



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT & LAND COURT AT KITALE.**

**LAND CASE NO. 60 OF 2008.**

**MICHAEL KUNDU KAMOTI ::: PLAINTIFF.**

**VERSUS**

**WILLY KIPTOO KIRUI)::**

**ELIAS CHEBET ) ::: DEFENDANTS.**

**J U D G M E N T.**

**INTRODUCTION.**

1. The plaintiff is the son of the late Hezron Odera Kamoti (deceased). The deceased was proprietor of LR. No. Trans Nzoia/Mito Mbili/83 which was 10 acres. In or around 1984 David Kutiri alias Kutiri Sahenyi Mabonga (Kutiri) filed a claim against the deceased before the Land Disputes Tribunal claiming a stake in the land. The Tribunal vide its verdict dated 21/6/1984 awarded 4 acres to Kutiri and the deceased remained with 6 acres.
2. In 1997 the deceased subdivided the entire 10 acres into three portions namely trans Nzoia/Mito Mbili/210, 211 and 212. The deceased processed title in respect of LR. No. Trans Nzoia/Mito Mbili/210 in his name. He transferred LR. Trans Nzoia/Mito Mbili/212 to his son the plaintiff in this case.
3. In the year 2000 Kutiri executed the decree which was in his favour vide Kitale Senior Resident Magistrate Land case No. 12 of 1984. Kutiri was duly registered as proprietor of LR. No. Trans Nzoia/Mito Mbili/210 and title issued to him on 30/10/2000.

This was after transfer documents were signed on behalf of the deceased by the Executive officer of the court.

4. On 11/1/2001 the deceased tried to have the title in favour of Kutiri cancelled by filing a suit to that effect but this suit was dismissed for want of prosecution on 13/10/2008.
5. In 2006 the first defendant herein started the process of buying LR. No. Trans Nzoia/Mito Mbili/210 from Kutiri. Before the deal could be sealed, Kutiri died but his family co-operated with the first defendant and concluded the sale. LR. No. Trans Nzoia/Mito Mbili/210 was transferred to the first defendant on 18/7/2011.
6. In the year 2000 the plaintiff herein filed a suit against Kutiri in which he sought a declaration that he was the sole proprietor of LR. No. Trans Nzoia/Mito Mbili/212 and an order of eviction against Kutiri. This suit was however dismissed for want of prosecution on 29/10/2008. The plaintiff had already filed the present suit against the defendant herein and another before the suit against Kutiri was dismissed for want of prosecution. The plaintiff sought the same prayers against the first defendant herein as was in the previous case against Kutiri. The first defendant filed defence to the plaintiffs claim and raised a counter-claim in which he sought orders of eviction against the

plaintiff from LR. No. Trans Nzoia/Mito Mbili/210.

### **PLAINTIFF'S CASE.**

7. The plaintiff testified that he is the son of the deceased who was the proprietor of LR. No. Trans Nzoia/Mito Mbili/83. This plot was later sub-divided into three portions namely Trans Nzoia/Mito Mbili/210, 211 and 212, LR. No. Trans Nzoia was registered in the name of the deceased who was to hold it on behalf of the plaintiff's last born brother. LR. No. Trans Nzoia/Mito Mbili/211 was given to Dominic Kamoti Odero a brother to the plaintiff. The plaintiff was given LR. No. Trans Nzoia/Mito Mbili/212.
8. The plaintiff processed and obtained title in respect of LR. Trans Nzoia/Mito Mbili/212 on 24/4/1997. The plaintiff testified that his father the deceased died before he could transfer LR. No. Trans Nzoia/Mito Mbili/210 to his last born brother. He testified that he obtained grant of letters of administration in respect of the estate of the deceased but that the grant has not been confirmed. He contends that as the administrator of the estate of the deceased, he has not transferred LR. No. Trans Nzoia/Mito Mbili/210 into the name of his last born brother.
9. The plaintiff testified that he is aware that the first defendant has title to LR. No. Trans Nzoia/Mito Mbili/210 where the plaintiff and his siblings are residing but that the first defendant is cultivating on LR. No. Trans Nzoia/Mito Mbili/212. He contends that he does not know how the first defendant obtained title to LR. No. Trans Nzoia/Mito Mbili/210.

### **FIRST DEFENDANT'S CASE.**

10. The first defendant testified that he is the registered proprietor of LR. No. Trans Nzoia/Mito Mbili/210. He bought this land from Kutiri but before the deal could be sealed, Kutiri died. He entered into two agreements with the family of Kutiri. The family of Kutiri agreed to incorporate him in the Succession Cause in respect of the estate of Kutiri. The entire parcel comprised in LR. No. Trans Nzoia/Mito Mbili/201 was transferred to him. He processed and obtained title in his name on 18/7/2011.
11. The first defendant testified that all along he has been cultivating on LR. No. Trans Nzoia/Mito Mbili/212 whereas he holds title to LR. No. Trans Nzoia/Mito Mbili/210. The plaintiff has been cultivating LR. No. Trans Nzoia/Mito Mbili/210 whereas he holds title to LR. Trans Nzoia/Mito Mbili/212. This fact was brought to the attention of the first defendant after a surveyor went to the ground and established who are in actual occupation of LR. No. Trans Nzoia/Mito Mbili/210 and 212. It turned out that the first defendant was on plot 212 when he is supposed to be on plot 210 and the plaintiff was on plot 210 while he is holding title to plot 212.

