



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 26 OF 2004

FREDRICK NAFTAL ONDIEKI.....PLAINTIFF

VERSUS

SOPHIE CAROLINE SAVAKO.....DEFENDANT

J U D G E M E N T

I N T R O D U C T I O N

1. The Plaintiff is the registered owner of **LR No. Trans -Nzoia/SInyerere/716** (suitland). The Defendant is the registered owner of **LR No. Trans-Nzoia/SInyerere/715** which borders the suitland. The Plaintiff brought a suit against the Defendant seeking an order of eviction against her from part of the suitland. The Defendant filed a defence and raised a counter-claim in which she contends that the Plaintiff obtained title to the suitland fraudulently and that he had encroached onto her land by two acres.

2. The Plaintiff's suit was filed on 8/3/2004. The parties delayed in listing down the suit for hearing. On 2/1/2016, the court issued Notice to the parties to show cause why the same should not be dismissed. The Notice to show cause was fixed on 11/2/2016. Mr Onyancha for Plaintiff was present. The Defendant was represented by M/s Mufutu who was holding brief for Mr Ingosi. Mr Onyancha explained to the court that he had delayed in fixing the matter for hearing as the Defendant's previous lawyer Mr Wafula had died and that he was not aware that Mr Ingosi had filed a Notice of change of advocates. The case was spared dismissal and a date for hearing was given in the presence of both advocates.

3. When the case came up for hearing, neither the Defendant nor her advocate were in court. The date having been taken by consent, the hearing proceeded ex-parte.

PLAINTIFF'S CASE

4. The Plaintiff testified that he purchased the suitland from one **Zebedayo Ndoté Musiro** who has since died (deceased). The deceased was married to **Jerida Kirisia Ndoté** who took out Letters of Administration in respect of the estate of the deceased. The suitland was part of **LR NO. 284**. LR No. was subdivided into two portions. The Plaintiff was given the suitland which is **15 ½ acres**.

5. In 2003 the Defendant trespassed into the suitland and occupied about two acres. When he brought his suit against the Defendant, the parties to the suit consented to send a surveyor to the ground to go and confirm if there was any encroachment. The surveyor went to the ground and carried out a survey. He found out that the Defendant had encroached on to the Plaintiff's land by **0.9 hectares** which is about 2

acres.

6. The Plaintiff denied the Defendant's claim that he had encroached on to her land by **2 acres** or that he obtained title to the suit land in a fraudulent manner.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

7. I have gone through the documents produced by the Plaintiff. The only issue for determination is whether there is encroachment either into **Plot No. 715** or **716**. The Plaintiff's evidence was not controverted. The Plaintiff produced title to the suitland **Exhibit 1** and a search carried out **Exhibit 2**. The two documents confirm that he is the registered owner of the suitland. He obtained his title on 24/10/1997.

8. When this case was filed in court, parties agreed to send a surveyor to go and ascertain the position. The surveyor found that the Defendant had encroached on to the Plaintiff's land by **0.9 hectares**. This translates to about **2 acres**. The survey report was produced as **Exhibit 4**.

9. The Plaintiff also produced a document from **Succession Cause No. 100 of 1984** from Kitale Senior Principal Magistrate's Court. This document produced as **Exhibit 3** confirms that Letters of Administration in respect of the estate of the deceased were given to **Jerida Kirisia Ndote**. In that document, **Plot No. 248** which was **42 acres** was to be sub divided into two portions. One portion of **26.5 acres** was to go to **Jerida Kirisia Ndote** and another portion of **15.5 acres** was to go to the Plaintiff. It is on the basis of this that the Plaintiff obtained his title.

10. The Plaintiff has proved his case to the required standards. He has proved that it is the Defendant who has encroached on to the suit land by **0.9 hectares** which is about **2 acres**. He obtained title in a genuine way after Succession had been carried out. There is therefore no basis for the Defendant to claim in her pleadings that the Plaintiff obtained his title by fraud.

DECISION

11. I find the Plaintiff has proved his case on a balance of probabilities. The Defendant's counter-claim was not prosecuted as she did not give evidence. I therefore dismiss the counter-claim with costs to the Plaintiff. The Plaintiff's claim is allowed. An order of eviction is hereby given directing the eviction of the Defendant or her servants and agents from a portion of **0.9 hectares** which she is occupying on **LR No Trans-Nzoia/Sinyerere/716**. The Defendant to pay costs of the suit to the Plaintiff.

Dated, signed and delivered at Kitale on this 12th day of May 2016.

E. OBAGA

JUDGE

Court: Judgement signed in open court at 3.00 pm in the absence of the Plaintiff and his lawyer who were aware of the date of delivery of the same.

Court Assistant – Isabellah

E. OBAGA

JUDGE

12/5/16