



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.346 OF 2008

FREDRICK WAWERU.....PLAINTIFF

VERSUS

DUNCAN NGANGA NGWARE..... DEFENDANT

JUDGMENT

The plaintiff, Fredrick Waweru filed this suit against the defendant, Duncan Nganga Ngware initially in Nairobi as HCCC No.1988/1992 claiming that the latter is a trespasser and seeking that he be restrained by an injunction from constructing, cultivating, grazing, fencing or interfering with PLOT No.856-NDEMI SETTLEMENT SCHEME (the suit property) in Nyandarua District. He also sought the eviction of the defendant, general damages for trespass and costs of the suit.

On 31st March, 1993, the defendant filed a defence in which he denied entering the suit property but maintained that he is in occupation of his parcel of land known as PLOT NO.1241 NDEMI SCHEME. Subsequently the defendant died and this case was transferred to Nakuru High Court for hearing and disposal.

On 29th April, 2010, Maraga, J ordered that the deceased defendant be substituted in these proceedings by his son, Joseph Ngware. Joseph Ngware has not participated in the hearing of this case as he failed to attend court despite service with a hearing notice.

The plaintiff proceeded *ex parte* and stated as follows:

On 16th June, 1981, he applied to the Settlement Fund Trustee to be allotted land in Ndemi Settlement Scheme. On 19th August, 1982, his application was approved and an allotment letter in his favour issued. The Settlement Fund Trustee advanced to him a loan of Kshs.12,204/= payable within twenty-eight (28) years. He was about to settle the loan when in 1992 the defendant invaded the suit land with his livestock claiming that he had exchanged it with PLOT NO.1241 NDEMI, hence this suit.

I have considered that testimony and all the documents relied upon by the plaintiff to support his claim as well as his advocate's written submission. From that evidence, the plaintiff has demonstrated to my satisfaction that the suit property was allotted to him; that he had been repaying the loan from Settlement Fund Trustee until the invasion by the defendant; that the defendant has not demonstrated any interest in the suit property and has, as a matter of fact, confirmed that his parcel of land is PLOT NO.1241 DEMI SCHEME. All the documents, including the plaintiff's application for allotment, an approval, an allotment letter, a charge and receipts, show that the suit property was allotted to the plaintiff.

In his testimony before the court, he confirmed that the deceased defendant's family, including his substituted son are not on the suit property. But there are persons who have also invaded the suit land. That being so, no purpose will be served in granting an injunction to restrain the defendant, his agents or servants if he is no longer on the suit property and without proof that those on the land are his servants or agents. Similarly, a declaration that he (the defendant) is a trespasser or an order of eviction are of no use for the same reason that the defendant and his family are not on the suit land. The prayer for general damages appears to have been abandoned.

In the result, it will suffice to state that subject to the plaintiff paying the balance on his loan, the Settlement Fund Trustee may consider discharging the charge to enable him obtain the title to the suit land after a delay of nearly nineteen (19) years caused by the suit.

Costs to the plaintiff.

Dated, Delivered and Signed at Nakuru this 29th day of March, 2011.

**W. OUKO
JUDGE**