



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISUMU**

**Civil Suit 11 of 2006**

**MODERN CENTRE LIMITED ..... 1<sup>ST</sup>  
PLAINTIFF**

**RASIKKUMAR POPATLAL CHANDARANA ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOEL GESUKA .....  
DEFENDANT**

**JUDGMENT**

The plaintiffs, Modern Centre Limited and Rasikkumar Popatlal Chandarana, claim to be the rightful and registered proprietors of parcels land Reference Block No.11/213, No.11/155, No. 11/156 and No.11/157 situated within the Kisumu Municipality.

The defendant, Joel Gesuka, is alleged to be illegally trespassing

into the said parcels of land by constructing a perimeter fence and a cattle shed.

The plaintiffs therefore seek prohibitory and mandatory injunctive orders against the defendant restraining him and his agents/servants from trespassing, wasting, damaging, alienating or in any other manner dealing or interfering with the said Land Registration Block Nos. 11/213, 11/155, 11/156 and 11/157.

The plaintiffs also seek an order for vacant possession of the said parcels of land and destruction of any structures erected thereon by the defendant. They further seek a declaration that the first plaintiff (Modern Centre Limited) is the sole and rightful proprietor of Land Reference No. Block 11/213 while the second plaintiff (Rasikhumar Popatlal Chandarana) is the sole and rightful proprietor of Land Reference Nos. Block 11/155, 11/156 and 11/157.

The plaintiff claim is grounded on the facts presented in evidence by the second plaintiff **Rasikkumar Popatlal Chandarana** (PW1) who said that he is the Managing Director of the first plaintiff Modern Centre Limited based in Kericho, which owns the parcel of Land Block No.11/213 vide a Certificate of Lease issued on 10<sup>th</sup> March 2003, (P.Ex. 1) while he owns the remaining parcels of land Block No.11/155 vide a certificate of lease issued on

8<sup>th</sup> January 1996 (Ex. 2), Block No. 11/156 vide a certificate of lease issued on 8<sup>th</sup> January, 1996, (Ex. 3)

and Block No.11/157 vide a certificate of lease issued on the 17<sup>th</sup> October 1996 (P. Ex. 4). Rasikhmar (PW1) told the court that prior to the issuance of the said certificates of lease the parcels of land had been allocated directly to the first plaintiff and to third parties. A letter of allotment dated 7<sup>th</sup> January 1999. (P. Ex. 5) Shows that an unsurveyed residential plot was allocated to the first plaintiff. The said unsurveyed plot was later assigned a number viz Kisumu/Municipality/Block 11/213 and a certificate of lease (P. Ex. 1) issued for a term of 99 years from 1<sup>st</sup> January 1999. The letter of allotment dated 28<sup>th</sup> July 1995 (P. Ex. 9) shows that an unsurveyed residential plot No. "A" Kisumu was allocated to two persons i.e. K. Sang and S.N. Chepketer.

The plot was transferred to the second plaintiff on the 16<sup>th</sup> October 1995, (See P> Ex. 10) and on the 8<sup>th</sup> November 1995, the Ministry of Lands and Settlement wrote to the second plaintiff (See P. Ex. 11) informing him of the transfer of the plot together with another unsurveyed plot No. "B" Kisumu previously allocated to Juliana C. Langat and C. K. Saina. The two unsurveyed plots were later assigned numbers Kisumu Municipality/Block 11/155 and Kisumu Municipality/Block 11/156 and certificate of lease (P. Ex. 12 & P Ex. 13) dated 8<sup>th</sup> January 1996 issued to the second plaintiff for a period of 99 years from 1<sup>st</sup> August 1995.

These certificates (P. Ex. 12 & P. Ex. 13) were the originals and were re-issued in the present format (P. Ex. 2 & P. Ex. 3).

The letter of allotment dated 25<sup>th</sup> July 1995 (P. Ex. 15) shows that an unsurveyed residential plot was allocated to Rochal Investments Limited who sold it to the second plaintiff as per the sale agreement made on the 17<sup>th</sup> June 1996 (. Ex. 16).

