



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**Civil Case 140 of 2009**

**MUTEGI KAREGA.....PLAINTIFF**

**VERSUS**

**JOSEPH KINYANJUI & HEADMASTER NJIHIA.....DEFENDANTS**

***(for and on behalf of themselves and as Trustees of KARIMA PRIMARY SCHOOL)***

**JUDGMENT**

The Plaintiff is the registered owner of land parcel Title No. Kijabe/Kijabe Block 1/4054 while the Defendant Karima Primary School is the registered owner of Plot No. Kijabe/Kijabe Block 1/3081. Due to the Plaintiffs' absence from the land, the school through its management, *(the trustees)* encroached upon the Plaintiff's land and built on it. Attempts by the Plaintiff to get the school to accept any terms of settlement *(through the Provincial Administration)* failed. So by a Plaint filed on 7<sup>th</sup> December, 1991 at the High Court in Nairobi, the Plaintiff claimed inter alia, the return of his land from the school and/or compensation for it.

Together with the Plaint the Plaintiff filed an application in which he sought an order of an injunction to restrain the Defendants from entering into, or building on any part of the Plaintiff's land Kijabe/Kijabe/Block 1/4054

pending the determination of the suit. An order of status quo was granted by Lady Justice Aluoch on 7<sup>th</sup> December, 1994, and ordered that the application be heard inter partes on 20<sup>th</sup> December 1994. The matter went before the Hon. Mr. Justice Pall on 20<sup>th</sup> December 1994. He ordered that the Plaintiff serve the Defendant with a copy of the Plaint and Summons to Enter Appearance, and ordered in the presence of the 1<sup>st</sup> Defendant, Joseph Kinyanjui, that the Defendants undertake not to enter the Plaintiff's land, Title No. Kijabe/Kijabe Block 1/4054 and build anything thereon. The Defendant did not obey the said order and there were threats of filing action for contempt of court, but did not proceed. In the event the Defendant filed its Defence on 16<sup>th</sup> October 2001 although it is dated 11<sup>th</sup> October 2001. In paragraph 4 of the Defence, the Defendant's say -

***"4. The Defendants state that Karima Primary School is built on a piece of land donated to it by the surrounding community. The school has been on the locality since inception and had never re-located to any other piece of land. It has a title deed to its piece of land and consequently it is a total stranger to the Plaintiff's allegations that he owns the land on which it is situated."***

When the matter came up for hearing before the Hon. Justice Kuloba on 22<sup>nd</sup> July 2003, a consent order was entered that the District Land Registrar Nakuru on the basis of the District Surveyor's ascertainment of the boundaries and extent of each of the plots namely Title Nos. Kijabe/Kijabe Block 1/4054 allegedly belonging to the Plaintiff, and Kijabe/Kijabe Block 1/3081 said to belong to Karima Primary School, and after determination and ascertainment through such survey the Land Registrar, Nakuru do submit his report to the Court of the findings showing the position on the ground of the two parcels of land in relation to each with copies of such report to Advocates for each party.

Apparently due to the hostility of the Defendants representative no survey was carried out until further orders were made by Lady Justice Angawa on 16<sup>th</sup> July 2008 that security be provided from the Commissioner of Police and survey be done in the presence of the Court Bailiff of the High

Court of Kenya on 25<sup>th</sup> September 2008 at 9.00 a.m.

According to Mr. Samuel G. Munene, the Court Bailiff who served the orders of 10<sup>th</sup> July 2008 upon the Deputy Principal, Mr. Mutitu of Karima Secondary School and also the Deputy Headmaster of Karima Primary School they took and retained a copy of the court order but refused to sign upon the original, and also refused to co-operate with the Court Bailiff and the Nakuru District Surveyor and the Nakuru District Land Registrar in carrying out a survey of the land.

According to the report filed in court on 22<sup>nd</sup> September, 2008, the survey established that Karima Secondary School is built on parcel No. 4054 the property of the Plaintiff, so that Karima Secondary School do not have a title deed on the land on which the school is built.

According to the Report of the District Surveyor also filed by the District Land Registrar on 22<sup>nd</sup> September 2008, the area computed using measured distances for Parcel No. 4054 is 3.60 acres approximately (*or 1.46 Ha*) although the Title Deed issued on 29<sup>th</sup> July 1994 shows an area of 1.012 Ha. Or 2.6 acres approximately (*according to my computation*). In other words the Plaintiff's land had not been properly surveyed by the original surveyors of the Mai Mahiu Kijabe Longonot Co. Ltd.

