



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Civil Suit 48 of 2004**

**FRANCIS P.O. NYABERI T/A STIRLAND COMPANY.....1<sup>ST</sup>  
PLAINTIFF**

**DAVID KIPTOO TIROP .....2<sup>ND</sup>  
PLAINTIFF**

**VERSUS**

**MARGARET WAMBOI .....1<sup>ST</sup>  
DEFENDANT**

**WANGARE MACHARIA .....2<sup>ND</sup> DEFENDANT**

**KESIA KURIA .....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The 2<sup>nd</sup> Plaintiff David Kiptoo Tirop sold a piece of land at Kipkaren river to one Francis Nyaberi in 2003. The land is described as Block 15/766 Eldoret Municipality. The certificate of lease for the land was produced as Exhibit 1 and a search certificate was produced as exhibit 2.

In 1999, before selling the land he visited the land and noticed some cultivation by a person he had not permitted. He used to visit the land every year. He did not know the person who was cultivating the land without permission. In the year 2001, when he visited the land, he found a young man tilling the land. That young man told him that he had been sent to till the land by a certain woman. He told the young man to go and tell that woman to stop tilling the land.

In 2003, when he took the prospective buyer, he saw that all the beacons had been uprooted. So he commissioned a surveyer a Mr. Kosgei, to go and re establish the beacons. On 18.3.2004 he entered into an agreement for sale with the buyer Francis Nyaberi, who bought the land on behalf of a business name. They executed the agreement which he produced as exhibit 3. When they executed the agreement, the land was not cultivated. A week after he gave possession of the land to Mr. Nyaberi – the said Francis Nyaberi rang and told him that he had been chased away by some people and the bill board that he had erected had been smashed by agents of some women. Those women are the defendants. Title is still in the name of the seller.

This suit was therefore filed by Francis Nyaberi t/a Stir land company as 1<sup>st</sup> plaintiff, and David Kiptoo Tirop as 2<sup>nd</sup> plaintiff. The suit was filed against three defendants. It seeks for orders for –

1. A permanent injunction restraining the defendants, their servants and or agents from threatening, intermeddling and or interfering with the 1<sup>st</sup> plaintiff's quiet use and possession of ELDORET MUNICIPALITY BLOCK 15/1706 measuring approximately 2.2 actares.
2. Costs of the suit.
3. Any other or further relief this Honourable Court may deem fit to grant.

The defendants filed a joint defence through Karira & Company advocates. Their defence is basically a denial of the two plaintiff's claim. They also aver that they were licenced by the Eldoret Municipal Council, annually since 1980, to use the land and were paying annual licence fees to the municipal council for growing food crops. The defendants also claimed in the defence that they had been in continuous occupation of the suit land since 1980 and had not been given notice by either of the plaintiffs that the farm belonged to them.

At the hearing, evidence was tendered for the plaintiffs and the defendants. The two plaintiffs gave evidence on the plaintiffs side. The three defendants testified in the defendants case.

The evidence of PW1 David Kiptoo Tirop was that he resided at Kipkaren river in Uasin Gishu District. He owned a parcel of land BLOCK 15/1766 Eldoret Municipality. He was the title holder and produced a copy of the certificate of lease as P Exhibit 1. He also produced a search certificate as P Exhibit 2. He took possession of the land in 1992. In 1999 he visited the land and noticed some cultivation on part of the land. He had not given permission to anybody to cultivate the land. He tried to find out who was cultivating the land, but did not establish the identity of that person. In 2001, he visited the land. He saw a young man cultivating on the land. That young man told him that he had been sent to cultivate by a certain woman. He told the young man to go and tell that lady to stop cultivating the land. In 2003 he took a prospective buyer to the land. He found that all the beacons had been uprooted. He commissioned a surveyor by the name Mr. Kosgei to go and re-establish the beacons.

Thereafter on 18.3.2004 they agreed with the buyer Francis Nyaberi and they entered into an agreement for sale. Mr. Nyaberi was buying on behalf of a business name. They entered into a written agreement, which he produced as P Exhibit 3. Mr. Nyaberi took possession of the land immediately. After a week, Mr. Nyaberi called him on phone and told him that he had been chased away by some people, who had even smashed the billboard that he had erected. The ownership of the land was still his, as the full purchase price had not yet been paid. He contended that the Eldoret municipal council did not have any legal basis to licence the defendant to use the land, as it would be himself as owner to allow anybody to use the land. It was his testimony that it was not true that the defendants were in occupation of the land since 1980, as even currently, the land was bushy. He prayed that the defendants be restrained from interfering with Mr. Nyaberi's use of the land.

