



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 95 OF 2011**

**M N W ..... PLAINTIFF**

**VERSUS**

**Z L C ..... DEFENDANT**

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

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

1. The plaintiff is the wife of one of the Administrators of the Estate of the late **A W M** who was the registered owner of **L.R. No. Ndivisi/Ndivisi/1778** (suit land). The defendant is a cousin of **A W M (deceased)**. The plaintiff brought this suit against the defendant seeking for an eviction order and a permanent injunction restraining the defendant from interfering with the suit land.

**PLAINTIFF'S CASE**

2. The plaintiff testified that the deceased died in the year **2004**. Prior to the death of the deceased, the defendant had invaded and occupied  $\frac{1}{2}$  **acre** of the suit land. After the demise of the deceased, she applied for Grant of Letters of Administration. Grant of Letters of Administration of the Estate of the deceased was given to her and one of the sons of the deceased. The Grant was later confirmed whereby the suit land was given to her during the process of distribution of the deceased's Estate. A Certificate of Confirmation of Grant was produced [Exhibit 1] and a copy of Title Deed the name of the deceased [Exhibit 2].

3. The plaintiff asked the defendant to move out of the suit land but he refused. She took him before the area District Officer who summoned the defendant but the defendant did not attend. The District Officer advised the plaintiff to file a case in court. This is how the plaintiff filed this case in which she seeks orders of eviction and injunction against the defendant.

**DEFENDANT'S CASE**

4. The defendant testified that his grandfather **K** had **seven sons** from **three wives**. The first house had **four sons**. The second house had **two sons** and third house had **one**. The defendant's father was called **M** and he was from the third house. The first born son of **K** was **J M** who was father to the deceased the husband of the plaintiff herein. The defendant's father died in **1951**. The defendant was taken in by **J M** the deceased's father. The defendant was like **J M**'s son. He was circumcised while staying with **J M** and even married while he was with **J M**. The defendant's grandfather gave all his sons land. The defendant's father was given 8 acres.

5. The deceased's father later sold the land meant for the defendant's father. He sold the land to raise

school fees for the deceased. When the deceased was employed, his father asked him to give some land to the defendant because it is him who benefited from the defendant's father's land which was sold to raise his fees. When the defendant demanded for his land, his uncles started tossing him around. He decided to file a claim at the Tribunal. The Tribunal ruled that the deceased's father should give him **five acres**. His relatives started complaining that he was not one of them. They sat down and agreed that he be given **two acres** instead of the five acres which the Tribunal gave him. The defendant contends that he has nowhere to go to if he is evicted from the land he is occupying.

### ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

6. I have carefully gone through the evidence adduced by both the plaintiff and the defendant. There is no contention that the defendant is occupying part of the suit land. The plaintiff is contending that the defendant is occupying 1 ½ **acres** whereas the defendant contends that he is occupying **2 acres**. The issue which emerges for determination is whether the defendant is entitled to any part of the suit land.

7. The defendant called **DW2 J B K** who is his uncle. This witness testified that when the defendant's father died, he was buried on a portion of land which he had been given by his father. The defendant's mother went away and remarried elsewhere. When the defendant grew up, he came back and demanded to be given land where his father had been buried. He was not given. He went and filed a case before the Tribunal which ruled that the father of the deceased do give the defendant **8 acres**. **J M** the deceased's father agreed to give the defendant **2 ¼ acres**. When the deceased died, his widow started claiming that the defendant had no land.

8. Another witness called by the defendant is **DW3 J M W** a cousin of the defendant. He testified that on **9/6/2001** the deceased who is his brother called him and 9 others. During that meeting, the deceased agreed to give the defendant **one acre**, **J M** agreed to give him ¼ **an acre** and **S M** agreed to give him **one acre** making a total of **2 ¼ acres**.

9. **DW4 Gabriel Koli** is the Chairman of Sangalo clan of the Abatachoni sub tribe of the Luhya. He testified that he knew that when the defendant's father died, the defendant was taken in by the deceased's father. The deceased's father sold land belonging to the defendant in order to raise fees for the deceased. When the deceased was employed, his father asked him to give land to the defendant as he is the one who benefited when the defendant's father's land was sold to raise school fees for him. The deceased later gave the defendant one acre but the plaintiff has refused to recognize that after the death of her husband.

10. It is clear from the evidence adduced by the defendant and his witnesses that the same is not in agreement. Whereas the defendant claims that he is entitled to 2 acres from the deceased, the evidence of other witnesses is that he is entitled to one acre from the deceased. **DW3** had testified that his brother, the deceased gave the defendant one acre. Another acre was given to the defendant by Stephen Masafu and ¼ an acre was given to him by **J M**. This is said to have happened on **9/6/2001**.

11. The defendant had taken a dispute to the Tribunal which awarded him 5 acres. The defendant filed a copy of the Tribunal proceedings. A look at the proceedings shows that the property in dispute was **Ndivisi/Ndivisi/948**. The claimant in the dispute was **J B Ki**. The objector was the defendant. The Tribunal found that **Plot No. Ndivisi/Ndivisi/948** belonged to the claimant **J B K**. The Tribunal ruled that the defendant should be given **5 acres** out of **Plot No. Ndivisi/Ndivisi/1497** registered in the name of **M K**. This ruling was given on **23/9/1996**.

12. The defendant had wanted land from Japhet Barasa Kimingichi. During the hearing, he testified at page 3 of the proceedings that it was wrong for one to claim that Masafu (the deceased's father) had sold land belonging to his father. The deceased's father was a witness during the Tribunal proceedings. He also wanted the defendant to get a piece of land from **J B K**. It is therefore wrong for the defendant to turn round and claim that the deceased's father had told the deceased to give the defendant land because he benefited from the sale of land belonging to the defendant's father.

13. The defendant had not lodged any claim for a share of the deceased's father's land. It is the Tribunal out of nowhere which decided that the defendant should be given 5 acres from L.R. No. Ndivisi/Ndivisi/1497 which belonged to the deceased's father. It is therefore clear that the defendant's claim that he is entitled to 2 acres he is occupying does not have any basis. The defendant and his witnesses have not been candid.

14. The defendant and his witnesses claim that the deceased's father was given 8 acres by his father. There is no evidence to confirm this. The copy of title deed produced by the plaintiff show that the suit land is **3.12 hectares** which is about **7.6 acres**. The suit land is a subdivision of **L.R. No. Ndivisi/Ndivisi/1497** which belonged to the deceased's father. It cannot therefore be logical that the deceased's father's land was 8 acres.

15. The defendant cannot claim a share of the suit land. He is not beneficiary of the estate of the deceased. His occupation of the 1 ½ acres of the suit land is without basis.

### **DETERMINATION**

16. I find that the plaintiff has proved her case against the defendant on a balance of probabilities. I order that the defendant be evicted from the 1 ½ acres he is occupying on the suit land. The defendant is hereby restrained by way of permanent injunction from interfering with the suit land once he is evicted from the suit land. The defendant shall pay costs of this suit to the plaintiff.

Dated, signed and delivered at Kitale on this **29th** day of **September, 2015**.

**E. OBAGA**

**JUDGE**

In the presence of M/s Munialo for Plaintiff and Defendant in person. Court Assistant – Winnie

**E. OBAGA**

**JUDGE**

**29/9/2015**