



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 65 OF 2009**

**SIMIYU NAMAWANGA.....PLAINTIFF**

**VERSUS**

**SHEM SIYA KORORIA.....1<sup>ST</sup> DEFENDANT**

**PETER KIMINYI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff is the administrator of the estate of his late father **Simiyu Namawanga** (deceased) who was the original Plaintiff in this case. The deceased was the registered owner of **LR. No. Elgon/ Kaptama/263**.

2. The Plaintiff seeks for the following reliefs;

*i. Eviction of the defendants/agents/servants/family from Elgon/Kaptama/263;*

*ii. Costs.*

**THE PLEADINGS**

**The plaint**

3. The amended plaint dated 13/10/15 states that the land known as **Elgon/Kaptama/263** is registered in the name of Simiyu Namawanga (deceased) and that the plaintiff is the administrator of his estate. The defendants are said to be in trespass of the said parcel of land.

**Plaintiff's Case**

4. The Plaintiff testified and stated that his late father Simiyu Namawanga was the registered proprietor of the suit land herein measuring 5.6 hectares. He produced documents in court being the Official search certificate, Green card and the Title deed. In his testimony, the Plaintiff further stated that the said suit land was at some point charged to Industrial and Commercial Development Corporation and the same was later discharged and remained the property of the deceased. The Plaintiff contends that the Defendants are encroachers who should be evicted from that suit property.

**The Defendants' Defence**

5. Vide an application dated 13/4/2011 the defendants sought that the ex parte judgment earlier entered against them in this case be set aside and that their draft defence be deemed as filed. The application was allowed on 4/5/2011.

6. It is apparent from the record that the original plaintiff died on 21/8/2014. On 12/8/2015 Patrice Simiyu Wafula armed with a copy of the limited grant of letters of administration ad litem applied to be substituted for the deceased. He filed an amended plaint on 13/10/2015.

**Defendants' Case**

7. The defendants did not testify in court despite the fact that they were represented by an advocate. However, they filed their submissions in court.

8. The Defendants in their pleadings contends that they bought the suit land property from a Mr. Alfred Wekesa and Sophie Wekesa who had bought the same via a public action from Industrial and Commercial Development Corporation sometime in **1974**.

## Analysis of Evidence and Issues for Determination

9. From the pleadings herein, the evidence and submissions by both parties, the issues for determination are;

*a) Whether the Defendants are in occupation of the Plaintiff's land and if so, whether they should be evicted;*

*b) What orders should issue?*

*a) Whether the Defendants are in occupation of the Plaintiff's land and if so, whether they should be evicted*

10. The issue for determination is whether the defendants should be evicted therefrom. The plaintiff admits that the defendants are in occupation of the suit land.

11. From the Official Search Certificate and the Title Deed, which were produced by the Plaintiff **P.Exh 2**, and **4** respectively **Simiyu Mawanga Mubalia** is the registered owner of the suit land.

12. However, **P.Exh 3**, the green card shows that Title Deed was issued twice to the Plaintiff with respect to the same parcel of land. The first title was issued on the **27<sup>th</sup> of November 1970** in the names of "**Patrice Simiyu**" while the second title was issued on the **9<sup>th</sup> of February 1996** in the names of "**Simiyu Nawanga Mubalia.**" This then begs the question, how is this so?

13. It is also clear that at some point the suit land was charged to Industrial and Commercial Development Corporation as evidenced by **P.Exh 3** and **P.Exh 5**.

14. A look at **document No. 4** in the defendant's list clearly shows payments were made by one **Alfred Wekesa Mwanga** on account of ICDC on several occasions with regards to the Suitland herein. That is the person same named in **P.Exh 5**.

15. **Article 159 (2) (d)** of the **2010** Constitution provides that justice shall be administered without undue regard to technicalities. Although the defendants, did not testify in court they did file some documents, some attached to affidavit made on oath which this court believed to be bona fide records and on the basis of which a vital order setting aside a judgment was issued. Since none was expunged, those documents may be considered even if they were not produced, if the plaintiff's own documents have any bearing on them.

