



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 6 “C” OF 2013

MARK MATHENGE GIKONYO..... PLAINTIFF

VERSUS

RAPHAEL GITHINJIDEFENDANT

J U D G M E N T

INTRODUCTION

1. The plaintiff is the registered owner of **LR. No. Sinyerere/Sitatunga Block 1/Mukuyu/204** (suitland). The defendant is the registered owner of **LR. No. Sinyerere/Sitatunga Block 1/Mukuyu/203** which is adjacent to the suitland. The suitland is about 15 acres. The defendant had been leasing the suitland from the plaintiff on yearly basis from 1996 upto 2012.
2. In late 2012, a dispute arose between the plaintiff and the defendant over a newly constructed permanent brick house which had been put up on the suitland by the defendant. The plaintiff who lost his eyesight in 2011 claimed that the defendant put up the house on his land without his knowledge allegedly for the plaintiff's benefit in return for land equivalent to the cost of the house.
3. The plaintiff brought a suit against the defendant in which he seeks a declaration that he is the sole owner of the suitland, a permanent injunction against the defendant and an order that the defendant removes a fence put round the suitland as well as demolition of the house which the defendant put up on the suitland failing which it be demolished at the defendant's expense.
4. The defendant filed a defence, and raised a counter-claim in which he sought **Kshs.2,100,000/=** being the value of the house he put up for the defendant or in the alternative **4.1 acres** out of the suitland being the equivalent value of the house put up for the plaintiff.

PLAINTIFF'S CASE

5. The plaintiff testified that he has been separated from his wife for over 20 years. His wife went away with five of their children but three of them returned back later. Between 1996 and 2012, he leased out the suitland to the defendant. He developed eye problems which lasted for about 10 years. He completely lost his eyesight in 2011. As a result of loss of eyesight, he moved from his semi permanent house on the suitland and went to stay in the home of his late brother which was about two kilometres away from the suitland.
6. In September, 2012, he received information that someone had put up a house on the suitland. He was accompanied to the suitland by one of his sons Elijah Kamau. On enquiring about the house, it turned out that it is the defendant who had put it up. He called the defendant and asked him why he had put up a

house on his land. The defendant hurled insults at him.

7. The plaintiff then went to his lawyer who wrote a demand letter asking the defendant to remove the fence he had erected round the suitland as well as the house which he had put up. He also asked him not to plough the suitland in 2013. The plaintiff instead ignored the demand letter and went ahead to plough the suitland. The plaintiff moved to court where he obtained an injunction stopping the defendant from planting on the ploughed land. The plaintiff denies that he ever agreed with the defendant to put up a house for him.

DEFENDANT'S CASE

8. The defendant testified that he is the plaintiff's neighbour. He started leasing the suitland from the plaintiff in 1996. Prior to the defendant's lease of the suitland, the same was being ploughed by the plaintiff's brother. It is the plaintiff who approached him to lease the suitland. All went on well. In July, 2012 the plaintiff went to his home and asked him to dig a well for him and also put up a decent house for him now that he was totally blind and his wife was not there. It was agreed that the value of the house and all improvements made were to be valued and he was to be given land equivalent to the value of the house. An acre of land was going for **Kshs.500,000/=** in the area.

9. On 12/7/2012 he entered into an agreement with the plaintiff. This was in the presence of the plaintiff's son **John Mutua** and a village elder. He thereafter embarked on construction of a permanent brick house after he dug a well. He also put up an ablution block for the plaintiff. The house was completed in November, 2012. The defendant then called a valuer who valued the house at **Kshs.2,100,000/=**. As the house was being constructed, the plaintiff who was now blind was staying in his semi permanent house with his son John Mutua.

10. The valuation was done in November, 2012. The plaintiff was present with his son John Mutua. The valuer took photographs of the plaintiff and his son standing in front of the house. A dispute over the house arose in January, 2013 after the valuation of the house. The defendant contends that the problem between him and the plaintiff was triggered by third parties some of whom were interested in cultivating the plaintiff's land. His relationship with the plaintiff had been well all through. He even used to take the plaintiff for eye checkup and even assisted him to acquire an ID card which he did not have.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

11. There is no contention that the plaintiff is the registered owner of the suitland. A copy of title was produced as exhibit 1. A search carried out also shows that the suitland is in the name of the plaintiff. There is also no contention that the defendant had been leasing the suitland from 1996 all through to end of 2012. What is in contention is whether the house which the defendant put up on the suitland was with permission of the plaintiff or whether the plaintiff was aware of its construction. A related issue for determination is whether there was an agreement that the defendant was to be given land equivalent to the value of the house which was to be put up. Is the defendant entitled to Kshs.2,100,000/=?

12. Though the plaintiff denied that he did not permit the defendant to put up a house for him, there is evidence from the defendant that an agreement was made on **12/7/2012** in which the plaintiff allowed the defendant to build for him a house, well and a toilet. The defendant produced a note book where this agreement was reduced into writing. It was produced as exhibit 1. The agreement was drafted by **DW3 Dominic Kuria** an in-law to the defendant. Among those who were present is **DW4 Samuel Ndichu Kinuthia** a village elder. The agreement is between the defendant and **Michael Ndegwa**. This Michael Ndegwa is the same person as the plaintiff. DW4 testified that the plaintiff is also known as Michael. Even when the plaintiff started testifying, he introduced **Mark Mathenge Gikonyo** as names which appear in his ID card. This was a clear indication that he was known by other names other than those on his ID card. He even thumbprinted on the agreement. He did not deny that he is the one who thumbprinted on the agreement.