### **ISSUES FOR DETERMINATION.**

12. There is no contention that the plaintiff is the registered owner of LR. No. Trans Nzoia/Mito Mbili/212. There is also no contention that the first defendant is the registered owner of LR. Trans Nzoia/Mito Mbili/210. The issue for determination is whether the plaintiff is in occupation of LR. No. Trans Nzoia/mito Mbili/210 and if so which order should be made in regard to his occupation of the said land.
13. The first defendant has conceded that he is indeed in occupation of LR. No. Trans Nzoi/Mito Mbili/212 which he has all along thought was LR. No. Trans Nzoia/Mito Mbili/210.

The first defendant testified that he only knew this fact when the surveyor went to the ground and established that he was cultivating on LR. No. Trans Nzoia/Mito Mbili/212 when he was holding title in respect of LR. Trans Nzoia/Mito Mbili/210. The case regarding the plaintiff was vice versa.

14. Whereas the plaintiff claims in his pleadings that he is not in occupation of LR. Trans Nzoia/Mito Mbili/210, there is evidence from the survey report which was mutually put in evidence that the plaintiff is in occupation of LR. Trans Nzoia/Mito Mbili/210. It is apparent that the plaintiff has all along been aware that he is residing on LR. No. Trans Nzoia/Mito Mbili/210 which belongs to the first defendant but that his plot LR. No. Trans Nzoia/Mito Mbili/212 has been occupied by

Kutiri who later sold it to the first defendant. This is why he is keen on getting eviction orders against the first defendant from LR. No. Trans Nzoia/Mito Mbili/212 while remaining silent on the occupation of LR. No. Trans Nzoia/Mito Mbili/210. The deceased who is father to the plaintiff had tried to wrest the title to LR. No. Trans Nzoia/Mito Mbili/210 from Kutiri in vain. The plaintiff cannot claim that he does not know how the first defendant had himself registered as proprietor of LR. No. Trans Nzoia/Mito Mbili/210. There is clear evidence that the first defendant bought the said land from Kutiri who had lawfully acquired it through a legal process. DW2 Joseph Simiyu Kutiri the son of Kutiri gave the history of the plot in issue and how the first defendant came to be registered as owner of the same.

15. The first defendant has been willing to swap his land with that of the plaintiff but the plaintiff has refused to do so. Of course the plaintiff is within his rights to reject a swap. Can the plaintiff insist on remaining on LR. No. Trans Nzoia/Mito Mbili/210 and insist on ejecting the first defendant from LR. No. Trans Nzoia/Mito Mbili/212? There is no basis upon which the first defendant's title can be faulted. It was obtained legally. The first defendant is willing to leave LR. No. Trans Nzoia/Mito Mbili/212 for his land which is LR. No. Trans Nzoia/Mito Mbili/210. There is absolutely no need for issuing an eviction order against the first defendant. There was no need for the plaintiff to seek a declaration that he is the sole proprietor of LR. No. Trans Nzoia/Mito Mbili/212. He knew all along that the plot belonged to him and no one is contesting this fact. His suit was therefore misguided.

16. The plaintiff appears intent on remaining on plot No. LR. Trans Nzoia/Mito Mbili/210. This is clear from his answers in cross-examination and from his submissions that he is claiming plot No. Trans Nzoia/Mito Mbili/210. The plaintiff also claimed that he does not agree with the report of the surveyor which was admitted in evidence by consent. A party is bound by his pleadings. The plaintiff did not seek cancellation of the title in favour of the first defendant and even if he were to do so, he will not have succeeded in view of the manner in which the first defendant obtained it. I find that the first defendant has proved his counter-claim on a balance of probabilities. On the other hand, I find that the plaintiff's suit is not sustainable.

### **DETERMINATION.**

17. The plaintiff's suit is hereby dismissed with costs to the first defendant. The first defendant's counter-claim is hereby allowed with the result that an eviction order is hereby issued against the plaintiff, his agents, servants and anyone claiming under him from LR. No. Trans Nzoia/Mito Mbili/210. The first defendant shall have the costs of the counter-claim.

**[Dated, signed and delivered at Kitale on this 22nd day of January, 2015.]**

**E. OBAGA.**

**JUDGE.**

In the presence of the plaintiff and Chebii for Mr. Yano for 1st defendant.

Court Clerk – Kassachoon.

**E. OBAGA.**

**JUDGE.**

**22/1/2015.**