



**No. 2944**  
**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE NO. 23 OF 2005**

ATAMBO NYABWARI  
ARIRI NYABWARI (Suing for and on behalf of the estate of  
NYABWARI MOSIGISI(Deceased)..... PLAINTIFF

**-VERSUS-**

NYABUTO NYAGAKA ..... DEFENDANT

**JUDGMENT**

In this suit filed on 7<sup>th</sup> March, 2005, the plaintiffs' claim against the defendant for:-

- **Eviction from the suit land under the supervision of OCPD Nyamira.**
- **A permanent injunction restraining the defendant, his agents, servants, employees and or personal representatives from entering, cultivating, occupying and or in any way interfering with all that parcel of land known as Settlement Fund Trustees/Ekerubo/16.**
- **Mense profits for unlawful use of the suit land.**
- **Costs and interest at court rates.**
- **Any other alternative relief, the Honourable court may deem fit and just to grant in the interest of justice.**

The facts informing the suit were that the plaintiffs were the administrators of the estate of **Nyabwari Mosigisi**, deceased and they brought this suit in that capacity. At all material times, the deceased was a member and shareholder of a land buying company known as Ekerubo Settlement Scheme. Prior to his death, the deceased had been allocated and registered as the owner of all that parcel of land known as **Settlement Fund Trustee/Ekerubo/16**, hereinafter "**the suit premises**". During the time of allocation and registration of the deceased as the owner of the suit premises, the defendant was already occupying approximately 2 hectares of the suit premises as a squatter and all peaceful means to have him vacate the portion aforesaid failed. Thus the defendant was a trespasser and had continued to trespass on the plaintiffs' suit premises. By reason of the matters aforesaid, the plaintiffs and all the legal beneficiaries of the deceased had suffered loss and damage as they could not use the suit premises for their benefit, hence the suit.

In response, the defendant by a written statement of defence dated 4<sup>th</sup> March, 2005 claimed that the

court lacked jurisdiction to hear the dispute as the deceased and defendant were members of Ekerubo F.C.S Ltd, and that the issue in dispute concerns land which is one of the business of the said co-operative society. That the proper forum for adjudicating any grievances by any of the parties was in the co-operative societies disputes tribunal. He also denied that the deceased was allocated the suit premises nor was he a squatter on the same. Accordingly, the plaintiffs were not entitled to evict him from the suit premises.

On 12<sup>th</sup> March, 2007 the hearing of the suit commenced before **Gacheche J.** She took the evidence of the 1<sup>st</sup> plaintiff and PW2. However, she left the station on transfer long before she could conclude the case. It thus fell upon me four years later to hear the defence and conclude the case after parties agreed that I take over the case from where **Gacheche J.** had reached.

In his evidence, the 1<sup>st</sup> plaintiff stated that the suit premises belonged to his deceased father, **Nyabwari Mosigisi.** They had mounted the suit as the administrators of the estate of their deceased father aforesaid. He tendered in evidence a grant of Letters of Administration intestate. He went on to state that his late father was the registered proprietor of the suit premises. As proof, he tendered in evidence a title deed and an official certificate of search bearing the names of his deceased father. Further, the plaintiff produced a letter dated 4<sup>th</sup> October, 1991 confirming that Ekerubo Farmers Co-operative Society Limited had only 100 members and in that list, his late father's name appeared as number 16. There is no name of the defendant. PW1 maintained that the defendant had trespassed on the suit premises and wanted the court to grant him the prayers in the plaint.

His witness, **Clement Ondieki Gisaigo** was the then vice chairman of Ekerubo Farmers Co-operative Society Ltd. He confirmed the evidence of PW1 and informed the court that the defendant was only a member of the society at its initial stages but was unable to pay up his shares and thus his membership was revoked and the little money he had paid towards his shares refunded to him. Thereafter the defendant was forcefully evicted from the society's farm but returned surreptitiously and settled on a portion of the deceased's suit premises. Otherwise the deceased was the rightful owner of the suit premises having fully paid for it. He further informed the court that each member was allocated a minimum of 46 acres of land and wondered aloud why the defendant could not occupy the entire parcel of the deceased's land if indeed it was allocated to him as he claimed. He concluded his testimony by stating that if the defendant was convinced that he had a genuine claim, he should channel the same through the society, not the deceased's estate.

On his part, the defendant testified that the portion he occupies was allocated to him by the committee of the society. However, he admitted that the portion he occupies is part of the deceased's suit premises. He was aggrieved when the suit premises though allocated to him was subsequently allocated to the deceased. He challenged that decision through the legal avenues available to him under the **Co-operative Societies Act.** He produced a memorandum of appeal of that dispute as an exhibit 1. He filed a suit against the society at the co-operatives societies tribunal which he lost. He then appealed to the commissioner of co-operatives who overturned the decision of the tribunal and awarded him the suit premises. The society appealed to the minister and the minister ruled in its favour. Thereafter he lodged civil appeal number 36 of 2001 which is still pending in this court. He denied being a trespasser therefore. However he insisted that he wants his rights vindicated by the society and not the estate of the deceased. That if the society pointed out to him where his parcel of land is, he would move there.

