



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 9 OF 2006**

**ANDREW CHEPTULEI ..... PLAINTIFF**

**VERSUS**

**MORRIS WANYONYI ..... DEFENDANT**

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

**I N T R O D U C T I O N**

1. The suit herein can be traced to a lease agreement dated 29/2/1996 between the plaintiff and the defendant. The lease itself is not clear as to the property being leased out. According to the lease agreement, the defendant leased out two acres at Kigulu farm to the plaintiff for the year 1995. The consideration was Kshs.1,300 per acre. In the same lease agreement the defendant leased out three acres to the plaintiff for the year 1996. The consideration was Kshs.1,300 per acre. The total consideration for the two years was Kshs.6,500/=.

2. It would appear that a dispute arose between the plaintiff and the defendant regarding the leased land. The defendant filed a case at the Endebess Land Disputes Tribunal in 2002. The case was heard and the tribunal gave its verdict on 7/5/2002. The Tribunal's ruling is not clear on what reliefs it granted the defendant. The Tribunal verdict was adopted as a judgement of the court vide Kitale Senior Principal Magistrate's court Land case No. 57 of 2002. The defendant then had an order of eviction issued against the plaintiff which eviction order required the plaintiff to move out of three acres at Kolongei Farm.

3. It is on the basis of the eviction order that the plaintiff moved to court and filed this suit seeking a declaration that the three acres which the plaintiff leased from the defendant in 1996 were no longer in existence as at the time of leasing the land, the land did not belong to the defendant. The plaintiff further seeks a declaration that any award purporting to award the defendant three acres is null and void and the same should be declared a nullity and set aside as the plaintiff does not own the three acres claimed by the defendant. The Plaintiff also seeks the setting aside of the decree arising from the award.

**P L A I N T I F F ' S C A S E**

4. The plaintiff testified that in 1996 the defendant leased to him three acres for one season. He produced the lease agreement as exhibit 1. He ploughed the land ready for planting but he was told that the land had already been sold. He went and informed the defendant about the development. He testified that the land was sold to Kolongei Farmers Co-operative Society on 29/3/1996. A sale agreement between Danson Adenya Azingale and Kolongei Farmers Co-operative Society Limited was produced as exhibit 2.

5. The plaintiff went on to testify that the defendant filed a case against him at Endebess Land Disputes Tribunal. Proceedings of the Tribunal were produced as exhibit 3. The Tribunal ordered him to give the defendant three acres. The Tribunal's verdict was adopted as Judgement of the court and a decree extracted exhibit 4. An eviction order was thereafter issued against him. He produced the eviction order as exhibit 4.

6. The plaintiff contends that he does not have three acres to give to the defendant as ordered. He contends that he has his own two acres which he bought from Kolongei Farmers Co-operative Society Ltd in 1993. He testified that he paid Kshs.2,000/= being entry fees and Shs.52,400 for two shares equivalent to two acres. He produced two receipts issued by Kolongei Farmers Co-operative Society as exhibit 6 (a) and 6 (b) respectively. It is on this basis that the plaintiff is seeking the orders in the plaint.

### **DEFENDANT'S CASE**

7. The defendant testified that he owns three acres at Endebess. He first bought 2 acres from Danson Adenya Azingale on 9/8/1985 at a consideration of Shs.14,000/=. On 2/11/1985 he bought another acre from the same vendor. He paid Kshs.7,000/= for it. He produced the agreement of 9/8/1985 as exhibit 1 and copy of the agreement of 2/11/1985 as exhibit 2. As the area had been hit by tribal clashes in 1991, the plaintiff approached him with a proposal that he leases the three acres to him as it was not safe for the defendant to live in the area. The plaintiff also indicated to him that once he had funds he would consider buying the three acres. The defendant agreed to lease out 3 acres to the plaintiff at Kshs. 1,300/= per acre for one season.

8. At the expiry of the lease period, the plaintiff refused to move out of the land. This forced the defendant to file a case at Endebess Land Disputes Tribunal. The Tribunal ruled that he should get the three acres. The verdict of the Tribunal was adopted as judgment of court at Kitale. A decree was extracted exhibit 4. An eviction order followed exhibit 5. The defendant prays that the plaintiff's suit be dismissed with costs so that he can regain his land which he has never utilised since 1991.

