



REPUBLIC OF KENYA

High Court at Kitale

Civil Case 54 of 2001

WILLIAM MALAKWEN TUWEI ::: PLAINTIFF.

VERSUS

PETER KIPLAGAT TENAI ::: DEFENDANT.

J U D G M E N T.

The plaintiff, **William Malakwen Tuwei**, filed this suit on 21st March, 2001, against the defendant, **Peter Kiplangat Tenai**, for a declaratory order to the effect that the defendant is in illegal and unlawful occupation of land parcel No. 5779/1 Kitale Municipality and that an eviction order should issue against him as well as an injunctive order restraining him from trespassing into the land.

The plaintiff avers that he is the registered proprietor of the suit land measuring 27 acres having purchased it from Kalenjin Estate Ltd. But without any colour of right the defendant invaded and occupied the land and has continued to use it for his own benefit. Further, the defendant instituted criminal charges against him (plaintiff) vide Kitale SPMCC No. 2390/98 in which he was acquitted by the court. The plaintiff contends that he is the sole proprietor of the suit land having obtained consent from the Land Control Board and only awaiting the issuance or collection of the necessary title deed.

It is further averred by the plaintiff that despite several requests made to the defendant he has refused to vacate the land and hence this suit.

The defendant filed his defence on 28th March, 2001 in which he denies the allegations made by the plaintiff and avers that paragraph 9 of the plaint and the plaintiff's verifying affidavit are materially false as the plaintiff is aware of a previous land case No. 129 of 1996 at the Kitale Magistrate's court in which he (defendant) was awarded a portion of the suit land measuring 9 acres and that in satisfaction of the decree of the court he took occupation and/or possession of the said 9 acres. Further, the plaintiff filed a suit similar to the present one being Kitale HCCC No. 38 of 1998 which was struck out and no appeal was preferred.

The defendant contends that this present suit is "res-judicata" and ought to be struck out and/or dismissed. He prays for striking out of the plaintiff's verifying affidavit and paragraph 9 of the plaint as they allude to false material facts.

The defendant further contends that he is not a trespasser on part of the suit land and that this suit is an abuse of the court process by the plaintiff.

Basically, the issue for determination is whether the plaintiff is entitled to the orders sought against

the defendant. In that regard, the plaintiff was required to establish on a balance of probabilities that he is and has at all material times been the legal or beneficial proprietor of the entire suit land measuring twenty-seven (27) acres such that the defendant would have no right of claim over part of the land to wit nine (9) acres.

Before examining the evidence presented before the court, it may at this juncture be stated that the previous suit alluded to by the defendant (i.e. HCC No. 38 of 1998) arose from the proceedings of a Land Disputes Tribunal which ended in the defendant being awarded nine (9) acres of the suit land. The plaintiff challenged the proceedings and all consequential orders of the Land Tribunal vide the said HCC No. 38 of 1998. However, the defendant raised a preliminary objection which was upheld by the court on technical grounds, in that the plaintiff was seeking to quash the proceedings of the tribunal but failed to move the court in the manner stipulated by law i.e. by way of judicial review.

Since the issues raised in the case No. 38 of 1998 were not canvassed and a final determination made by the court, it is the opinion of this court that the doctrine of “res-judicata” would not apply to this case. Nonetheless, the plaintiff was less than candid in paragraph 9 of the plaint and in his verifying affidavit by ascertaining that there has been no previous proceedings between him and the defendant in relation to the suit property. The plaintiff ought to have acknowledge any previous dispute between him and the defendant in any other court and/or tribunal over the same subject matter. However, his omission in that regard was not prejudicial to the defendant since he was aware of the previous suits and acknowledged as much in his defence.

Be that at it may, on evidence, it is only the plaintiff and his witness, **John Kirwa Rotich (PW2)**, who testified in court.

During the trial session on 18th March, 2013, the defendant failed to appear in court despite being served with the necessary hearing notice.

On that date, the plaintiff was re-called to produce certified copies of the application for consent of the Land Control Board (P.Ex. 1), consent letter (P. Exh. 2) and the transfer document (P.Ex. 3).

