



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL CASE NO. 121 OF 2012.

BENSON ALLAN MUSONGA)

ROSELINE MWIKALI KARANJA) :::::::::::::::::::::::::::::::::::::: PLAINTIFFS.

VERSUS

JOTHAM MUKORO MONO :::::::::::::::::::::::::::::::::::::::DEFENDANT.

J U D G M E N T.

The plaintiffs Benson Allan Musonga and Roseline Mwikali Karanja brought a suit against the defendant Jotham Mokoro Mono claiming the following orders:-

- a. *A declaration that the land comprised in title No. Trans Nzoia/Suwerwa/1250 solely belong to the plaintiffs and that the defendant who has no interest in the said property be ordered to vacate the same, together with his family and anybody also claiming under him, failing which the defendant be forcefully evicted.*
- b. *A permanent injunction restraining the defendant and his family members from interfering with the plaintiffs user of the land comprised in title No. Trans Nzoia/Suwerwa/1250.*
- c. *A mandatory injunction ordering the defendant to open the road affording the access to the plaintiffs parcel No. 1140 and failing which the OCS Cherangani/Kachibora Police Station be authorised to open the said road of access.*
- d. *Costs.*
- e. *Interest.*
- f. *Any other relief that this Honourable court may deem fit to grant.*

The plaintiffs case is that on 22/2/2004 the defendant entered into a sale agreement with Wycliffe Masinde Wasike for the purchase of 2 acres out of plot No. 662 at Suwerwa. The purchase price was Ksh. 140,000/= per acre making a total of Ksh. 280,000/=. The defendant paid Ksh. 200,000/= and was allowed to clear the balance on or before 30/8/2005. The defendant was shown where his plot was and he put up a house where he remained for about 2 years before re-locating to a different portion of the same plot. The defendant was unable to clear the balance and on 19/12/2006 the defendant and the vendor agreed that he

takes 1 ½ acres for the amount he had already paid.

The vendor had plot No. 662 subdivided into 2 portions which became known as plot 1139 and plot 1140. Plot 1140 was sold to the plaintiffs herein. The vendor remained with plot No. 1139. When the vendor became ill, he transferred plot No. 1139 into the names of his daughter Lilian Namenge Aseka and son in-law Humphrey Charles Aseka.

The vendor subsequently died without having transferred the 1 ½ acres into the defendant. The vendor's daughter Lilian Namenge Aseka and her husband then subdivided plot No. 1139 which now became plot Nos. 1244-1250. They then sold plot No. 1250 measuring 2 ½ acres to the plaintiffs. Though the defendant was at the area which became plot No. 1250, he was not supposed to be there. He was asked to occupy plot No. 1245 which is 1 ½ acres but he has refused and continues to occupy plot No. 1250 which is 2 ½ acres and is already registered in the name of the plaintiffs. Plot No. 1250 borders plot No. 1140 which the plaintiffs had bought from the deceased vendor. The defendant who is now occupying plot No. 1250 has blocked the plaintiffs from accessing plot No. 1250 which they bought and is already registered in their names. It is on this basis that the plaintiffs are seeking the orders enumerated hereinabove.

In the defence, the defendant contends that he bought 2 acres from Wycliffe Masinde Wasike at Ksh. 140,000/= per acre. He made a down payment of Ksh. 200,000/= and was given one year to clear the balance. When he took the balance of Ksh. 80,000/=, the seller alleged that the price of land had gone up. He declined to take the balance opting to give him 1 ½ acres for the amount he had already paid. He reported the matter to the area chief who advised that they involve a surveyor. A surveyor went to the ground and curved out 1 ½ acres in the presence of village elders. After 1 ½ acres had been curved out, the vendor took him to the D.O's office at Chebarus but the vendor's daughter Lilian objected to him being given title. He later learnt that the plot he was occupying had already been sold to someone else who had blocked a road of access he had been granted by the vendor.

I have considered the evidence adduced by the plaintiff and the defendant and his witnesses. There is no contention that the defendant initially wanted to buy two acres out of plot 662 Suwerwa. The two acres were later reduced to 1 ½ acres after the defendant failed to raise the balance of Ksh. 80,000/=. Though the defendant contends that, it is the vendor who declined to take the balance arguing that the price of land had gone up, this is not an issue for determination as the vendor and the defendant mutually agreed that he takes 1 ½ acres for the Ksh. 200,000/= he had paid. There is an agreement to this effect made on 19/12/2006. The issue for determination is whether the defendant is occupying his rightful portion and if not whether he has any right to remain on the said portion.

