

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 83 of 2007

SALVATION ARMY KENYA.....PLAINTIFF

VERSUS

PETER NJUGUNA GITAU.....DEFENDANT

JUDGMENT

SALVATION ARMY KENYA, the plaintiff in this case describes itself in the plaint as a non governmental organization registered as such under Section 10 of the Non Governmental Organization Act. It claims that it has since 1978 been running a children's home for the physically disabled children at its premises situate on Land Reference No. 451/VII/13 Nakuru.

In 1980, pursuant to its application the Government reserved, set aside and allocated to it the adjacent government land comprising of 2 acres and known as Land Reference NO. 451/1294 to enable it extend its operations and establish a children's hostel, play ground and an education and agricultural demonstration farm for the benefit of the physically disadvantaged children. It further claims that the Commissioner of Lands, the Provincial Physical Planning Officer, the Municipal Council of Nakuru and the Provincial Administration duly confirmed in writing that the suit piece of land had been reserved for it and that the same will be allocated in due course.

Sometimes in the year 2006 the defendant without any colour of light invaded the suit piece of land and subdivided it into 20 plots. Upon enquiry the defendant flashed a title deed (Nakuru Municipality Block 15/956) in his name. The plaintiff further avers that the defendant unlawfully and corruptly obtained title to that piece of land. It therefore seeks a permanent injunction to restrain the defendant by himself, his servants and/or agents and even the third parties he might have sold the land to from entering into or in anyway interfering with that piece of land. It also prays for the cancellation of the title deed issued to the defendant and the costs of this suit.

In his defence, the defendant denied the plaintiff's claim and stated that the plaintiff's claim is bad in law as it is based on a mere promise. He said that he is the registered proprietor of the suit piece of land.

At the hearing the plaintiff called one witness, Captain Heron Chepsir, its Kakamega Commander. He testified that in early 1980s when the plaintiff's piece of land Nauru became inadequate for its operations the plaintiff applied to the Provincial Physical Planning Officer for allocation of the suit piece of land to enable it extend its operations. By its letter of 17th November 1997, Exhibit 4, the Director of Physical Planning authorized the plaintiff to develop the plot. Thereafter the plaintiff fenced it and started paying rates to the Municipal Council of Nauru in respect of the plot and using it as a play ground and a demonstration garden awaiting the Commissioner of Land's letter of allocation. The letter of allocation, however, never came. In November 2006 they saw the plaintiff subdividing the piece of land and building material being deposited on it.

In cross examination, Captain Chepsir conceded that the Commissioner of Lands has never formally allocated the land to the plaintiff and that the children's home is not on the suit land. He also conceded that it is an organization called SCAN (Street Children Association of Nakuru) which is running the children's home.

On his part the defendant testified that on his application the Commissioner of Lands allocated the suit

piece of land to him on 1st January 1996. After paying the required stand premium and the conveyancing fees he was issued with a title deed and he has since subdivided the piece of land and sold off the subdivisions thereof.

After the closure of the defendant's case counsel for the parties agreed to file written submissions but counsel for the plaintiff did not. In his submissions counsel for the defendant submitted that this suit is bad in law and sought its striking out on the ground that the plaintiff is not the organization that applied for allocation for the suit piece of land. He said the body that applied for allocation was the Salvation Army Church and not the NGO, Salvation Army Kenya. If the suit is not struck out he submitted that the same should be dismissed as the plaintiff has not proved any interest in the property the same having not been allocated to it.

Having considered the evidence on record and these submissions I agree with counsel for the defendant that the plaintiff has failed to prove its claim in this suit. Admittedly the plaintiff was never allocated the suit piece of land. All it was given is a promise of allocation but the same was not done. In *Wreck Motor Enterprises V Commissioner of Lands & Others*, Civil Appeal No. 71 of 1977 the President of the Republic of Kenya approved the Plaintiff's application for allocation of a piece of land in Nairobi but the same was later allocated to the second defendant in that case who was issued with a Title Deed. Reversing the High Court decision which had decreed the promised piece of land to the plaintiff, the Court of Appeal held that "Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of the title document."

I have no doubt that Salvation Army church sought to be allocated the suit land for a noble cause: to expand its operations for the physically handicapped. But all they got was just a promise. Apparently in their naivety they sat back and waited for a letter of allotment or title deed but neither was issued to them. In the circumstances, much as I sympathize with the plaintiff I am afraid its case has no legal basis and I accordingly dismiss it.

As I have said the plaintiff sought to be allocated the suit land for charitable purposes: to benefit the physically disabled. For that purpose, I order that each party bears its own costs.

DATED and delivered this 28th day of May, 2009.

D. K. MARAGA

JUDGE.