



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 84 OF 2012**

**J D O (SUING AS GUARDIAN AD LITEM OF S A T).....PLAINTIFF**

**VERSUS**

**ROBERT WALUSEKHE WESAKANIA:.....DEFENDANT**

**J U D G E M E N T**

**INTRODUCTION**

1. The plaintiff is the guardian ad Litem of S A T who is said to be suffering from senile dementia. The plaintiff was appointed guardian ad litem by the court on 24.5.2011. Prior to his appointment as guardian ad litem, the plaintiff had been given power of attorney by S A T to deal with his property known as Shinyerere/Kipsaina Block 2/Kesogon/[particulars withheld] (suitland).
2. The plaintiff filed this suit against the defendant seeking a declaration that the agreement of 17.3.2009 (actually the agreement in issue is dated 15.1.2008) is illegal, null and void hence unenforceable in law and that the defendant is a trespasser to the suitland who should be evicted therefrom and an order made that he pays mesne profits of Kshs2000/= per acre and return S A T's original title and ID card. The plaintiff also prays for a permanent injunction restraining the defendant or his servants from interfering with the suitland.
3. The defendant filed his defence and raised a counter-claim in which he seeks an order of specific performance of the agreement of 15.1.2008 in respect of the suitland.

**PLAINTIFF'S CASE**

4. The plaintiff testified that he is a cousin of S T who is the registered owner of the suitland. That S T was diagnosed with a mental condition known as senile dementia in 2003. The condition became acute in 2005. He used to take S T to Maseno Mission Hospital for treatment. In 2009 S T donated a power of attorney to him to deal with the suit land. The plaintiff was later appointed guardian ad litem of S T. He produced an order to that effect (exhibit 1).
5. S T had purchased the suitland in the 1980's. The suitland is situated at Kesogon in Trans-Nzoia County. S T was staying alone in the suitland having lost his wife. In 2008 S T went back to his rural home at Kisumu as he had been thrown out of the suitland following the post election violence of 2007/2008. S T appeared devastated. The plaintiff contacted T's former worker a Mr. Nandwa. The plaintiff collected some of T's belongings which he left behind. The plaintiff learnt that the defendant was claiming that he had bought the suitland from T. He went and filed a case against the defendant at Kaplamai Land Disputes Tribunal on behalf of T. The Tribunal ruled that the suitland belonged to Mr. T. The defendant moved to the High Court and the Tribunal decision was quashed.

6. Mr. T had sold part of his land to various individuals including the defendant who bought a plot measuring 50 X 100 for which he has title. Mr. T remained with 7.4 acres. The defendant went to the rural home of Mr. T and claimed that he had bought the remainder of T's land vide agreement dated 15.1.2008 and that he had paid Kshs.404,000/= on 15.1.2008. The authenticity of this agreement was doubted because the country was going through difficult times following post election violence and Mr. T was sick. It was even difficult for Mr. T to carry such a huge amount of money during that time.

### **DEFENDANT'S CASE**

7. The defendant testified that on 30.11.2007 he entered into a sale agreement with Mr. T for purchase of his land at consideration of 500,000/=. He paid a deposit of Kshs.254000/=. The balance of Kshs.254,000/= was to be cleared after Mr. T processed title in his favour. He produced the agreement of 30.11.2007 (Defence exhibit 1). On 15.1.2008 he entered into another agreement with Mr. T. He paid an additional sum of Kshs.150,000/= which made it Kshs.404,000/=. He produced the agreement of 15.1.2000 (defence exhibit 2). The balance was now Kshs.104000/=. He was given possession. Mr. T moved to Maseno. He kept in touch with Mr. T.

8. The defendant produced a letter dated 8.4.2008 (Defence exhibit 3) written by Mr. T in which Mr. T was notifying the defendant that he was going to send his nephew to K to pick up his belongings which remained behind. He also produced another letter dated 26.4.2008 (Defence exhibit 4) in which Mr. T was inviting him to maseno to go and introduce him to his children as purchaser of his land.

9. The defendant testified that Mr. T took him before the land Control board where consent to transfer the land was granted. He produced an application for consent and the consent itself as defence exhibit 5 and 6 respectively. He testified that Mr. T executed transfer in his favour. He produced the transfer (defence exhibit 7). He stated that he has not lodged the transfer for registration as Mr. T has not surrendered the original title.

