



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

Civil Suit 373 of 2001

THE GOAN INSTITUTE NAKURU *Suing by its Trustees*

MR. MANHARLAL C. DESAI.....
.....1ST PLAINTIFF

MR. HIMATHLAL M. BHATT.....
.....2ND PLAINTIFF

MR. GURMIT SINGH KONDOLA.....
.....3RD PLAINTIFF

VERSUS

SAID ABDALLA AZUBEDI.....
.....DEFENDANT

JUDGMENT

By an amended plaint dated the 23rd November 2001, the trustees of the Goan Institute Nakuru filed suit against the defendant seeking several orders of this court. They sought a declaration that the suit property formerly known as **L.R. No.451/1298 Nakuru Municipality** and now known as **Nakuru Municipality Block 10/197** (*hereinafter referred to as the suit land*) is the rightful property of the institute and a further declaration that in any event the institute's vested interest in the suit property amounted to an overriding interest. The plaintiff sought a further declaration that the title in respect of the suit land which was issued to the defendant is null and void having been purchased from parties without any legitimate vested proprietary interest in the suit land. The plaintiff further prayed to be awarded general damages against the defendant for trespass. The plaintiff finally sought a permanent injunction to restrain the defendant from interfering with the plaintiff's ownership of the said suit land. The plaintiff prayed for costs of the suit.

The basis of the plaintiff's suit was laid out in a 27 paragraph amended plaint. The plaintiff claimed that it was the registered owner of the suit land having been issued a grant in respect of the same by the government. The plaintiff averred that between the years 1976 and 1979, it was approached by the Municipal Council of Nakuru and the Nakuru KANU Branch to cede part of the suit property for the purposes of the construction of a wholesale market for small scale entrepreneurs and for the purpose of construction of Nakuru District KANU Headquarters. The plaintiff stated that it acceded to the request and on the basis of a clear subdivision scheme, the plaintiff was to retain approximately 1.3 acres out of the original 5.17 acres. The said 1.3 acres would constitute the portion which the institute's buildings and club house was situated. The plaintiff averred that at that time its lease in respect of the suit land had expired and had not been extended by the Commissioner of Lands. The plaintiff averred that it was

surprised thereafter when it learnt that the suit land had been subdivided into two portions to be owned by the Municipal Council of Nakuru and KANU without putting into consideration the agreement that required the said parcel of land to be subdivided into three portions. The plaintiff averred that KANU purported to sell its portion, which included the plaintiff's club house, to the defendant. The defendant had therefore threatened to evict the plaintiff from the suit land hence the plaintiff's decision to bring the current suit before court.

When the defendant was served, he filed a defence and a counter-claim against the plaintiff. The defendant denied that having knowledge of any proprietary interest that the plaintiff could have had over the said part of the suit land. The defendant averred that he was the registered owner of the suit land having purchased the same for valuable consideration without any notice of the plaintiff's claim. The defendant averred that the plaintiff did not have any proprietary rights over the suit land because the lease issued to it by the Commissioner of Lands had expired before the said parcel of land was subdivided and later transferred to the defendant. The defendant stated he was registered as the owner of the suit land after the High Court had issued a decree declaring him to be the owner of the said suit land. He therefore counter-claimed for orders of this court against the plaintiff to have the plaintiff evicted from the suit land and further prayed for general damages for trespass. The defendant further prayed to be paid a sum of Ksh.200,000/= per month being loss of income from the date of filing suit to the date of judgment. The defendant finally prayed for an order of permanent injunction to restrain the plaintiff from occupying, encroaching, or trespassing into the said suit land. The defendant prayed for the plaintiff's suit to be dismissed with costs and for the counter-claim to be allowed with costs. The plaintiff filed a reply to the defence and a defence to the counter-claim. The plaintiff reiterated the contents of its plaint and denied the claim of the defendant as contained in his counter-claim.

