



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Suit 158b of 2005**

**JOSEPH W. MUNDIA.....PLAINTIFF  
VERSUS**

**SOLOMON K. RUGUT.....1<sup>ST</sup> DEFENDANT  
DISTRICT LAND REGISTRAR, NAKUR.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

Joseph Wambugu Mundia, the plaintiff herein, filed this suit on 13/6/2005, against Solomon Kipkorir Rugut and the District Land Registrar, Nakuru seeking the following orders:-

**(a) a declaration that the 1<sup>st</sup> defendant has trespassed on Nakuru/Olenguruone/Amalo/332 and that the plaintiff is the legal and registered owner of the said property;**

**(b) an injunction restraining the defendant, whether by himself, servants or agents from occupying, selling, alienating or in any way interfering with Nakuru/Olenguruone/Amalo 332 and a further order of eviction to issue against the 1<sup>st</sup> defendant;**

**(c) An order directing the 2<sup>nd</sup> defendant to cancel the title deed to LR Nakuru/Olenguruone/Amalo 332 currently in the 1<sup>st</sup> defendant's name and in his place, do register the plaintiff as the legal proprietor of the suit land;**

**(d) Costs of the suit.**

In his plaint, the plaintiff stated that on 18/12/97, the 1<sup>st</sup> defendant fraudulently acquired or purported to acquire a title deed for the suit land in collusion with the 2<sup>nd</sup> defendant. Particulars of the fraud are set out at paragraph 5 of the plaint.

The 1<sup>st</sup> defendant filed an amended defence on 13/8/2010 denying all the allegations of fraud, he claimed to be the legal owner of the suit land having purchased it under a sale agreement and put the plaintiff to strict proof. The 1<sup>st</sup> defendant also put the plaintiff on notice that he would raise preliminary issue that the plaintiff's suit was bad in law and an abuse of the court process.

On 28/7/2010, the parties recorded a consent to the effect that the claim against the 2<sup>nd</sup> defendant was withdrawn.

In support of his case, the plaintiff called a total of 4 witnesses. The plaintiff testified as PW1. He has been residing in Sweden since 1991. He testified that the suit land is his and he was issued with the title deed on 6/6/1978 (PEX.1); that the title had been held by Continental Bank for a loan of Kshs.75,000/-

which had been advanced to him. He cleared the loan on 12/5/03 and a discharge was issued, dated 10/5/04. PW1 also told the court that the 1<sup>st</sup> defendant is his neighbour, and when he relocated to Sweden in 1992, he left PW2, Henry Martim Lagat to take care of his land. PW2, Langat confirmed that the plaintiff was his neighbour and that after the tribal clashes in 1992, PW1 left the land under his care till the year 2003 when the 1<sup>st</sup> defendant told him to leave the land because he had bought it. The defendant communicated to him through a letter (PEx.7). PW2 informed PW1 of what the 1<sup>st</sup> defendant had told him but PW1 denied selling the land. PW2 denied that the defendant showed him any sale agreement in respect of the suit land. When PW1 enquired from the Ministry of Lands whether the Registrar signed the 1<sup>st</sup> defendant's title, he denied doing so vide his letter dated 27/5/04. PW1 also denied knowing one David Kibet Arap Mangesoi whose name appears on the green card as the previous owner of the land and who purportedly sold the land to the 1<sup>st</sup> defendant. PW1 was aware that the 1<sup>st</sup> defendant was charged in Criminal Case 225/05 but was not aware of the outcome.

PW3, Mr. Ignatious Wekesa, a former Inspector of Police with PCIO's office Nakuru, testified that he received a complaint from PW1 that his land had been taken over and occupied by his neighbour. He was tasked to investigate the complaint, he visited the suit land on 8/6/2004 where he found the 1<sup>st</sup> defendant in occupation. The 1<sup>st</sup> defendant had cut some of the trees on the land and his people were picking PW1's tea. He visited the 1<sup>st</sup> defendant's house, searched and recovered a title in the names of the 1<sup>st</sup> defendant, a sale agreement between himself and one David Kibet Arap Mangesoi but the 1<sup>st</sup> defendant could not explain where that seller could be traced. The 1<sup>st</sup> defendant was taken to the PCIO and was issued with a P22 to report back within a week with documents of proof of the sale but he went underground. PW3 further carried out investigation, to ascertain where the purported seller could be found but the Identification Card did not belong to the names off David Kibet Arap Mangesoi. PW3 also visited the Lands Registry and obtained a letter from the Registrar who confirmed the true owner of the land to be the plaintiff. He found that as per the green card, on 6/6/83, it indicates that certificate was lost. The land was transferred to David Arap Mangesoi on 4/3/89 and on the same day the title was transferred to the 1<sup>st</sup> defendant. Since the entry was suspect, they took the green card, got sample handwritings from the Land Registry staff for purposes of further investigations. The investigations revealed that the suspected writing resembled the writing of one of the clerks, Githii, who was on a discipline case, he was intercepted when he came to collect his salary from the Lands office, his specimen writing was taken and forwarded to the Government Handwriting examiner. PW3 also visited the Chief's office of the area where the land is situate who confirmed that they were not involved in the sale transaction between the 1<sup>st</sup> defendant and one David Arap Mengesoi. The Chief had also written to the 1<sup>st</sup> defendant to stop any interference with the land till the dispute was resolved. The defendant was charged and PW3 testified in the criminal case.

