



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
LAND & ENVIRONMENT CASE NO.316 OF 2015

ISAYA OKOLI WERE.....PLAINTIFF

VERSUS

ALFAYO OMARI INGUTIA.....DEFENDANT

JUDGEMENT

[1]. The plaintiff herein filed this suit against the defendant claiming that he is the registered owner of land parcel of LR No. Butsotso/Shibeye/3548 comprising of 1.40 hectares. That the defendant is the registered owner of Butsotso/Shibeye/3547 comprising of 1.60 hectares.

The plaintiff states that the said properties were initially one land called Butsotso/Shibeye/610 an ancestral land comprising 28.9 and which was registered in the name of Shitensi Were as a trustee for his brothers.

[2]. That sometime in 2009 the defendant moved from his land 3547 and unlawfully trespassed and occupied the plaintiff's land 3548. The plaintiff says that he had made several attempts to have the defendant leave his land to no avail making this suit which seeks to ask for orders that the defendant to move and vacate the plaintiff's land necessary. The plaintiff also asks for a permanent injunction to restrain the defendant together with his servants, agents from occupying, encroaching and/or trespassing land parcel Kakamega/Butsotso/3548.

[3]. The defendant filed a defence on 14/3/2016 denying the claim and averred that the subdivision of land parcel No. Butsotso/610 by the plaintiff to create titles No.3547 and 3548 inter alia was fraudulent since the same was done after the death of the original owner Shitiseswa Were. The defendant set out the particulars of fraud in his defence. He also said that the suit land is the subject of Kakamega High Court Succession Cause No.220 of 2015 and that this Court lacks jurisdiction.

[4]. Prior to the hearing hereof the application dated 21/12/2015 which was pending was withdrawn with no order as to costs and the suit was fixed for hearing on 9/11/2016. On the hearing date Mr. Nandwa learned Counsel for the defendant said he had not complied with *Order 11 of the Civil Procedure Rules 2010* since he had not received instructions from his client to allow him to file witness statements. He applied to withdraw from acting for the defendant. The defendant who was in Court told the Court that he had no funds to visit his Counsel. Mr. Nandwa was allowed to withdraw and the suit proceeded to hearing.

[5]. The plaintiff told the Court that he wished to rely on his statement dated 21/12/15 as evidence. He produced his title for Butsotso/Shibeye/3548 and a Search Certificate dated 15/12/2015 and a copy of the Green Card dated 20/4/2016 as exhibits to prove ownership of the land. He said he got the land from his father together with some seven other people. He told the Court that the defendant was his brother's son

known as Shiteswa Were. He said that the defendant's father had his land. He said that the defendant has two wives one on his father's land and another on the plaintiff's land. He requested the Court to grant him his orders.

[6]. The plaintiff called one witness Mr. Jackson Nelima Were who said he had written a statement dated 29/4/2016 and relied on the same. He told the Court that the defendant's father's land is Butsotso/Shibeye/3547. He produced the original title of the same. He said that the defendant had refused to collect the title from the Chief who gave it to him to keep in safe custody. It was produced as P. Exhibit 4. On cross examination by the defendant the witness said that the defendant's father was the one supposed to get the land not the defendant.

[7].The defendant in his defence said that he will not come out of the land. That the plaintiffs who are his father's brothers have sold the land. That he has seven children by one wife who stays on the suit land 3548 and that in parcel number 3547 his other wife and his brothers live therein and he has nothing on 3547.

[8].That being the case for the plaintiff and the defendant, the issue for determination is whether the defendant should move out and vacate out of the plaintiff's land.

[9]. The plaintiff produced the documents, to wit title deed Certificate of official Search and the Green Card to show that he is the registered owner of Kakamega/Butsotso/Shibeye/3548. He was able to prove that this was a gift intervivo from his deceased father.

The plaintiff's witness Mr. Jackson Nelima Were who comes from Butsotso in Lurambi Kakamega County said that the defendant's father's land was Kakamega/Butsotso/Shibeye/3547. He produced in Court a title deed for the same which was given to him by the Chief of the area to keep in safe custody when the defendant refused to collect it from him.

[10]. The defendant, despite refusing to collect the title occupied his father's land through one of his wives and children. He kept the other wife and seven children in the plaintiff's land.

In his defence, the plaintiff had no explanation for such occupation. He only says that his father's brothers sold the land and none is left. He stubbornly refuses to move and vacate out of the plaintiff's land and move to his father's land Kakamega/Butsotso/Shibeye/3547. His occupation of the plaintiff's land is illegal and unlawful.

[11]. I am satisfied that the plaintiff herein has proved his case on balance of probability. I grant him the orders he prays in his plaint with costs and interests.

I further do order that the defendant do move out of the plaintiff's land Kakamega/Butsotso/Shibeye/3548 within 45 days from the date of this judgement failing which the plaintiff shall be at liberty to evict him with the help of the Court bailiff assisted by the police Officers of the nearest police Station. He shall bear the costs of such eviction.

It is so ordered.

Judgment read.

Notice of delivery of Judgment served.

DATED and DELIVERED at BUNGOMA this 10th day of March, 2017.

S.N. MUKUNYA

JUDGE

In the presence of:

Court Assistants - Chemutai/Joy

Parties served.