



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KITALE
LAND CASE NO. 175 OF 2006

CHARLES K. KITIYO.....PLAINTIFF

VERSUS

DAVID KIPTUM.....1ST DEFENDANT

GILBERT SIRET.....2ND DEFENDANT

SIMON KIBOI.....3RD DEFENDANT

ROBERT KIBOI MUSARU.....4TH DEFENDANT

J U D G E M E N T

INTRODUCTION

1. The plaintiff is the beneficial owner of **Plot No. 689 (formerly Plot No. 523)** at Kitale Settlement Scheme (suitland). The second defendant is the beneficial owner of **Plot No. 849** having bought the same from the first defendant. The third and fourth defendants are brothers and the beneficial owners of **Plot No. 848**.

2. The plaintiff brought this suit against the defendants seeking a declaration that he is the lawful proprietor of the suitland. He also sought for a permanent injunction restraining the defendants from interfering with his quiet enjoyment of the suitland.

PLAINTIFF'S CASE

3. The plaintiff testified that he bought the suitland from **David Chelogoi** who was the original allottee. He took possession in **1997**. He paid **Kshs.650,000/=** for the **10 acres**. Sometimes in 2006, the defendants invaded the suitland and cultivated part of it. Two of the defendants that is the first and third defendants have since moved out but the second and fourth defendants still remain on part of the suitland.

4. The plaintiff further testified that he is occupying **6.75 acres** of the **10 acres**. He sold **one acre** to **Sophia Wekesa** and that one acre is comprised of a catchment area. The plaintiff contends that he has a shortfall of about **4 acres**. He therefore contends that the second and fourth defendants who occupy about 4 acres are occupying part of the suitland and that if the two were to surrender the 4 acres, the suitland will be about 10 acres as he originally bought from Davis Chelogoi.

SECOND DEFENDANT'S CASE

5. The second defendant testified that he bought his land (**Plot No. 849**) from **David Kiptum** (first defendant) who had been allocated the same on 18/8/2000. He denied encroaching on to the suitland.

THIRD AND FOURTH DEFENDANTS CASE

6. The third and fourth defendants are brothers. They are the beneficial owners of **Plot No. 848** which had been allocated to their mother **Josephine Ndiema**. The two denied encroaching on to the suitland.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

7. There is no contention that the three plots namely **Plot No. 689** (suitland), **Plot No. 848** and **849** exist on the ground. The suitland had been allocated to Davis Chelogoi on 25/11/1996. It was 10 acres. David Chelogoi sold the suitland to the plaintiff on 1/12/1996. The letter of allocation was produced as Exhibit 2 and the sale agreement between Davis Chelogoi and the plaintiff was produced as Exhibit 1.

8. **Plot No. 849** measuring **1.0 hectare** was allocated to **David Kiptum** as per allotment letter produced as Defence Exhibit 1. This plot was later sold to the second defendant by one Martin Kiptum who had authority of David Kiptum to sell the same. An allotment letter dated 18/8/2000 and the sale agreement were produced as Defence Exhibit 1 and 2 respectively.

9. **Plot No. 848** was allocated to **Josephine Ndiema** on 18/8/2000 as per letter of allocation produced as Defence Exhibit 6. Josephine Ndiema is mother to the third and fourth defendants. This plot is **1.0 hectare**.

10. The only issue for determination is whether any of the defendants have encroached on to the suitland. The plaintiff's suit was filed on 23/10/2006. As at the time this suit was filed, the first defendant had already sold his interest in Plot No. 849 to the second defendant. The sale took place on 1/4/2006. It is therefore clear that the first defendant should not have been sued in the first place. What therefore remains to be decided is whether any of the three defendants have encroached on to the suitland.

11. The suitland borders both Plot No. 848 and 849. Before this matter was heard, the court made an order that a surveyor do visit the ground and ascertain the position on the ground. The order was made on 13/2/2012 by consent of the advocates for the parties. A surveyor went to the ground and prepared a report dated 30/4/2012. The survey report was produced by the plaintiff as Exhibit 6.

12. According to the survey report, the plaintiff was occupying **6.75 acres**. The plaintiff had sold **one acre** to **Sophia Nekesa**. The third and fourth defendants occupied **2.23 acres** and the second defendant occupied **2.084 acres**. The plaintiff's evidence is that besides the one acre he sold to Sophia Nekesa which is not part of the 6.75 acres he occupies, he has one more acre which is comprised of a water catchment area. If this be true, then the total acreage of his land is 7.75 acres minus the one acre which he alleges is a water catchment area. It therefore follows that the suitland has no shortfall of about 4 acres as he alleges.

13. The second defendant on the one part has 2.084 acres and the third and fourth defendants on the other part have 2.23 acres. They do not have any excess land and therefore there is no basis upon which the plaintiff can allege that either of them has encroached on to the suitland.

14. Though the plaintiff claims that one acre out of the suitland is a water catchment area, this is not true. The plaintiff produced a sketch map [Exhibit 8] which shows the position of the suitland and Plot No. 848 and 849. According to this sketch map, the plaintiff plot does not border any catchment area. It is the second, third and fourth defendants' plots which border the catchment area. During cross-examination, the plaintiff's attention was drawn to this sketch map [Exhibit 8] and the surveyor's report [Exhibit 6]. He denounced the two exhibits and stated that he does not agree with the same.

15. If indeed there is any shortfall on the plaintiff's land, the same cannot be attributed to any of the three defendants. The plaintiff produced an area list of Kitalale Settlement Scheme Phase 11 [Exhibit 7]. This area list shows that Plot Nos. 848 and 849 exist and they appear on 256 and 257 respectively on the list. What the plaintiff seems to suggest is that since he has a shortfall of about 4 acres and that the combined acreage of the defendants portions is about 4 acres, it then follows that what they are occupying is part of his land. This is a fault reasoning which is not supported.

16. It is clear from the evidence adduced herein and the documents produced that the suitland is not less by 4 acres as the plaintiff claims. The shortfall if any is about 2 acres and this shortfall cannot be attributed to any of the defendants.

DECISION

17. From the reasons given herein I find that there is no encroachment to the suitland by any of the defendants. The upshot of this is that the plaintiff has failed to establish his case against the defendants. The same is hereby dismissed with costs to the defendants.

Dated, signed and delivered at Kitale on this **20th** day of **January, 2017**.

E. OBAGA

JUDGE

In the presence of Mr Khisa for Mr Ingosi for Plaintiff.

Court Assistant – Isabellah.

E. OBAGA

JUDGE

20/1/17