The plot was assigned number Kisumu Municipality/Block 11/157 and the original certificate of lease (Ex.20) issued on 17<sup>th</sup> October 1996, for a period of 99 years from 1<sup>st</sup> August 1995. The certificate was later re-issued (P. Ex.4)

The second plaintiff stated that on the 11<sup>th</sup> November 2005, he carried out an official search respecting the four aforementioned parcels of land and found no encumbrances whatsoever. The search certificates, (P. Ex. 21) (a-d) confirm that the plots of land are registered by way of leasehold to the plaintiffs who pay the required rent and rates (See P.Ex. 22 & P. Ex. 23)

The second plaintiff stated that in the year 2007, the Government of Kenya issued a circular for the sale of Government houses and for the re-possession and validation of houses irregularly acquired. The circular dated 24<sup>th</sup> January 2007, (P. Ex. 24) was in reference to sale of non strategic Government owned houses. Part 11 thereof provided for sale that would include validation and regularization of illegally/irregularly alienated houses and in Kisumu such houses numbered one hundred and forty three (143) and included a house MG 92 erected on the material Block No.11/157.

However, further to the circular (P.Ex. 24) a second circular dated 2<sup>nd</sup> March 2007 ( P. Ex. 27) was issued showing that a house HG 92 (and not MG 92) stands on the material Block 11/213 (and not Block 11/157).

The second circular (P. Ex. 27) superseded the first circular (P. Ex. 24) thereby confirming the existence of a Government house on Block 11/213 belonging to the first plaintiff rather than Block 11/157 belonging to the second plaintiff.

This second circular (P. Ex. 27) is an addition (addendum) and a correction (corrigenda) of the first circular (P.Ex. 24).

The plaintiffs state that the defendant who is a civil servant occupies the house erected on the said Block 11/213.

The Nyanza Provincial Surveyor **Andrew Kipkemoi Mursoi** (PW.3) reacting to a query from the plaintiff's advocate (See P. Ex. 25) indicated and confirmed that the Government house is erected on Block 11/213 (See P. Ex. 26 (a)). He produced a map of the general area [P. Ex. 26 (b)] showing that all the material plots (i.e. Block No.11/213, Block No.11/155, Block No. 11/156 and Block No. 11/157) are adjoining. He visited and inspected the site and further confirmed that the Government house is erected on Block No.11/213 and not Block No. 11/157 which is vacant. He said that the four material plots, were part of a single plot which was sub-divided and belonged to the Government. He confirmed that the Government house at the scene is occupied by a civil servant.

The second plaintiff (PW1) stated that they did apply for the validation of their acquisition of plot No.11/213 together with the house erected thereon. He produced the completed application form (P.Ex. 28) and the necessary receipt for the sum of KShs.1,000/= [P.Ex. 29 (a)]. He also produced a receipt for the sum of KShs.280,000/= [P. Ex. 29 (b)] being payment for the required 10% of the recommended value of the plot i.e. KShs.2.8 million. He said that he did not apply for validation because his title was defective or illegally acquired and that he has not received any correspondence from the Government for the repossession of any of the material plots. He contends that he is not aware and has not been informed that the defendant applied for the same plots. He further contends that the present case was not filed in court due to a defect in his titles and that the titles have never been re-possessed by the Government and remain valid to date. He maintains that the material plots belong to them and that the defendant is a trespasser who has since erected a perimeter fence made of iron sheets.

