



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 77 OF 2009

LILIAN SAYO OGOLA.....PLAINTIF

VERSUS

JACOB WAFULA MUSUNGU.....DEFENDANT

JUDGEMENT

INTRODUCTION

1. The plaintiff is the administratrix of the estate of her late husband **Samuel Kiberenge Musombi Jackmoore** (deceased) who was the registered owner of **LR. No. Trans-Nzoia/Cherangani/35** (Suitland) which is **20 acres**. The plaintiff was substituted in place of the deceased who was the original plaintiff.

2. The plaintiff brought this suit against the defendant seeking a declaration that she is the legal owner of the suitland and that the defendant is a trespasser who should move out of the suitland or be evicted therefrom. The plaintiff also prays for mesne profits at the rate of **Kshs.100,000/=** for **nine years** which she has been kept out of the suitland.

3. The defendant who was duly served with a hearing notice was not present when the case proceeded. He only surfaced after the plaintiff had completed her evidence and a judgement date given. I verbally advised him to take necessary steps to have the proceedings set aside. The defendant filed an application seeking to set aside the ex-parte proceedings. I returned the file to the registry with the remarks that the application should be served for inter-partes hearing on a date to be given at the registry. The directions were given on 20/9/2016.

4. As I was going through the cabinet for files pending judgements, I realized that I did not have this file. I called for it; when it was brought from the registry, I noticed that the defendant had not taken a date for hearing of his application hence the decision to write this judgement.

PLAINTIFF'S CASE

5. The plaintiff testified that the deceased died on **4/2/2013**. The deceased had purchased the suitland from the **National Council of Churches of Kenya (NCCCK)**. The suitland was duly transferred to the deceased on **29/6/2007**.

6. The defendant's father had filed **Kitale High Court Civil Case No. 29 of 2007** against NCCCK and other parties but this case was dismissed by the court. The defendant refused to move out of the suitland. He put up semi permanent structures where he stays as he cultivates the suitland. Efforts by the deceased to take possession through a third party were thwarted by the defendant who repulsed the person who

attempted to take possession.

7. The plaintiff testified that had she leased out the **20 acres** at a minimum of **Kshs.5,000/= per acre**, she would have made **Kshs.900,000/=** for the **nine years** that she has been kept out of the land.

ANALYSIS OF EVIDENCE

8. I have carefully considered the evidence of the plaintiff in this case as well as the defence filed by the defendant. The defendant contends in his defence that he was improperly sued in this case. That he has never trespassed on to the suitland and that he is aware that there is **Kitale HCCC No. 129 of 2007** which is pending and that the plaintiff is **Alphas Wafula Musungu** and that he has been sued as third defendant in that suit.

9. The plaintiff produced a copy of certificate of death in respect to the deceased [Exhibit 1]. Also produced is a copy of grant of letters of administration ad litem [Exhibit 2]. A copy of title produced [Exhibit 3] shows that the deceased is the registered owner of the suitland.

10. The plaintiff had pleaded in her plaint that she had lost **Kshs.200,000/=** for the two years i.e. **2008** and **2009** and that she was praying for additional mesne profits of **Kshs.100,000/= per year** with effect from **2010** until date of judgement. A copy of title produced shows that the suitland is **8.0 hectares** which is the equivalent of **20 acres**. The plaintiff is asking for a minimum leasing amount of **Kshs.5000/= per acre**. For a period of **9 years**, the plaintiff has lost **Kshs.900,000/=**.

11. The plaintiff's evidence has not been controverted. The defendant's conduct on the date of hearing shows that he was not keen on proceeding with the hearing. He deliberately kept off only to come to court after the case had been concluded.

DECISION

12. I find that the plaintiff has proved her case on a balance of probabilities. I allow her claim with the result that a declaration is hereby given that she is the legal owner of **LR. No. Trans-Nzoia/Cherangni/35** and that the defendant is a trespasser on the said land. The defendant should move out voluntarily or he be evicted. The plaintiff is entitled to mesne profits of **Kshs.900,000/=**. The costs of this suit shall be borne by the defendant.

Dated, signed and delivered at Kitale on this **11th** day of **October, 2016**.

E. OBAGA

JUDGE

In the presence of Ms. Wanyama for Mr. Kiarie for Plaintiff.

Court Assistant - Isabellah.

E. OBAGA

JUDGE

11/10/2016