16. The court's attention has been drawn to the Defendants documents filed in court on **12<sup>th</sup> of August 2013** particularly documents **2,3,4 ,5** and **6** which show that the suit land herein was sold by Public Auction.

17. As demonstrated above, it is clear that Mr. Alfred Wekesa's name was never entered into the register over the suit land. As evidenced by **P.Exh 7** he passed on before the same was registered.

18. The document produced by the Plaintiff as **P.EXh 5** clearly shows that the said land was discharged to one Alfred Wekesa Mwanga.

19. **P.Exh 7** is a copy of the Originating Summons in **Civil Suit No 20 of 1996 - Bungoma** in which Alfred Wekesa's son, Samuel Wekesa Namawanga attempted to have himself declared the owner of the suit land by adverse possession.

20. Coming from the plaintiff, **P.Exh 5** and **P.Exh 7** are credible evidence that Mr. Alfred Wekesa Mwanga had a role in the loan issue which has not been properly explained by the plaintiff in his evidence. The plaintiff testified that Alfred Wekesa Mwanga was a borrower and Simiyu Namawanga was only a guarantor.

21. However it is to be remembered that when the defendants filed an application dated **13/4/2011** the plaintiff never responded to the application. If he had done so he would have had to respond to exhibits "**SSK1**" and "**SSK2**" annexed to the supporting affidavit. "**SSK2**" shows that the land was charged by **Patrice Simiyu S/O Namawanga** on **2/12/70** and "**SSK1**" is a certificate of sale/power of attorney that shows that the suit property was sold to **Alfred Wekesa Mwanga** on **23/4/1974**.

22. The draft defence of the defendant annexed to that application raises the defence of limitation and draws attention of this court to **Bungoma Misc Application No 113 of 2001** and **Bungoma HCCC 38 of 2009**. Had the plaintiff responded to that application his position on the above suits would have also come to light.

23. The plaintiff's plaint and amended plaint- the latter which was filed as recently as **13/10/2015** - do not reveal that litigation either. The only litigation this court has learnt of through the plaintiff is **Bungoma HCCC 40 of 2002.(OS)** and **Civil Suit No 20 of 1996 - Bungoma**.

24. This court has noted in the defendant's documents a copy of a judgment by the Hon Justice G P Mbiti (retired) dated **24/9/2001** **Bungoma Misc Application No 113 of 2001** in which it is evident that the plaintiff lodged a claim at the Mt Elgon Land Disputes Tribunal which made an award in his favour; that the 1<sup>st</sup> defendant herein was one of the respondents; that the respondents successfully sought to quash the award, and in quashing the award of the tribunal the court stated as follows:

*"The Land Disputes Tribunal Act 1990 according to section 13 thereof, the tribunal is barred from actions barred by limitation of actions act. As the current claim relates to land, it was barred after 12 years when the interested party's title was extinguished. He therefore fell in error in entertaining a time barred claim and the applicants would be best advised to sue for adverse possession."*

25. The plaintiff herein was the interested party in that case. His title was already declared by a court of competent jurisdiction to be extinguished, yet he is here with another claim over the same land.

26. It is not surprising that two of the applicants in *Bungoma Misc Application No 113 of 2001* are *Sofia Nanjala Wekesa and Samuel Wekesa*. *Sofia* complied with the court's recommendation and filed *Bungoma HCCC 40 of 2002 (OS)*. *Samuel Wekesa* had already filed *Civil Suit No 20 of 1996*. Both sets of documents evidencing these proceedings were produced by the plaintiff as **P.Exh 6 and PExh 7**. The plaintiff can not therefore feign complete ignorance of *Bungoma Misc Application No 113 of 2001* which declared that his title had been extinguished.