### **ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION.**

10. I have carefully gone through the evidence adduced herein by both the plaintiff and defendant as well as the documents produced in support of each side's contention. The plaintiff had averred in his statement of claim that Mr. T had in 2006 subdivided his land into 9 plots one of which he sold to the defendant at Kshs.200,000/=. The size of the plot was 50 X 100. This evidence came out during the hearing and the defendant himself does not deny that he had earlier on bought a plot measuring 50X100 from Mr. T. The issue for determination in this case is whether Mr. T later sold 7.4 acres to the defendant and if so did he have capacity to do so? Another issue for determination is whether the defendant is entitled to an order of specific performance in respect of the agreement of 15.1.2008.
11. The defendant produced two agreements that is the one dated 30.11.2007 and the one dated 15.1.2008. A look at the agreement of 30.11.2007 (defence exhibit 1) shows that the property being sold was described as Sinyerere/Kipsaina Block 2/Kesogon//[particulars withheld]. There is no purchase price indicated in the said agreement. It is only indicated that a deposit of Kshs.254,000/= was paid on the same day of the agreement and as per clause 4 of the agreement, Kshs.254000/= being the balance was to be paid upon the vendor processing title. A simple calculation shows that the total deposit and the balance comes to 508,000/=. The defendant's evidence is that the agreed purchase price was 500,000/=. It is not explained why the total comes to 508,000/= yet the purchase price according to the defendant was 500,000/=. The only time the defendant attempted to explain the amount over the alleged agreed purchase price was during re-examination by his lawyer when he stated that Kshs.4000/= was processing fees. He did not say which processing fees this was.
12. The agreement of 15.1.2008 again refers to Land parcel No. Sinyerere/Kipsaina Block 2/Kesogon//[particulars withheld]. There is however a change made to it in handwriting

- introducing parcel No. /[particulars withheld]. The initial parcel number was typewritten but parcel No. /[particulars withheld] was in handwriting. The same pen which introduced this parcel number is the same pen which introduced a second witness to the agreement on the purchaser's side.
13. The suitland had been registered in the name of T on 17.3.2004. A title deed was issued in his name the following day on 18.3.2004. The land is 4.73 hectares which is about 11 acres. There is a certificate of official search which was obtained on 15.9.2011 in respect of the suitland. It shows that Mr. T was the registered owner of the land. It is therefore clear that if at all the defendant entered into any agreement with Mr. T it was not in respect of the suitland which was still intact and that there had been no subdivision. If it is true that the defendant bought part of the suit land and obtained title for the 50 X 100 plot, then the search of 15.9.2011 would not have reflected parcel /[particulars withheld] because the title would have been closed and fresh titles issued reflecting new parcel numbers. At least on the evidence on record I find that there was no agreement between the defendant and Mr. T regarding parcel No. /[particulars withheld] (suitland).
  14. On the issue as to whether Mr. T had capacity to enter into the agreement in issue, it appears that the plaintiff is doubting whether Mr. T ever signed the agreement or not. The plaintiff's evidence seems to suggest that if Mr. T signed the agreement he signed it not knowing what he was doing. Evidence was adduced to show that Mr. T had been diagnosed with a condition called senile dementia. PW4 Dr. Peter Otiato was called as a witness of the plaintiff. He testified that he is a Doctor at Maseno mission Hospital. That Mr. T had been a patient at the hospital from 2005. He used to go there for review. In his opinion, Mr. T was suffering from Senile dementia which aggravates with aging. He produced two letters he wrote on 12.3.2009 and 8.4.2010 (plaintiff exhibit 2 and 3 respectively). He formed an opinion that Mr. T could not comprehend his whereabouts or his company. He formed an opinion that Mr. T should not be held accountable for his actions after 2005.
  15. There is evidence that Mr. T had retired from the civil service. He had lost his wife and was staying alone. The power of attorney which he donated to the plaintiff in 2009 was signed by both himself and one other person. This is an indication that he was not alright medically. This has been confirmed by a medical doctor. The agreement in issue was entered into on 15.1.2008 at the peak of post election violence in Kenya. If Mr. T signed the said agreement, then the defendant must have taken advantage of his health status and the post election violence to make him sign the agreement. The defendant could not purchase a 50X100 plot at 200,000/= and years later purport to buy 7.4 acres at a paltry Kshs.500,000/=.
  16. One of the alleged witnesses to the agreement of 15.1.2008 is DW2 Stephen Barasa Wesakania a brother of the defendant. A look at the agreement of 15.1.2008 shows that his name was introduced later as the pen used to write his name is quite different. This witness had not even recorded a statement. He came to record his statement in 2015 after the court granted leave. This witness backdated his statement to 19.7.2012 which is not the date he recorded it. This witness claims that he witnessed Mr. T being given 254,000/= on 30.11.2007 and another 150,000/= on 15.1.2008. This witness was not present as alleged in his statement and evidence in court.
  17. PW2 Nahashon Shisia Shiyonga was Mr. T's farm worker. He narrated the events of 15.1.2008 and 18.1.2008. On 15.1.2008 the date of the alleged agreement, the defendant came to the home of Mr. T. He saw him talk to Mr. T but he did not know what they discussed. This was about 5:00pm. The defendant went away and came back with a tractor loaded with his personal items. He was accompanied with a group of rowdy youths. They demanded house keys and gave Mr. T a few minutes to vacate the suitland. However as it was late, the defendant allowed them stay for a night. The following day he escorted Mr. T who was sick to Kitale where he boarded a vehicle to go back home to Maseno.
  18. I have no reason to doubt the evidence of PW2 given the prevailing situation at the time. People took advantage of the situation to either illegally occupy other peoples land or buy the land at throwaway prices from those who were fleeing. I have no doubt that the defendant was exploiting the situation of the moment. The alleged witness of Mr. T was one Edward Maruti. There is no evidence as to who he was or where he was found so as to be witness of Mr. T. Given the prevailing situation and the health status of Mr. T, I find that he was not in the right frame of