The plaintiffs called Lilian Namenge Aseka as a witness. This is the vendor's daughter who took the initiative to subdivide her father's land which had been transferred to her when her father was ailing and had it transferred to the various buyers. This witness testified that when the defendant bought land from her father he was shown where his plot lay. The defendant stayed there for about two years before he moved to a different portion of the same plot. As at the time the defendant bought this land, the same had not been subdivided. The land has now been subdivided and a portion of 1 ½ acres has been reserved for the defendant. The defendant has instead refused to take up his rightful portion and is insisting on occupying land which is 2 ½ acres.

The defendant called a witness DW2 Edward Matagaro. This witness only testified as to what he knew about the sale between the defendant and the vendor Mr. Wasike. He conceded in cross-examination that he does not know the physical location of the land which the defendant bought. The defendant also called DW3 Maurice Wanyonyi Wesonga as his witness. This witness is a village elder of Bibiriet sub-location. He testified on how the assistant chief of Bibiriet sub-location called him to his office where he met the vendor Mzee Wycliffe Masinde Wasike who asked him to go to Masinde's land and witness reduction of land for someone who had bought land but was unable to clear the full purchase price. He accompanied Mr. Wasike to his land. There was a surveyor called David Meli. They found the defendant who was looking after his animals. They told him that they had gone to survey the land with a view to reducing it from 2 acres to 1 ½. The defendant told them that it was okay. The surveyor

proceeded to curve out 1 ½ acres. The defendant's houses remained on the portion of 1 ½ acres and the plot was accordingly fenced with poles.

The defendant had testified that the surveyor who was involved in the reduction of the land was one Gadafi. This is the name which appears on the agreement of 19/12/2006. The defendant's witness says of a surveyor called David Meli. Even if David Meli is the one also known as Gadafi the fact remains that the defendant had been shown land elsewhere but he moved to the current portion later. It is expected that where land sold to someone before subdivision, the subdivision ought to ensure that each person is left to occupy land where he has been occupying or where he has constructed. In the present case, the defendant had been shown his portion elsewhere but he moved to a different one on his own motion. Now that the land has been sub divided and the portion to which he moved has already been sold to someone else who has obtained title for the same, it will be untenable for the defendant to insist that he should get title for the plot he is currently occupying. There is land which has been reserved for him. The land is 1 ½ acres for which he paid. He cannot insist on remaining on land which is 2 ½ acres. The defendant is to blame for the predicament he finds himself in. Had he stuck to the original portion he was shown, he would not have been inconvenienced by the re-location after subdivision. The portion he is occupying now has been registered in the name of the plaintiffs. He cannot insist on occupying it when his own portion is lying elsewhere unoccupied. When the defendant cross-examined plaintiffs witness no. 2 Lilian Namenge Aseka, it became apparent that the defendant had demanded compensation for developments on his land. This is an indication that he was willing to relocate to his own plot but the issue which arises is whether he is to be compensated. I do not think that the defendant should be compensated by anyone. He is to blame for moving from the portion he had been shown by the vendor. Had he called evidence to show that the portion where he is being asked to move out was where he had been occupying all through, then the issue of compensation will have risen. I find that the plaintiffs have proved a case against the defendant on a balance of probabilities. There was no evidence adduced by either side on what developments are on the land currently occupied by the defendant. There is however evidence that the defendant is growing crops on the land and has a cow on the land. Photographs produced by the plaintiffs show that the defendant has a pit latrine whose walls are built by mud covered by iron sheets. I allow the plaintiffs claims as pleaded in the plaint with costs. The defendant is hereby allowed six (6) months to allow him to harvest the crop growing on the land and allow him time to re-locate to his plot No. 1245.

[Dated, signed and delivered in open court on this 29th day of July, 2013.]

E. OBAGA.

JUDGE.

In the presence of Mr. Kiarie for plaintiffs and the defendant.

Court Clerk – Mr. Rumaita.

E. OBAGA.

JUDGE.

29/7/2013.