



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 169 OF 2016**

**JACKSON RUIRU.....PLAINTIFF**

**VERSUS**

**WILLIAM LOKWANGPONG.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff filed this suit against the defendant on **22/11/2016**. In the plaint, the plaintiff sought orders which I replicate verbatim as follows:-

- (a) **A declaration that the plaintiff is the rightful proprietor of all the parcel of land known as Land West Pokot/Keringet 'A'/684 and an order of eviction of the defendant, his agents, servants and all persons claiming through him from the suit land do issue.**
- (b) **The costs of this suit.**
- (c) **Any other or relief which this court may deem just and fit to grant.**

**The Plaintiff's Case**

2. It is the plaintiff's case that at all material times he was the registered absolute proprietor of al that parcel of land know as **West Pokot/Keringet 'A'/684** measuring approximately **eight (8) hectares** situate in Trans-Nzoia County - which I believe is an error because the description shows it lies in West Pokot County; that the plaintiff's title to the suit land is valid, effectual and indefeasible; that the defendant has on diverse dates encroached on a portion of the suit land and is living thereon without colour of right and that as a result of the action of the defendant, the plaintiff has been unlawfully deprived of the use and enjoyment of the said portion of the suit land. He avers that despite demand and notice of intention to sue, the defendant has failed, refused and/or neglected to vacate the suit land.

**The Defendant's Defence and Counterclaim**

3. The defendant filed defence on **10/1/2017**. In that defence and counterclaim dated 9/1/2017, the defendant states that the plaintiff is only a paper owner as the defendant has been in exclusive and continuous possession of the suit land since 1983. In his counterclaim he avers that he purchased the suit land on 24/6/1983 from one Samson Andiema for Kshs.8,000/= whereupon he took immediate possession but subsequently the said Samson Andiema failed to cooperate with the defendant in having the land transferred to him. The defendant further avers that when he conducted an official search in the land registry in 2013 he learnt that Samson Andiema had transferred the suit land to one Mburu Mwangi who later transferred the suit land to the plaintiff in the year 1990. He levelled allegations of lack of exercise of due diligence in respect of the suit land on the part of the plaintiff and stated that the plaintiff purchased the land with the prior knowledge that it had been sold to the defendant and that he failed to visit the site to confirm if the land was vacant. He pleads that the plaintiff obtained title in 1990 and his rights of ownership are now extinguished under **Section 7 of the Limitation of Actions Act Cap 22**. He therefore claims for a declaration that the defendant has acquired ownership of the suit land by way of adverse possession and that the plaintiff's title became extinguished by operation of the law upon the expiry of 12 years from 20/11/1990, and he held the title to the land in trust for the defendant. He also sought a permanent injunction to restrain the plaintiff and persons claiming under him from interfering in any manner with his possession of the land, costs and interest.

4. The plaintiff filed a reply to defence and defence to counterclaim on 17/1/2017 denying all the particulars on the defence. In his defence to counterclaim the plaintiff averred that the counterclaim is incompetent for offending unstated mandatory provisions of the law and an abuse of court process; he denied the fraud alleged in the counterclaim. He maintained that by the time of purchase of the suit land in 1990 the land was vacant and he took possession and remained in such possession until recently when the defendant encroached thereon. He also maintains that his possession of the land was only interrupted by the infamous tribal clashes and that the defendant's alleged interest in the land had not

and has never been noted in the land registry. He prays that the counterclaim be dismissed with costs. That was the close of the pleadings in this matter.

## **THE EVIDENCE OF THE PARTIES**

### **The Plaintiff's Evidence**

5. Hearing took place on **19/11/2017** and **31/7/2018** when plaintiff testified and was cross-examined. On **9/11/2017** the plaintiff testified in the absence of the defendant who had been served.

6. Neither the defendant nor his counsel were in court and the plaintiff, at the end of his evidence closed his case and was ordered to file submissions within 14 days.

7. However on **17/11/2017**, that is 8 days later, an application was filed by the defendant seeking orders that this court do review and set aside the orders closing the plaintiff's case and ordering the filing of submissions and that the ex-parte proceedings of 9/11/2017 be set aside and the suit be set down for hearing *de novo* or in the alternative the plaintiff be recalled for cross-examination.

8. That application was settled by way of a consent entered into by Mr. Lowasikou counsel for the defendant and Mr. Analo counsel for the plaintiff on 29/1/2018. By that consent it was agreed between parties and the consent adopted as an order of the court that the plaintiff be recalled for cross-examination and that the application dated 16/11/2017 be marked as settled with costs to the plaintiff.

