



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

**Civil Suit 181 of 2006**

**JOHN KIHARA NJOROGE.....PLAINTIFF**

**VERSUS**

**MICHAEL KAHIRO MACHARIA.....DEFENDANT**

**RULING**

On 1<sup>st</sup> September 2006 the plaintiff filed a suit against the defendant and stated that he was the owner of all that parcel of land known as **Plot No. 133** Solai Settlement Scheme (hereinafter referred to as “*the suit premises*”). He said that he had initially been allotted **Plot No. 139** by the Commissioner of Lands but when they went to the ground he was shown **Plot No. 133** which he proceeded to occupy. He occupied the suit premises in 1977. He further stated that the defendant had encroached into the suit premises and irregularly caused the same to be subdivided. He therefore sought a declaration that he was the sole owner of the whole of the suit premises and also sought a permanent injunction to restrain the defendant, his servants and/or agents from interfering, changing boundaries, cultivating, constructing or in any other way dealing with the suit premises.

Together with the plaint, the plaintiff also filed an application by way of chamber summons brought under **Order XXXIX rules 1, 2, 3, 4 and 9** of the **Civil Procedure Rules** seeking an interlocutory order of injunction to restrain the defendant by himself, servants and/or agents from interfering, changing boundaries, cultivating, constructing or in any other way dealing with the suit premises pending the hearing and determination of the suit. In his affidavits in support of the said application, he deponed that he was initially allotted **Plot No. 139** in Solai Settlement Scheme by the Ministry of Lands and Settlement and he annexed the Allotment Letter as annexure “JKN1”. He made all the requisite payments to the Government pertaining to **Plot No. 139** Solai Settlement Scheme but when they went to the ground so that the said plot could be identified to him, he was shown **Plot No. 133** and he occupied the same and started carrying out developments thereon. Immediately thereafter, the defendant went and put up a structure on the suit premises, that is, **Plot No. 133**. The plaintiff decided to lodge a complaint at the District Commissioner’s Office in Nakuru but he was referred to the Senior Chief, Solai Settlement Scheme.

A probe committee was set up to investigate the complaint and on 15<sup>th</sup> April 1994 the Director of Land Adjudication and Settlement wrote a letter to the plaintiff informing him that pursuant to the investigations that were carried out by the probe committee it had been decided that he was to retain **Plot No. 133**. He was asked to contact the District Land Adjudication and Settlement Officer at Nakuru for implementation of the decision. However, sometimes in April 2005 he received a letter from the District Land Adjudication and Settlement Officer, Nakuru, informing him that surveyors from the District Land Adjudication and Settlement Office would be going to subdivide the suit premises into two to create **Plot No. 133A** and **133B**. The exercise was to be undertaken in April 2005 and it was as per the Director’s letter dated 15<sup>th</sup> April 1994. The plaintiff replied to the said letter and expressed shock at the contents of the same but did not get an immediate response to his letter. Sometimes in July 2006 the plaintiff received another letter from the District Land Adjudication and Settlement Officer, Nakuru, informing him that the subdivision of the suit premises as earlier advised was to be carried out on 26<sup>th</sup> July 2006 at 2.30 p.m. He was asked to avail himself on the material day. The letter was also addressed to the

defendant.

The plaintiff protested and instructed his advocates to write a letter to the District Land Adjudication and Settlement Officer, warning him that if the intended subdivision was carried out he would sue the officer and the Government of the Republic of Kenya since he was the sole owner of the suit premises. The said letter was written on the 19<sup>th</sup> July 2006.

Despite his protest, the subdivision was carried out and according to his advocate, the plaintiff's water tank was now located on a portion of the suit premises that was assigned to the defendant and he was now unable to access the same.

Based on the plaintiff's depositions as stated hereinabove, Miss Njoroge submitted that the plaintiff had shown that he had a prima facie case with high chances of success and urged the court to grant the orders of injunction as sought. She further submitted that on a balance of convenience the plaintiff stood to suffer more than the defendant if the orders sought were not granted.

