



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 21 OF 2012

LAWRENCE TALIAN NAIBEIPLAINTIFF

VERSUS

DIFFAS CHEROP CHEPTABUTDEFENDANT

J U D G E M E N T

INTRODUCTION

1. The Plaintiff was the allottee of **Plot No. 95 at Endebess Settlement Scheme** (suitland). The land which is seven acres had been allocated to him by the Settlement Fund Trustee in 1998. In or around 2001, the Plaintiff killed one **Andrew Ndiwa** (deceased). He was arrested and arraigned in court charged with the offence of Murder. The offence was later reduced to Manslaughter and the Plaintiff was sentenced to imprisonment for seven years in 2001.
2. While the Plaintiff was in prison, the Plaintiff's clan decided to sell the suitland in order to raise funds to purchase cows and goats to compensate the family of the deceased. The suitland was sold to the Defendant who is in possession of the same. The Plaintiff brought this suit against the Defendant seeking an order for eviction and a Permanent injunction restraining him from interfering with the suitland.

PLAINTIFF'S CASE

3. The Plaintiff testified that in 2001 he was sentenced to seven years in jail for Manslaughter. As he was serving sentence in prison, he was visited by his home area Chief who was in company of the Assistant Chief, one of his wives and son. The visitors had a sale agreement in respect of the suit property which they wanted him to sign. He declined to sign the same. The visitors then went away.
4. When the Plaintiff was released from prison, he went home and found that the Defendant had occupied the suitland on allegations that he had bought the same. He asked the Defendant to move out but the Defendant declined. He sought the intervention of the area District Officer who told him that he could not intervene on a matter which had been decided by the clan.
5. The Plaintiff contends that he is not aware of any agreement between his family and the family of the deceased regarding compensation. He stated that he is now living as a squatter in Saboti forest with some of his 18 children. His two wives do menial jobs for survival. It is on this basis that he prays that that Defendant be evicted from the suit land and be permanently restrained from

interfering with the same.

DEFENDANT'S CASE

6. The Defendant testified that in 2001 the Plaintiff killed his neighbour. He was arrested and charged for Murder. While the Plaintiff was in remand, the clan held negotiations and decided that the family of the Plaintiff had to compensate the family of the deceased by paying **28 cows** and **12 goats**. It was decided that the Plaintiff's land (suitland) was to be sold to raise money for buying cows and goats to be given as compensation.
7. The Defendant testified that the negotiations were between the clan elders and the Plaintiff's two wives. When a decision was reached, some elders were asked to go to prison and communicate the clan decision to the Plaintiff. The elders came back and approached him to buy the suitland. He was initially reluctant to buy the suitland but he was persuaded by elders. He accompanied one of the elders to prison where he negotiated on the purchase price with the Plaintiff. The Plaintiff agreed to sell the suitland at **Kshs 70,000/= per acre**.
8. He went back to the Chief and told him that he had agreed on the purchase price with the Plaintiff. The chief wanted to confirm this. He went to prison where he confirmed that the Plaintiff wanted to sell the suitland. He then came back and called the Plaintiff's two wives to his office where an agreement for sale was signed on 10/4/2002. The Defendant then paid **Kshs 490,000/=**.
9. The money he paid was used to purchase cows and goats for compensation. The balance was used to purchase land elsewhere for the Plaintiff's family. The Plaintiff's family had been displaced following the killing of the deceased. All the Plaintiff's houses had been razed down and property looted.
10. The Defendant tried to take possession of the suitland twice but he was chased away by the deceased's family. He however later took possession after the intervention of the area District Officer who convinced the deceased's family to allow him to occupy it as he had bought it. When the plaintiff left prison, he started demanding back the suitland.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

11. There are certain facts which are not in contention. These include the fact that the plaintiff was the allottee of the suitland. That the Defendant is the one who is currently in possession of the suitland and that the plaintiff is the one who killed the deceased and further that he served a prison term for Manslaughter.
12. The Plaintiff's contention in the pleadings is that when he came out of prison, he found that the defendant had invaded the suitland. The basis for invasion was an alleged sale which was to enable the clan to raise money to compensate the family of the deceased. The Plaintiff denies being party to any agreement to compensate the family of the deceased or sale of his land. On the other hand, the defendant contends that it is the Plaintiff who agreed to have his land sold and that it is him who mandated his wives to sign the sale agreement.
13. The issues which emerge for determination in this suit are as follows:-
 - i. Whether the Plaintiff sanctioned the sale of the suit land or not.
 - ii. Whether there was any agreement to compensate the family of the deceased and whether they were actually compensated.
 - (iii) Was the sale of the suitland lawful?

Whether the Plaintiff sanctioned the sale of the suitland

14. The Plaintiff's contention in the pleadings is that the Defendant Invaded the suitland after his wives were coerced by family and clan members into signing a sale agreement which was disguised as a document which was to facilitate his release from prison. There is evidence that there was an attempt by the then Provincial Administration led by Chief and his assistant to convince the Plaintiff to agree to sell his land. The plaintiff declined to give consent to have his land sold.
15. It is after the Plaintiff declined to have the suitland sold that the administration and clan decided to have the land sold without his consent. This is why the wives of the Plaintiff were asked to sign a document on allegations that it was to facilitate their husband's release from prison only for them to realise later that it was a sale agreement.
16. It is therefore clear that the sale of the Plaintiff's land was without his sanction. Infact it was a unilateral decision by the clan. A look at the sale agreement produced as **defence exhibit 1** shows that the decision to sell the suitland was made by the clan. The sale agreement was signed by the two wives of the plaintiff and one of his sons. The Plaintiff had not sanctioned them to sell the suitland. I therefore find that the sale of the suitland did not have the sanction of the plaintiff.
17. The Defendant claimed that he went to prison where he met the Plaintiff who agreed to sell the suitland to him at Kshs 70,000/= per acre and that he sanctioned his wives to sign a sale agreement. This evidence is not true because there is other evidence on record including documentary evidence that it is the clan which decided to sell the suit land after the plaintiff declined to give consent for that purpose.

