



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.4 OF 2009

MARIGI NJUGUNA.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL..... DEFENDANT

JUDGMENT

This matter was instituted way back in 1986 by the plaintiff, Marigi Njuguna against the defendant, Attorney General claiming:

- a) an eviction order;
- b) a permanent injunction restraining the defendant from interfering with the plaintiff's parcel of land known as NYANDARUA/MKUNGI/310 (the suit land);
- c) the cancellation of the suit land and combining it with NYANDARUA/MKUNGI/66 (Number 66).
- d) general damages;
- e) costs of the suit;
- f) interest on a) and b) above at court rate.

Prayer c) above will become clearer shortly as it is the crux of this dispute.

Started briefly, it is the plaintiff's case that between 1963 and 1985, the suit property (13.22 acres) and No.66 (2.74 acres) situated within Mkungi Settlement Scheme was one parcel divided by road but held by a brace as depicted in the P. Exhibit 4 – a Registry Index Map of 1983. The parcel belonged to the plaintiff.

In 1985 by an amendment to the said map (P. Exh.5) the brace was removed and No.310 registered in the name of the Government of Kenya. This meant that the plaintiff was confined to No.66 while No.310 was vested in the Government. The plaintiff testified and called his son **P.W.1 Samuel Kimani Marigi** and a neighbour **P.W.3, Francis Karanja Wakihigu** who is the registered owner of plot No.61 which is also divided by a road but connected by a brace. The value of his evidence was to demonstrate that although he is in a similar situation as the plaintiff, his two portions of No.61 have remained intact in his name. Both the plaintiff and his son maintained that before 1985, the two parcels belonged to the plaintiff and he utilized both of them until he was evicted upon the removal of the brace.

I have considered this evidence and written submission as well as authorities cited. The defendant has maintained that the plaintiff has never had any interest in the suit property; that the brace was inserted by mistake; that the reliefs sought are not available against the defendant.

The borne of contention and the only two broad questions falling for determination are whether the suit property was unlawfully and wrongfully acquired by the Government and whether the reliefs sought can be granted against the defendant.

For the plaintiff to succeed in the first question, it must be shown either that he is (was) the registered owner of the suit property or had an interest on it recognized in law. It is common ground that an offer was made to the plaintiff on 7th December, 1963 by J. G. Hadden on behalf of the Settlement Fund Trustee for a loan of Kshs.2,000/= to purchase a parcel of land known as Scheme MKUNGI Plot No.66. The same day, the plaintiff accepted the offer.

The basis of the plaintiff's claim is that MKUNGI Plot No.66 was one parcel traversed by a road but connected together by means of a brace. It is not denied that in 1985, eighteen years after the land was allotted to the plaintiff, the brace was removed and the parcel given a new number – 310 and registered in the name of the Government. The circumstances of the removal of the brace are not clear. It was for the defendant to make that clarification. But unfortunately, the defendant's witness was himself not helpful as he was unaware of what led to the removal of the brace. He merely guessed that the brace may have been placed on the map in the first place by mistake. He has never set foot on the suit property; he could not tell when the brace was placed on the map or when it was removed. From the latest Index map of 1985, the court was shown not less than two parcels that are connected by braces. Apart from plot No.61, it was noted that plot Nos.246 and 44 in the same scheme have braces and are intact.

Without any explanation to justify the removal of the brace on the suit property, I am persuaded that the removal of the brace and subsequent registration of the Government as the owner of the suit property was irregular. The next question is whether the reliefs sought in the plaint can issue against the defendant. I reiterate that the plaintiff seeks in the main suit, an eviction order, a permanent injunction and *“cancellation of the suit property and combining the same with No.66.”*

By dint of **Section 16(1) and (2) of the Government Proceedings Act**, the court cannot grant as against the Government or against an officer of the Government an order of injunction or specific performance. **Proviso (ii) to Section 16(1)** is relevant to this matter and it is appropriate to reproduce it.

“16(1)(ii) In any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property, or to the possession thereof.”

Clearly, both orders of eviction and injunction are not available against the defendant.

I shall proceed in terms of the provision set out above and declare that the plaintiff is entitled to NYANDARUA/MKUNGI/310 as against the Government of Kenya represented by the defendant herein.

I was not addressed on the claim for general damages. I assume it was abandoned.
Costs of the suit is awarded to the plaintiff.

Dated, Delivered and Signed at Nakuru this 15th day of March, 2011.

**W. OUKO
JUDGE**