In cross-examination he stated that the buyer was to pay in instalments. The agreement has not been fully implemented because of the interference from 3<sup>rd</sup> parties. He did not physically know the women who were the defendants. The receipts from Eldoret municipal council purportedly in favour of the defendants did not refer to his land. He did not file proceedings in 1999 when he was informed about the interference on the land because he did not know the identify of the people who were interfering. The prayers in the plaint were in favour of the 1st plaintiff, (Nyaberi).

PW2 was the second plaintiff Mr. Francis Nyaberi. His evidence was that he was an estate agent. That on 18.3.2004 he entered into an agreement with the 2<sup>nd</sup> plaintiff for purchase of land Block 15/1766. The seller took him to the land. He placed a signboard to give notice to the public for sale of the land. After two weeks some people showed in interest buying portions of the land, but they said that the signboard was removed and burnt. He then informed the seller of the land (PW1) and they went to the

chief of Pioneer location. They were sent to the village elders to investigate as to who had removed the signboards. Afterwards the chief called a public meeting. That is when some three women appeared and said that the subject land belonged to them and that they were given the land by the Eldoret Municipal Council to plough. The chief asked those women whether they had title to the land, and they said that they had receipts from the Eldoret municipal council. His evidence was that he paid Kshs.500,000/= for the land and that, at the time that he bought the land nobody was in occupation of that land. Therefore he was asking the court to stop the defendants from occupying or using the land, so that he could develop it. He was also asking for costs of the suit. He saw the three women, who were the defendants, for the first time when he was with the chief.

In cross examination he stated that he signed the agreement for sale on behalf of Starland Company. According to the agreement for sale, he paid Kshs.200,000/= out of a purchase price of Kshs.2,000,000/=. He also had receipts for payment of Kshs.300,000/= though he did not bring them to court. The land was to be transferred within 6 months, but it was not transferred because of the interference. He had already sold part of the land to some people before filing suit. Some buyers had paid some money in instalments. That was the case for the plaintiffs.

MARGARET WAMBOI (DW1) testified for the defence. She is the first defendant. She testified that she did not know DAVID TIROP the 2<sup>nd</sup> plaintiff. However, she knew the 1<sup>st</sup> plaintiff FRANCIS NYABERI. She denied the trespass allegation. She did not know the farm under reference but she Kipkaren for 40 years. She denied being on the farm or land of Mr. Tirop. She contended that the Eldoret Municipal Council had not given her any notice to vacate.

In cross examination she stated that she paid the Eldoret Municipal Council for permit to farm the land. The land belonged to the Municipality. The latest time they went to pay for 2004 permit, the Eldoret Municipal Council refused to take the money, but told them to continue to cultivate. She did not know the plot number of the farm on which they were cultivating. However, if the land belonged to Tirop, then she would move away. She conceded that she knew that Tirop had land of approximately 100 acres in Kipkaren. She herself was cultivating only two acres.

DW2 WANGARE MACHARIA testified that she did not know the plaintiff or why they sued her in court. She had been allocated land by the Eldoret Municipal Council for 42 years now. She did not know where the land in dispute is situated. She cultivated ½ of an acre. Margaret Wambui was her neighbour, but where they each carry out farming is about 1 km apart.

In cross examination she stated that she started farming the land in 1983, though she could not remember exact years. She was given permission to cultivate on the land by a town clerk called Kendagar. She contended that the land of the plaintiffs is not the same land that she is occupying.

The evidence of DW 3 KEZIA MURUGI KURIA is that she had a farm at Kipkaren which she was given by Kendagar the Town Clerk Eldoret Municipal Council since 1982. Then in 2002 the 1<sup>st</sup> plaintiff came and took her to the chief. The police later came and removed the 1<sup>st</sup> plaintiff's people from the land. She continued cultivating the land. However, the 1<sup>st</sup> plaintiff came and started putting up some structures. The 1<sup>st</sup> and 2<sup>nd</sup> defendants were her neighbours at Kipkaren. She did not exactly know the parcel of land on which they were brought to court for.

In cross examination she stated that she did not have the number of the plot on which she used to farm. She also did not know that it had a title deed. However, there was a day that 1<sup>st</sup> plaintiff went to the land and stated that the land belonged to him. They even went to the chief and to police at Langas. If the Municipality told her to leave cultivating the land, she would do so.

After the close of the case for the plaintiffs and the defendants, parties filed their written submissions, through their counsel.

This is a case that basically revolves upon ownership to land and remedies therefrom. In my view, the

issues for decision are two. The first issue is who owns the subject land. The second issue is whether this court can grant the prayers sought.

