



IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 183 OF 2003

ZELIPHER NYAKINYUA MWANGI.....PLAINTIFF
VERSUS

DAVID TOMNO ROP.....1ST DEFENDANT
JOSEPH KHAYO AKHOKO.....2ND DEFENDANT
JOSEPH OGUTA.....3RD DEFENDANT
MESSERS DAVID NYANYA.....4TH DEFENDANT
MESSERS MANASES.....5TH DEFENDANT

JUDGMENT

The plaintiff herein, Zelipher Nyakinyua Mwangi, filed this suit vide a plaint dated 7/11/2003 against **David Tomno Rop, Joseph Khayo Akhoko, Joseph Oguta, Messers David Nyanya and messers Manases**, the defendants herein. The plaintiff seeks the following orders:-

- (a) A declaration that the plaintiff is the owner of all that piece of land parcel **NAKURU/OL'RONGAI/PHASE 11/82**.
- (b) A permanent injunction restraining the defendants, the servants or agents from interfering in whatever manner with the plaintiff's peaceful and quiet enjoyment of all tht piece of land known as **NAKURU/OL'RONGAI PHASE II/82**.
- (c) The defendants to pull down the illegal structures on the plaintiff's land and give vacant possession.
- (d) Compensation for the destroyed trees and illegal grazing.
- (e) Costs of the suit.

The 1st to 4th defendants filed their defence dated 16/3/04 through Omwenyo Advocates denying all the allegations in the plaint and put the plaintiff to strict proof.

The plaintiff's case is that she is the owner of the suit land and produced in evidence, a copy of the title deed PEXW1, an official search and receipts from the lands office dated 8/10/2010 (3a & b). The plaintiff recalled that when the defendants entered her plot, she was there, she made a report to the Chief of the area who in turn wrote a letter to the Settlement Officer on 14/2/04 (EX.4). The Ministry of Lands also wrote the letter dated 25/2/03 (Ex.5) and another was written by Provincial Surveyor dated 28/10/03 (Ex.6) which all indicated Plot 82 to belong to the plaintiff.

The defendants were served with the hearing notice as per the affidavit of service sworn by the process server, one George Rasugu on 3/5/2010 but none of them appeared at the hearing. The hearing proceeded in their absence but the court nevertheless has to consider her defence. By the time the matter came up for hearing, the deendatns were not represented Omwenyo Advocate having been allowed to cease acting for the defendants on 8/2/2010.

The defendants denied all the averments in the plaint and pleaded at paragraph 6 of the defence that they bought the land from one Zaina Waitherea Hussein Plot Title No. **NKU OL RONGAI PHASE II/579** originally **No. 11/5** between 1997 and 1999.

From the above defence it is evident that the land which the defendants lay claim to is different from that of the plaintiff. The only question is therefore whether the defendants have encroached on the plaintiff's land.

The plaintiff has demonstrated that the suit land Plot 82 belong to her. It is supported by the Title Deed exhibit No. 1, (copy of title left on file) the official search from the lands office (Ex.3a & b) which shows that the land is still registered in the plaintiff's names. The letter from the Ministry of Lands and Settlement dated 25/2/03 also confirms that the land Plot No. 82 belongs to the plaintiff and the Land Registrar Nakuru wanted the District Officer Rongai Division to intervene and ensure that the defendants did not continue with construction until the surveyors went on site.

The letter dated 28/4/2003 from the Ministry of Lands and Settlement written by the Provincial Surveyor, Mr. Lumasayi, did confirm that a surveyor had visited the site on 17/4/03 and established that the defendants had trespassed onto parcel 82 and the District Officer was advised to effect their removal and enable the plaintiff take full possession. These facts have not been controverted and I do find the defendants to have encroached onto the plaintiff's land Ol Rongai 11/82 and their defence remains mere allegations.

The plaintiff contended that when the defendants entered the land they destroyed 20 acacia trees which she placed the costs at Kshs.4,000/- per tree and therefore claims Kshs.200,000/- as compensation. The defendants put the plaintiff to strict proof. Apart from her word, the plaintiff did not bother to attempt to prove her loss. For example the Chief of the area should have been in a position to go to the suit land to determine how many trees, if any, had been cut down by the defendants. In the Chief's letter dated 14/2/2003, written soon after the illegal occupation, there was no mention of trees having been cut down or destroyed. In my considered view, the plaintiff has not endeavored to prove that her 200 trees were indeed cut. 200 trees is a large number that could not go without notice of the Chief or Assistant Chief of the area and the court finds that the claim is not proved and declines to allow it.

I find on a balance of probability that the plaintiff has proved that the suit land belongs to her and that the defendants have encroached onto the land. The court hereby grants a declaration that the plaintiff is the owner of parcel **NAKURU/OL'RONGAI PHASE II/82**. The court also grants a permanent injunction restraining the defendants, their servants or agents from entering or in any manner interfering with the plaintiff's peaceful and quiet enjoyment of the suit land. The defendants should within 30 days from the date this order is served upon them, pull down their illegal structures and give the plaintiff vacant possession of the said land. The defendants will bear the costs of this suit.

DATED and DELIVERED this 19th day of November, 2010.

R.P.V. WENDOH
JUDGE