Charles Birundu, the Land Registrar Nakuru testified as PW4. He recalled receiving the documents pertaining to the suit land. He checked with the records held at their office and found that the original adjudication was registered in favour of the plaintiff on 27/5/1976 which he produced in court as PEx.6 (copy). He also referred to the letter dated 27/5/2004 addressed to PCIO, Nakuru and confirmed that the entries No.6 and 7 are forgeries. He said that there was nothing in his file to support entry No. 6 & 7 relating to the sale and transfer of the land to the 1<sup>st</sup> defendant. He denied having in his records showing the divesting of the plaintiff's interest in the land to any other person. He denied seeing the original title deed in the names of Solomon Rugut.

In the consent recorded on 27/7/2010, the parties also agreed that that days costs including the plaintiff's air fair to and from Sweden was agreed at Kshs.87,000/- and was to be paid by the 1<sup>st</sup> defendant within 30 days. On 4/7/2011 when the matter came up for hearing after the plaintiff testified Mr. Kurgat, the plaintiff's counsel reminded the court that the defendant had not complied with the court's order on costs which were payable within 30 days of 27/7/2010. The court directed the 1<sup>st</sup> defendant to pay the costs before the next hearing date which was 14/5/2012. On that date, Mr. Simiyu, counsel for the 1<sup>st</sup> defendant attended court, the 1<sup>st</sup> defendant was absent and the costs had not been paid and the court directed that the 1<sup>st</sup> defendant be excluded from the proceedings for failure to comply with the court's order.

The plaintiff produced in evidence the land certificate dated 6/6/1978 confirming that he is the absolute proprietor of the suit land. He had charged the property to secure a loan with Continental Bank which he cleared on 12/5/2003. The title was not released back to him till 10/5/2004 as evidenced by the discharge of charge from the Bank. It follows that the plaintiff could not have been in a position to sell his land to the 1<sup>st</sup> defendant between 12/8/81 till 2004 when the charge was subsisting. PW2 knew the plaintiff to be the owner of the land and was left to take care of it in 1992 when the plaintiff relocated to Sweden. It is until the 1<sup>st</sup> defendant wrote to him a letter dated 21/4/2004 (PEx.5) asking him to vacate the land. Further when the matter was reported to the police, PW3 did extensive investigations which led him to Continental Bank in Nairobi where he established that the plaintiff had indeed charged his land to the Bank and the charge was forceful in 2004. PW3 also carried out investigations with the land office and after he established that there was evidence to prefer charges against the defendant, the 1<sup>st</sup> defendant was charged in CRC 225/05 in which he testified. It is not clear what transpired in that case.

PW4, the Land Registrar produced the adjudication record which shows that the land was allocated to the plaintiff in 1976 and further confirmed that the entries on the green card showing that the land was transferred to the 1<sup>st</sup> defendant were forgeries i.e. entry 6 & 7. This evidence was not controverted and I am satisfied that there is overwhelming evidence on record to show that the plaintiff is the sole proprietor of the suit land.

The defendant in his defence denied that he is the legal proprietor of the land having purchased it. The green card showed the name of David Arap Mangesoi as the seller. Firstly, the 1<sup>st</sup> defendant never adduced any evidence in support of his defence. His defence remains mere allegations. He did not produce any title deed to the suit land. PW3 during his investigations was unable to trace who the purported seller David Mangesoi was and the Identity Card in the green card did not tally with the names. Besides, PW4 confirmed that the entries regarding the sale of the land are forgeries and the land still belongs to the plaintiff as per the records held at the land office. This being agricultural land, it would have been expected that the 1<sup>st</sup> defendant would produce the Land Control Board consent and the sale agreement. None of these have been shown to court. PW2 testified that he had to stop the activities he used to do on the plaintiff's land when the 1<sup>st</sup> defendant wrote to him. PW3 visited the land and found the 1<sup>st</sup> defendant in occupation, he had cut some of the trees and his people were picking the tea that belonged to the plaintiff. In **Delamere v T.P. Smith Ltd (1946) 2 ALL ER 23**, relied on the case of Roberts Taylor where the court said:-

**“The foundation of an action for trespass is dependent upon possession of property.”**

From the evidence on record, it is clear that the 1<sup>st</sup> defendant was guilty of trespass upon the plaintiff's land.

As pointed out earlier, the 1<sup>st</sup> defendant did not testify and therefore his defence remains mere allegations. He has not demonstrated that he holds the original title to the suit land; none was produced in court. PW2 testified that entries in the green card are forgeries and after investigations by PW3, the officer suspected to have committed the fraud disappeared. The 1<sup>st</sup> defendant also failed to show the court the sale agreement transferring the land to him nor could the purported seller be traced. Lastly, PW4 who is charged with keeping records relating to land confirmed that the adjudication register shows the land is still registered in the plaintiff's names and their records as regard the proprietorship of the land have never changed. The only conclusion that lends itself to this court is that the 1<sup>st</sup> defendant fraudulently acquired some fake title to the plaintiff's land. He had no title deed. The documents he had if any were falsified. The plaintiff's evidence remains unchallenged and on a balance of probability, I am satisfied that the plaintiff has proved that the suit land belongs to him. I hereby grant the prayers sought in the plaint; I declare that the 1<sup>st</sup> defendant trespassed on the plaintiff's land; the plaintiff is the legal proprietor of the suit land; I direct the Land Registrar, Nakuru to cancel the purported title issued to the 1<sup>st</sup> defendant; I grant an order evicting the 1<sup>st</sup> defendant from the suit land and grant a permanent injunction against the 1<sup>st</sup> defendant by himself, his servants or agents from occupying or in any way interfering with the suit land. The plaintiff is entitled to the costs of this suit.

**DATED and DELIVERED this 15<sup>th</sup> day of March, 2013.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr. Wanjau holding brief for Mr. Kurgat for the plaintiff

Mrs Wanjiku holding brief for Mr. Simiyu for the defendants

Kennedy – Court Clerk