27. This court's dicta in *Meru Land Case No. 157 of 1996 M'Wamwari M'Mwirichia Versus M'Mugiria M'Thuura Josephine Kinanu* is to be recalled. The court stated as follows in that case:

**"The extremely short lifespan of that other suit and the hurried admissions made by the 1<sup>st</sup> defendant herein in that suit are symptomatic of massive fraud. If the earlier proceedings had been brought to the attention of the court in *Meru CMCC 501 of 1974* by the 1<sup>st</sup> defendant herein - and I find that it was incumbent upon him to bring them to the court's notice-the orders made in *Meru CMCC 501 of 1995* may never have been made for indeed a court should not countenance the making of orders that contradict earlier orders save on review. This court noted as much in *Kitale Land Case No. 126 of 2004 Rebecca Nasombi Khisa (as legal representative of the estate of John Khisa Mumelo (Deceased) -vs- Alice Lusweti* stating:**

**"This is sufficient ground for review, for it is improper in a justice system for two proceedings having different conclusions over the same subject matter to exist side by side without any conscious rationalization for that existence".**

28. The plaintiff's instant case is not an application for review within the meaning of that dicta.

29. Having set out the above data, what else need this court say of the plaintiff's claim?

30. This court notes that when the application for setting aside *ex parte* judgment was filed the plaintiff did not contest the allegation that he never served the defendants with the summons, hence the application proceeded *ex parte* and was allowed. He appointed his current advocates on 6/12/013 and by 18/8/2014 they applied to cease acting for him for want of instructions. After another short stint they applied for a second time to cease acting on 15/12/2016. His erstwhile advocate J.M. Wafula was reported to have conflict of interest whereupon he offered to give up the case before his demise. From 4/5/2011 the date of setting aside judgment to 19/7/2017 plaintiff failed to complete the process of filing and serving all his documents on the defendants.

31. I am aware that after the judgement he had obtained against the defendants was set aside the plaintiff quietly bided his time and then struck hard. It appears that the plaintiff is a litigant of the guerilla species - clearly evading open confrontation on the most crucial issues raised by the record and raining on the defendants a blitz of artillery fire when least expected. His concealment of the previous court decisions adverse to him appears to be true to this character. However, ours is an adversarial litigation system and any species of plaintiff who has a grievance or a prima facie a grievance is allowed to approach court and he is entitled to judgment if he establishes his case on a balance of probabilities. However, where the court observes too many gaps in a claim even an undefended case such as this one, the claimant should not be accorded a walkover. The Court of Appeal decision in *Hon. Daniel Toroitich arap Moi -vs- Wangi Stephen Muriithi NBI CA 240 of 2011* stated that even in an undefended claim the claimant must prove his claim to the standard required by law. In particular, the unexplained issuance of a second title deed while there was claim of sale of the charged suit land by public auction to the defendants' predecessor does not permit this court's mind to rest easy with issuance of any judgment for the plaintiff.

32. This is not to say that the court is impressed at all with the defendants' successive counsels' perfunctory and dysfunctional approach to this litigation and the defendant's own glacial pace at helping their successive counsel in articulating their defence in the matter. Lamentably, what should have been a short piece of litigation capable of lasting a few days has taken the parties and the court ten years to resolve.

## **Conclusion**

### ***(b) What orders should issue?***

31. I do not find any sufficient evidence on which to grant the prayers sought by the plaintiff in his amended plaint. The upshot of the foregoing is that the Plaintiff has failed to establish his case against the Defendants on a balance of probabilities. This suit is hereby struck out with costs to the defendants.

Dated, signed and delivered at Kitale on this 21<sup>st</sup> day of **November, 2018**.

**MWANGI NJOROGE**

**JUDGE**

**21/11/2018**

Coram:

Before -Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi holding brief for Nyamu for plaintiff

N/A for the defendant

**COURT**

Judgment read in open court.

**MWANGI NJORGE**

**JUDGE**

**21/11/2018**