Previously, the plaintiff testified that he purchased the suit land in 1972 from a company known as Kalenjin Estate at a purchase price of Ksh. 7,000/=. The land measured twenty seven (27) acres and he took possession thereof in the same year 1972. He said he went to the Land Control Board on 16th June, 1976. He made the necessary application for the board's consent and this was granted on 17th June, 1996. Thereafter, a transfer form dated 1st October, 1998 was completed but due to lack of funds he could not pursue the title deed which has not issued to date.

The plaintiff testified that he paid the required rates for the land but was only using six (6) acres of the land since the defendant trespassed thereon and damaged his property in the year 1987. The defendant further took occupation of 9 acres of the land and erected a house thereon which he later demolished.

The plaintiff contended that the defendant does not till the land and has since sold it resulting in its occupation by strangers.

The plaintiff testified that he was charged in a criminal court with trespassing on the land but was acquitted. He therefore asked this court to evict the defendant from the land. The plaintiff's witness (PW2) testified to the effect that he was the secretary of Kalenjin Estates, a company which has since been deregistered but which was formed for purposes of buying land. He said that the company purchased the land for its members in 1970. the members included the plaintiff and the defendant among others.

The witness (PW2) further testified that the defendant sold to the plaintiff his shares for twenty seven (27) acres of the land worth Ksh. 2,000/=. As a result of that sale, the defendant was refunded the money by the company. He (defendant) lost interest in the land and therefore, the plaintiff was taken to the land control board by the company. He (plaintiff) obtained the necessary consent and the twenty seven (27) acres were transferred to him by the company.

The plaintiff's witness went on to state that the defendant left the land in 1972 but made a come back in 1992.

From all the foregoing evidence, it is apparent that the transaction involving the transfer and the alleged ownership of the suit land from the defendant to the plaintiff was essentially carried out by the company known as Kalenjin Estate. It was the company which had purchased the land from its original owners and sub-divided it among its members. The defendant allegedly agreed to sell his twenty seven (27) acres to the plaintiff and was refunded the value thereof by the company. However, it was confirmed by the company secretary (PW2) that there was no written agreement of the transfer of the defendant's shares to the plaintiff. It was not therefore known whether or not the defendant had sold his entire entitlement to the land. There was also nothing to show that money was refunded to the defendant.

Consequently, there is considerable uncertainty as to whether the plaintiff purchased 27 acres of land from the defendant. These are the acres subject matter of this suit.

In testimony, the defendant was the beneficial owner of the land and therefore the rightful vendor for the purposes of the consent of the land control board.

Yet the consent was sought by the plaintiff and the company (Kalenjin Estate) in the absence of the actual vendor (defendant). Further, the alleged transfer of the land was between the company and the plaintiff.

It is intriguing that the application for consent (P. Exh. 1) was dated 1st October, 1998 and so was the transfer (P. Exh. 3) yet the letter of consent (P. Exh. 2) was dated 17th June, 1976 involving a transaction between the plaintiff and the company but not the defendant. It is instructive to note that the plaintiff was also a member of the company and was also entitled to a portion of the vast land in his own right. It would therefore appear that the consent (P.Exh. 2) had nothing to do with the alleged purchase of 27 acres of the land by the plaintiff from the defendant.

The production of the consent (P. Exh. 2) by the plaintiff in support of his present case against the defendant was intended to mislead the court. It would follow that the alleged transaction between the plaintiff and the defendant was null and void for want of the necessary Land Control Board consent. In the circumstances, this court cannot be called upon to enforce an illegal transaction between the plaintiff and the defendant on the one hand and between the plaintiff and the company on the other hand.

The duty to establish the case against the defendant lay with the plaintiff even if the defendant failed to testify in court.

It is clear from the evidence availed herein that the plaintiff failed to establish his alleged ownership of part of the suit land whether as a legal or beneficial owner. The plaintiff also failed to establish that the defendant has no right of claim over nine (9) acres of the land.

In the end result, the plaintiff is not entitled to orders sought against the defendant. This suit is thus dismissed with costs to the defendant.

[Delivered and signed this 16th day of May, 2013.]

J.R. KARANJA.

JUDGE.