The defendant filed a replying affidavit and pointed out that the plaintiff had initially been allocated **Plot No. 139** and his occupation of **Plot No. 133** was after the said plot had been allocated to him (the defendant). He said that he occupied **Plot No. 133** in 1977 and it was only around 1980 that the plaintiff started encroaching into his land. The defendant sought the intervention of the Settlement Officer who informed him that Solai Settlement Scheme had many problems and the Government was taking steps to resolve them. The defendant made a further complaint to the Provincial Land Adjudication and Settlement Officer who promised to conduct a probe into the circumstances under which the plaintiff encroached into the parcel of land. He further stated that in 1999 the Lands Office, Nakuru sent surveyors to the area and they made it clear to the plaintiff that he had encroached into the defendant's parcel of land and he was required to move out. A probe committee was put in place and both the plaintiff and the defendant appeared before the committee and made their representations. In April 1994 all the people who had land disputes relating to the settlement scheme were called for a meeting at Afraha Stadium, Nakuru. The defendant was given a letter which informed him that it had been decided that he had to retain **Plot No. 133A** which was a portion of the original **Plot No. 133**. After the subdivision, the plaintiff got **7.90 acres** and the defendant **6.69 acres**.

In his submissions, Mr. Kahiga for the defendant stated that the plaintiff's application was unsustainable in that he was seeking to restrain the defendant from occupying the suit premises whereas he knew that he had been in occupation of the same since 1977. In his view, the plaintiff ought to have filed an application for a mandatory injunction if he had any grounds for doing so.

On the merits of the application, counsel submitted that the plaintiff had not shown that he had a prima facie case with any chances of success considering the history of the matter which had been set out by both parties. He further submitted that the Director of Land Adjudication and Settlement was the allocating authority and it had initially allocated to the plaintiff **Plot No. 139** and to the defendant **Plot No. 133**. Given that it was the officials from the aforesaid department that allowed the plaintiff to settle on **Plot No. 133** and it was the same department that eventually decided to subdivide the suit premises into two, that was the official position as far as ownership and occupation of the suit premises was concerned. Mr. Kahiga further submitted that the plaintiff should have brought an appropriate action as against the Government if he was not satisfied with the subdivision that was carried out. In any event, he added, the parcel of land that had initially been allocated to the plaintiff was **Plot No. 139** and not **133**, the suit premises. He therefore urged the court to dismiss the plaintiff's application with costs.

I have carefully considered the history of the suit premises as stated by both the plaintiff and the defendant in their detailed affidavits. It is not in dispute that sometimes in 1977 the plaintiff was allocated **Parcel No. 139** within Solai Settlement Scheme. It is not clear why he was shown **Plot No. 133** at the time when he went to settle there. That is an issue which could only be explained by the department of Land Adjudication and Settlement. The defendant said that **Plot No. 133** had been allocated to him in 1977 although he did not annex to his affidavit an allotment letter in proof thereof. However, I accept that he was in occupation of the plot sometimes between 1977 and 1980. It is also not

in dispute that the problem between the plaintiff and the defendant dates back to the 1980s and in particular there is evidence that on 21<sup>st</sup> January 1989 the plaintiff referred his complaint to the District Commissioner, Nakuru who in turn referred the dispute to the Senior Chief, Solai Location. The probe committee that was set up by the department of Land Adjudication and Settlement, the author of the dispute between the parties herein, eventually decided to subdivide the suit premises between the plaintiff and the defendant. The plaintiff was given a bigger portion of the land than the defendant. In light of the above, I would agree with Mr. Kahiga that the plaintiff should have directed his complaint and possibly filed the appropriate suit against the Attorney General since it is the department of Land Adjudication and Settlement that brought about the dispute between the plaintiff and the defendant from the very beginning. Indeed M/S Nancy Njoroge and company Advocates, the plaintiff's advocates, had written a letter to the District land Adjudication and Settlement Officer, Nakuru, warning that a suit would be filed against the Government if the suit premises were subdivided. Perhaps the plaintiff should have filed such an action immediately he realized that the department of Land Adjudication and Settlement had done double allocation thus causing the defendant to occupy a portion of **Plot No. 133** which the plaintiff said he had been authorized to occupy by the said department.

An order of injunction cannot issue to restrain the defendant from occupying the suit premises as sought by the plaintiff if indeed the defendant has been in occupation of the suit premises all along. A restraining order is issued where there is threatened breach of a legal right but is inapplicable where an event that is sought to be undone has already taken place.

I am also not satisfied that in the circumstances of this case, the plaintiff has a prima facie case with a likelihood of success as against the defendant. I say so because the defendant has amply demonstrated that he has been in lawful occupation of the suit premises for many years. For these reasons I dismiss the plaintiff's application with costs to the defendant.

DATED, SIGNED and DELIVERED at Nakuru this 9<sup>th</sup> day of October, 2006.

**D. MUSINGA**

JUDGE

Ruling delivered in open court in the presence of Miss Njoroge for the plaintiff and Mr. Kahiga for the defendant.

**D. MUSINGA**

JUDGE