



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 82 OF 2010

HARRY KEDAHA ANDREW.....PLAINTIFF

VERSUS

CONSTANT KHISA1ST DEFENDANT

FUCHAKA KHISA.....2ND DEFENDANT

NICHOLAS SIMIYU3RD DEFENDANT

MARY OKUMU.....4TH DEFENDANT

JUDGMENT

1. In the plaint dated **24/9/2010** and filed on **4/10/2010**, the plaintiff sued the defendants seeking the following prayers:-

(a) An order of eviction from Waitaluk/Kapkoi Block 13/750;

(b) A permanent injunction restraining the defendants either by themselves, their agents, servants, employees, lessees, or persons claiming through them from trespassing on Waitaluk/Kapkoi Block 13/750 and/or using or leasing, selling, tilling or in any manner having dealing with regard to the said plot;

(c) Costs of this suit;

(d) Any other or further relief the Honourable Court may deem appropriate to grant in the circumstances.

2. The plaintiff's case proceeded *ex parte* on 20/9/2017 as the defendants never appeared in court despite having filed a defence dated 11/3/2011 on 14/3/201.

3. According to the plaint, the plaintiff claimed that he is the registered owner of all that parcel of land known as **Weitaluk/Kapkoi Block 13/850** measuring **0.404 Ha**. The 2nd defendant is said to be a son to the 1st defendant and is in occupation of the suit premises, alongside the 3rd and the 4th defendants, the latter two whom the plaintiff claims have leased or purchased the property from the 1st defendant.

4. The plaintiff avers that the 1st defendant was a chairman of **Wehoya Farm Limited** who was entrusted to allocate land parcels to new owners; that between **1975 - 1985**, the plaintiff purchased land totaling to **9**

acres in terms of shares from **Wehoya Farm Limited**, but the 1st defendant maliciously and without any colour of right excised **one acre** from the land so purchased by the plaintiff and registered it in his favour as **Waitaluk/Kapkoi 13/60**. Subsequently the plaintiff moved the Waitaluk Land Tribunal and he was awarded the land, which was also placed in his possession. A vesting order was also obtained in Kitale **SPM's Land Case No. 34 of 2001** vesting the land in the plaintiff. The title issued to the 1st defendant was subsequently cancelled and a new title in the plaintiff's name, to wit, the title for **Waitaluk/Kapkoi Block 13/750** was issued.

5. The defendants were forcefully evicted in the year **2005** but they have now re-entered the suit property and their trespass upon the land has deprived the plaintiff of use and enjoyment of the suit property thus occasioning the plaintiff loss and damage. The plaintiff avers that there have been constant confrontations between him and the defendants hence the plaintiff have never enjoyed peaceful, uninterrupted and/or exclusive use and possession of the property.

6. On the 5/4/2017 the court was informed by Mr. Chebii that the 1st defendant had passed on, the hearing therefore proceeded against the 2nd, 3rd and 4th defendants. In his evidence, on 20/8/2017 the plaintiff stated that the 1st defendant had defrauded him. Whereupon he moved the Tribunal named above, and subsequently obtained a decree in **SPM's Land Case No. 34 of 2001 - Kitale** and tried to evict the defendants using the decree but they came back to the land.

7. The plaintiff produced a certified copy of an order in **SPM's Court Land Case No. 34 of 2001** as *P. Exhibit 1*. The suit was against the 1st defendant herein. The order states that the plaintiff is to be placed in possession of the one acre surveyed and excised from **Plot No. 60 Wehoya Farm, Trans-Nzoia District** on 26/2/2004 within 7 days from 7/10/2004, and that if the defendant caused any obstruction he was to be arrested and placed in prison for 30 days.

8. The plaintiff also produced as *P. Exhibit 2* an order of the court in **Kitale CMCC No 34 of 2001** which required that the Executive Officer of that court to execute all requisite transfer instruments so as to give effect to the court's decree dated 25/9/2003 and hence enable the plaintiff herein to receive one acre as awarded by that court. The decree dated 25/9/2003 granting the plaintiff one acre of land by the 1st defendant was produced as *P. Exhibit 3*.