At the hearing of the suit, the plaintiff called three witnesses in support of its case. The said three witnesses were PW1 Barbir Singh Kondola, PW2 Stephen Maina Mwangi and PW3 Gordon Odeka Ochieng'. It was the plaintiff's case that it was the registered owner of the suit land. PW1 testified that the suit land was allocated to it by the colonial government. The colonial government issued a lease in respect of the suit land which was then known as L.R. No.451/1298. The said parcel of land measured 5.17 acres. A certificate of lease was issued to the registered trustees of the plaintiff in 1963 which granted the plaintiff a lease in respect of the said parcel of land for a period of 15 years. The said certificate of lease was produced as *plaintiff's exhibit No.1*. It was the plaintiff's case that one year before the lease expired, it applied for extension of the said lease. However from the copies of the correspondence file kept by the Commissioner of Lands (*produced as plaintiff's exhibit No.20*), it is apparent that the said lease was not renewed. One of the reasons why the said lease was not extended was because the Municipal Council of Nakuru objected to the said extension of lease because it was interested in acquiring a portion of the said parcel of land for the purposes of constructing a wholesale market for small scale entrepreneurs. The Commissioner of Lands communicated to the plaintiff and informed the plaintiff that its application for the extension of the lease was under consideration.

It was the plaintiff's case that when it realised that the lease had expired and it had yet to receive a positive response from the Commissioner of Lands, it approached the former President with a view of having at least the portion where its club house stood secured. The trustees of the plaintiff acceded to the request by the Municipal Council of Nakuru to surrender a portion of the said parcel of land measuring 2.57 acres for the purposes of the construction of the wholesale market. It further acceded to the request made by the Nakuru District KANU Branch to surrender a portion measuring 1.3 acres for the purposes of the construction of the Nakuru District KANU Headquarters. It was the plaintiff's case that it requested the former President to allow it to retain a portion measuring 1.3 acres where the club house stood. PW1 testified that the request by the plaintiff was acceded to. However, it was apparent that when the time came for the said parcel of land to be subdivided, instead of it being subdivided into three portions as proposed by the plaintiff, it was subdivided into two portions.

Although the plaintiff had not surrendered the lease, it was apparent that the Commissioner of Lands ordered the suit land to be subdivided on the basis that the said parcel of land was unsurveyed. It is pursuant to the said subdivision, that two parcels of land namely; Nakuru Municipality Block 10/197 and Nakuru Municipality Block 10/198 were registered. There is no dispute as regard Nakuru Municipality

Block 10/198. This is because the said parcel of land was transferred to the Municipal Council of Nakuru. It was the plaintiff's case that parcel No. Nakuru Municipality Block 10/197 ought to have been divided into two portions belonging to the plaintiff and KANU but instead it was registered in one portion in the name of KANU. It was the plaintiff's case that KANU was aware of its interest in the said parcel of land, particularly the portion where the club house had been erected. The plaintiff testified that during the period that KANU was in possession of its portion of land, it never interfered with the plaintiff's ownership of the portion of land where the club house is situated.

It is only when the defendant purchased the said parcel of land that formerly belonged to KANU, that he started claiming the portion of land where the plaintiff's club house is situated. It is the plaintiff's case that the defendant has no right to claim the said portion of land where the club house is situated because from the time the title in respect of the said parcel of land was issued, it was understood that the club house and the parcel of land around it would belong to the plaintiff. The plaintiff produced 20 exhibits in support of its case. An important aspect of its case is that the plaintiff alleged that the subdivision that led to the creation of parcel No. Nakuru Municipality Block 10/197 was manipulated so that its interest on the portion of land where the club house is situated was not taken into consideration. The plaintiff adduced evidence to the effect that when the parcels of land within Nakuru Municipality became registered under the Registered Land Act, the parcel of land which was formerly known as L.R. No. 451/1298 became known as Nakuru Municipality Block 10/37. The plaintiff produced the green card in respect of the said parcel of land which indicated that parcel No. Nakuru Municipality Block 10/37 is still registered in the name of the Government of Kenya

plaintiff further adduced evidence to the effect that it had paid land rates and land rent in respect of the suit land upto date. The plaintiff reiterated that it was entitled to a declaration of this court that it is the owner of the said portion of land where its club house is situated. The plaintiff reiterated that the defendant had no right over the said portion of land where its club house is situated. The plaintiff urged this court to allow the prayers sought in its plaint together with costs.

