



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Case 85 of 2010**

**HANNAH WANGUI NJENGA.....PLAINTIFF**

**VERSUS**

**DISTRICT LAND REGISTRAR.....1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT**

**DIRECTOR OF SURVEY.....3<sup>RD</sup> DEFENDANT**

**HON. ATTORNEY-GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a Plaint dated and filed on 1<sup>st</sup> April 2010, the Plaintiff sought the following orders -

- (a) a declaration that the creation of NAKURU/CEDAR LODGE/116 within land parcel number CEDAR LODGE/41 is illegal and hence null and void;
- (b) a declaration that the plaintiff's parcel of land No. Nakuru/Cedar Lodge/41 (4 acres) comprise and is inclusive of the area of the Borehole (now known as Nakuru Lodge/116);
- (c) an order directing the 3<sup>rd</sup> Defendant to amend Sheet No. 1 Cedar Lodge Settlement Scheme to cancel and/or remove parcel No. 116;
- (d) an order directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to rectify the Register for the Nakuru Cedar Lodge registration Section and to cancel the registration of parcel No. 116;
- (e) an order restraining the Defendants either by themselves, agents and/or servants howsoever from interfering alienating disposing or in anyway dealing with the plaintiff's parcel No. Nakuru/Cedar Lodge/41;
- (f) costs of the suit.

In a Statement of Defence dated 26<sup>th</sup> July 2010 and filed on 29<sup>th</sup> July 2010, by the Attorney-General (*the 4<sup>th</sup> Defendant*), and on behalf of the 1<sup>st</sup> – 3<sup>rd</sup> Defendants denied the plaintiff's claim and in paragraph 6 of the Defence states -

***“... that the land parcel Nakuru/Cedar Lodge/116 has no relation at all with the property of the***

***plaintiff which remains 1.6 Ha.”***

Despite clear notice of the Hearing Date, the Defendants or their representative, counsel from the Office of the Attorney-General did not attend the hearing of the case. They did not consequently controvert the plaintiff's evidence as set out in subsequent paragraphs of this judgment. The Defendants did however, through the Hon. Attorney-General the 4<sup>th</sup> Defendant, file written submissions purporting to controvert the plaintiff's evidence. Submissions however cogent, are no substitute for evidence, oral or documentary.

According to the oral and documentary evidence of the plaintiff, the parcel of land known as NAKURU/CEDAR LODGE/41 (*the suit land*) was initially allocated to one KIPKETER SERONEI. However by a letter dated 12<sup>th</sup> January 1984, from the Office of the Settlement Officer Nakuru Complex, the consent of the Land Control Board was sought for the transfer of the suit land by the said KIPKETER SERONEI to NJENGA NGUGI.

By a letter dated 2nd February 1984, the Land Control Board, Molo Division, gave its consent for the sale of the suit land by Mr. Kipketer Seronei to Mr. Njenga Ngugi for the sum or price of Kshs 16,000/=.

The Plaintiff herein was issued with a Title Deed to the suit land on 15th November 2001. There is no material or evidence to show how or why the title to the suit land was issued to the plaintiff herein. PW2, the husband of the plaintiff, confirmed that he bought the suit land within which was located one of the three bore holes in the Complex.

However thereafter there evolved a dispute as to the use of the borehole, and that the area Assistant Chief and the elders insisted that the borehole was for common use, and not restricted solely to the Plaintiff or the use of the property.

Although PW2 did not find it fit to elaborate, and the absence of the surveyor who was the author of a letter dated 30<sup>th</sup> October 2008, (*which formed part of the plaintiff's evidence*) did not help to clarify the question of the excision of the bore hole and the creation of the 6 metre access road, it is quite clear to me that both the excision of the borehole and the creation of the 6 metres access road was as PW2 testified at the insistence of the public led by the Assistant Chief, and his advisers, the village elders.

The Plaintiff's claim is that he bought the suit land together with the borehole which was an improvement on the land. Following the Latin language of the ancient Romans – *quicquid plantatur solo, solo cedit* (*that what is affixed or rooted in the soil belongs to the soil*), the plaintiff is of course correct in seeking the orders in the plaint.

There however appear to be other complainants, besides the four Defendants who are sued in their official capacities, and have been unable to secure the attendance of either the Assistant Chief, elders or other residents who may be adversely affected by the orders the plaintiff is seeking.

The District Surveyor per his letter of 30th October 2008 confirms the excision of Plot No. 116 and the access road. An access road is important as it is for the use of the residents and owners of plots adjacent to it. Neither the surveyor nor the plaintiff was helpful in clarifying whether the excised plot 116 has been allocated to anyone else other than just being reserved as a bore hole and a source of water for both human and animal consumption. The bore hole is surrounded by the plaintiff's land. There was no evidence that the plaintiff has been denied access to it or the use of its waters.

Despite the technical righteousness of the plaintiff's cause, an order granting exclusivity of access to the bore hole according to the Latin maxim (*supra*) may well work injustice to the residents of the area who have no knowledge of this case, and for whose benefit the bore hole was excised. I therefore decline to issue the orders sought.

Instead of granting the orders the plaintiff seeks, there shall issue a prohibitory order to be noted on

the register of Plot 116, as against the 2<sup>nd</sup> Defendant from allocating the said Plot 116, and against the 1st Defendant from registering any other person as the proprietor of the said plot 116 (*Nakuru/Cedar Lodge/116*) without first giving the plaintiff option to consolidate it as part of the suit land.

In light of the public interest in the use of the borehole, I direct that costs rest with the plaintiff and the Defendants respectively.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 15<sup>th</sup> day of March 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**