

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 46 OF 2003

JOHN WEPUKHULU.....PLAINTIFF

VERSUS

PETER MWEGA.....1ST DEFENDANT

MWIRERI GICHERU.....2ND DEFENDANT

J U D G M E N T

INTRODUCTION

1. The plaintiff is the registered owner of **LR. Nos. Kitale Municipality Block 3/867, 868 and 869** (suit lands). The plaintiff was allotted plot No. **LR.Kitale Municipality Block 3/869**. He later bought plot **Nos. Kitale Municipality Block 3/867 and 868** which had been allotted to **Susan Tanui** and **John Tanui** respectively.
2. The first defendant is one of the registered owners of LR. No. **Kitale Municipality Block 3/729**.The land is held on behalf of a group calling itself **Ex- Mau Mau Freedom Fighters**. The plaintiff brought this suit against the defendants claiming the following reliefs:-
 - (a) A permanent injunction to restrain the defendants from interfering with the plaintiff's quiet enjoyment of the suit lands or laying claim to the same.
 - (b) A declaration that the plaintiff is the lawful owner of the suit lands.
 - (c) An order of eviction against the defendants or anyone claiming through them from the suit lands.

PLAINTIFF'S CASE

3. The plaintiff testified that on 26.3.1996 he was allotted LR. No. **Kitale Municipality Block 3/869** by the Commissioner of Lands. He produced letter of allotment (exhibit 7). He later processed and obtained certificate of lease (exhibit 9'c'). He also produced a search confirming that he is the registered owner of **Kitale Municipality Block 3/869** (Exhibit 8).
4. The plaintiff later bought two adjacent parcels being **LR. Kitale Municipality Block 3/867 and 868**. **Kitale Municipality Block 3/867** belonged to **Susan Tanui** and **Kitale municipality Block 3/868** belonged to **John Tanui** the husband of **Susan Tanui**.The plaintiff produced original letter of allotment issued to **Susan Tanui** (exhibit 1) as well as certificate of official search for **Kitale Municipality Block 3/867** and a certified copy of certificate of lease exhibit 2(b) and 2(a) respectively. He later processed transfer documents which are now in his names as confirmed by certificate of official search (exhibit 3) and certificate of lease exhibit 9(a).
5. The plaintiff produced original letter of allotment in respect of **LR. Kitale Municipality Block 3/868** which is in the name of **John Tanui** (exhibit 4). He also produced a certified copy of title in the name of **John Tanui** exhibit 5(a) and a certificate of official search dated **6.7.2005** exhibit 5(b) confirming that **John Tanui** was the registered owner of **LR. No. Kitale Municipality Block 3/868**.The plaintiff later processed transfer documents which are now in his names as confirmed by certificate of official search (exhibit 6) and certificate of lease exhibit 9(b).

6. The defendants who are his neighbours own **LR. No. Kitale Municipality Block 3/729**. The defendants have since encroached onto the suit lands where they have settled members of **Ex – Mau Mau Freedom Fighters** who have put up informal settlements on the same. When this dispute was pending in court, the parties agreed that they send a surveyor to the ground to establish the boundaries of the suit lands in relation to **Kitale Municipality Block 3/729** owned by the defendants. The surveyor found that indeed the defendants group had encroached onto the suit lands. The defendant and their members have since refused to move out of the suit lands claiming that they are entitled to the same and that the titles held by the plaintiff are fake.
7. The plaintiff called **PW2 Susan Tanui** as a witness. This witness testified that she and her husband who is now deceased were given two plots that is **Kitale Municipality Block 3/867 and 868**. They later sold the two plots to the plaintiff. As at the time they sold the two plots to the plaintiff, there was no one occupying the same.

DEFENDANTS CASE

8. The defendants stated their case through evidence adduced by the first defendant who testified that he is the **National Co-ordinator of Mau Mau Ex- Freedom Fighters**. The Ex-Freedom Fighters were allotted land which was **1.20 hectares** on **12.10.1993**. A letter of allotment was produced as defence exhibit 1. There was payment of some monies as confirmed by receipt produced as defence exhibit 2. A certificate of lease was subsequently issued. This certificate of lease was produced as defence exhibit 3.
9. The first defendant went on to state that the **Catholic Church** was allocated the same land. When the **Ex-Freedom Fighters** questioned why this happened, the Catholic Church sat with them and it was agreed that they be given land elsewhere but this has never happened.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

10. I have gone through the evidence adduced by both parties herein as well as pleadings and submissions. The main issue which emerges for determination is whether the defendants and their agents have encroached onto the plaintiff's parcels (suit lands). The other issue for determination is whether the plaintiff obtained title to the suit land in a fraudulent way.
11. On the issue whether there is encroachment on the suit lands, there is evidence on record that when this suit was pending, the parties herein agreed that the District Surveyor do visit the suit lands and plot **LR.No. Kitale Municipality Block 3/729** and determine their boundaries and whether there was any encroachment. The District Surveyor went to the grounds and prepared a report. The report was filed in court on **8.5.2006**. The report was subsequently adopted by the court on **19.6.2006**. This report found out that some people had settled on all the three parcels owned by the plaintiff. The Surveyor interviewed them and they all confirmed that they were settled on the suit lands by the defendants. The surveyor prepared a sketch plan showing the areas occupied by the illegal settlers. Though the adoption of the report was set aside by the court, the report still remained valid. It was never quashed. What was faulted is the manner in which it was adopted and the fact that it was filed outside the given time without the surveyor asking for extension of time to file the report. The accuracy of the report was not questioned. At least the report found that there was encroachment by agents of the defendants.
12. The defendants association had been allotted **1.20 hectares** as per the allotment letter but when they were given certificate of lease, they were given land which is **0.6798 hectares**. This was of course less than what was indicated in the letter of allotment. The question which then arises is whether the plaintiff was responsible for this shortfall. The procedure is that land is allocated as it then was by the **Commissioner of Lands**. The plaintiff had been given plot No. **Kitale Municipality Block 3/869**. He later bought two other parcels from **Susan Tanui** and **John Tanui**. The two had been lawfully allotted the lands which they sold to the plaintiff. The defendants in their evidence stated that it is the Catholic Church which was allocated the same land which was meant for them. It is therefore ironical that they

can turn round and claim that it is the plaintiff who has part of their land.

13. The defendants have been to the **National Land Commission** seeking to have their land that is **Kitale Municipality Block 3/729** extended. This is on the basis that their members are in occupation of the adjacent land which happens to belong to the plaintiff. The defendants cannot seek to extend their land to include land lawfully held by the plaintiff. The plaintiff did not acquire his titles in a fraudulent manner. If the Catholic Church took the land which was meant for them, they cannot seek to compensate that by taking the plaintiff's land.

DETERMINATION

14. I find that the plaintiff has proved his case on a balance of probabilities. He has proved that there is encroachment a fact which is admitted by the defendants who are now seeking to have the same given to them through the **National Land Commission**. The defendants or their agents have no ground for remaining on the suit land. I find that the plaintiff's claims are well founded. I allow the same in terms of the prayers in the amended plaint filed on **14.3.2013**. The defendants shall pay costs of this suit to the plaintiff.

Dated, Signed and delivered at Kitale on this 15th day of September 2015.

E. OBAGA

JUDGE

In the presence of Mr. Samba for plaintiff and M/s Arunga for M/s Bett for the defendant. Court Assistant - Winnie