



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Civil Suit 244 of 2001**

**CHEGE MURAYA.....PLAINTIFF**

**VERSUS**

**REHEMA NOOR.....1<sup>ST</sup> DEFENDANT**

**ABDI MOHAMMED NOOR.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Chege Muraya**, the plaintiff in this suit instituted this suit against Rehema Noor and Mohammed Noor, the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. The defendants are also described as husband and wife. The plaintiff's claim is that he is the registered absolute proprietor of a piece of land comprised in Title Number Dundori Mugwathi Block 2/351 which borders the defendant's piece of land Dundori/Mugwathi Block 2/352. The plaintiff testified that the defendants were his neighbours; he was allotted the parcel of land as a shareholder of Kalenjin enterprises Limited. He contended that he joined the land buying company in the 1970's and bought shares at Ksh 1,500/= however he surrendered the share certificate so that he could be issued with a title, he produced the shareholder card and a rate demand note from County Council of Nakuru in respect the suit premises demanding for the payment of Ksh 53/= being the site value for the year 1991. The plaintiff was also issued with a title deed in 1985 but a restriction was registered by the land registrar until the ownership was determined.

The plaintiff complained that sometimes in 1995-1996, the defendants unlawfully, illegally and without any color of right or consent from the plaintiff trespassed on his land, fenced and ploughed. The defendants alleged that they were the owners of the land. The plaintiff denied that he obtained the title to the suit premises fraudulently. During cross-examination the plaintiff admitted that he had known the defendants for over 20 years and when he was shown the land, he found the defendants occupying their land. He was member No. 3316 in Kalenjin Enterprise. He was entitled to plot No. 728 which refers to a town plot at Ronda estate.

On further cross-examination, the plaintiff testified that he could not remember who issued him with the shareholders card or the person who showed him the land or when the company was started. He also did not have the receipt of Kshs 1,500/=. The plaintiff also denied having received any letter from the District Land Registrar regarding the issuance of the title.

On the part of the defence, the defendants denied the plaintiff's claim and filed a counterclaim. It was the defendant's counterclaim that that the plaintiff misrepresented to the land Registrar that there was no other beneficial owner of the land. The plaintiff ought to have known or knew that the suit premises was always occupied and allotted to the 2<sup>nd</sup> defendant's late father. It was the defendants' contention that the title was issued to the plaintiff through fraud, misrepresentation or by mistake. In support of the defence and counterclaim the 1<sup>st</sup> defendant's gave evidence and relied on the evidence of three other witnesses.

According to Rehema Noor, 1<sup>st</sup> defendant, Plot No. Dundori/Mugwathi Block 351 (*suit premises*) and Dundori/Mugwathi Block 352] all belonged to her father in law the late Mzee Ahmed Amin Farah. Ahmed Amin Farah was a shareholder of the Kalenjin Enterprises; he transferred his share to the 2<sup>nd</sup> defendant before he passed away. Snr. Chief Moses Mirigo DW5 witnessed when the late Mzee Farah transferred his share holding in the company to his son. The 2<sup>nd</sup> defendant obtained a limited grant of letters of administration and filed the present counterclaim.

DW1 testified that her father-in-law was a shareholder of Kalenjin Enterprises. However the original share certificate and receipts got lost and the matter was reported to the police as per the police abstract form which she produced as an exhibit. The defendants started living on the suit premises from 1971; they denied that they trespassed upon the plaintiff's land that never entered the land. When the defendants' realized the title of the land they had all along been occupying was issued to the plaintiff, they lodged a complaint with the lands office, the District Land Registrar noticed the mistake and wrote a letter to the plaintiff requesting him to surrender the title which was issued by mistake so that it could be rectified. DW1 further testified that she was paying rates as per the rates receipts produced as exhibits from 1971. It was the defendants' case that the plaintiff's claim over the suit land is without basis.

The defence also relied on the evidence of Susan Warring Mosheim (DW2) the District Land Registrar, Nakuru. According to the records at the lands office, the suit premise is registered in the name of the plaintiff. The land originally belonged to a land buying company known as Rift Valley Enterprises Koilel farm. The titles were prepared pursuant to a list of members which the Directors of the company furnished to the lands office.