The defendant called three witnesses in support of its case. The defendant testified as DW1. He called two other witnesses, namely; DW2 Lazarus Paul Wambua and DW3 John Warui Theuri. It was the defendant's case that he was a purchaser for value without notice. The defendant testified that he purchased the suit land from Alice Bomet and Mrs. Rahab Wanjiru Evans who are the registered owners of the said parcel of land. The defendant testified that he entered three separate agreements for the purchase of the said parcel of land. The defendant produced the said agreements as defence exhibits in this case (*See exhibit No.2 (b), exhibit No.5 an exhibit No.1*). He testified that he paid the purchase consideration in full for the said parcel of land. The defendant testified that he was aware that the said parcel of land was previously owned by KANU before the same was transferred to Mrs. Rahab Wanjiru Evans and Alice Bomet.

DW2 Lazarus Paul Wambua testified that he was the executive officer of KANU. He recalled that the suit property was allocated to KANU but was later sold to Mrs. Rahab Wanjiru Evans and Alice Bomet when KANU purchased another property which it converted to be its Nakuru District Headquarters. The defendant testified that after he had purchased the said parcel of land, he realised that there were many illegal occupants on the said parcel of land. He consequently filed **Nakuru HCCC. No.307 of 2001 Said Abdalla Azubedi vs George Ngoiya & 305 others** seeking to have the said defendants evicted from the suit land (*See defendant's exhibit No.7*). He recalled that the High Court at Nakuru granted him an eviction order which enabled him to evict the said defendants from the suit land. He testified that he did not sue the plaintiff because all along the plaintiff had assured him that it would pay him rent for the portion of land that it was occupying. The defendant testified that contrary to the agreement, the plaintiff failed to pay any rent to him hence his decision to seek to have the plaintiff evicted from the suit land.

It was the defendant's case that the plaintiff did not have any legally recognizable claim over the portion of the suit land where its club house is situated. The defendant testified that after he had executed the agreement with Mrs. Rahab Wanjiru Evans and Alice Bomet, the two failed to transfer the suit land to him. He consequently filed **Nakuru HCCC. No.44 of 1999, Said Abdalla Azubedi vs Rahab Wanjiru & Alice Bomet** seeking the orders of the court to have the said parcel of land transferred to him. He

testified that by a judgment dated 11th May 2001, Rimita J, found in his favour and ordered the suit land transferred to him (*See defence exhibit No.4 being copy of the judgment*). The defendant was subsequently registered as the owner of the suit land (*Certificate of lease produced as defendant's exhibit No.5*). It was the defendant's case that the plaintiff's lease had expired and therefore it had no claim over the suit land. The defendant urged this court to dismiss the plaintiff's suit with costs and grant him the prayers, *inter alia*, of eviction as sought in his counter-claim. He further prayed for the costs of the suit.

After the close of both the plaintiff's and the defendant's case, the parties agreed by consent to file closing written submissions. By the time this court reserved this case for judgment, it is only the defendant who had filed his written closing submissions. I have read the pleadings filed by the parties to this case in support of their respective cases. I have also carefully considered the evidence, including the documentary evidence, that was adduced by the parties to this suit. I have also considered the written submissions filed by the defendant including the two cases that the defendant relied on in support of his closing submissions. The issues for determination by this court are as follows:-

- (i) Who is the legal owner of the parcel of land now registered as Nakuru Municipality Block 10/197 (formerly part of L.R.No.451/1298)?
- (ii) Was the process under which the said title in respect of Nakuru Municipality Block 10/197 issued tainted by illegality?
- (iii) Does the plaintiff have a right recognised by the law over the portion of land where its club house is situated within the suit land?
- (iv) Was the suit land lawfully transferred and registered in the name of the defendant?
- (v) What are the appropriate orders that would issue in the circumstances of this case?

The facts of this case are more or less not in dispute. It is not disputed that the plaintiff was granted a lease in respect of part of the suit land by the colonial government which lease was renewed from time to time until the 1st July 1963 when the said lease was extended for a further period of 15 years. The said lease was in respect of parcel No.L.R.No.451/1298 measuring 5.17 acres within the Municipality of Nakuru. The registered trustees of the plaintiff were issued with a certificate of lease under the **Registration of Titles Act**. A copy of the said lease was produced by PW1 as *plaintiff's exhibit No.1*. The said lease was to expire in 1978. One year before the said lease expired, the plaintiff applied to the Commissioner of Lands for the period of the said lease to be extended. According to the correspondences that appear in the file kept by the Commissioner of Lands in respect of the suit land and copies of which were produced as plaintiff's exhibit No.20, the Municipal Council of Nakuru objected to the plaintiff being granted extension of lease because the said council was interested in a portion of the suit land to develop a wholesale market. Due to the objection by the Municipal Council of Nakuru, the said lease expired before it was renewed.

