

REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 55 OF 2005

EUSTACE WANJOHI NDUGO.....PLAINTIFF

VERSUS

MOSES KAIGANIRA WAINAINA.....DEFENDANT

JUDGMENT

The plaintiff, Eustace Wanjohi Ndugo filed suit against the defendant, Moses Kaiganira Wainaina seeking a declaration of this court to declare him to be the owner of parcel No.**LR.Solai/Arutani/Block 1/66 (Marigu A)** (*hereinafter referred to as the suit land*). He further prayed for a permanent injunction to restrain the defendant by himself, his servant or agents from entering, ploughing, planting or in any other way interfering with the plaintiff's ownership of the suit land. He further prayed to be awarded costs of the suit. When the defendant was served, he entered appearance but did not file a defence. The plaintiff did not however apply for interlocutory judgment to be entered against the defendant. The plaintiff instead chooses to fix the case for hearing. This was after he had concluded discovery on his part.

The plaintiff fixed this case for hearing on the 20th July 2007. The plaintiff served the counsel for the defendant on the 21st September 2007. The defendant's counsel accepted service without any reservations. On the 26th November 2006, when this case was scheduled for hearing, neither the defendant nor his counsel attended the hearing. This court was satisfied that the defendant was properly served. It ordered the plaintiff to proceed with his case, the absence of the defendant notwithstanding.

The plaintiff testified as PW1. He testified that he was allocated the suit land by Marigu farmers Co. Ltd. He testified that he was a former director of Marigu farmers, which was incorporated for the purposes of assisting its members acquire land. He testified that members were required to pay various sums to enable them acquire shares which was later to be translated into land. The plaintiff produced a bundle of receipts as *plaintiff's exhibit No.1*. He testified that he was issued with a share certificate on the 7th January 1989. The share certificate was produced as *plaintiff's exhibit No.2*. It was his testimony that he did not ballot for the land but was allocated the suit parcel of land on the 9th April 2002. He was subsequently issued with the title in respect of the suit land.

The plaintiff recalled that when he checked the register in respect of the suit land at the Lands Office, he realised that the defendant had put a caution on his title. He complained to the Land Registrar. The Registrar notified the defendant that he would remove the caution if the defendant did not show cause why the said caution should remain in the register. The defendant did not respond. The caution was lifted. The plaintiff explained that the defendant had cautioned the title of the suit land after making a representation that there existed a dispute in respect of the suit land pending at the tribunal. He maintained that no such case had been filed or was pending before the land disputes tribunal.

The plaintiff testified that from the year 2002 to the year 2006 the defendant had been in occupation of the suit land. However, in the year 2007, he took possession of the suit land. He reiterated that he had no dispute with the company over the ownership of the suit land. He insisted that he was the lawful allottee of the suit land. He recalled that the defendant had complained to the Marigu Farmers Co. Ltd on his ownership of the suit land. The dispute was however resolved by the company in his favour. The plaintiff urged the court to declare him as the owner lawful of the suit land. He further prayed for an order of this

court to permanently restrain the defendant from entering or occupying the suit land. He prayed to be awarded costs of the suit.

I have read the pleadings filed by the parties to this suit. As stated earlier in this judgment, the defendant failed to appear in court on the day that this case was scheduled for hearing. This court ordered the plaintiff to proceed with this case in the absence of the defendant. The plaintiff offered uncontroverted evidence which established that he was the registered owner of the suit parcel of land *i.e.* **Solai/Arutani Block 1/166 (Marigu A)** measuring 0.3380 Hectares. The plaintiff was so registered on the 3rd March 2005. He produced the title in respect of the suit land as *plaintiff's exhibit No.3*. The plaintiff explained how he was allocated the suit land by the Marigu Farmers Co. Ltd pursuant to the shares that he had purchased from the said land buying company as far back as 1973. He produced receipts and a share certificate which established that he was indeed a member of the said land buying company.

The issue for determination by this court is whether the plaintiff established, to the required standard of proof on a balance of probabilities, that he is the owner of the suit land. It was apparent that the defendant challenged the ownership of the plaintiff of the suit land on the basis that the plaintiff had been allocated another parcel of land, other than the suit land, by Marigu Farmers Co. Ltd. The defendant spurned the opportunity offered to him by this civil proceeding to establish his claim. The plaintiff's assertion that he is the legally recognized owner of the suit land was therefore not challenged. The plaintiff adduced evidence which established his ownership of the suit land.

In the premises therefore, this court has no option but to grant prayers sought by the plaintiff in his plaint. This court declares the plaintiff to be the owner of the suit parcel of land *i.e.* **LR. No.Solai/Arutani Block 1/166 (Marigu A)**. The defendant by himself, his servants or agents are hereby permanently restrained from entering, ploughing, planting or in any other way interfering with the plaintiff's ownership, possession and quiet enjoyment of the said suit parcel of land. The plaintiff shall have the costs of the suit.

DATED at NAKURU this 14th day of December 2007

L. KIMARU

JUDGE