When this matter came up for hearing before me on 2<sup>nd</sup> March 2010, only the Plaintiff and his Counsel attended Court. Neither the Defendant's representatives nor their Advocate, Mr. Osoro who was said to have taken the hearing date by consent before Hon. Mr. Justice Maraga. I believed Mr. Kirimi and proceeded to hear the matter ex-parte. I have checked the file. I do not see any record of any hearing date being given by Justice Maraga. Thus I am keenly aware that the orders I am about to give in this judgment may be challenged and set aside and on the sole ground that the Defendants were not given a chance to be heard. However may this be so, I have examined the evidence of the Plaintiff herein. His evidence was clear and consistent as to how he acquired the parcel of land through the Mai Mahiu Kijabe Longonot Co. Ltd in which he bought and held one share which entitled him to a piece of land on the ground. That piece of land on the ground was Plot No. 3750 according to the share certificate. (*Certificate No. 836 issued to him on 9<sup>th</sup> February 1984*). It translated to title No. Kijabe/Kijabe Block 1/4054.

The Report filed by the District Land Registrar and the surveyor referred to earlier and also referred to in the Plaintiff's

evidence clearly shows that the said parcels of land is the property of the Plaintiff.

In the absence of the Defendant's or their Advocates at the hearing, the court was denied the benefit of obtaining evidence in accordance with paragraph 4 of the Defence, that the land was donated to the school by the community. As the land did not belong to the community at large but to the Plaintiff alone, and he denies that he ever donated his land to the school. I think this is one of those cases where the community acting on its dominance of numbers arrogated to itself the right to set aside private property for a noble purpose without caring about the opinion of the owner of the property, in this case, the Plaintiff. It is an illegality which cries for a remedy, and I will grant that remedy to the Plaintiff.

The Plaintiff claimed mesne profits at the rate of Shs. 3,000/= per year or Shs 7,000/= if the land was leased. The Plaintiff told the court that he preferred to get his shamba back but that because it is already occupied by the school, they are at liberty to buy it from him, and in the meantime pay him mesne profits at the rate of Shs 3,000/= per month, or Shs 7,000/= per month if the land had been leased for cultivation.

The Plaintiff led no evidence on how he arrived at the hiring/leasing rate of Kshs 7,000/= per month for cultivation. There was no contract or evidence of custom or practice in the area that land is leased for cultivation at the rate of Kshs 7,000/= per month. There is therefore no basis for my adopting that figure for purposes of computation of the losses suffered by the Plaintiff.

On the other hand, it is clear both from the evidence of the Plaintiff and the Report by the District Land Registrar that the school (Karima Secondary School - *(the baby of the Defendant)*) is situate and occupies the Plaintiff's entire land, and has so occupied the Plaintiff's land since he obtained title to it on 29<sup>th</sup> July 1994. He has been denied the use of it from that time to date a period of 15 years and 5 months (*29<sup>th</sup> July 1994 to 31<sup>st</sup> May 2010*). The Plaintiff has lost the use of his land for that period of time.

"**Mesne Profits**" means damages suffered by a landlord as a result of a tenant holding over after the expiry of his tenancy. The Defendants were of course no tenants of the Plaintiff. They were simply trespassers; and deserve to be evicted. However because the Defendants' represent a public institution, a school erected for the benefit of the children, an order for eviction would be inappropriate. An order for mesne profits, and a direction that the land be valued by the District Land Officer to establish its current market value would be more appropriate.

**Firstly** therefore, I would award the Plaintiff mesne profits for the period 29<sup>th</sup> July 1994 to 30<sup>th</sup> May 2010 (for ease of computation), a period of 185 months, at the rate of Kshs 3,000/= p.m. making a total of Kshs 555,000/=.

**Secondly** I direct the District Land Officer, Nakuru District, to carry out a valuation of the Plaintiff's land Kijabe/Kijabe/Block 1/4054 in the company of the court bailiff, and under the security of the Provincial Police Officer or an

officer deputed by him in writing and file his report duly dated and signed by him within 60 days of the date hereof for purposes of determining the sale value of he land on a willing seller, willing buyer basis.

*Thirdly* I would also award the Plaintiff the costs of this suit.

This matter be mentioned on 23<sup>rd</sup> July 2010 for further directions.

**Dated, delivered and signed at Nakuru this 21<sup>st</sup> day of May 2010**

**M. J. ANYARA EMUKULE**

**JUDGE**