Whether there was any agreement to compensate the family of the deceased and whether they were compensated

18. Though the Defendant's witnesses claim that the suitland was sold so as to raise funds to buy cows and goats to compensate the family of the deceased, there is no credible evidence to show that there was such an agreement or that there was actually any compensation made. In the sale agreement produced as **defence exhibit 1**, it is indicated that the reason for sale of the suitland was because of insecurity among family members following the death of the deceased.
19. The evidence of a clan meeting came from **DW2 Alice Chebet Sikowa** a sister of the Plaintiff, **DW3 Jon Twayim Ngeiywa**, a step brother of the Plaintiff, **DW4 John Kiboi Paul** Chairman of **Kapkuno clan** and **DW5 John Musanga Chepsiror** a cousin to the Plaintiff and secretary of Kapkuno clan. These witnesses claimed that it was decided that the Plaintiff's family gives the deceased's family 28 cows and 12 goats. There is no credible evidence as to whether there was any clan meeting and whether there was any agreement that the deceased's family was to be compensated. This is because the clan had decided to state in the agreement for sale that the suitland was being sold due to bad blood between the Plaintiff's family and the deceased's family.
20. There is no evidence at all to show that there was any compensation made to the deceased's family. There was no credible evidence that the 28 cows and 12 goats were bought. There is evidence from the Defendant's witnesses that the **Kshs 490,000/=** went towards purchase of alternative land for the plaintiff's family and the rest was used to purchase food and clothes for the plaintiff's family.
21. It was alleged that part of the money was used to purchase 15 acres for the family of the Plaintiff at **Kokwo Multipurpose Co-operative Society**. **DW5** testified that the Plaintiff was given three shares equivalent to 5 acres for each share which was valued at Kshs 50,000/=. During cross-examination, it emerged that members of **Kokwo Multi-Purpose Co-operative Society** are not on the land which the society had allocated the Plaintiff. The Government removed all members from the land as it was a Government forest land. It therefore means that the Plaintiff has no land

and he is living as a squatter in Saboti forest as he testified.

Was the sale of the suit land lawful?

22. The suitland belonged to the Plaintiff. He did not sanction its Sale. The sale of the land was made by the clan who coerced the Plaintiff's wives to sign the agreement for sale. Though the clan wanted to conceal the reason for sale in the agreement, the defendant's witnesses claim that the sale was to raise compensation money. If this was the case, the clan was fulfilling certain customary ways of appeasing the family of the deceased. In as much as the court is enjoined to promote certain traditional dispute resolution mechanisms, it cannot promote customary practices which contravene the bill of rights.

23. In the instant case, the Plaintiff is protected under **Article 40 of the Constitution of 2010** which guarantees him right to own property. **Article 159 of the Constitution** provides that courts in exercising their judicial authority shall be guided by principles set out therein. One of the principles is promotion of among others traditional dispute resolution. However **sub Article 3** provides that traditional dispute resolution mechanisms shall not be used in a way that -

(a) Contravenes the Bill of Rights.

(b) Is repugnant to Justice and morality or results in outcomes that are repugnant to justice or morality; or

c. Is inconsistent with the constitution or any written law.

24. Even the old constitution which was in force at the time the sale of the suitland was made provided for protection of right to property. A person could not be arbitrarily deprived of his property. In the instant case, the clan arrogated itself powers to sell the plaintiff's land in order to raise compensation money. The action of selling the plaintiff's land was not only unlawful in the sense that it did not receive his consent but was also in contravention of the bill of rights. The method of compensation chosen and the means of reaching that compensation i.e sale of the plaintiff's land was in contravention of the Bill of Rights which is excluded when it comes to promotion of traditional dispute resolution mechanisms. The result of that action rendered the plaintiff landless. The land which was allegedly bought for him turned out to be Government land and the plaintiff is not benefiting from it as all members of **Kokwo Multipurpose co-operative society** were evicted from that land.

25. I find that the manner in which the defendant came into the suitland was unlawful and amounted to invasion of the same. The alleged consideration if any was made in an opaque manner. The same was used in an opaque manner. It is not known who received it and how it was applied. The sale agreement was made 10/4/2002. It is said that Kshs 300,000/= was paid on that day. It is not indicated as to who received it. A second installment of Kshs 20,000/= was to be made on 20/4/2012. A third and final installment of kshs 170,000/= was to be made at the lands office on an unspecified date. It was not indicated who was to be paid that money and why such a large amount was to be made at the lands office.

26. The transaction never received the consent of the land control board as required. It therefore became null and void and the defendant's remedy can be recovery of what he paid if he will be able to prove that he paid it.

DECISION

27. I find that the plaintiff has proved his case to the required standards. I grant an order of eviction against the Defendant from **Plot No 95 at Endebess Settlement Scheme**. A permanent injunction is hereby given restraining the Defendant or his servants from in any way interfering with the suitland after he is evicted from the same. The defendant shall pay costs of this suit.

Dated, signed and delivered at Kitale on this 18th day of April 2016.

E. OBAGA

JUDGE

In the presence of M/s Mufutu for Mr Chebii for Defendant and Plaintiff in person.

Court Assistant – Isabellah

E. OBAGA

JUDGE

18/4/16