The defendant **Joel Onsare Gesuka** (DW1) stated in evidence that he is employed as an accountant with the Ministry of Finance currently based in Turkana Central District as the District Accountant. Previously, he was based in Kisumu as the deputy District Accountant and had been allocated a Government house No. MG 92 which he occupied with effect from 1<sup>st</sup> May 2005, and which he still occupies through his family members. He produced the allocation letter dated 21<sup>st</sup> April 2005, (D. Ex. 3) together with electricity as well as water bills (D. Ex. 5 & D. Ex. 6). He also produced payslips (D. Ex. 4) to confirm a deduction of KShs.7,200/= towards the payment of the monthly rent for the house which had previously been occupied by other civil servants. (see D. Ex. 7). He said that the house is erected on a one acre plot with a fence and gate. He produced photographs of the house (D. Ex. 8) showing the house No. MG 92 rather than No. HG. 92 which he does not occupy. He said that in the year 2007 the house was offered for sale by the Government of Kenya vide the circular dated 24<sup>th</sup> January 2007, (D. Ex. 9/Ex. 24) and that he applied for its purchase. He produced a receipt of KShs.1,000/= (D. Ex. 2) for the purchase of the necessary application form and a bankers cheque (D. Ex. 1) for the sum of KShs.320,000/= reflecting a 10% deposit of the value of the property i.e. KShs.3,2 million. He said that he has since learnt that he is in occupation of premises having title deeds issued to third parties which in his opinion were irregularly issued. He therefore contends that he is in lawful occupation of a Government house belonging to the Government of Kenya erected on the material plot No. 11/157. He further contends that vide the circular dated 24<sup>th</sup> January 2007 (D. Ex. 9) (P. Ex. 24) the house was re-possessed for sale to occupying civil servants.

From all the foregoing it is evident that the defendant is in actual occupation of a house standing on the material Block No. 11/213 rather than Block No. 11/157.

The plaintiffs claim a legal right over the house by virtue of their leasehold interest in the said Block No. 11/213 while the defendant claims a right by virtue of his occupation of the house on account of his employment with the Government of Kenya which according to him is the actual proprietor of not only the house but also the parcel of land on which it stands.

Indeed, both the plaintiffs and the defendant applied to the Government of Kenya for the purchase of the house and plot upon an offer made by the Government through the Ministry of Housing. The offer was for the sale of non-strategic Government owned houses and was made by way of a general circular to all the Government departments dated 24<sup>th</sup> January 2007 (P. Ex. 24)

(D. Ex. 9).

The circular indicated that the material house is the property of the Government of Kenya specifically described as house No. MG 92 standing on the material Block 11/157.

The circular did not specify the material Block 213.

However, a subsequent circular dated 2<sup>nd</sup> March 2007, (P. Ex. 27) which was an addendum and corrigenda of the initial circular indicated that the material house is described as House No. HG 92 standing on the material Block 11/213. The subsequent circular dated 2<sup>nd</sup> March 2007, (P. Ex. 27) would be the most crucial for the purposes of this case in as much as it was the latest.

The defendant acting on the initial circular dated 27<sup>th</sup> January 2007, (P. Ex. 24) (D.Ex. 9) applied for the purchase of the entire property and paid a 10% deposit of the sale price. He produced a bankers cheque for the sum of KShs.320,000/= (D. Ex. 1) and a receipt for the sum of KShs.1000/= (D. Ex. 2) for the purchase of the necessary application form. He said that he did not see the second circular (P. Ex. 27) which in any event was an additional list of the houses on sale and did not include House No. MG. 92. The plaintiffs indicated that the material Block No. 11/213 was allocated to the first plaintiff by the Government of Kenya on the 7<sup>th</sup> January 1999. (See P. Ex. 5) and after the payment of all the requisite fees including stamp duty they were granted a certificate of lease dated 10<sup>th</sup> March 2003 (P. Ex. 1). The said certificate of lease indicates that the lessor is the Government of the Republic of Kenya and that the lease is for a period of 99 years from 1<sup>st</sup> January 1999 at a rent of KShs.7,200/=.

The certificate was a confirmation that the first plaintiff was the registered proprietor of that leasehold interest respecting Block No. 11/213.

However, in the month of March 2007, the plaintiffs acting on the second circular dated 2<sup>nd</sup> March 2007 (P. Ex. 27) applied for the purchase of the entire property.

The application form (P. Ex. 28) was titled - **“Application form for sale of non-strategic Government owned houses.”** – and was duly signed and presented by the plaintiffs. They applied for the purchase of house Block No. 11/213 situated in Milimani Estate of Kisumu which was offered for sale at a price of KShs.2.8 million. They paid the required 10% deposit of the sale price and obtained a payment receipt for the sum of KShs.280,000/= (See P. Ex. 29 (b)).

