



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL SUIT NO. 2 OF 2009**

**JOHN MUHATIA ..... PLAINTIFF**

**VERSUS**

**JOASH SHIVUKALE ..... DEFENDANT**

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

John Muhatia, is the plaintiff in this suit which was filed herein on 5th January, 2009 for orders of eviction to issue against the defendant, Joash Shikuvale, from land parcel/plot No. Kwanza/Kwanza/Block 4/Koross/27 on grounds that in the year 2000 without the consent of the plaintiff, the defendant trespassed into the said parcel of land which is duly registered in the name of the plaintiff.

The defendant filed a defence in which the allegation's made against him by the plaintiff are denied and in which he contends that the property is family land which the plaintiff fraudulently registered in his name.

The defendant further contends that this suit is “res-judicata” as the issues relating to the same were deliberated upon in Kitale CM's land case No. 62 of 2007. The statement of defence was filed on 3rd February, 2009

The hearing of the suit commenced on 6th December, 2011, after several interlocutory applications had been dealt with.

In his testimony, the plaintiff John Muhatia (PW1) , stated that the defendant was his brother living on the suit land which is his (plaintiff's) property and which was lawfully registered in his name and a title deed (P.Ex.1) issued in his name.

The plaintiff further stated that the suit property was registered in his name on 7th December, 2006 without any objection from the defendant who in the year 2007, filed land case No. 62 of 2007 at the Chief Magistrate's court in Kitale in relation to a separate portion of land. The plaintiff produced the necessary award and decree (P. Ex.3) pertaining to that case and contended that the suit property was purchased by himself from one David Koskei. He denied that the suit property is family land and that he obtained it by fraud. He also denied that the title to the land is held by him in trust for the defendant. He further denied that plot No. 27/Koros which was the subject of the proceedings before a land tribunal is the suit property herein. He admitted that he attended the proceedings of the tribunal but denied that the tribunal ordered that the land be subdivided.

The plaintiff closed his case without calling any witness and with a contention that the defendant

should look for his own land.

In his testimony, the defendant Joash Shivukale (DW1) stated that the plaintiff was his elder brother who stays at Koros 1 plot No. 27 which is registered in the name of the plaintiff. He stated further that family land situated in Kapsabet was sold to facilitate the purchase of Plot No. 27 but the plaintiff registered the plot in his name to hold in trust for him (defendant) and their other brother. That, he (defendant) settled on the plot and incurred expenses for its survey. He produced the necessary receipts (D. Ex.5a – b) and indicated that the plot measures 4.6 acres and each of the three brothers is entitled to 1.46 acres of the same although the third brother has since passed away.

The defendant indicated that it was upon the refusal of the plaintiff to sub-divide the land for their benefit that he filed a claim at the Kwanza land disputes tribunal which ruled in his favour. He produced the tribunal's Award (D.Ex.1) and the relevant decree (D.Ex.3). He also produced the application (D.Ex.2) filed in court by the plaintiff disputing the decree and indicated that the application was dismissed. He produced the court's ruling (D.Ex.4) and stated that the plot was ultimately sub-divided as per the decree. He denied that he was a trespasser on the land and contended that it is the plaintiff who was a trespasser and that the suit property is the same plot No. 27 being referred herein.

**Abisai Savatia (DW2)** testified that the plaintiff and the defendant have been his neighbours at Koros 1 and also at Kapsabet where they lived on land belonging to their late mother Dorcas. That, Dorcas sold the land in Kapsabet and informed him (DW2) that she had given money to the plaintiff to purchase land in Kitale.

That, the plaintiff purchased for (4) acres of land at Koros and occupied it together with the defendant and their mother who was buried thereon after her death. That, the land has since been occupied by the defendant and his family. The witness (DW2), stated that although the plaintiff lays a claim to the land, it belongs to the family comprising of himself and his two brothers i.e the defendant and a deceased brother.