His witness, **Momanyi Ateka**, a clerk in the Ministry of Lands, Nyamira district confirmed that the suit premises were registered in the name of the deceased. He stated further that although a restriction was registered on the suit premises on 20<sup>th</sup> February, 2001, it was however removed on 6<sup>th</sup> April, 2004.

At the conclusion of the formal hearing of the suit, parties agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered them.

What are the issues for determination in this suit? I think that they are essentially four;

- **Whether this court has jurisdiction to entertain this suit.**
- **Whether the defendant is a trespasser.**
- **Whether eviction should issue.**
- **Costs.**

Starting with the first issue, I am satisfied that this court has jurisdiction to hear and determine this suit. It is common ground that the deceased is the registered proprietor of the suit premises. By virtue of section 27 and 28 of the **Registered Land Act**, it cannot be a dispute that can be resolved by the co-operatives societies tribunal. In other words, the co-operative societies disputes tribunal has no jurisdiction to deal with land disputes where one of the parties has a valid title. Further there is evidence so far undisputed that though initially the defendant was a member of the society, his membership ceased when he was unable to pay for his membership and the little that he had paid was refunded to him and was thereafter expelled from the society. Being a non member of the society, he cannot invoke the jurisdiction of the co-operative societies tribunal. In any event, the plaintiffs are also non members of the society. How then can they be dragged into the tribunal against their will and when they are non-members. The tribunal has jurisdiction to hear disputes between members and between members and the society. That is the essence of section 76 of the **Co-operative Societies Act**. Since therefore both the plaintiffs and defendant are not members of the society, the Co-operative Societies Tribunal will have no jurisdiction to entertain any dispute involving them. The non-membership of the defendant of Ekerubo F.C.S Ltd is confirmed by the list of members of the society. The defendant's name does not feature among the members.

Again it appears to me that if the defendant has any claim, he should direct it to Ekerubo F.C.S Ltd and not the estate of the deceased. Infact he should have applied to enjoin the said society in these proceedings. If indeed there is a dispute between the defendant and Ekerubo F.C.S Ltd, as he conceded under cross-examination, such dispute does not affect the deceased's suit premises. In any event, the defendant is already on record as having filed suit in the co-operative societies tribunal over the same subject matter where he lost though an appeal arising therefrom is still pending in this court. What useful purpose therefore will be served by re-litigating the same dispute in the tribunal when most probably the defence of *res judicata* would be staring in their face.

With regard to the 2<sup>nd</sup> issue, it is clear from the evidence of PW1, PW2, the defendant and his witness that the defendant is occupying the suit premises. It is also common ground that currently, the suit premises are not registered in his name but that of plaintiffs' deceased father. The defendant did not tender in evidence any document that would entitle him to a portion of the suit premises. On the other hand the plaintiffs tendered in evidence a certificate of title entitling them to occupy the entire parcel of land. By the defendant occupying a portion of land which does not belong to him but the plaintiffs, he is therefore a trespasser. The defendant did not call a single witness to support his claim. Infact the witness he called from the lands office, Nyamira supported the plaintiffs' case. He confirmed that the suit premises belonged to the plaintiffs' deceased's father and that the restriction registered on the suit premises at the instigation of the defendant had since been removed. That removal must have been as a result of satisfaction by the land office, that the defendants claim to the suit premises was spurious. The title to the suit premises is as a result free and unencumbered. In effect, the defendant's occupation of a portion of the suit premises is that of a trespasser.

Since the defendant is a trespasser, the only remedy available to the plaintiffs is an order of eviction. Therefore unless the defendant voluntarily removes himself from the suit premises within the next sixty (60) days from the date of this judgment, the plaintiffs shall be at liberty to forcefully remove and or evict him therefrom. The plaintiffs abandoned the claim for mesne profits. Accordingly, the same does not fall for consideration.

Finally the defendant raised the issue of limitation. However, the same was not captured in his defence. However, being a matter of law, it can be considered. Be that as it may, there is no evidence led by the defendant that would have enabled me to determine whether the suit was time barred or not.

In the end the plaintiffs succeed in their claim. I therefore grant prayers (a), (b) and (d) in the plaint. However eviction shall only come to pass, sixty (60) days from the date of this judgment.

**Judgment dated, signed and delivered** at Kisii this 23<sup>rd</sup> day of September, 2011.

**ASIKE-MAKHANDIA**  
**JUDGE**