9. Further the plaintiff produced as *P. Exhibit 4* a copy of the **Kenya Gazette Notice No. 12999** dated **4/11/1999** by that Notice it was announced to all and sundry that all efforts to compel the 1st defendant to surrender the land title in respect of **Waitaluk/Kapkoi Block 13/60** had failed and that if no valid objection was received within 30 days of the Notice, the Registrar Trans-Nzoia/West Pokot District would dispense with the production of the said title document and issue a title document to the plaintiff, and that upon such issuance, the title in the name of the 1st defendant shall stand cancelled and of no effect.

10. The action that followed was the making of a mutation form (Marked as *P. Exhibit 5(a)* and *5(b)*) and the dispatch of a letter dated 3/11/2009 from the District Surveyor's Office *P. Exhibit 5(c)* stating that the subdivision had been done pursuant to the court order and forwarding the mutation forms to the District Land Registrar, Kitale. Thereafter the plaintiff paid the land transfer fees of Kshs.1000/= vide Receipt No. 1353364 dated 6/11/2009 and a transfer duly executed by the Executive Officer in favour of the plaintiff which was produced as *P. Exhibit 6(b)* and *6(c)* was registered on 6/11/2009. The Land Control Board Consent sanctioning this process was applied. Application for Consent of Land Control Board Forms whose copy was produced as *P. Exhibit 6(d)*. The copy of the Land Control Board Consent was produced as *P. Exhibit 6(e)*. The valuation for Stamp Duty Form was produced as *P. Exhibit 6(f)*. The Kenya Revenue Authority Stamp Duty Assessment and Pay-in Slip was produced as *P. Exhibit 6(g)*.

11. I have gone through all the documents mentioned herein above and I find that the process of the registration of the plaintiff as the proprietor of **Waitaluk/Kapkoi Block 13/750** the suit property herein, was above board. The certified copy of the title which was issued to the plaintiff upon registration was produced as *P. Exhibit 7*. He called the Assistant Land Registrar, Kitale, one Shadrack Biwott who

confirmed that Parcel No. 750 was borne out of the subdivision of **LR. No. Waitaluk/Kapkoi Block 13/60**. He acknowledged that the documents mentioned herein above were genuine. He also produced the green card (copy of Register) for **Plot No. Waitaluk/Kapkoi Block 13/60** and confirmed that Parcel No. 750 mentioned therein is the parcel that was issued to the plaintiff upon subdivision of **Plot No. Waitaluk/Kapkoi Block 13/60** into two parcels.

12. I find that the plaintiff has in view of the above evidence shown that he is entitled to the orders of eviction and injunction sought. However I do not find that he has proved his case in respect of general damages and *mesne* profits.

13. In the final submissions Mr. Gachathi's the plaintiff's counsel relied on the cases of *Edward Mariga -vs- Nathaniel David Schuler & Another 1997 eKLR*, *Lake Flowers -vs- Cila Franklyn Onyango Ngong'a 2008 eKLR* and *Joel Kipchirchir Kitur -vs- David Kimutai Langat & Another 2006 Eklr*, in support of his client's case. I approve of those cases and the passages cited as being relied on.

14. The upshot of the above is that I find that the plaintiff has proved his case on a balance of probability against the 2nd, 3rd and 4th defendants. I therefore enter judgment against the defendants jointly and severally and I grant prayers No. **(a)**, **(b)** and **(c)** in the plaint dated 24th September, 2010.

Dated, signed and delivered at Kitale on this **30th** day of **October, 2017**.

MWANGI NJOROGE

JUDGE

30/10/2017

Coram: Before Mwangi Njoroge - Judge

Court Assistant – Isabellah/Picoty

Ms. Mwemeke holding brief for Gachathi for the plaintiff

Defendant absent.

COURT

Judgement read in open court in the presence of counsel for the plaintiff.

MWANGI NJOROGE

JUDGE

30/10/2017