



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC CASE NO. 55 OF 2018**

**MAINGI UVYU MWALALE..... PLAINTIFF**

**=VERSUS=**

**JAMES MUTUKU KYUMBUA..... DEFENDANT**

**JUDGEMENT**

1. By his plaint dated 19<sup>th</sup> April, 2018 and filed in court on 22<sup>nd</sup> May, 2018 the Plaintiff prays for judgement against the Defendant for:-

**(a) A Declaration that the Plaintiff is the lawful owner of all that parcel of land known as KITETA/KAKUSWI/478 measuring approximately 2.6 Hectares.**

**(b) A declaration that the Defendant's presence on the suit property without the Plaintiff's authority or permission is illegal and constitutes trespass.**

**(c) General damages for trespass.**

**(d) An order of eviction against the Defendant be issued to be enforced by the Officer in Charge of Police Department (O.C.P.D) Makueni.**

**(e) Costs and interest in this suit.**

**(f) Any other relief that this honorable court may deem fit to grant.**

2. The Plaintiff has pleaded in paragraphs 3, 6, 7 and 8 of his plaint that on or about 18/08/1980 he purchased all that land known as Kiteta/Kakuswi/478 from one Kyumbua (deceased) for a consideration of Kshs.12,000/= and obtained vacant possession of the said land, that he petitioned for letters of administration intestate to the estate of the late Kyumbua Kawau through Machakos Succession Cause No.233 of 2009 and a grant of letters of administration intestate of the said estate was issued to him on 19/08/2009 and confirmed on 30/04/2017, that he was thereafter registered as the owner of the said suitland and was duly issued with a title deed to the land which measures approximately 2.6 hectares and that the Defendant who is one of the beneficiaries of the estate of the late Kyumbua Kawau has since then entered into the said land known as Kiteta/Kakuswi/478 and is using it without the Plaintiff's authority and/or permission to the detriment of the Plaintiff.

3. The Plaintiff's claim is denied by the Defendant vide his statement of defence dated 20/07/18 dated and filed in court on even date.

4. On the 24/08/18 the Plaintiff filed a reply to the Defendant's statement of defence.

5. During the hearing, the Plaintiff adopted his statement dated 19/04/18 as his evidence. Briefly his evidence was that he bought the suitland from Kyumbua Kawau and his children. He produced the title deed, grant of letters of administration intestate dated 25/09/2009, certificate of confirmation of grant dated 04/04/17, sale agreement dated 18/08/1980, acknowledgement of payments and demand letter dated 01/02/2008 in his list of documents dated 19/04/18 and filed in court on 22/05/18 as P.Exhibit Nos. 1 to 6 respectively. He went on to produce the citation to accept or refuse letters of administration intestate dated 12/08/08 and supporting affidavit in support of the citation dated 12/08/08 in his further list of documents dated 22/08/18 and filed in court on 24/08/18 as P.Exhibit Nos.7 and 8 respectively.

6. His evidence in cross-examination by Mr. Masaku for the Defendant was that the agreement is between himself and Kyumbua. That he bought a portion of the suitland since the other portion had been sold to someone else. He said that the Defendant entered into his portion of land. He added that all the payments were acknowledged and that he had his witnesses when they prepared the agreement. He said that he did not inform Kyumbua's children when he filed the succession cause. It was also his evidence that although the title covers the entire parcel of land, he was to subdivide it with the other buyer. That he paid the last installment of Kshs.400/= and the same was not recorded.

7.His evidence in re-examination by Mr. Nthiwa was that Kyumbua's children were cited when he applied for succession cause.

8. In his defence, the Defendant adopted his undated statement filed in court on 08/04/18 as his evidence. He produced a copy of the agreement dated 08/03/1980 as D.Exhibit No.1. He went on to produce a further agreement dated 24/03/1981 as D.Exhibit No.2.

9. The Defendant's evidence in cross-examination by Mr. Nthiwa was that Kyumbua Kawau sold land so that he could take his (defendant's) mother to the hospital. He admitted that the Plaintiff bought land from his father. He said that he is opposed to the Plaintiff being awarded the suitland because he has not finished paying the purchase price.

10. On the 24/08/18 the Plaintiff filed his list of issues dated 22/08/18. It has nine issues namely:-

**1) Did the Plaintiff purchase all that land known as KITETA/KAKUSWI/478 from Kyumbua Kawau (deceased) for a consideration of Kshs.12,000/=?**

**2) Did the plaintiff cite the beneficiaries to the estate of Kyumbua Kawau through Succession cause number 496 of 2008 to accept or refuse letters of administration intestate?**

**3) Was the plaintiff granted leave by court to petition for letters of administration intestate to the estate of Kyumbua Kawau after the beneficiaries to the said estate refused and failed to petition?**

**4) Did the Plaintiff petition for grant of letters of administration intestate of the late Kyumbua Kawau and the same given and confirmed by the court?**

**5) Is the Plaintiff the registered owner of a parcel of land known as KITETA/KAKUSWI/478?**

**6) Has the defendant entered into and trespassed on the said land without authority and/or permission of the plaintiff?**

**7) Has demand and notice to sue been issued?**

**8) Is the Plaintiff entitled to the reliefs sought in the plaint?**

**9) Who bears the cost of the suit?**

On the other hand the Defendant filed his list of issues on 08/08/19 the same being dated on even date. The issues according to the Defendant were:-

**1) Whether the Plaintiff is the owner of the suit property where they reside.**

**2) Whether the defendants encroached or trespassed into the suit property.**

**3) Whether the plaintiff is entitled to the prayers sought in the plaint.**

**4) Who bears the costs of the suit?**

11. I have read the submissions filed by the Counsel on record for the parties herein. They are more or less a review of the evidence adduced by both the Plaintiff and the Defendant.