What may be deciphered from the foregoing is that even though the plaintiffs had obtained a certificate of lease respecting Block No. 11/213 way back in the year 2003, they nonetheless acknowledged that the property in essence belonged to the Government of the Republic of Kenya which had the right to offer it for sale to any individual including themselves. The offer was indeed made vide the two circulars (P. Ex. 24 and P. Ex. 27) and both the plaintiffs and the defendant accepted the same and paid the 10% deposit of the sale price. But, the two circulars had conflicting information pertaining to the actual description of the material property and its estimated value. This explains why there is herein the mention of House No. MG 92 and House No. HG 92 and the difference in the 10% deposit payment. The plaintiffs paid a deposit of KShs.280,000/= while the defendant paid a deposit of KShs. 320,000/=. In the opinion of this court, the second circular dated 2<sup>nd</sup> March 2007 (P. Ex. 27) being the latest would take precedence over the first circular dated 24<sup>th</sup> January 2007. (P. Ex. 24)

After all, the second circular (P. Ex. 27) was an addition and correction of the information contained in the first circular (P. Ex. 24) although the intent and purpose of the two circulars remained the same.

It would follow therefore that the correct description of the material property would be House No. HG.92 standing on Block No. 11/213 Milimani Kisumu.

This is the property that the plaintiffs applied to purchase despite their leasehold interest thereon and it is the same property that the defendant is currently occupying as a civil servant. It would appear that the property which the defendant applied to purchase and paid a 10% deposit is non-existent despite the marking “MG 92” in the house he occupies.

A house number is merely for identification and does not confer any legal title to the house or the land it is erected on.

The second circular (P. Ex. 27) indicated that the number MG 92 was erroneous and should be HG 92.

Be that as it may, the intent and purpose of the said circulars was to offer for sale non-strategic government owned houses to not only civil servants but also private individuals who may have previously acquired the houses through other means.

The sale included validation and regularization of illegally/irregularly alienated houses. This presupposed that individuals who had acquired the houses prior to the circulars had done so illegally or irregularly.

The material House No. HG 92 standing on Block No. 11/213 fell into this category.

Indeed, the second circular (P. Ex. 27) indicated that the house and the parcel of land were put up for sale for validation purposes. It was for this reason that the first plaintiff a limited liability company – accepted the offer by the Government of Kenya and paid a 10% deposit of the sale price.

The defendant had also accepted the offer on the basis that he was the civil servant occupying the house and was paying rent to the Government. The terms and conditions of the Government offer included the following:

“Where the house identified for sale remained intact but the occupant is a:-

**(a) Non civil servant, the allottee compensates the Government for the loss of rent, the cost of the building and market value of the land at the time of alienation plus interest on loss of capital.**

**(b) Civil servant who has been paying rent to the Government but the allocation was to a non civil servant, the Government to repossess the house and sell to the occupying civil servant.**

Despite the acceptances by both the first plaintiff and the defendant none of them is shown to have fully paid the purchase price for the material property. There was no consideration thereby invalidating the Government offer altogether. The payment of the 10% deposit of the sale price did not amount to consideration. Therefore, the remedy available to the plaintiffs and the defendant is to seek for a refund of the deposit from the Government of the Republic of Kenya.

It is apparent that the proposed sale of the material property Block No. 11/213 did not materialize and was a failure.

The defendant confirmed as much when he stated that the Government withdrew the proposed offer for the sale of its houses.

This would effectively mean that the defendant has no valid claim or defence against the plaintiff's claim of ownership of the material Block No. 11/213.

The plaintiff's leasehold interest on the said property was donated by the Government of the Republic of Kenya which is the lessor.

Any challenge to the plaintiff's claim of proprietary interest respecting the said Block No. 11/213 and the house erected thereon would come from the Government of the Republic of Kenya and no other person.