Roban Kayanda Mukisa (DW3),stated that the plaintiff and the defendant are her brothers and that the suit property was purchased by their late mother through the plaintiff who however registered it in his name instead of in the joint names of the three brothers. She (DW2) indicated that the property is occupied by the defendant who lives there.

Aggrey Kavehi (DW4), an Assistant Land Registrar Kitale, indicated that the area list for Koros Farm described as Kwanza Block 4/Koros was handed over to them to facilitate registration of the portions sub-divided to individual members of the farm. He said that the suit property was part of the farm and was registered in the name of the plaintiff.

From all the foregoing evidence, the issues arising for determination are firstly whether this suit is res-judicata and secondly, whether registration of the suit land in the name of the plaintiff as the absolute owner was obtained by fraud.

With regard to the first issue, section 7 of the Civil Procedure Act provides that;-

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

It is the defendant's contention that this suit is res-judicata because the dispute herein relates to the suit property and was conclusively heard and determined vide Kitale land case No. 62 of 2007 for

which there exists a valid decree.

The decree (D.Ex. 3) arose from the decision of the Kwanza division land dispute tribunal filed in the Chief Magistrate's court at Kitale on 7th June, 2007 and it is clear that it refers to a plot No. 27 Koros 1 which has not been shown to be the suit property Kwanza/Kwanza block 4/Koross/27. The descriptions are distinct meaning that these are two different portions of land and therefore the doctrine of res-judica" would not apply herein.

Further, considering that the decree arose from a decision of a land board which is not described as a court in the Civil Procedure Act, it would follow that any decision made by the tribunal would not be subject to the doctrine of res-judicata. However, the tribunal's decision having been adopted as a decision of the court in land case No. 62 of 2007, it became a decision of the court subject to the doctrine of res-judicata which could not apply in this matter because it is doubtful whether the land tribunal made a decision touching on the suit property Kwanza/Kwanza Block 4/Koross/27 which was not the subject of the decree referred to herein above. Indeed, the doctrine of res-judicata would have been applicable herein if only the plaintiff had established by concrete evidence that the suit property is in the same plot No. 27 Koross 1.

With regard to the second issue for determination, it is undisputed that the suit property is registered in the name of the plaintiff. The title deed indicates that it was a first registration made under the Registered Land Act (Cap 300 Law of Kenya). The effect of the registration under section 27 of the Act was to confer absolute ownership of the land to the plaintiff. His rights as a proprietor are indefeasible except as provided in the Act.

Herein, the registration of the suit property in the name of the plaintiff was a first registration which could not be challenged by the defendant on the basis of fraud as there was insufficient or no evidence at all to prove that the property was purchased by the late Dorcas (mother to both the plaintiff and defendant) through the plaintiff and that it was to be registered in the names of the plaintiff, the defendant and their late brother Francis. The evidence by the plaintiff indicated that he purchased the property in his own right from one David Koskei.

This was supported by Abisai (DW2) who confirmed that the plaintiff entered into a sale agreement with the said David Koskei and purchased the suit property which he registered in his name.

The land Registrar (DW4), confirmed that the plaintiff was registered as the absolute proprietor on 7th December, 2006 and that there was no entry of an existing trust in the register. Basically, no evidence was availed by the defendant to establish that the registration of the suit property in the name of the plaintiff was obtained by fraud or any other wrong doing.

It would therefore follow that the defendant's occupation of the suit property or part thereof without the consent of the plaintiff was illegal thereby rendering him a trespasser. Consequently, the plaintiff is entitled to an order of eviction against him,.

Therefore, judgment is herein entered for the plaintiff against the defendant to the extent that the defendant be evicted from the suit property within a period of twenty one (21) days from this date hereof if he would not have voluntarily moved out of the property.

Ordered accordingly.

**J. R. KARANJA,**

**JUDGE**

(Delivered and signed this 11th day of February, 2014).