This court's analysis of the evidence adduced in this case indicates that the trustees of the plaintiff were aware that the lease in respect of the suit land had expired and therefore the plaintiff's ownership of the suit land was in a legally precarious position. The plaintiff through its trustees approached the former President with a view of seeking his assistance to get the legal ownership documents in respect of the portion of land where the club house is situated. The trustees of the plaintiff were prepared to surrender a substantial portion of the suit land to the Municipal Council of Nakuru and to the then ruling political party, KANU. According to the correspondences contained in the *plaintiff's exhibit No.20* and also according to the testimony of PW1 Barbir Singh Kondola, it was agreed that the suit land would be subdivided into three parcels of land measuring 2.57 acres, 1.3 acres and 1.3 acres respectively. The portion of land measuring 2.57 acres was to be transferred to the Municipal Council of Nakuru for the purposes of setting up a wholesale market. A portion measuring 1.3 acres was to be registered in the name of the Nakuru District KANU Branch for the purposes of constructing the Nakuru District KANU Headquarters. However, it was apparent that when it came to implementing the said agreement between the plaintiff on the one hand and the Municipal Council of Nakuru and KANU on the other hand, the

plaintiff was locked out. Instead of the said parcel of land being subdivided into three portions, it was subdivided into two portions.

At the time when the subdivision was being effected, the register in respect of the parcels of land within the Municipality of Nakuru was being converted from the **Registration of Titles Act** to the regime under the **Registered Land Act**. The two parcels of land which resulted from the subdivision of the parcel of land which was formerly registered as L.R.No.451/1298 were registered as parcels No.Nakuru Municipality Block 10/197 and 198 respectively. Parcel No.Nakuru Municipality Block 10/198 was transferred to the Municipal Council of Nakuru while parcel No.Nakuru Municipality Block 10/197 was transferred to KANU Nakuru Branch. Within the portion of land which was transferred to KANU was situated the club house of the plaintiff. The plaintiff and KANU co-existed peacefully according to the testimony of DW2 Lazarus Paul Wambua, the executive officer of KANU, Nakuru District Branch.

The said parcel of land was sold and transferred to Rahab Wanjiru Evans and Alice Bomet by KANU when KANU required funds to purchase a building within the Municipality of Nakuru. It was Rahab Wanjiru Evans and Alice Bomet who subsequently sold the said parcel of land to the defendant. The defendant has established on a balance of probabilities that he purchased the said parcel of land for valuable consideration without notice of what had earlier transpired in respect of the suit land. The defendant produced three agreements which clearly proved that the defendant purchased the said parcel of land from the said Rahab Wanjiru Evans and Alice Bomet for valuable consideration.

According to the evidence adduced in this case, it is clear that during the period that the said parcel of land was owned by KANU and by Rahab Wanjiru Evans and Alice Bomet, the plaintiff peacefully occupied the portion on the land where its club house is situated. The other portion was occupied by squatters and other illegal occupants. When the defendant purchased the said parcel of land, he filed suit before this court and sought the eviction of the 306 illegal occupants. This court granted the plaintiff the eviction orders in **Nakuru HCCC No.307 of 2001, Said Abdalla Azubedi vs George Ngoiya & 305 others**. The said illegal occupants were duly evicted from the suit land. Rahab Wanjiru Evans and Alice Bomet failed to transfer the suit land to the defendant. The defendant filed **Nakuru HCCC No.44 of 1999, Said Abdalla Azubedi vs Rahab Wanjiru & Alice Bomet**. One of the prayers sought by the defendant in the said suit was a declaratory order of the court that he was the rightful owner of the parcel of land Nakuru Municipality Block 10/197. By the judgment dated the 11th May 2001, Rimita J, granted all the prayers sought by the plaintiff in his plaint. The court declared the defendant in this case to be the legal owner of the suit land. It further gave orders for the said parcel of land to be registered in the name of the defendant. There was no appeal filed against the said decision of Rimita J.