There is no evidence that the existing lease respecting the material Block No. 11/213 (P. Ex. 1) or even the leases respecting Block No. 11/155, Block No. 11/156 and Block No. 11/157 (P. Exs. 2, 3 & 4) have since been invalidated by the Government of Kenya nor that the material parcels of land including the house erected on Block No. 11/213 have since been repossessed by the same Government of Kenya. The

said leases are in favour of the plaintiffs herein and if the Government of Kenya treats and considers them illegal and/or irregularly acquired it would have demonstrated the fact by simply canceling and invalidating them. This, the Government of Kenya has not done. It has shown absolute lethargy and dis-interest in this matter. It was joined as a party to this suit on 2<sup>nd</sup> March 2006 upon its own request but did not file any statement of defence neither did it participate in these proceedings. Instead, its officers (PW2 and PW3) appeared in court and adduced evidence in favour of the plaintiffs.

Interestingly, the Government through the Honourable the Attorney General in its application to be joined as a defendant in this suit stated that the suit property has at all material times been Government property and is currently occupied by the defendant who is paying market rent to the Government and that the property is among other Government properties identified for re-possession/possession/recovery pursuant to the recommendation of the presidential commission on the recovery of illegally allocated Government lands and Houses.

Why make such a strong and far reaching statement yet fail to defend and validate it by committed participation in this suit??

It would seem that the Government by its conduct recognizes the plaintiff's ownership of the suit property. This also explains why no attempts have been made to formally invalidate the plaintiff's leasehold interest in the property. Indeed, the Government through its agents to date continues to receive necessary rents and rates from the plaintiff's (See P. Exs 22 & 23).

The rent payments deducted by the Government from the defendant's monthly salary would therefore be unjustified. If anything, the rent ought to be remitted to the first plaintiff or be refunded to the defendant.

Registration of an individual under the Registered Land Act

( RLA) (Cap 300 LOK) vests in the registered proprietor absolute and indefeasible title. This is the import of S. 27 and 28 of the RLA.

S. 27(b) of the RLA provides that:-

“The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

S.28 of the same Act provides that:-

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims

whatsoever -----.”

To date, the plaintiffs leasehold interest in the material parcels of land has not been lawfully declared or rendered defective and may not be regarded as being null and void. Indeed, this suit was instituted against the defendant prior to the issuance of the now obsolete Government circulars ( P. Ex. 24 & P. Ex. 27)

The suit was instituted on the 30<sup>th</sup> January 2006, and the defendant has been in occupation of the suit property since May 2005.

The leasehold certificates (P. Ex. 1 – 4) were issued in 1996 and 2003, thereby making the defendant a trespasser vis-a-vis the plaintiffs from the beginning of his occupation of the house erected on the

material Block 11/213. He stated in evidence that he has since been transferred from Kisumu to Turkana Central District but that the material house is currently occupied by his family. Invariably, he is required to vacate and surrender the house to the plaintiffs rather than the Government of Kenya which granted the still valid leasehold interest to the plaintiffs.

The defendant cannot maintain occupation of the house by “**remote control**” through his family unless with the consent of the plaintiffs. He has no valid defence against the plaintiff’s claim. Consequently, prayers (b) (c), (e) and (f) of the plaint dated 30<sup>th</sup> January 2006, are hereby granted in favour of the plaintiffs.

Vacant possession of the suit property be delivered by the defendant within seven (7) days from this date hereof failure which an order of eviction issues forthwith.

Those are the orders of this Court.

**J. R. KARANJA**

JUDGE

Delivered and signed this 16<sup>th</sup> day of January, 2009, in the presence of Mr. Orengo for the defendant and Mr. Otieno for plaintiff.

**J. R. KARANJA**

JUDGE

**16.1.2009**

Before J. R. Karanja – J.

**Court Clerk:** Laban.

**Mr. Otieno:** holding brief for Mr. Gadhia for plaintiffs.

**Mr. Orengo:** for defendant.

**J. R. KARANJA**

JUDGE

**Mr. Orengo:**

I apply for copies of proceedings and a certified copy of the judgment and order of this court with a view to appeal.

We would at this juncture apply for stay of execution pending the filing of a formal application.

**Mr. Otieno:**

I would object to the second request of stay pending appeal. defendant have 7 days within which they can make a formal application.

**J. R. KARANJA**

JUDGE

**Court:**

Copies of proceeding and judgment, be supplied to the defendant. Formal application for stay of execution pending appeal be filed by the defendant.

**J. R. KARANJA**

JUDGE

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