From the evidence of the two plaintiffs the subject land ELDORET MUNICIPALITY/BLOCK 15/1766 belongs to the 2<sup>nd</sup> plaintiff DAVID KIPTOO TIROP. He sold it to the 1<sup>st</sup> plaintiff FRANCIS NYABERI t/a STIRLAND COMPANY, but such sale has not been finalized because of interference by the three defendants. The evidence of the three defendants is that they do not know the exact place where the land of the 2<sup>nd</sup> plaintiff is at Kipkaren. On their part, they are cultivating land at Kipkarent which was permitted for their cultivation by the Eldoret Municipal Council. They are cultivating on the land, though they are aware that the 1<sup>st</sup> plaintiff has complained to them and the chief that they are cultivating on the land that he bought.

The plaintiffs produced a certificate of lease as exhibit 1 showing that the 2<sup>nd</sup> plaintiff is the registered owner under the Registered Land Act (Cap. 300) of ELDORET MUNICIPALITY/BLOCK 15/1766 which is a piece of land measuring 2.7 hectares for 99 years from 1<sup>st</sup> June 1991. Under the Registered Land Act – Section 28 – this title is indefeasible. The defendants have not shown any evidence that they own the subject land. Mere use is not ownership. The Eldoret Municipal Council cannot give title or right of use to land which it does not own. No evidence has been placed before this court that even remotely suggests that the subject land belongs to Eldoret Municipal Council. Though the defendants stated in their evidence that they were cultivating the land from the 1980's that does not give them a title to this particular piece of land. It is my finding that the plaintiffs have proved on the balance of probabilities that land parcel number ELDORET MUNICIPALITY/BLOCK 15/1766 belongs to DAVID KIPTOO TIROP the 2<sup>nd</sup> plaintiff.

The second issue is whether the court can grant the orders sought. The substantive prayer in the plaint is as follows:-

**“A permanent order of injunction restraining the defendants, their servants and or agents from threatening, intermeddling and or interfering with the 1<sup>st</sup> plaintiff's quiet use and possession of ELDORET MUNICIPALITY/BLOCK 15/1766 measuring approximately 2.7 hectares”.**

In the cross examination on behalf of the defendants, there was a suggestion that the sale by the 2<sup>nd</sup> plaintiff to the 1<sup>st</sup> plaintiff has not been completed. There was also a suggestion that the 1<sup>st</sup> plaintiff has only paid Kshs.200,000/= as part of the purchase price of Kshs.2,000,000/=, instead of Kshs.500,000/= which he mentioned to in court. There was also a suggestion that there was an irregularity in the sale agreement in that it is not clear whether the buyer was FRANCIS NYABERI in person or whether it was Stirland Company. Submissions were also made on the same points. Those points have been taken to show that the 1<sup>st</sup> plaintiff has no locus standi in the matter and cannot therefore benefit from the orders sought.

In my view, those arguments are self defeating. Firstly, the evidence on record, which was not controverted, was that Stirland Company was a business name, not an incorporated company. The agreement for purchase of the land clearly states that it was signed by FRANCIS NYABERI for Stirland Company. The business name could only operate through a human person, who was the 1<sup>st</sup> plaintiff. The plaint also clearly states that FRANCIS NYABERI (1<sup>st</sup> plaintiff) was trading as Stirland Company. I find no misdescription nor do I see any confusion of roles or identity of the 1<sup>st</sup> plaintiff herein. The second argument on locus standi appears to be that since the sale agreement was not completed, the 1<sup>st</sup> plaintiff cannot succeed as well. The 2<sup>nd</sup> plaintiff is the owner of the land. He has a right to decide who to confer his proprietary rights to. He has sued as one of the plaintiffs herein and wishes to prevent the defendants from interfering with the 1<sup>st</sup> plaintiff. The 1<sup>st</sup> plaintiff could have been a stranger, if he had sued alone. In our present case the title holder has sued with him and wants him protected by an order of the court. The defendants have no right to challenge the intention of the owner who is the 2<sup>nd</sup> plaintiff. Therefore that technicality also fails.

The upshot of the above is that I find that the court can perfectly grant the orders sought in the plaint to protect the 1<sup>st</sup> plaintiff, though he is not yet the owner of the land, as it has not been transferred to him.

For the above reasons, this suit succeeds. I allow the suit and grant the prayers sought. I also award costs of the suit to the plaintiffs.

Dated and Delivered at ELDORET this 7<sup>th</sup> day of September 2006.

**GEORGE DULU**

**AG. JUDGE**