



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 126 OF 2004

JOHN KHISA MUMELO PLAINTIFF

VERSUS

ALICE LUSWETI..... DEFENDANT

J U D G M E N T

INTRODUCTION

1. The plaintiff is a brother in-law of **Edward Lusweti** (deceased) who was the husband of the defendant. The deceased was a younger brother of the plaintiff's wife. The plaintiff is the registered owner of **LR. No. Sinyerere/Kipsaina Block 1/Bistati/22** which measures **5.059 hectares** (suit land). The plaintiff brought this suit against the defendant for an order of eviction from the suit land.

PLAINTIFF'S CASE

2. The plaintiff testified that he was a member of **Bistati Farmers Co-operative Society Limited** where he had shares. By virtue of his shareholding in the society he was given **5.059 hectares**. He later processed and obtained title deed for the suit land [*Exhibit 1*]. He also produced a search dated 28/10/2010 [*Exhibit 2*] which shows that he is the registered owner of the suit land.
3. The plaintiff produced a copy of receipt dated 6/5/1996 which he said was money paid for processing title deed [*Exhibit 6*]. He testified that he has been paying rates for the suit land as per receipt produced as *Exhibit 7*. He testified that the defendant who is wife to the deceased came to the suit land in 1975. That the deceased had bought a share at the Bistati Farmers Co-operative Society Limited but the society refunded his money. It is after the deceased got his refund from the society that the defendant moved into the suit land. He has been asking her to move out of the suit land in vain.

DEFENDANT'S CASE

4. The defendant testified that she is the wife of the deceased who died in **1997**. Prior to the demise of the deceased, the deceased was a member of **Bistati Farmers Co-operative Society** which owned **Plot No. 34**. The plaintiff was also a member of the society. The society's land was subdivided. The plaintiff got **Plot No. 22** and the deceased got **Plot No. 118**. The defendant produced title deed in the name of the deceased [Defence Exhibit 1] which shows that the deceased is the registered owner of **LR. No. Sinyerere/Kipsaina Block 1/Bistati/118** which is **2.530 hectares**. She produced an area list [*Exhibit 2*] which shows that the deceased was a member of Bistati Farmers Co-operative Society Limited. The plaintiff's name is also on the list.

5. There was an appeal filed by the plaintiff at the Co-operative Tribunal from the decision of an arbitrator. The Commissioner of Co-operative ruled that the suit land be divided equally between the plaintiff and the deceased. The proceedings from the Commissioner of Co-operatives were produced as *Defence Exhibit 3*. The deceased later filed a dispute at the Charangany Land Disputes Tribunal. The elders heard the dispute and resolved that both the plaintiff and the deceased do share the suit land equally. The proceedings of the panel of elders were produced as *Defence Exhibit 5*. The award of the elders was forwarded to Kitale Senior Resident Magistrate's Court for adoption. Once the decision of the elders was adopted as a judgment of the court, surveyors moved to the suit land in **1993** and subdivided it into two equal portions of **2.530 hectares** as per letter from Survey of Kenya produced as *Defence Exhibit 4*. The deceased later processed title which he obtained on **28/1/1997**. The deceased's title is **LR. No. Sinyerere/Kipsaina Block 1/Bistati/118** which is **2.530 hectares**.
6. The defendant produced a demand notice for rates from the County Government of Trans-Nzoia [*Defence Exhibit 6*] issued on 27/1/2015 in the name of the deceased.

ANALYSIS OF EVIDENCE, ISSUES FOR DETERMINATION AND THE LAW

7. There is no contention that the deceased and the plaintiff were related by virtue of the plaintiff having married the deceased's elder sister. The evidence on record shows that the plaintiff had a case with the deceased. This was ***Kitale Senior Resident Magistrate Civil Case No. 127 of 1989***. This case was referred to the District Officer for arbitration. It was ruled that the plaintiff and deceased were to share the suit land equally that is **6 ½ acres each**. The surveyors went to the ground and sub-divided the suit land into two equal portions of **2.530 hectares**. The deceased went ahead and obtained title for his portion on **28/1/1997**. The surveyor's letter of **19/3/1993** is clear that **Parcel No. 22** was reserved for the plaintiff because no title had been issued for **Parcel No. 22** which was initially **5.059 hectares**.
8. It is not clear how the plaintiff who obtained his title on **19/3/1997** managed to be registered as owner of the entire portion of **5.059 hectares**. The deceased had already processed title for his half portion of what used to be **Parcel No. 22**. He had obtained title on **28/1/1997**. Almost one and half months later, the plaintiff obtained title for the entire parcel including the portion for which the deceased had obtained title. Though the plaintiff claimed that the deceased's title had been obtained fraudulently and that the same had been cancelled, there is no evidence that the deceased's title was cancelled and no particulars of any fraud were set out in the plaint. The only logical conclusion which can be made is that the plaintiff irregularly obtained title for the entire parcel comprising of **5.059 hectares**. All previous proceedings between the plaintiff and the deceased ended in favour of the deceased. There were no appeals preferred against any of those decisions. The deceased's title which was obtained pursuant to a lawful process is therefore valid.
9. The plaintiff had tried to obtain grant in respect of the estate of the deceased but there was no evidence that he succeeded. The deceased's widow also testified that she had filed succession for the estate of the deceased but that the process had been frustrated by the plaintiff. Though there was no evidence to show that, the fact remains that the deceased had succeeded in having **6 ½ acres** through a lawful process.
10. The only issue for determination is whether the plaintiff has demonstrated that he is entitled to the orders of eviction. My finding based on evidence is that the plaintiff is not entitled to eviction orders. He cannot seek to evict the defendant from land she is occupying in her capacity as wife of the deceased who had the land registered in his name through a lawful process.
11. The plaintiff had tried to put up a case that the deceased was a member of the society and that his money was refunded to him. Documents in support of this contention were marked ***M.F.I.3,4,5*** and ***8*** but they were all not produced. They therefore do not form part of the record and are not of any evidential value. Even if copies of the same were to be in the court file which is not the case, the court will not have relied on them. In ***Nairobi Court of Appeal Civil Appeal No. 140 of 2008***

Kenneth Nyaga Mwige -vs- Austine Kiguga & 2 Others, the High Court had relied on documents which had been marked for identification but which were not produced to reach a decision which led to the dismissal of the appellant's case. When the appellant appealed to the Court of Appeal , the Court of Appeal overturned the High Court decision holding that documents which are marked but not produced cannot be relied on and are of no probative value as they do not form part of the record.

DISPOSITION

12.It is therefore clear that the plaintiff has failed to prove his case as required. The same is hereby dismissed with costs to the defendant.

Dated, signed and delivered at Kitale on this 26th day of January, 2016.

E. OBAGA

JUDGE

In the presence of M/s. Bett for Mr. Chebii for Defendant and Mr. Ndarwa for M/s. Arunga for Plaintiff.

Court Assistant – Isabellah.

E. OBAGA

JUDGE

26/01/16