12. The Plaintiff's Counsel urged the court to find that the Plaintiff has proved his case and proceed to allow the suit. The Counsel further submitted that even though the Defendant said that he was never served with citation and succession proceedings, he has never sought to revoke the grant and certificate of confirmation of grant included in the Plaintiff's list of documents. The Counsel added that the succession proceedings before the High Court were before a competent court and remain in force. That **Section 54 of the Land Act** supports this and states as follows:-

*"if a person has become entitled to any land, lease or charge under any law or by virtue of any order or certificate of sale made or issued under any law, the Registrar, on the application of any interested person supported by such evidence as the person may require, shall register the person entitled, as the proprietor."*

The Counsel went on to submit that the Defendant did not give any particulars of fraud committed by the Plaintiff in the whole process of transfer of property. The Counsel pointed out that parties are bound by their pleadings and the Defendant did not indicate in his defence that he was not aware of the succession proceedings.

13. The Counsel urged the court to find that the title deed was lawfully transferred to the Plaintiff herein and thus he remains the legitimate owner thereof. That since there is no counterclaim, the allegation by the Defendant that he is entitled to the land cannot hold. To buttress his submission, the Counsel cited **Section 26 of the Land Registration Act** which provides as follows: -

*"S.26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission*

*by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except”*

14. On the other hand, the submissions by the Defendant’s Counsel were that nothing was tendered to show that the Defendant was aware of the succession proceedings in respect of his father’s estate. The Counsel went on to submit that the Plaintiff in his evidence in cross-examination confirmed that prior to purchasing his portion of land, he was aware that another portion forming part of the suitland had been sold to other persons and yet he proceeded to have the whole parcel of land registered in his name in total disregard to the other purchasers. The Counsel pointed out that the Plaintiff is out to disinherit the Defendant as well as the bonafide purchaser of a portion of the suitland.

15. It was further submitted on behalf of the Defendant that it was a cardinal principle that he who avers must prove if the court is to exercise discretion in his favour. The Counsel cited **Section 107 of the Evidence Act chapter 80 of the Laws of Kenya** which provides that:-

*“whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.”*

16. Arising from the above, the Counsel submitted that although the Plaintiff claims that he bought the suit property and paid the purchase price in full, he has failed to demonstrate how he paid the same. The Counsel urged the court to dismiss the Plaintiff’s suit.

17. From the evidence on record, it is clear that the Plaintiff purchased a portion of land parcel number Kiteta/Kakuswi/478 from one Kyumbua who was the father of the Defendant herein. The Defendant has conceded that indeed the Plaintiff did purchase the said portion of land from his father even though according to him, the Plaintiff did not pay the full purchase price. The Defendant has also stated that the Plaintiff had the entire land parcel No. Kiteta/Kakuswi/478 registered in his name even though one portion had been sold to another person. That may be so but it is not for the Defendant to complain on behalf of the other purchaser. The other purchaser is the one who should sue the Plaintiff herein if he so wishes.

18. There is also evidence to show that the Defendant was served with the citation to either accept or refuse letters of administration intestate by the Plaintiff. He therefore cannot be heard to say that he was not aware of the succession case when it is clear that the Plaintiff filed the cause after the Defendant failed to take action upon being served with citation. It is also clear that the Defendant still occupies the portion that the Plaintiff purchased from the Defendant’s father. However, none of the two advocates made any submissions regarding the award of damages for trespass.

19. From the evidence on record, it is safe to conclude that the Defendant’s presence in the suitland without the Plaintiff’s authority or permission is illegal and constitutes a trespass. In the case of **Duncan Nderitu Ndegwa vs. KP&LC Ltd & Another [2013] eKLR**, Nyamweya J held thus:

*“.....once a trespass to land is established it is actionable perse, and indeed no proof of damage is necessary for the court to award general damages.”*

20. Given the circumstances of this case, I am of the view that Kshs.100,000/= would be sufficient award for trespass.

21. Being satisfied that the Plaintiff has a cause of action against the Defendant, I hereby proceed to enter judgement for the Plaintiff and against the Defendant as hereunder:-

- (a)
- (b)
- (c) Kshs.100,000/= being general damages for trespass.
- (d)
- (e)

**Signed, Dated and Delivered at Makueni this 1<sup>st</sup> day of October, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Mutune for Mr. Nthiwa for the Plaintiff

Ms. Kyalo for the Defendant

Ms. C. Nzioka - Court Assistant

**MBOGO C. G., JUDGE,**

**01/10/2019.**