



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 55 OF 2014

JOSEPH MADIGO OGADAPLAINTIFF

VERSUS

HUDSON WASIKE1ST DEFENDANT

JULIA WEKESA *sued as a representative of*

***Emoru Friends Monthly Church*2ND DEFENDANT**

J U D G M E N T

INTRODUCTION

1. Michael Andrew Jode (deceased) was the registered owner of **LR No. Trans-Nzoia/Emoru/30**. During his lifetime, the deceased subdivided his land into three portions namely;-

Trans-Nzoia/Emoru/136, 137 and 138. The deceased had given Power of Attorney to his son **Joseph Omolo Jode (Joseph)**. On 19/7/2005, Joseph sold 1 ½ acres to the plaintiff. The Plaintiff was subsequently registered as owner of Trans-Nzoia/Emoru/138 (suitland).

2. Joseph later on sold one acre to a Mr Justus Wekesa who became a neighbour to the plaintiff. The said Justus Wekesa then sold half an acre to the first defendant and another half to Emoru Friends Monthly Church (church). There arose a boundary dispute between the plaintiff and the defendants. The plaintiff went and reported the dispute to the Land Registrar who went to the ground and found that the dispute was actually one of trespass and not boundary dispute.

He advised the plaintiff to file his claim in court hence this case in which the plaintiff seeks an order of eviction of the defendants or their agents from the suitland.

PLAINTIFF'S CASE

3. The plaintiff testified that after he purchased the suitland, he fenced it but in 2007 the fence he had erected round the suitland was removed by Justus Wekesa who then sold part of his plot to the defendants. When he sought the intervention of the Land Registrar, the Land registrar came to the ground and found that the dispute was one of trespass and not boundary dispute. The Plaintiff engaged a surveyor who found out that the defendants had encroached on to the suitland by 0.1 of an acre.

DEFENDANT'S CASE

4. The first defendant testified that he bought half an acre from Justus Wekesa. The church also bought

half an acre from Justus Wekesa. The first defendant's half acre was behind that of the church.

The church's half acre fronted a road. That he has since sold his interest to one Hudson Wekesa.

5. On her part, DW2 Julia Wekesa testified that the church bought half an acre from Justus Wekesa. They started bringing building materials to put up a church. The church stopped further progress after they were served with summons in this case. Both defendants denied that they have encroached on to the suitland.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

6. There is no contention that the plaintiff is the registered owner of the suitland. He produced a copy of title as exhibit 1. He obtained this title on 15/7/2011. An agreement of Sale between him and Joseph was produced as exhibit 2. Consent of Land Control Board was applied for and obtained. Application for consent and the consent were produced as exhibit 3 and 4 respectively.

7. Survey of the main title i.e Trans Nzoia/Emoru/30 was carried out. The Plaintiff produced copies of Mutation forms. The suitland was transferred to the plaintiff by the deceased. Mutation forms and transfer were produced as exhibit 6 and 5 respectively.

8. The only issue for determination in this case is whether the defendants have encroached on to the Plaintiff's land. A surveyor was sent to the ground and found that the suitland had been encroached into by 0.1 of an acre. The survey report was produced by PW2 Bainito Ombudu Hussein who is the County Surveyor Trans -Nzoia County. The actual visit was made by Mr Wakibisi a surveyor.

The surveyor who went to the ground found that some building materials had been put up on part of the suitland.

He produced the report as exhibit 8.

9 Both defendants while under cross-examination stated that they had no any report contradicting that of the surveyor who went to the ground. Whereas the two defendants deny that there is no encroachment on to the suitland, the first defendant seems to take issue with the fact that registration of the plaintiff as owner of the suitland was effected after the demise of the deceased. The deceased had done all that was required under the law. He had subdivided his land during his lifetime, applied for consent to transfer which consent was granted. He thereafter signed a transfer. The deceased having done all this, the property had vested in the plaintiff and it does not matter that the lodging and registration of the transfer was done after the death of the deceased. The plaintiff did not require any assistance from the deceased or the court to have the suitland registered in his name. ***See Nyeri Court of Appeal Civil Appeal No. 108 of 2002 between The Registered Trustees Anglican Church of Kenya Mbeere. Diocese and The Rev. David Waweru Njoroge.***

10. The mutation forms which the plaintiff produced clearly show the position of the suitland. The mutation forms and Sketch Plan attached tally with the findings of the Surveyor. The Surveyor found that the Plaintiff was occupying 1.4 acres instead of 1.5 acres. He found out that the 0.1 of an acre had been taken by the defendants. There were structures which had been erected. The structures comprise the construction site. The second defendant in her evidence admitted that the church had accumulated building materials on the disputed portion. The surveyor even confirmed that some posts had been removed on a portion next to the road.

DECISION

11. I find that the plaintiff has proved his case on a balance of probabilities. I allow his claim and order that an order of eviction do issue directing eviction of the defendants or their agents from LR No. Trans -Nzoia/Emoru/138 and that the illegal structures thereon should be removed.

The defendants to pay costs of this suit to the plaintiff .

Dated, signed and delivered at Kitale on this 29th day of September 2016.

E. OBAGA

JUDGE

In the presence of M/s Mufutu for M/s Arunga for Plaintiff.

Court Assistant – Isabellah

E. OBAGA

JUDGE

29/9/16