mind to enter into such an agreement which was not only exploitative but also made in bad faith. If Mr. T signed the agreement then there must have been undue influence and such an agreement cannot be allowed to stand.

19. The defendant did not show any evidence that he had such a sum to pay out during that time where there was fighting in most parts of the country and particularly in Trans-NZoia where the suitland falls. The defendant produced an application for consent of land control board made on 6.3.2008 and a consent given on 29.5.2008 for transfer. This application and consent relates to LR. No. Sinyerere/Kipsaina Block 2/Kesogon/[particulars withheld]. It has nothing to do with the suit land which is parcel No. /[particulars withheld]. The defendant's evidence is that he was purchasing parcel No. /[particulars withheld]. He has not explained how this again turned out to be 569. In re-examination by his lawyer he tried to explain that parcel No. /[particulars withheld] was a subdivision of parcel No. /[particulars withheld].
20. The last issue for determination is whether the defendant is entitled to an order of specific performance in respect of the agreement of 15.1.2008. My finding on this is that the defendant is not entitled to an order of specific performance. To begin with, he is seeking an order touching on parcel No. /[particulars withheld] when his agreement and evidence do not support this. In the agreement of 15.1.2008, he was purchasing unknown acreage from parcel No. /[particulars withheld]. In his evidence, he introduced parcel No. /[particulars withheld]. He cannot therefore seek an order touching on parcel No. /[particulars withheld] which is 4.73 hectares about 11 acres.

### **DECISION**

21. I find that the agreement of 15.1.2008 was not lawfully made. It cannot be enforced as it is null and void. The defendant's stay on the suit land is therefore illegal. He is a trespasser on the same and should be evicted therefrom. There was no basis upon which this court could award mesne profit or make a finding that it is the defendant who has Mr. T's original title and ID card. The claim for mesne profits is therefore disallowed as is the case with the title and ID card. I also find that the defendant's counterclaim cannot be allowed for reasons given herein above. The counterclaim is hereby dismissed with costs to the plaintiff. The plaintiff shall have costs of the suit.

Dated, signed and delivered at Kitale on this 1st day of February, 2016.

**E. OBAGA**

**JUDGE.**

**COURT** - Judgment delivered at 3:50pm in the absence of parties who were aware of today's date. Parties can read the judgment at the registry.

**E. OBAGA**

**JUDGE**