



IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT AND LAND CASE NO. 56 OF 2013

ISAAC MUGASIALI MUHAVI PLAINTIFF

VERSUS

FESTUS NYONGESA SITIKHO DEFENDANT

JUDGMENT

1. The plaintiff filed this suit in court on 1st March 2013 against the defendant seeking eviction orders to be issued against the defendant. He also prayed to be awarded the costs of the suit. The defendant was served with summons to enter appearance and plead and on receipt, he filed his statement of defence on 12th June 2013. In the defence, the defendant denied the claim in totality and stated he is entitled to the portion he lives on with his family.

2. The plaintiff gave oral evidence to prove his case. He said he is a farmer and a resident of Mayanja. He has brought this suit because the defendant has refused to move out of his land parcel no W. Bukusu/S. Mateka/3165. According to him, the court confirmed he was the legal owner of the suitland and produced as *ex P1*, a court order. He said the defendant had done a forgery over the title deed and he produced a second court order as *ex. P2*. He also referred to a green card *ex P3* which shows the land is in his name. In cross examination, he said he did not buy this land but bought L.R. W. Bukusu/S. Mateka/1886. He was not occupying the land because the defendant refused him entry. He said the defendant's land is L.R. W. Bukusu/S. Mateka/3196. He closed his case with his evidence only.

3. The defendant then gave his defence. He is a farmer and a resident of Lunakhwe village. He lives on the land which belongs to him as given to him by the elders of the tribunal. He did not have the proceedings of the tribunal. He wanted the plaintiff to prove by producing a sale agreement on how he acquired this land. He also produced the court orders as *Dex. 2 & 3*. certificate of official search as *Dex. 1* and copy of his title deed as *Dex. 4*. He asked this suit be dismissed with costs to him. On cross examination, he said he does not know how the plaintiff acquired his title. According to him, the order said the land belongs to him and he lives on the land measuring 1½ acres. He closed his case.

4. On the evidence given by the parties herein, neither of the parties did bring out clearly the history of this land and how each got to lay a claim on it. This court will look at the documents referred to by the parties vis a vi their evidence to reach a just determination. According to the green card *ex P3* title W. Bukusu/S. Mateka/3165 was a resultant sub-division of L.R. W. Bukusu/S. Mateka/1885. The defendant became the first registered owner on 17th July 2000 and was issued with a title deed on 11th August 2006. In *ex P1* – it is a vesting order issued in Bungoma Chief **Magistrate's court civil application no. 19 of 1997** directed at both this plaintiff

then owning land L.R.no. W. Bukusu/S. Mateka/1886 and the defendant then owning the land L.R. no W. Bukusu/S. Mateka/1885 to subdivide and share the two parcels of land as follows;

- a). *Isaac Mugasiali (plalintiff) -----1.5 acres*
- b). *Festus Nyongesa (defendant) ----- 0.5 acres*
- c). *Charles Wekesa ----- 1 acre*
- d). *Eliud Masika ----- 1 acre*
- e). *Martin Simiyu ----- 1 acre*
- d). *Peter Simiyu ----- 1 acre*

5. This court on 26th November 2012 allowed the plaintiff's notice of motion dated 31st October 2012 which sought for orders requiring the defendant to surrender the original title deed for W. Bukusu/S. Mateka/3165 in default the original title deed be dispensed with to facilitate transfer of the suitland to the plaintiff. This motion was not opposed as the defendant did not attend court. The orders which were granted stated thus;

1. *THAT the Respondent herein be ordered to surrender the original title deed for land parcel number W. Bukusu/S. Mateka/3165 to the Deputy Registrar of this honourable court for onward transmission to the District Land Registrar Bungoma for further action.*

2. *THAT in default of compliance with paragraph (1) above by the respondent herein the production of the original title for land parcel W. Bukusu/S. Mateka/3165 be dispensed with to facilitate transfer of the suitland in the names of the applicant.*

3. *The respondent be and is hereby ordered to pay the costs of this application to the applicant.*

6. My understanding of the purpose of the plaintiff's notice of motion dated 31st October 2012 was to help him execute the orders earlier issued in Bungoma CM Misc civ Application no 19. He annexed to his affidavit in support of the motion the transfer documents executed by the executive officer of the court in favour plaintiff. The registration of those documents could not be undertaken unless the original title was surrendered which title deed was in possession of the defendant herein. Once the registration was allowed to proceed without the original title deed being surrendered the plaintiff obtained the title to L.R. W. Bukusu/S. Mateka/3165 registered into his name.

7. The defendant stated that he is living on the land given to him by the elders of the tribunal. It seems to me that the vesting order *Ex. P1 (also produced by the defendant as Dex 3)* was execution of the decision of the land disputes tribunal award. In the vesting order which the defendant has not appealed against or applied to set aside, he was entitled to 0.5acres (half acre) of the land. He told court that he is living on land measuring one and half acres which is more than what he was given by the elders of the tribunal. The plaintiff said the defendant is entitled to the parcel L.R no W.Bukusu/S.Mateka/3196 which averment the defendant did not deny during his testimony. I am therefore satisfied that the plaintiff has proved his case to the required standards of the law. The result of which is that this suit is allowed. The defendant said he lives on this land with his family and for this reason, the court direct that he gives vacant possession of L.R no W.Bukusu/S.Mateka/3165 within six (6) months from the date of this judgment. If he fails to do so within the specified period, the plaintiff is at liberty to forcefully evict him. Each party will bear their costs of this suit.

Dated and Delivered in Bungoma this **15th** day of October, **2014**.

A. OMOLLO

JUDGE