



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 43 of 1994

LEAH KARINGO PLAINTIFF

VERSUS

JOHN CHEPKWONY DEFENDANT

JUDGMENT

The plaintiff in this matter Leah Wanjiru Karingo filed this suit way back in 1994. The suit was subsequently amended on 22nd May, 2001. According to the amended plaint the plaintiff has sought for an order of permanent injunction restraining the defendant, John Chepkwony, his agents and/or heirs from interfering with the plaintiff's land known as Nakuru/Municipality/Block 29/90 (Ronda). General damages for trespass and the costs of the suit. This matter has been quite protracted as the record will show the hearing took several twists and turns including being referred to arbitration before the panel of elders and the award being set aside. May that be as it may, the hearing of this matter started de novo before me on 6th February, 2006.

The plaintiff gave evidence in support of her claim and said that she is the personal representative of the estate of the late Stephen Karingo Mucina according to the letters of administration intestate produced in evidence as plaintiff's exhibit no. 1. The plaintiff stated that her late husband on the 14th day of July, 1980 purchased 50 ordinary shares with Kalenjin Enterprises also known as Rift Valley Enterprises Ltd at a consideration of Kshs. 20,000/- from one Peter Gakuo who was a shareholder and the shares were duly transferred to the plaintiff's deceased husband. The said Peter Gakuo had been allotted plot no. 81 which he passed on to the plaintiff's husband after the sale agreement.

The plaintiff further stated that her late husband settled on the plot no. 81 and built many rental rooms and other structures where the plaintiff said she was running a primary school called Imani and Ungaru Nursery Schools but on 19th December, the plaintiff complained that the defendant chased her away. The defendant went to the Chief's office where he filed a complaint alleging that the plaintiff was illegally occupying his land. The matter was referred by the DC for arbitration by the chief and the plaintiff claimed their ruling was in her favour, so was the ruling by the panel of arbitration under the chairmanship of the DO which was later set aside by the court. The plaintiff said that she was later on issued with a certificate of title deed No. Nakuru/Municipality No. 20/90 Rhonda which she sold to Jua Kali Artisans in order to settle the loan of her husband's estate. The plaintiff sought for orders for damages which she said she suffered as a result of the demolition of her premises. She claimed that she used to earn Kshs.6,000/- from her Tenants per month and the demolished structure was worth Kshs.300,000/-. However, the plaintiff did not produce any documentary evidence to support this claim. She only said the matter has been in court for 12 years within which documents may have been lost. The plaintiff also prayed for an order of costs of the suit.

The plaintiff also relied on the evidence of one Elijah Kiplangat Chelaite a director/Secretary of Kalenjin

Enterprises Ltd the original owner of the suit premises. He produced an extract of the company records to show the genesis of the suit premises which he said was original plot no. 81 and belonged to Zakayo Sitonik an original member and shareholder of Kalenjin Enterprises Ltd. In 1972 he sold the plot to Peter Gakuo who in turn sold to the plaintiff's husband. This witness told the court that the plaintiff brought to the company letters of administration which was prove that she was the legal representative of the estate of the late Karingo and they therefore procured the title deed in her favour.

As regards the claim by the defendant, the witness told the court that his plot no. 2012 became a Primary School and then he balloted at another property called Dondori Farm where he was entitled to a larger share.

On the part of the defendant, he gave evidence and relied on the evidence of Caleb Kotut (DW2) a surveyor from Nakuru who produced an Area Field Sheet which he said they use to prepare the final map. This witness said the records identify plot no 90 which is 2012 on the field sheet and plot no. 81 which is plot no. 90. This witness confirmed that before the final map is prepared it is possible to have amendments. He also said the survey office was not involved in the allocation of plot as that was done by the Kalenjin Enterprises Ltd the original owners of the suit land. The evidence of the defendant was that he was an original member and share holder of Kalenjin Enterprises since 1974; he produced a copy of the share certificate which was issued to him as a member. According to the defendant he balloted for a plot in Rhonda Estate and got plot no.2012 which was changed to plot no. 90, he therefore claimed that it is the plaintiff who had interfered with his parcel of land no. 90 which is shown on the survey map.

From the above evidence, the following issues turn out for determination

- 1) ***Whether the plaintiff is entitled to the prayers sought.***
- 2) ***Whether the defendant's statement of defence to the amended plaint is a counterclaim and whether the prayers sought by the defendant viz the nullification of Title Deed No. Nakuru/Municipality/Block 29/90 (Ronda) should be granted.***

What baffled me is the defendant's statement of defence which contains the particulars of fraud and a prayer for the nullification of the title and yet the defendant has not clearly stated whether he has set up a claim by way of counterclaim as provided for under order VIII rule 2 and 6 of the Civil Procedure Rules which provides;

"Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his statement of defence, state specifically that he does so by way of counterclaim."

The defendant did not state in his defence that he has set up a counterclaim and therefore I will disregard the prayers for the nullification of the title. The second reason why I would disregard the said prayer is that it was the evidence of the defendant's witness DW2 that the plots were allocated by the Kalenjin Enterprises Ltd the company that owned the parcel of land who submitted the list of allottees to lands offices for the issuance of title. Even if I were to treat the defendant's claim as a counter claim it would fail for failure to join in M/S Kalenjin Enterprises and the land register who presented the information and the issuance of title respectively. It is not the plaintiff who allocated herself plot no. 81 and she is not the one who issued to herself the title.

Evidence by the plaintiff's witness (PW2) Elijah Chelaite detailed how the plot came to belong to the plaintiff. This witness produced the company records, and this being the secretary of the company that allocated the plot to the plaintiff I find his evidence plausible. As regards the plaintiff's claim for general damages, no material was produced by way of evidence to prove the fact that she lost income of Kshs.6,000/- per month as rent from the tenants. She also did not produce any report to show to the court that the structures that were destroyed by the defendant were worth Kshs.300,000/- indeed if the plaintiff intended to pursue the claim of the destroyed structures that was a specific claim that she ought to have pleaded on her pleading as set out in mandatory wording under order II rule 1 of the Civil Procedure rules which states;

“Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action...”

In the result I will not allow the prayer for general damages but allow prayer no. 1 that is a permanent injunction restraining the defendant, his servants and/or heirs from interfering with plaintiff's land known as Nakuru/Municipality/Block 29/90 (Ronda).

Since the plaintiff was partially successful I will allow her half of the costs.

It is so ordered.

Judgment read and signed on the 7th July, 2006 at Nakuru.

M. KOOME

JUDGE