



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Case 90 of 1997**

**KAMAU KANIA ..... PLAINTIFF**

**VERSUS**

**PATRICK RERIMOI .....1<sup>ST</sup> DEFENDANT**

**MARY NDUTA KAGWIMA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff, Kamau Kaniu instituted this suit against Patrick Rerimoi and Mary Nduta Kagwima, 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. By way of an amended plaint filed on 13<sup>th</sup> May 1997, the plaintiff sought for the following declaratory and injunctive orders:

- a) A declaration that the plaintiff is the lawful owner of LR. Dundori/Muguathi Block 2/139.
- b) A declaration that title deed obtained by the 1<sup>st</sup> defendant on 11<sup>th</sup> November 1996 was obtained by fraud and hence null and void.
- c) An order be issued to Nakuru Land Registrar directing him to cancel title certificate issued to the 1<sup>st</sup> defendant on 11<sup>th</sup> November 1996 and in its place he register the plaintiff as the lawful owner of the suit property and thereafter issue him with the relevant title certificate.
- d) A permanent order of injunction to be issued against the defendant by themselves, their agents or servants, restraining them against entering, cultivating, constructing any structure or in any way interfering with the plaintiff quiet, enjoyment of LR Number LR. No.Dundori/Muguathi Block 2/139.
- e) Eviction orders.

The 1<sup>st</sup> defendant did not enter appearance and thus interlocutory judgment was entered against him. The 2<sup>nd</sup> defendant filed a defence. During the hearing of this matter, Counsel for the plaintiff indicated that he intended to proceed against the 1<sup>st</sup> defendant against whom the interlocutory judgment had been entered.

Thus, the plaintiff gave evidence and gave a detailed account of how he purchased Plot Number 193

Koelel Farm LR Number Dundori/Muguathi Block 2/139 from one Tarus Kimagut who was a shareholder of M/s Kalenjin Enterprises Ltd the original registered proprietor of the suit premises.

The plaintiff entered into a sale agreement on 12<sup>th</sup> April 1995 with Daniel Kiptanui the agent and son of Tarus Kimargut and he paid Kshs.30,500/- towards the purchase price. The plaintiff was issued with a membership card and a share certificate for the Kalenjin Enterprises Ltd which entitled him to 1½ Acres of land at Koelel Farm belonging to the said Kalenjin Enterprises Ltd. The seller also executed the transfer of share and stock in favour of the plaintiff. The plaintiff told the court that he subsequently paid the survey fees and was issued with the receipts by the company signifying the approval of transfer of the shares.

On 6<sup>th</sup> December 1996, the plaintiff paid for the title but he was not issued with the title which was instead issued to the 1<sup>st</sup> defendant. The plaintiff contended that after purchasing the plot, he took possession and was cultivating until sometimes in 1996 when he noticed the 2<sup>nd</sup> defendant constructing a temporary structure. He filed the present suit and obtained an interim order of injunction restraining the defendants from dealing with the suit premises. The plaintiff contends that the transfer of the suit premises to the 1<sup>st</sup> defendant was obtained fraudulently through misrepresentation to the Land Registrar that the 1<sup>st</sup> defendant was the lawful allottee of the plot when indeed the plaintiff was the legal allottee according to the records and documents of ownership that he produced as evidence.

The plaintiff also relied on the evidence of Maina Kirungui, (PW 2) who was an official of the Kalenjin Enterprises Ltd. The gist of the evidence of PW 2 was that in so far as the Land Buying Company was concerned the plaintiff was the lawful proprietor of the suit premises. In this regard, the company had requested the 1<sup>st</sup> defendant alongside other individuals who had obtained the title illegally to surrender the illegally obtained titles for cancellation. This witness produced a resolution of the company in support of the fact that the company gave notice of cancellation of irregularly obtained titles.

The above is the summary of the evidence in support of the plaintiff's case. Counsel for the plaintiff also filed written submissions and cited decided cases to support the plaintiff's case.

Counsel for the plaintiff has submitted that the plaintiff did not need to enjoin the Registrar of Lands in this suit for reasons that the mistake was caused by the 1<sup>st</sup> defendant who misrepresented to the Registrar that he was the lawful owner. In any event, the Registrar of lands had also accepted the payment of money from the plaintiff which is an indication that he was ready to process the title but the 1<sup>st</sup> defendant had already obtained the same title a month earlier.

The certificate of official title establishes the 1<sup>st</sup> defendant is the registered owner of the land that previously belonged to the Land Buying Company, he is therefore a second registered owner. Counsel submitted that the title to the 1<sup>st</sup> defendant was issued fraudulently and thus the Register of Lands can be rectified as provided for under Section 143 of the Registered Lands Act. The above provision of the law was elaborated upon by the Court of Appeal in the case of Chauhan Vs Omagwa [1985] KLR 656 where it was held

*“Once the court was satisfied that the registration in favour of the appellant was made by fraud by the vendor, it was authorized by Section 143 to order rectification of the register even if the plaintiff did not disclose a cause of action against the appellant. It was the registration made by the fraud of the vendor which permitted an order for rectification to be made by the court.”*

This case against the 1<sup>st</sup> defendant was not defended and the issue I have to determine is whether the plaintiff has proved his case to the required standard.

The plaintiff established that he purchased the shares that entitled him to the suit premises from the shareholder. He paid the purchase price and the company approved the sale of shares and allotted to him the suit premises which he took possession. From the evidence of PW2, the plaintiff is the bona fide

allotte of the suit premises and the company therefore requested the 1<sup>st</sup> defendant to return the irregularly obtained title for cancellation. Besides, the plaintiff has been in occupation of the suit premises for well over ten years before the 2<sup>nd</sup> defendant came into the picture.

I find the plaintiff has proved his case against the 1st defendant. The 1<sup>st</sup> defendant irregularly obtained the title over Plot LR Number Dundori/Muguathi/Block 2/139 which he purported to sell to the 2<sup>nd</sup> defendant. When the plaintiff noticed the irregularity he obtained an order of injunction against the 1st and 2<sup>nd</sup> defendant which orders have not been set aside from 1997.

Accordingly, I hereby grant the plaintiff the orders sought in the plaint in terms of Prayers (a), (b) (c) and (d). The plaintiff shall also be entitled to cost of the suit.

I have not issued the order of eviction as the plaintiff proceeded with the suit against the 1<sup>st</sup> defendant and the order of eviction was directed against the 2<sup>nd</sup> defendant.

It is so ordered.

Judgment read and signed on 8th December 2006.

**MARTHA KOOME**

**JUDGE**