After the defendant had acquired the said parcel of land, he sought to have the plaintiff pay rent to him in respect of the portion of land occupied by the club house. The plaintiff was however unwilling to pay any rent in respect of the portion of land that it occupied. It was the plaintiff's contention that it was the legal owner of the portion of land occupied by its club house.

Having carefully considered and analysed the evidence adduced by the parties to this case, it is clear that the issues in dispute in this case shall be determined on the basis of documentary evidence. It is evident to this court that the plaintiff has failed to establish to the required standard of proof on a balance of probabilities that it has proprietary interest on the said parcel of land which is recognised by the law. It is evident that although the plaintiff occupied the suit land on the basis of a lease which was issued to it by the Commissioner of Lands under the **Registration of Titles Act**, the said lease expired on the 30th June 1978. The lease was not renewed. The said parcel of land reverted back to the government of Kenya. The government later allocated the said parcel of land to the Municipal Council of Nakuru and the then ruling party KANU.

Although the plaintiff has presented to this court facts which establish that the process under which the said parcel of land was subdivided to the Municipal Council of Nakuru and KANU was manipulated so that the plaintiff would be excluded from ownership of the portion of land that it is claiming, I do hold that the plaintiff made no legal effort to enforce its rights. It is clear from special condition 10 annexed to the certificate of lease which was granted to the plaintiff and which was produced as *plaintiff's exhibit*

No.1 that in the event that the government failed to renew the said lease, the plaintiff was entitled to be paid a fair and reasonable compensation for any permanent improvement effected on the land. The plaintiff made no such claim for compensation despite of the fact that it was aware that the suit land had been subdivided and transferred respectively to KANU and the Municipal Council of Nakuru.

The plaintiff called upon this court to declare that it is entitled to the portion of land where its club house is currently situated. However this court cannot grant the said prayer sought by the plaintiff because such an order could only be issued if the Commissioner of Lands and the beneficiaries of the subdivision of the suit land had been enjoined as parties to this suit. To call upon this court to make such a declaration against the defendant who was an innocent purchaser for value without notice would be stretching the concept of legal liability too far. It is apparent to this court that the plaintiff was lulled into a false sense of security as regard its occupation of part of the suit land where its club house is situated when KANU and subsequently thereafter Rahab Wanjiru Evans and Alice Bomet were the owners of the said parcel of land.

When the defendant sought to assert his proprietary rights over the suit land, that is the time that the plaintiff woke up to the realisation that it was living in a fool's paradise as regards its rights of occupation of the suit land. It is clear to this court that all the time that the plaintiff has been in occupation of the suit land, It has been occupying the same as the licensees of the registered owners. The position that plaintiff finds itself in is similar to the position that the appellant found himself in the case of **Faraj Maharus vs. J.B Martin Glass Industries & 3 others CA Civil Appeal No.130 of 2003 (Mombasa) (Unreported)**. In that case, the Court of Appeal held that the only recognised procedure under which the government can allocate land is the procedure that is provided for under the **Government Lands Act**. The court further held that a litigant can only succeed in enforcing a right to ownership of land if he has a title recognised by the law. In the present case, the plaintiff has no title to the suit land. The suit land is registered in the name of the defendant.

Taking into consideration the totality of the evidence adduced in this case, it is clear that the suit filed by the plaintiff will of necessity fail. I therefore find that the plaintiff has failed to prove its case against the defendant as regard the ownership of the suit land to the required standard of proof on a balance of probability. The plaintiff's suit is therefore hereby dismissed with costs. As to the counter-claim of the defendant, I hereby hold that, as the registered owner of the suit land, the defendant is entitled to exercise his right of ownership which includes, inter alia, the right to occupy the same. I therefore grant the prayers sought by the defendant in his counter claim against the plaintiff. I hereby issue a permanent injunction restraining the plaintiff from occupying, encroaching or trespassing into the suit land i.e. the parcel of land known as Nakuru Municipality Block 10/197. The plaintiff is hereby ordered to give vacant possession of the suit land to the defendant within ninety (90) days of today's date in default thereof the defendant shall be at liberty to evict the plaintiff from the suit land. The defendant did not establish to the required standard of proof on a balance of probabilities his claim that he should be paid general damages for trespass and loss of income. I will therefore disallow the said prayers in his counter-claim. The defendant shall have the costs of the counter-claim.

It is so ordered.

DATED at NAKURU this 29th June, 2007.

L. KIMARU

JUDGE