



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL CASE NO. 121 OF 2007

(FORMERLY BGM HCC. NO. 71 OF 2000)

DAVID JAMES MBOGO.....PLAINTIFF

VERSUS

ALFRED C. ASIKOYO)

STEPHEN O. EKISA)

ROSEMARY W. KAMAU).....DEFENDANTS

JOSEPH ALLISON)

JUDGMENT

1. This is an old matter that has had a chequered history of not only movements from court to another, but the matter proceeded for hearing Judgment was pronounced and then set aside. The matter as the record shows, was filed before the High Court Eldoret, it was transferred to Bungoma High Court and finally to Kitale. In between, there are proceedings and orders which were issued before the High Court Nakuru and Kakamega. Be that as it may, this matter came for hearing before me on the 26th October, 2010 the defendants did not appear although they were served with the Hearing Notice on 12th October, 2010 as per the affidavit of service and Hearing Notice attached to it.

2. The plaintiff testified in support of the claim, he told the court how, sometimes in 1992 he, together with others founded a Self Help Group known as **Mishemwa Village Project**. The group was dully registered under the Ministry of Culture and Social Services. The plaintiff was the chairman while the defendants were members of the committee. The plaintiff applied for Registration and the Group was issued with certificate No. 2105 dated 20th February, 1992. The group was also given authority to operate a bank account and they managed to open one at the Barclays Bank where he banked the money for the project.

3. The plaintiff was made the Project Manager of the Welfare Group whose objective was provision of shelter for homeless and street children. The home was supported by well-wishers both local and international. The group received money from the donors which was acknowledged and duly banked in the project account. The plaintiff produced banking slips for the moneys received and banked. The project was operated from plot No. 212 within Liyabo Settlement Scheme.

4. The group managed to purchase this plot from John Kosgey, they used a sum of Ksh. 250,000/= to purchase the plot was registered in the name of the plaintiff. That seems to have been the genesis of the plaintiff's problems that snowballed into a complaint lodged by the defendants that the plaintiff had stolen Ksh. 250,000/= as an employee of the group.

5. The plaintiff was charged before the Principal Magistrate's Court Kitale in Criminal Case No. 1068 of 1993 with the offence of stealing by servant contrary to section 281 of the Penal Code. He was tried convicted and sentenced to serve 7 days suspended sentence. The court went out of its way and also ordered that the organization should have the land registered in any of the person(s) of their choice, or the plot to remain in the name of the accused as trustee of **Mshemwa Village**. The plaintiff appealed against the conviction and sentence and appeal was allowed by the court order dated 27th January, 1997 in **High Court Cr Appeal No. 158 of 1994 at Eldoret**.

6. Meanwhile, the defendants had transferred the property in their names despite the fact that even on 4th November, 1994 an order had been made by the High Court Bungoma in the following terms:-

1. THAT the enforcement of the order of **INJENE INDECHE** made in Kitale PMC Criminal Case No. 1068 of 1993 (Republic Vs David Mbogo) on the 30/6/1994 regarding plot No. 212 in Liyavy Settlement Scheme be stayed, pending the hearing of the application inter parties., It is further ordered that the enforcement of the eviction order signed on the 23rd September, 1994 be stayed, and the appellant and to use the plot aforesaid to remain in possession, pending the hearing of the application inter partes on 14/11/94.

7. Based on the Trial Magistrate's order the defendants obtained an eviction order on 2nd November, 1994 and managed to evict the plaintiff from plot No. 211. The defendants moved into the plot and they have excluded the plaintiff. The plaintiff contends that the eviction and transfer of a plot to the 1st, 2nd and 3rd defendants has no legal basis it was cancellation and re-registration to his name. The plaintiff produced official search over the plot **No. 212 Liavo Settlement Scheme** now known as **Trans Nzoia/Liavo/212** which are in the names of Rosemary Wamboi Kamau, A C Asikoyo and S O Ekisa. On 6th October, 1997, the title was registered in the names of Joseph Alison, S O Asikoyo and Rosemary Wamboi Kamau as administrators of the estate of the late S O Ekisa.

8. Upon the evaluation of the evidence on record, it is common ground that the plaintiff was charged with theft of KSh. 250,000/- belonging to an organization in which he was a Director. The plaintiff was convicted and sentenced. IN addition the learned trial magistrate ordered that there be a transfer of Plot No. 212 to a person of the organization's choice. That judgment was set aside, and rightfully so, by the order of the High Court in Criminal Case No. 158 of 1998 where Nambuye J posited:

There is no dispute that the appellant was a Director of the said project and the organization had no legal capacity to own land. It is also evident that the project needed some place to operate from either leased land or purchased land....."

9. The appeal was allowed and sentence was quashed. It follows that the orders by the Trial Magistrate in which he ordered the transfer of the plot is also a nullity. The organization that was directed by the order of the trial magistrate to transfer the plot had no legal capacity to effect a transfer. Moreover the plaintiff having been a founder and Director of the Self Help Group could not have been charged with a Criminal offence. If the plot was registered in his name in breach of Trust, the defendant's remedy lay in a civil suit for breach of trust. The defendant filed sworn statement of defence and counter claim on 3rd January, 1995, but no evidence was adduced in its support.

Accordingly the counter claim, for it is hereby dismissed with costs.

10. Back to the plaintiff's case, the plaintiff produced the judgment by the Principal Magistrate Kitale in PMCR Case No. 1068 of 1993, it was established by the ruling of **Nambwiye J** that there was no order of eviction issued by the plaintiff. Going by the opinion of **Nambwiye J**, the transfer of the plot to the defendant and the eviction of the plaintiff from the suit premises were made in blotand disregard of the orders of the High Court.

11. I find the plaintiff's evidence has established on a balance of probability that he is entitled to the

orders sought in the plaint as follows:-

(a) An order canceling the Registration of Plot No, 212 Luvano Settlement also known as Trans Nzoia Luvano 212 from the 1st, 2nd and 3rd defendant. The plot be re-registered in the names of the plaintiff.

(b) An order that the defendants do move out of the plot No. 212 Luvano Settlement Scheme, within 60 days.

(c) The plaintiff shall also have the costs of this suit and counter claim.

Judgment read and signed this 12th Day of November, 2010

MARTHA KOOME

JUDGE