



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 50 OF 2012**

**NDIEMA KIRUI TOBOSWA ..... PLAINTIFF**

**VERSUS**

**ENES N. WAFULA..... DEFENDANT**

**J U D G M E N T**

**INTRODUCTION**

1. The defendant is the wife of the late **Peter Wafula Paul**(deceased) who died in **2007**. The plaintiff brought a suit against the defendant seeking orders of eviction from **L.R. No. Trans-Nzoia/Maridadi/118** (suit land) which is registered in his name.He also sought for a permanent injunction against the defendant barring her from interfering with the suit land once she is evicted.

**PLAINTIFF'S CASE**

2. The plaintiff testified that on **18/2/1993** he entered into a land exchange agreement with the deceased in which the deceased agreed to take the plaintiff's four acres of **Maridadi Farm** and the plaintiff agreed to take the deceased's four acres at **Kolongei Farm** in Endebess. The two took possession of the respective parcels in1993. Soon after the plaintiff had settled at the Endebess land, it turned out that the deceased had not cleared paying for the land.The plaintiff approached the deceased who went and sorted out the issue with Kolongei Farmers Co- operative Society. The deceased paid Kshs.1,000/= to Kolongei Farmers Co-operative Society which enabled the plaintiff to become a member. The plaintiff was then formally given four acres.

3.Around the same year, one **Tom Azingale** came and told the plaintiff that the land on which he was staying belonged to him. The said Tom Azingale later came and curved out **2 ½ acres** which he sold leaving the plaintiff with **1 ½ acres** which the plaintiff is utilizing to date. The plaintiff testified that Tom Azingale has since obtained eviction orders against Kolongei Farmers Co-operative Society and that he is now expected to move out of the remaining **1 ½ acres**. He has been asking the defendant to move out of the suit land so that she can go back to the Endebess land to deal with its problems but that the defendant has declined to do so.

4.The plaintiff obtained title to the suit land on 7/3/2012 and he now wants the defendant to be evicted from the suit land.

**DEFENDANT'S CASE**

5. The defendant states that the deceased and the plaintiff entered into a land exchange agreement in 1993. She took possession of the land at Maridadi Farm where she has done extensivedevelopment. Her

husband the deceased died in 2007. She has not taken out Letters of Administration yet she has been sued in her capacity as wife of the deceased. She prays that the plaintiff's case be dismissed with costs to her.

### **ANALYSIS OF EVIDENCE**

6. There is no doubt that there was a land exchange agreement between the plaintiff and the deceased. The plaintiff produced the two land exchange agreements as exhibits 1 and 2. The plaintiff has also obtained title deed for the exchanged land. This title was obtained on 7/3/2012 and was produced as exhibit 3. The plaintiff also produced a copy of an eviction order as exhibit 4. This is an eviction order arising from a case filed by *Tom Kevole Azingale and 7 Others -vs- Kolongei Farmers Co-operative Society and Another in Kitale HCCC No. 104 of 1997*.

### **ISSUES FOR DETERMINATION**

7. The issues for determination in this case are firstly, whether the plaintiff has been ordered to vacate from the land he was given in exchange for the one at **Maridadi** and secondly whether the suit against the defendant can be sustained in the circumstances. The exchange agreement between the deceased and the plaintiff was in respect of four acres comprised in **L.R. No. 5335/10/3**. The plaintiff claims that Tom Azingale has obtained eviction orders against **Kolongei Farmers Co-operative Society**. A look at the eviction order shows that the exchanged land is not among the blocks where Kolongei Farmers Co-operative Society were ordered to move out.

8. The plaintiff claims that Tom Azingale curved 2 ½ acres and sold the same to third parties. There is no evidence to show that the said Tom Azingale sold 2 ½ acres. It does not make sense that one can obtain eviction orders against the entire co-operative society and again seek to sell a few acres of individuals and leave them with other acres. The plaintiff himself stated in his evidence that the said Tom Azingale told him that the deceased was entitled to 1 ½ acres. He cannot then claim that he is supposed to be evicted. There is no evidence that Tom Azingale sold 2 ½ acres. When the deceased exchanged his land with the plaintiff, he ensured that the plaintiff had become a member and that he had been given 4 acres. It was not the duty of the deceased to keep watch over the exchanged land. If it is indeed true that the said Tom Azingale sold 2 ½ acres, then he sold the plaintiff's plot and it was upon the plaintiff to deal with him as he had already been given four acres as confirmed in his own evidence. The exchanged plot was not among the plots which Kolongei Farmers Co-operative Society had been ordered to move out.

9. The plaintiff brought this suit against the defendant as wife of the deceased. The defendant had not taken out Letters of Administration in respect of the deceased's estate. It is only the legal representative who should have been sued. The defendant is not yet the legal representative of the deceased. The defendant has not been sued as a trespasser. To this extent the plaintiff's suit cannot stand against the defendant. The plaintiff went and processed title for the exchanged plot which he obtained in 2012. The defendant had been on the suit land since 1993. The plaintiff's claim is caught up by limitation. The Limitation of Actions Act is clear that a party cannot bring a suit to recover land after expiry of 12 years.

### **DECISION**

10. I find that the plaintiff has not only failed to prove his case to the required standards but the same is brought against a party with no capacity to be sued and is statute barred. The plaintiff's suit is therefore dismissed with costs to the defendant.

Dated, signed and delivered at Kitale on this **1st** day of **July, 2015**.

**E. OBAGA**

**JUDGE**

**1/7/2015**

In the presence of M/s. Bett for Plaintiff and M/s. Arunga for Defendant.

Court Clerk – Isabellah.

**E. OBAGA**

**JUDGE**

**1/7/2015**