



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL SUIT NO. 87 OF 2010

BEN MUKHWANA WEPUKHULU PLAINTIFF

VERSUS

TOM DAVID WANYONYIDEFENDANT

J U D G M E N T

The Plaintiff Ben Mukhwana Wepukhulu brought this suit against the Defendant Tom David Wanyonyi for an order of eviction from Land Reference number Trans-Nzoia/Nyasi/49. The Plaintiff testified that he is the registered owner of Plot No. Trans-Nzoia/Nyasi/49 herein after referred to as “the suit land”. He produced a Title Deed (*exhibit 1*) which shows that the suit land is 1.416 hectares. He also produced a Search Certificate (*exhibit 2*) issued on 31/08/2010. The Certificate of Search confirms that he is the registered owner of the suit land and that there are no encumbrances, inhibitions, cautions or restrictions. In the year 2010, the Defendant entered into the suit land illegally. He moved to Court seeking for injunction orders but the Court ordered that the status quo be maintained until the suit is heard and finalized. The Plaintiff testified that the Defendant has put up illegal structures on the land and he now prays that the Defendant be evicted from the suit land and the illegal structures be demolished.

The Defendant Tom David Wanyonyi in his defence stated that he bought 2.2 acres from Samson Juma Simu. Before he bought the land, he carried out a search which confirmed that the Vendor was the registered owner of Plot No. 27. He completed paying the purchase price in 1995. The Vendor had sold part of his land to a number of other people. When the buyers wanted to process Title Deeds, they visited the Land Registry in 2001 where they found that the Plaintiff herein had registered a caution against the Vendor's title.

In 2009, the Plaintiff brought in a surveyor who wanted to curve out over 3 acres for him. The other buyers moved to Court and filed an application for injunction seeking to stop the Plaintiff from evicting them. The application for injunction was made in Land Case No. 68 of 1998 which was between the Vendor Samson Juma Simu as Plaintiff and Ben Mukhwana Wepukhulu as Defendant. The Defendant further testified that he and other buyers later filed HCCC No. 114 of 2009 which is still pending.

The Defendant called Dw2 Samson Juma Simu as his witness. This is the one who sold land to both the Plaintiff and the Defendant. He testified that he sold 2.4 acres to the Defendant and 0.4 of an acre or (four points) to the Plaintiff. He contends that the Plaintiff herein obtained title to the suit land in an improper way and that he is out to defraud him as well as others to whom he sold land.

I have considered the Plaintiff's case as well as the Defendant's position. There is no doubt that the suit land is registered in the name of the Plaintiff. The issue for determination is whether the Plaintiff is entitled to eviction orders against the Defendant. The Plaintiff herein is seeking the orders on the

strength of the Title Deed he is holding. During the hearing, the Advocate the Plaintiff while cross-examining the Defendant's witness asked him whether he was aware of any suit between him and the Plaintiff. The witness Samson Juma Simu denied that he ever had any case with the Plaintiff. He was shown a document relating to Kitale Chief Magistrate Land Case No. 68 of 1998 but he still denied knowledge of the case. This prompted Mr. Onyancha for the Plaintiff to ask the Court to make an order directing the Executive Officer of Kitale Law Courts to produce Court file in respect of Kitale Chief Magistrate Land Case No. 68 of 1998. The Court file was produced in Court by Hellen Tata Amuke the In-charge of the Chief Magistrate's Court Civil Registry.

It is clear from the proceedings in Kitale Chief Magistrate Land Case No. 68 of 1998 that the Defendant's witness Samson Juma Simu took the Defendant before Kiminini Land Disputes Tribunal over a dispute with the Plaintiff in this case. The Tribunal listened to the dispute and ruled that the Plaintiff herein had bought 3 ½ acres from Samson Juma Simu. The Tribunal's verdict was adopted as judgment of the Court vide Kitale Chief Magistrate Land case No. 68 of 1998. Samson Juma Simu was dissatisfied and he brought an application for judicial review seeking to overturn the finding of the Tribunal. The application was dismissed by the High Court and Samson Juma Simu did not take any further steps.

The Defendant herein with others tried to obtain an injunction stopping the Plaintiff from executing judgment in Kitale Chief Magistrate Land Case No. 68 of 1998 but they did not succeed. They obtained an injunction ex-parte but which injunction was discharged following the dismissal of their application. The Plaintiff herein then proceeded and executed the judgment by having 3 ½ acres curved out of Plot No. 27 belonging to Samson Juma Simu. The necessary transfer documents were signed on Samson Juma Simu's behalf and the Plaintiff herein obtained his title.

The Plaintiff herein bought the suit land beginning from 1987. The Defendant claims that Samson Juma's land was 5 acres. If this is the case, then the Vendor knew that he didn't have enough land to sell to other buyers, the Defendant inclusive. The Defendant is said to have bought 2.2 acres from the Vendor in 1995. There are still other buyers from the same Vendor.

It is clear that the Plaintiff legally obtained title to the 1.416 hectares which translates to 3 ½ acres which he bought from the Vendor. I found the Defendant's witness Samson Juma Simu to be a person whose evidence cannot be relied on. He was not being truthful when he claimed that he had nothing to do with Land Case No. 68 of 1998 when the truth is that he is the one who initiated the proceedings which he unsuccessfully tried to overturn in the High Court. He cannot claim that the Plaintiff herein is out to defraud him and other buyers including the Defendant. The Defendant should lay his claim against the Vendor Samson Juma Simu. The Defendant has no business remaining on the 3 ½ acres which belongs to the Plaintiff. I find that the Plaintiff has proved his case on a balance of probabilities. An order of eviction is issued against the Defendant and his family or anyone claiming under him. The Defendant is allowed three months to relocate from the Plaintiff's land failing which he should be evicted from the suit land. The Defendant shall pay costs of this suit to the Plaintiff.

Dated, signed and delivered in Open Court on this 17th day of September, 2013.

E. OBAGA

JUDGE

In the presence of Plaintiff and Defendant.

Court Clerk: Kassachoon.

E. OBAGA

JUDGE

17/09/2013