



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 110 OF 2017**

**ZEPHANIA KHISA SAUL.....PLAINTIFF**

**VERSUS**

**THE SCHOOL COMMITTEE**

**ST. ANNE'S SECONDARY SCHOOL.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated **21/6/2017** and filed in court on the same date the plaintiff sought the following orders against the defendant:-

**(a) An eviction order against the defendant, their agents/or servants from part of the said parcel of land known as Kakamega/Mabusi/424 measuring approximately 0.31 hectares.**

**(b) A permanent injunction restraining the defendant, their agents and/or servants from trespassing upon and/or committing any acts upon the said parcel of land known as Kakamega/Mabusi/424 measuring 0.31 hectares.**

**(c) Costs.**

**(d) Interest at court rates form 21/3/20109 till judgment and until payment in full.**

**(e) Any other relief this court may deem just to fit to grant.**

**The Plaintiff's Case**

2. According to the plaint the plaintiff was the owner of land known as **Kakamega/Mabusi/424** measuring **0.31 hectares**. On **21/3/2007** the plaintiff and the defendant agreed to have a water project established in the plaintiff's land and half acre portion of land was carved out of his land in favour of the school which was to pay a consideration of **Kshs.600,000/=** for the land before the commencement of the said project. The plaintiff acknowledges in his plaint that the defendant paid **Kshs.350,000/=** as a down payment. The balance however remains unpaid to date despite several demands having been served upon the defendant. By reason of the default the plaintiff seeks orders of eviction of the defendant from land parcel **Kakamega/Mabusi/424** and alternatively payment of the balance of the purchase price. I find a discrepancy in the plaint in that whereas consideration is said to be **Kshs.600,000/=** at paragraph 4 and the down payment already received by the plaintiff to be **Kshs. 350,000/=** the plaintiff seeks payment of the balance which he computes at **Kshs.300,000/=**; the same mistake is repeated in the plaintiff's statement; in my view simple arithmetic shows the balance to be **Kshs.250,000/=**.

**The Defendant's Defence and the Reply to Defence**

3. The defendants filed its defence on **18/3/2019**. However I do not need to reiterates the contents of the defence and reply to defence herein since this matter proceeded ex-parte on **11/7/2019**.

**The Plaintiff's Evidence**

4. The suit came up for hearing on **11/7/2019**, when **Zephania Khisa Saul**, the plaintiff testified. His evidence is that he and the school agreed that the school should have a spring that was located on his land and therefore the one half acre on which the spring was located would be sold to the school for **Kshs.600,000/=**. He was paid **Kshs.350,000/=** and the balance of **Kshs.250,000/=** remained unpaid hence this suit. It is in his evidence that the down payment changes to **Kshs.300,000/=**. At the hearing he testified that what he is claiming as balance of purchase price is **Kshs.300,000/=**. He produced a copy of the minutes of the meeting between him and St. Anne's Nzoia Girls Secondary School dated **21/3/2007**. Those minutes show the school water project was discussed and that the plaintiff was present. The minutes indicate that after survey by the Ministry of Water Officials the plaintiff's spring was found as most suitable because of proximity to

the school. In particular, Minute No. 2 indicated that the plaintiff had asked for **Kshs. 600,000/=** which the ministry could not meet for certain reasons. He also produced minutes of 19/3/2007 regarding the defendant's water project. Those minutes show that the issue of compensation arose and the plaintiff demanded **Kshs.600,000/=** whereupon some objection was voiced to the figure by the District Water Officer' Lugari. He further produced two demand letters one dated 23/10/2009 addressed to the District Water Officer, Lugari and the second one 2/2/2017 addressed to the Board of Governors St. Annah (sic) Secondary School Moi's Bridge. The demand dated 2/2/2017 requires the school to vacate the land within 30 days. It appears that the school never did so and that it never paid the balance of the purchase price hence this suit.

5. According to the plaintiff the title deed is still in his name and no subdivision has ever been conducted to formally excise the portion occupied by the school. No consent of the Land Control Board has ever been issued for the transaction. He produced a copy of the title as P. Exhibit 5. The plaintiff insisted that he would like this court to order the defendant to vacate the land.

### **Determination**

6. I find that the plaintiff has established that he has title for the whole of the suit land.

7. The only issue that this court must determine is whether the orders sought by the plaintiff are deserved, that is, order of eviction and a permanent injunction restraining the defendant from trespassing upon the suit land. In doing this the place of the alleged agreement between the parties must be considered.

8. There is also an alternative prayer for payment of balance of purchase price of Kshs.300,000/= but this is contained in the body of the plaint rather than in the prayers. I must concentrate on the prayers as expressly stated in the "prayers" section of the plaint.

9. I have noted that the defendant is a public institution which apparently negotiated with the plaintiff for the sale of the suit land to it. This appears to have been a direct transaction between the parties herein and not a land acquisition process by the government on behalf of the school.

10. I do not find any express agreement for sale exhibited by either the plaintiff or the defendant even in a bundle of their documents. The defendant itself never filed any bundle of documents in court and what this court has to rely on are the exhibits by the plaintiff. Those exhibits, and especially the minutes, show that there was discord between the parties as to the quantum of the purchase price for the suit land. Even though the plaintiff avers that there was an agreement and that he was paid part of the purchase price there is no evidence of such an express agreement. Without that express agreement it is not possible to grant the alternative prayer for payment of the balance of the alleged purchase price.

11. The defendant also never appeared in court to argue their defence and demonstrate that they have right to be in the suit land. Indeed **paragraph 8** of defence dated **15/3/2019** reads as follows:

**"Further in response the defendant avers that he never entered into an agreement with the plaintiff nor paid him a partial amount of the alleged consideration and shall put plaintiff to strict proof thereof."**

12. Without any evidence from the defence that it bought the land or otherwise legally took possession thereof its presence thereon amounts to trespass on the plaintiff's property as this court has found that the plaintiff is the registered owner of the suit land and is entitled to possession of the land. The plaintiff's right to property guaranteed by **Article 40** of the Constitution have therefore been violated. **Article 40** of the Constitution provides for the protection of the right to acquire and own property and forbids parliament and state from arbitrarily depriving a person of his property. I do not find any justification given for the defendant's occupation of the plaintiff's land. I therefore find that the plaintiff has established his claim on a balance of probabilities and I enter judgment in his favour against the defendant and grant **prayers No. (a), (b) and (c)** in the plaint dated **21/6/2017**.

**Dated, signed and delivered at Kitale on this 30<sup>th</sup> day of July, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**30/7/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

Plaintiff in person

Mr. Wabwire for the defendant

**COURT**

Judgment read in open court.

**MWANGI NJORGE**

**JUDGE**

**30/7/2019**