26/5/2013.

(v) Bank statement showing a deposit of Ksh. 44, 176/-.

(vi) Proceedings and judgment in criminal case no. 4843 of 1997.

(5) The first Defendant filed a written statement of defence dated 29/7/2016 in which he admits having sold two (2) acres only to the Plaintiff. He also said that there is a pending case at the High Court at Machakos. He did not give the details of the case.

(6) In addition, the first Defendant recorded a witness statement which was filed on 29/7/2016. In it he admits that in the year 1984, he sold part of his land to the Plaintiff and the Plaintiff paid him Ksh. 16, 000/-.

(7) The second Defendant filed a written statement of defence dated 17/8/2016 in which it avers that it was not under any obligation to compensate the Plaintiff as he is not the registered owner of the land through which its power lines pass.

Johnson Muthoka, a land economist working for the second Defendant recorded a witness statement dated 17/8/2016 reiterating what is in the statement of defence.

(8) In addition, the Defendant filed the following documents;

(i) A copy of letter of offer dated 26/4/2013 made to the 1st defendant.

(ii) A copy of Grant No. I.R. 56131 L.R. NO. 14785 situate south of Athi River in Machakos District.

(iii) A copy of the Resettlement policy framework.

(9) At the trial, only the Plaintiff and the second Defendant testified. The second Defendant's Counsel filed written submissions on 21/1/2022 while the counsel for the Plaintiff filed on 25/1/2022.

(10) The second Defendant identified one issue for determination namely, whether the Plaintiff has a valid claim as against the second Defendant. The Plaintiff's Counsel identified five issues for determination namely; adverse possession, absence of consent of the land control board, compensation of the Plaintiff by the second Defendant and costs.

(11) I have carefully considered all the evidence the submissions and the jurisprudence in the entire case. I find that the following issues arise.

(i) How much land did the Plaintiff buy from the first Defendant?

(ii) How much land does the Plaintiff occupy?

(iii) Does the Plaintiff have a justiciable claim against the second Defendant?

(iv) Between adverse possession and constructive trust doctrine, which one is applicable in this case?

(12) On the first issue, I find that the Plaintiff has proved that he bought two (2) two and not five (5) acres. The Sale Agreement dated 5/7/1984 contains two (2) acres. The subsequent addendum to the agreement to increase the acreage to five is not adequately proved.

It is disputed by the first Defendant and there is no good explanation by the Plaintiff why there was no further agreement for the extra land.

(13) From the evidence adduced by the Plaintiff, it is not proved that he occupies five acres. He did not file any documentary or other evidence to show the extent of the land he occupies. His oral evidence did not prove the area occupied. Nor did the written evidence which is very brief.

(14) I find that the Plaintiff does not have a justiciable claim against the second Defendant because he is not the registered owner of the land. The second Defendant has offered a good explanation as to why they paid compensation to the first Defendant and not to the Plaintiff. It is simply because the Plaintiff is not the registered owner of the suit land.

It has also been proved that the Plaintiff was compensated for the crops.

(15) Finally, I find that the doctrine of constructive trust applies in this case in favour of the Plaintiff for the two acres that he bought and which the first Defendant does not dispute.

All that is missing is the consent from the Land Control Board and the transfer instrument.

Recent jurisprudence from the case of *Macharia Mwangi Maina and 87 others –vs- Davidson Mwangi Kagiri (2014) eKLR* is that a controlled transaction that lacks the requisite consent under the Land Control Act can be enforced under the equitable doctrine of

constructive trust where the purchaser has paid the full purchase price and is in actual possession.

The same doctrine was found applicable in the more recent case of *Willy Kimutai Kitilit –versus- Michael Kibet Civil Appeal No. 51 of 2015 (2018) eKLR*.

It is not in dispute that the Plaintiff paid the full purchase price for the two acres and he has been in actual possession. This doctrine therefore applies.

(16) In conclusion, I enter judgment for the Plaintiff against the first Defendant as follows;

(a) The first Defendant to transfer 2 acres of land from former Land Number 9 Empakasi Ranching, to the Plaintiff failing which the Deputy Registrar will execute all necessary documents to effect the transfer.

(b) Costs to the Plaintiff and the second Defendant

Order accordingly.

Dated signed and delivered virtually at Kajjado 20th day of April, 2022.

M.N. GICHERU

JUDGE