9. The court thereafter made a supplemental order that the plaintiff do appear in court on **24/7/2018** for cross-examination as agreed between the parties. On **24/7/2018** Mr. Analo and Mr. Lowasikou and the plaintiff appeared but the matter could not be reached and it was adjourned to **31/7/2018**.

10. On **31/7/2018** the same appearances were recorded and Mr. Lowasikou extensively cross-examined the plaintiff. At the end of the plaintiff's re-examination by Mr. Analo on that day the plaintiff again closed his case and it was open to the defendant to call his evidence.

11. Surprisingly at that juncture however Mr. Lowasikou applied for leave to file the witness statements of three witnesses and serve them upon the plaintiff which application was, naturally, opposed by Mr. Analo for the plaintiff who conceded that the only statement he had been served with was only the defendant's. He protested that his client might not have occasion to challenge those statements as he had closed his case. He also submitted that the defendant having had sufficient time to put his house in order has failed to do so and the application for leave to file additional witness statements should be declined.

12. In reply Mr. Lowasikou defended his application, stating that failure to file those statements was an oversight. In the ruling that arose from those submissions this court declined the application and ordered that the hearing do proceed with the documents and statements on the record.

13. Thereafter the court set down the matter for hearing on **15/11/2018**. On the **15/11/2018** Mr. Lowasikou and Mr. Analo appeared before court but the defendant did not. The defendant was excused on the basis of ill health upon Mr. Lowasikou's plea in that behalf and with Mr. Analo's indulgence, the hearing of the case was again set down for hearing on **21/3/2019** on which date Mr. Bartirol holding brief for Mr. Lowasikou for the defendant and Mr. Bisonga for the plaintiff appeared before court. Mr. Bartirol submitted orally and without any evidence that the defendant was unwell and the hearing of the matter was adjourned to **11/7/2019**. On **11/7/2019** Mr. Bungei holding brief for Mr. Lowasikou for the defendant and Mr. Bisonga for the plaintiff appeared before court and Mr. Bungei indicated that Mr. Lowasikou was not ready to proceed whereupon the court adjourned the hearing to **15/7/2019**. On **15/7/2019** Mr. Bisonga appeared alone and prayed that the defence be deemed as closed. The defendant case was deemed as closed. None of the parties filed any submissions.

14. I have considered the fact that no evidence was called in favour of the defendant in the case. The suit went undefended. In the circumstances the plaintiff's evidence stood unchallenged. I have examined the plaintiff's evidence. His story is that he bought the suit land at an auction held by or on behalf of the Agricultural Finance Corporation (A.F.C). He produced the original of the form showing the particulars of the property dated 3/10/1990 as **P. Exhibit 1**. He also produced an original of the transfer by chargee as **P. Exhibit 2**, the original of the certificate of sale as **P. Exhibit 4**. He also produced an original of an AFC official loan receipt dated 12/10/1990 and the 25% deposit receipt as **P. Exhibits 3 (a)** and **3(b)** respectively. He further produced an official receipt from the Lands Department for total of Kshs. 13,000/= being comprised of various sums paid on 20/11/1990 upon his registration as proprietor (**P. Exhibit 5**). He produced an official search dated 7/11/2016 showing that the land was registered in his name (**P. Exhibit 7**). He also produced the original title deed also showing that he was the registered owner of the land (**P. Exhibit 6**). On the basis of the documentary evidence produced by the plaintiff at the hearing as well as his oral evidence and the pleadings I am convinced that he has established his claim on a balance of probabilities against the defendant who never called any evidence. I therefore enter judgment in favour of the plaintiff against the defendant as prayed in the plaint and I issue the following final orders:-

**(a) A declaration that the plaintiff is the rightful proprietor of all the parcel of land known as Land West Pokot/Keringet 'A'/684.**

**(b) An order that the defendant, his agents, servants and all persons claiming through him shall remove themselves from the suit land forthwith and in default be evicted therefrom.**

**(c) The defendant's counterclaim is hereby dismissed.**

**(d) The defendant shall bear the costs of this suit and of the counterclaim.**

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

**MWANGI NJOROGI**

**JUDGE**

**30/9/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

N/A for the defendant

**COURT**

Judgment read in open court.

**MWANGI NJOROGI**

**JUDGE**

**30/9/2019**