**Elijah Chelaite, DW3** a Director of the land buying company called the Kalenjin Enterprise also known as Rift Valley Enterprises also testified in support of the defendant's case. He confirmed that plot No. 351 was allocated to the defendant's father Ahmed Amin Farah who paid for the membership, was issued with a share certificate which he certified as a true copy of the original after the original had been reported lost. This witness also produced the survey receipts and the list of members in 1996 which he said he prepared when he was the secretary of the company and a member of a task force appointed to verify the genuine allottees of the company land. According to DW3 the plaintiff was given a fake title because he was not a member of the Kalenjin Enterprises Ltd. The membership of the company was by people from the Kalenjin tribe and there was no way the plaintiff could have been a member he being of a Kikuyu tribe. The Kikuyu's who became members bought shares from the original owners who were Kalenjins.

**Mukuria Ngethi, DW4** testified that he acquired a parcel of land No. Dundori/Mugwathi Block 2/344 which borders the suit premises in 1982. He exchanged this parcel of land with one Kimayu Pius and he found Mzee Farah the father of the defendants and his family occupying this parcel of land. Since he moved to this area he confirmed that the defendants have been in occupation of the suit premises.

Both parties filed written submissions which I have taken into consideration. The issue for determination is whether the order of eviction sought against the defendants should be granted and whether the defendants have been able to prove their counterclaim. According to counsel for the plaintiff, the plaintiff is the registered proprietor of the suit premises, he is the first owner and the effect of first registration accords the plaintiff absolute proprietorship. See **Section 32(2), Section 27 and 28** of the **Registered Lands Act** which provide that the certificate of title is prima facie evidence of ownership and the registration vests upon the proprietor, absolute ownership which cannot be defeated except as provided for in the Act by way of overriding interests.

The defendant's case is based on the allegation that the plaintiffs fraudulently obtained the title, through misrepresentation and a mistake by the registrar of lands. It is not in dispute that the plaintiff has never taken possession of the suit premises. The defendants have been in possession since 1971. The plaintiff claims to have purchased shares from the Kalenjin Enterprises Limited the land buying company which allocated the land to their shareholders. However the plaintiff's evidence as to how he purchased the shares and the payment receipts was less than candid.

DW3, a former secretary of a task force of Kalenjin Enterprises and a current Director testified that the plaintiff was allocated the suit premises by mistake; the shareholders were originally from the Kalenjin tribe and those other communities who purchased shares did so from the original shareholders. This line of evidence gives credence to the allegation that the plaintiff's title was probably obtained by fraud. Even if I may be wrong on this finding, the defendants have been on the suit premises from 1971; the title to the land was issued in 1991, when the defendants were in occupation. By the time the title was issued there were overriding interests as provided for under **Section 30 of the Registered Lands Act (Cap 300)** which provides as follows:

***“unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same without their being noted on the register – (a) ... (g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where enquiry is made of such person and the rights are not disclosed.”***

The defendants tried to rectify the anomalies through the registrar of titles who tried to recall the title for correction. They also filled a caution on the title to restrict any dealings on the land until the dispute is settled. It follows that the defendants who have always been in occupation of this premises and were able to prove their father bought shares and was the recognised shareholder by the land buying company are the rightful owners of the suit premises. If the registrar of lands conducted an enquiry over the land before registering the title in the name of the plaintiff the interests of the defendants would have been noted. The registrar of lands noted the mistake but too late in the day after the title had been issued. In this regard, I find that the plaintiff's claim despite being the absolute and prima facie owner, the claim fails for reasons that the title was not obtained according to the law. It was issued through a mistake.

The defendant's counterclaim succeeds and the 2<sup>nd</sup> defendant is hereby declared the registered owner of Dundori Mugwathi Block 2/351. The registration of Chege Muraya as the owner of Dundori/Mugwathi Block 2/351 to be cancelled.

Due the nature of this litigation each party shall bear their own costs of this litigation.

It is so ordered.

**Judgment read and signed on this 9<sup>th</sup> day of May 2008**

**M. KOOME**

**JUDGE**