### **ANALYSIS OF EVIDENCE**

9. Both the plaintiff and the defendant produced proceedings from Endebess Land Disputes Tribunal. A look at the proceedings of the Tribunal shows that the defendant testified that he had leased out 3 acres to the plaintiff but that he sold one acre to one William Kae. He was categorical during the proceedings that he was only demanding two acres from the plaintiff. As I said hereinabove, the ruling of the panel of elders was not clear as to what relief was given to the defendant herein. The elders opened their ruling by finding that the defendant leased out 2 acres to the plaintiff. Again in the ruling, they said that three acres belonged to the defendant. What the elders forgot is that the defendant had already sold one acre out of the three to one William Kae. The defendant himself stated that he was only claiming two acres from the plaintiff. It does not therefore make sense that a decree of three acres could be extracted.

10. The lease agreement itself is not clear. It states that the defendant leased two acres for 1995 and three acres for 1996. It is therefore not clear how the two seasons could be combined into one season. The parties themselves were not clear on the lease agreement. However be that as it may, there is no contention that the defendant leased land to the plaintiff. From the proceedings of the Tribunal, it is clear that the dispute between the defendant and the plaintiff arose after the plaintiff erected a structure on the land and started claiming that he had bought the land.

11. The plaintiff is contending that the land which he leased from the defendant was non existent and that the same had been bought by Kolongei Farmers Co-operative Society. The lease agreement between the plaintiff and the defendant was made on 29/2/1996, whereas the agreement between Danson Adenya Azingale and Kolongei Farmers Co-operative Society was made on 29/3/2006. It cannot therefore be argued that Kolongei Farmers Co-operative Society had bought the land unless the plaintiff produced a wrong agreement.

12. The defendant produced a sale agreement dated 9/8/1985 and another one 2/11/1985. The defendant

bought 2 acres and one acre respectively through those agreements. The purchase was from Danson Adenya Azingale. This Danson Adenya Azingale was called as a witness by the plaintiff. He testified that he sold 23 acres to Kolongei Farmers Co-operative Society on 24/4/1996. When he was cross – examined by Professor Sifuna, he admitted that he sold three acres to the defendant. At first he sold 2 acres and later sold one acre making a total of three acres. It is therefore clear that the defendant had three acres before Kolongei Farmers Co-operative Society bought land from Danson Adenya Azingale. The plaintiff's contention that the defendant had no land to lease out is without basis.

13. The plaintiff has admitted that he has two acres at Kolongei Farm. Though he claims that he bought the two acres from Kolongei Farmers Co-operative Society, I doubt that this is the case. The plaintiff obtained the two receipts from officials of Kolongei Farmers Co-operative Society with whom he colluded in his scheme to deprive the defendant of his land. The two acres which the plaintiff is holding belong to the defendant. The defendant had three acres, but he sold one acre to William Kae. He therefore he remained with two acres which the plaintiff is holding.

14. The conduct of the plaintiff during the hearing at the Tribunal shows that he is a man who is not truthful. He was not candid in his answer to questions by the panel of elders or even the defendant herein. The plaintiff is seeking to nullify the findings of the Tribunal through a suit. The Land Disputes Tribunal Act (now repealed) had a special procedure which a dissatisfied litigant could use to attack the decision if he was aggrieved. He had the option of filing an appeal to the provincial Appeals Committee and if he was not satisfied he could file an appeal to the High Court on points of law. The plaintiff had also the option of filing an application for judicial review to the High Court. He did not do any of the above. The plaintiff's counsel has conceded in her submissions that the plaintiff filed this suit because he was late in taking any remedial steps under the relevant Act. This suit cannot be a substitute to failure to do what he was required under the Act.

15. The plaintiff is specifically seeking to have the proceedings of the Tribunal which resulted in the decree issued by the Senior Principal Magistrate court nullified. This is not possible. The plaintiff could only seek declaratory orders which are free from the proceedings of the Tribunal. He cannot ask the court to declare that he does not have three acres to give the defendant. I have already pointed out that the defendant had already sold one acre of his three acres to one William Kae. He cannot therefore seek to execute for three acres. In the interest of Justice, I direct that the decree of the lower court when it comes to execution be amended to read two acres and not three acres.

## **DECISION**

16. For the reasons given above, I find that the plaintiff has failed to prove his case on a balance of probabilities. The same is hereby dismissed with costs to the defendant. As directed hereinabove, the decree of the lower court in Land Case No. 57 of 2002 at Kitale should be amended to read two acres instead of three acres.

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

**E. OBAGA**

**JUDGE**

In the presence of M/S Munialo for plaintiff and Mr Momanyi for the defendant. Court Clerk – Kassachoon.

**E. OBAGA**

**JUDGE**

**3/7/2014**