13. DW3 and DW4 described him as Michael Ndegwa in their testimony. He cannot therefore turn round

and claim that he is not known as Michael Ndegwa. Infact the plaintiff himself did not deny that he was also known as Michael Ndegwa. It is his lawyer who raised the issue of names in cross-examination. In the agreement it is clear that the defendant was to put up a house for him, a well and a toilet and in return the defendant was to get land equivalent to the value of the house.

14. When the house was completed, the defendant brought in a valuer. The keys to the house had already been handed over to the plaintiff's son John Mutua. When the valuer came to value the house, the plaintiff was present. Photographs of the plaintiff and his son were taken while they were standing in front of the house. The plaintiff had not been forced to stand in front of the house. Though he was blind, he cannot claim that he did not know what was happening. The agreement between him and the defendant was made in a gentleman's way. Those who were present never signed. It was only signed by the plaintiff who thumbprinted on it. The relationship between the plaintiff and the defendant was cordial for long. It is apparent that something went wrong after the valuation which seems to have scared the plaintiff who decided to renege on the agreement.

15. The plaintiff claimed that he was first told about the house in September, 2012 by his son **Elijah Kamau**. That he called the defendant and asked him to explain why he had put up a house on his land without his permission. The plaintiff claimed that the defendant hurled insults at him prompting him to go to his lawyer. This cannot be true. If he claims to have been insulted in September, why did he willingly appear during the valuation which was done in November, 2012? The plaintiff went to his lawyers in January, 2013 that is when his lawyer wrote a demand letter which was posted to the defendant by registered post. This letter was produced by the plaintiff as exhibit 3(a) and is dated 11/1/2013.

16. There is evidence from **DW2 George Maina Mugo**, the person who did wiring in the house. He stated that the plaintiff was staying in his semi permanent house for the entire period the house was being constructed. He cannot therefore claim that he was away at his late brother's home two kilometres away. The plaintiff tried to blame his son John Mutua whom he claims was a drunkard and used to do menial jobs at the defendant's home. I do not find any merit in this claim. This Mutua is the one who was staying with him. The rest of the sons never even bothered to come to him. They only came in after the house had been put up and tried to interfere with what the plaintiff had permitted to be done on the suitland. The evidence of the plaintiff as regards the alleged reaction by the defendant contradicts what PW2 Elijah Kamau stated. Whereas the plaintiff claims that the defendant reacted by insulting him when PW2 took him to his home, the evidence of PW2 is that when he took his father to the defendant's home, the defendant promised to come back to them which he never did. It is therefore clear that the plaintiff and his son were not being truthful.

17. In trying to show that the house was constructed and that it could not be seen, the plaintiff and his son stated that it was built after part of grown maize had been cut and that it was not possible for one to see it from the road which was barely 10 metres away. In as much as it was admitted by the defendant that they had to cut down some maize which had grown to pave way for the construction, it is not possible that a house can start and be completed without even a neighbour or anyone else noticing. The plaintiff's son John Mutua was one of those who were present when it was being constructed. The plaintiff cannot claim that John Mutua would not have told him about the house as he was a thief and drunkard. I find that the plaintiff was actually aware of the house which was being put up and it was by his sanction that it was put up.

18. The plaintiff seems to have started backtracking on the agreement after the valuation. One cannot stand by and see one constructing a house and once it is complete, rush to court seeking orders that the house be demolished. If the plaintiff is not willing to give land equivalent to the value of the house, then he should be prepared to give its monetary value to the defendant. It will be very unfair and unjust for a court of law to give orders of demolition of the house given the circumstances it was built. It is clear that those who were not there when the defendant was helping the plaintiff, are now trying to position themselves to benefit from the plaintiff's land without regard to what the defendant has done to improve the life of the plaintiff who had been abandoned by his family. It will be inequitable for a court of law to come in aid of a person who has stood by, seen a house coming up to completion before coming to court to claim that his rights have been violated and that he wants injunctive orders.

19. The defendant has proved that a house was constructed on the suitland. This is not contested. The house was valued by a professional valuer in the presence of the plaintiff and his son John Mutua. The valuer was called. He testified that he valued the house and the ablution block as well as the well. He found that the value was **Kshs.2,100,000/=**. He gave out the methodology of how he arrived at the value. This value was duly pleaded as a special claim. A report on the same was produced as defence exhibit 3 by the valuer **DW5 Francis Kariuki**.

DECISION

20. On the analysis herein, I find that the plaintiff's claim is frivolous and cannot be maintained. The same is hereby dismissed with costs to the defendant. On the other hand, I find that the defendant has proved his counter-claim on a balance of probability. I enter judgment for the defendant in terms of prayer (a) of the counter-claim. The plaintiff shall also pay costs of the counter-claim. Interest on the Kshs.2,100,000/= shall be calculated at court rates with effect from the date the counter-claim was filed.

Dated, signed and delivered at Kitale on this **13th** day of **September, 2016**.

E. OBAGA

JUDGE

In the presence of M/s. Mufutu for Mr. Kiarie for plaintiff.

Court Assistant- Isabellah.

E. OBAGA

JUDGE

13/9/2016