

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 324 OF 1996

BEATRICE YAGAN.....PLAINTIFF

VERSUS

JOSEPH YATOR.....DEFENDANT

JUDGMENT

The plaintiff, Beatrice Yagan filed suit against the defendant, Joseph Yator seeking an order of this court to be declared the owner of parcel No. **Nakuru Municipality/ Block 10/185** on which is situate **House No.MG/45** (*hereinafter referred to as the suit land*). The plaintiff further prayed for an order of permanent injunction to restrain the defendant from, *inter alia*, interfering with her quiet possession of the suit land. She further prayed for an order for the defendant to be evicted from the suit land. She further prayed for the demolition of any structure that the defendant erected. When the defendant was served, he entered appearance and filed a defence and a counterclaim. He denied the plaintiff's claim as averred in her plaint. He deponed that he had purchased the suit land from the government in 1993 together with all the fixtures thereon. He deponed that he was now the registered owner of the suit premises and therefore the plaintiff did not have any legally recognizable claim over the suit land. He counterclaimed for an order of eviction of the plaintiff from the suit land. He deponed that the plaintiff, who had occupied the suit land pursuant to her employment, had refused to give vacant possession to the defendant once the suit land was transferred to him. He therefore prayed for an order of eviction of the plaintiff from the suit land. Both the plaintiff and the defendant prayed to be awarded costs in the event that the suit would be determined in their respective favour. The plaintiff did not however file a defence to the counterclaim.

This suit was on various dates listed for hearing. On the 21st September 2000 the plaintiff's suit was dismissed with costs by Ondeyo J. This was after the plaintiff had taken the witness stand but refused to testify. The plaintiff made an application to have the said order of dismissal reviewed. The application was however dismissed by this court on the 3rd August 2005. On the 26th November 2007, this court proceeded with the hearing of the defendant's case on his counterclaim. The defendant testified that he had been allocated the suit land by the government in 1993. He produced the letter of allotment *defendant's exhibit No.1*. He stated that he fulfilled all the terms of allotment including paying all the requisite fees that was required of him by the government. After completion of the payment of all the requisite amounts, the defendant was issued with a title in respect of the suit land on the 25th November 1993. He produced the title as *defendant's exhibit No.2*. He had been paying land rents in respect of the suit property since being allocated the same (*land rents receipts produced as defendant's exhibit No.3*).

The defendant testified that he was residing on one part of the suit land where he had constructed a storey building. He is residing in the said house. He testified that the said building cost him Ksh.10 Million to construct. The other part of the suit land was occupied by the plaintiff who had refused to give vacant possession to the defendant. The defendant prayed that the plaintiff be ordered to give vacant possession of the suit land or alternatively be evicted therefrom. The defendant reiterated that the process under which he was allocated the suit land by the government was above board. He testified that although he was aware at the time that the plaintiff was in occupation of the house in the suit land (*the plaintiff was a civil servant at the time*), he maintained that he was allocated the suit land transparently.

The defendant testified that he had complied with all the legal requirements pursuant to the said allotment. He explained that he had filed the present suit to secure the eviction of the plaintiff after the plaintiff had failed to give vacant possession of the suit land. He testified that he did not have any

documents to support his claim that he had expended the sum of Ksh.10 Million in developing the said plot. He recalled that the plaintiff had attempted to stop him from constructing the residential house that he is currently occupying, but the court refused to grant the plaintiff the order of injunction that she had sought. The defendant testified that the plaintiff was no longer a civil servant and was therefore no longer entitled to occupy the house in the suit land on the basis of her employment. He reiterated that the government had not, at any time, questioned his ownership of the suit land. He prayed for judgment to be entered in his favour as prayed in his counterclaim. He also prayed for the costs of the suit. The plaintiff did not offer any evidence and closed her case without adducing any evidence.

I have read the pleadings filed by the parties to this case. As stated earlier in this judgment, the plaintiff did not file a defence to the counterclaim by the defendant. The defendant's counterclaim was therefore unopposed. The issues for determination by this court are two fold; firstly, who is the owner of the suit land and secondly, whether the defendant established his case to the required standard of proof on a balance of probabilities that he is entitled to the order of eviction sought in his counterclaim. The defendant adduced uncontroverted evidence which established that he was the registered owner of the suit land. He produced the certificate of lease in respect of the suit land *i.e.* **Nakuru Municipality/ Block 10/185** as *defendant's exhibit No.2*. The said certificate of lease was issued to the defendant on the 25th November 1993. There is no encumbrance noted in the encumbrance section of the said certificate of lease. The said certificate of lease was issued under the **Registered Land Act**. The defendant is the first registered owner of the suit land. **Under Section 27 and 28 of the Registered Land Act**, a title issued on first registration under the **Registered Land Act** cannot be challenged (*See **Esiroyo vs Esiroyo & Anor. [1973] EA388***). The plaintiff's challenge to the defendant's ownership of the suit land fizzled out when her suit against the defendant was dismissed by the court in the year 2000.

The plaintiff failed to establish that she has a legally recognizable right on the suit land. On his part, apart from establishing that he is the registered owner of the suit land, the defendant established that he has been in occupation of one part of the suit land since taking possession of the suit land. The plaintiff has however refused to give vacant possession of the part of the suit land that she is currently occupying. There is no legal reason to prevent the defendant from enjoying all rights appurtenant to his ownership of the suit land, including having quiet possession and occupation of the suit land. As was held by the Court of Appeal in **Jaj Super Power Cash and Carry Ltd vs Nairobi City Council & 2 others Civil Appeal No.111 of 2002 (unreported)** at page 8 of its judgment:

“It would be a violent affront to our land tenure systems, with all their perceived imperfections, unless there is a lawful challenge to an existing Title or a policy-change by parliament, to uphold the rights of a temporary allottee of land or a trespasser, over those of a registered proprietor. This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it – see Aikman vs Muchoki [1984] KLR 353, Kamau Mucuha vs The Ripples Ltd (Appl. Nai 186/92 (Ur).”

In the present case, although it appeared that the plaintiff questioned the manner in which the defendant was allocated the suit land, once the defendant was issued with the title in respect of the suit land, the said parcel of land was no longer available to be allocated to the plaintiff. The defendant established, to the required standard of proof on a balance of probabilities, that the correct procedure laid down by the law was followed when he was allocated the suit land. The fact that he was issued with the certificate of lease in respect of the suit land established the defendant as the lawful owner thereof.

In the premises therefore, I hold that the defendant established his case as pleaded in his counterclaim. Judgment is entered in his favour against the plaintiff. The plaintiff is hereby ordered to give vacant possession of the portion of the suit land that she is currently in occupation within forty five (45) days of today's date, or in default thereof the defendant shall be at liberty to secure her eviction without further reference to the court. The defendant shall have the costs of the counterclaim.

DATED at NAKURU this 14th day of December 2007

L. KIMARU

JUDGE