



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 83 OF 2011**

**DAVID CULLEN ..... PLAINTIFF**

**VERSUS**

**THE MEDICAL SUPERINTENDENT**

**KITALE DISTRICT HOSPITAL ..... 1ST DEFENDANT**

**THE ATTORNEY GENERAL ..... 2ND DEFENDANT**

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

1. The Plaintiff brought this suit against the defendants seeking for a declaration that he is the lawful owner of Kitale Municipality Block 8/167. He also sought for a mandatory injunction against the first defendant restraining him/her from any further interference with the plaintiff's use and or enjoyment of the rights of ownership of the suit premises. The plaintiff also prays for mesne profits and costs of the suit.
2. The defendants filed a defence to the plaintiff's claim and raised a counter-claim in which they seek the following reliefs;-
  - (i) A declaration that all that parcel of land comprised of the suit property and described as Kitale Municipality/Block 8/167 is the property of the Government of Kenya.
  - (ii) A declaration that the creation of and subsequent registration of Kitale Municipality/Block 8/167 to Esther Rotich and Lily Cheronno was irregular, fraudulent, illegal and void ab initio.
  - (iii) A declaration that the transfer of and subsequent registration of Kitale Municipality/Block 8/167 from Esther Rotich and Lily Cheronno to David Cullen was irregular, fraudulent, illegal and void ab initio.
  - (iv) An order for rectification of the register by cancellation of the certificate of lease and all entries on the land register for Kitale Municipality/Block 8/167 in respect of the lease.
  - (v) An order that the plaintiff surrender to the land Registrar Trans-Nzoia the original certificate of lease issued to him in respect to Kitale Municipality/Block 8/167 for cancellation.
  - (vi) An order of preservation and permanent injunction against the plaintiff, his

agents, servants, assigns or any other person deriving power from the plaintiff restraining them from leasing, transferring, charging, taking possession or in any other manner howsoever from dealing with Kitale Municipality/Block 8/167 otherwise then by transfer or surrender to the Government of Kenya.

3. The State Counsel representing the defendants closed the defendant's case without calling any evidence. The parties agreed to file written submissions in support of their respective cases.

### **PLAINTIFF'S EVIDENCE**

4. The plaintiff testified that on 15/10/2002 he bought the suit property from Esther Rotich and Lily Cherono. He testified that he paid Kshs.1.2 million. He thereafter obtained certificate of lease for the same on 18/10/2002. He took possession of the property and started cultivating on it as he prepared to put up a house on it.
5. The plaintiff further testified that on 7/3/2011 he received a call from his people on the ground that the property had been taken by the Government. He drove from Naivasha where he works and on arrival at Kitale, he found that the land was being guarded by Administration police officers and that the same had been ploughed and the medical superintendent of Kitale District hospital had planted beans.
6. The plaintiff issued a demand notice to the AG (exhibit 1). The Attorney General responded to the notice through letter written by Muthoni Kimani (exhibit 2). He produced a certificate of official search (exhibit 3) and green card (exhibit 4). The plaintiff also produced a copy of certificate of lease (exhibit 5).
7. The plaintiff testified that he did a search before he bought the land and that he did not know that the land had any problem.
8. I have considered the plaintiff's evidence in light of his statement of claim. Though the Attorney General had filed defence and counter-claim, there was no evidence called in support of the same. The state counsel who appeared during the hearing applied for adjournment after the plaintiff closed his case. This was to enable him avail one witness. The case was adjourned from 17/3/2014 to 2/4/2014 to enable Mr Wabwire for the Attorney General to avail his witness. On 03/04/2014 Mr Wabwire informed the court that he was unable to get his witness and that as he did not wish to hold the case any longer he was closing the defence case without calling any witness. It is at this time that counsel agreed to put in written submissions which they duly did.
9. Both the plaintiff and defendants were bound to prove their respective cases. On the part of the plaintiff he was bound to prove his claim in the plaint. On the part of the defendants, they were bound to prove their counter-claim. The degree of proof in civil cases is on a balance of probabilities.
10. In the **case of Wareham t/a A.F. Wareham & 2 others -Vs- Kenya Post Office Savings Bank (2004) 2 KLR** it was held as follows;-

***“The burden of proof is on the plaintiff and the degree of proof is on a balance of probabilities. In discharging the burden of proof, the only evidence to be adduced is evidence of the existence or non existence of the facts in issue or facts relevant to the issue. It follows that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”***

### **ISSUES FOR DETERMINATION**

11. In the present case the issue for determination is whether the plaintiff bought the suit property from Esther Rotich and Lily Cherono and whether the said Esther Rotich and Lily Cherono acquired the property in a lawful manner. The burden of proof as to whether the said Esther Rotich and Lily Cherono obtained the property in a lawful way lay on the defendants. The plaintiff's burden was to show that he indeed bought the suit property from the said Esther Rotich and Lily Cherono.

### **ANALYSIS OF EVIDENCE**

12. During his testimony, the plaintiff indicated that he was adopting the statement he had written which was filed in court. A look at the plaintiff's statement shows that he bought the suit land from one Philip Kimutai Kibor on 15/10/2002. He went on to state in his statement that the two ladies agreed to transfer the land directly to him as the vendor Philip Kimutai Kibor had cleared the balance he owed to them. The plaintiff had been confronted with allegations that the property which he bought had been acquired fraudulently. For him to show that he purchased the land for value without notice of anything wrong with its acquisition, the plaintiff was expected to produce documents such as sale agreement, allotment letter if any from previous owner etc. In this case, the plaintiff alleges to have bought the land from Philip Kimutai Kibor. In his pleadings he alleges that he bought the land from Esther Rotich and Lily Cherono. This is clearly a contradiction on the part of the plaintiff.
13. From the green card produced by the plaintiff as exhibit 4, it is clear that the lease in favour of Esther Rotich and Lily Cherono was signed on 18/10/2002. A transfer in favour of the plaintiff was signed on the same day and certificate of lease given to the plaintiff. If indeed the plaintiff had bought the land from Philip Kimutai Kibor who had also bought it from the two ladies, why was it then necessary that a lease be processed in the names of the two ladies who had already relinquished their interest to Philip Kimutai Kibor? The plaintiff has failed to prove that he bought the land from the two ladies as he alleges. There was no sale agreement produced. There were no documents to show that the two ladies were the registered owners of the property.
14. The plaintiff was expected to show that he indeed purchased the land and that the same was transferred to him in a genuine way. The mere production of a copy of certificate of title and green card is not enough to show that he is lawfully registered as the owner of the suit property. The plaintiff testified that he did a search and confirmed that the property belonged to the vendor. He did not produce the said search. The plaintiff having been notified that the property he bought was acquired fraudulently, he should have at least produced documents to prove that he was indeed an innocent purchaser for value without notice any defect in the title.

### **DECISION**

15. I find that the plaintiff has not proved his case on a balance of probabilities. The same is hereby dismissed with no order as to costs. The defendants counter-claim is also dismissed with no order to costs. There was no proof of the allegations in the said counter-claim.

Dated, signed and delivered at Kitale on this 3rd day of June, 2014.

**E. OBAGA**

**JUDGE**

In the presence of Mr Samba for plaintiff and Mr Odongo for

Mr Wabwire for defendants. Court Clerk – Kassachoon.

**E. OBAGA**

**JUDGE**

**3/6/2014**