



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 52 of 2004

JACKSON KIPROP LAGAT.....PLAINTIFF

VERSUS

GEOFFREY KAMAU.....DEFENDANT

JUDGMENT

The plaintiff, Jackson Kiprop Lagat, filed suit against the defendant, Geoffrey Kamau seeking declaratory orders of this court that the defendant is a trespasser on the plaintiff's parcel of land known as ***Dundori/Mugwathi Block 2/250 (hereinafter referred to as the suit land)***. The plaintiff further prayed for an order of this court compelling the defendant to deliver vacant possession of the suit land or in default he be evicted therefrom. The defendant filed a defence denying that he was in illegal occupation of the suit land. He contended that the plaintiff had fraudulently obtained the title in respect of the suit land. The defendant counterclaimed that he should be declared the owner of the suit land and that the plaintiff be permanently restrained from interfering with the defendants occupation and ownership of the suit land. The plaintiff denied the averments made in the counterclaim by the defendant. He put the defendant to strict proof thereof and reiterated that he was the genuine and legal owner of the suit land.

At the hearing of the case, the plaintiff called one witness; himself. He (PW1) testified that the defendant was residing on his farm at Ndongori. He stated that he had not authorized the defendant to occupy his land. The parcel of land was registered as DUNDORI/MUGWATHI/BLOCK 2/250. He testified that he had purchased the land from Kalenjin Enterprises where he is a member. He obtained a certificate of search from the lands office on the 14<sup>th</sup> of January 2005 (*Certificate of search was produced as plaintiff's exhibit No. 1*). The plaintiff had the title deed of the land. He was the registered owner (*title deed produced as plaintiff's exhibit No. 2*). He further testified that the District Officer of the area had confirmed that the land belonged to him. The plaintiff testified that he was seeking the orders of the court to have the defendant vacate from the suit land.

He further stated that although he had asked the defendant to give him vacant possession, the defendant had refused to do so. The plaintiff was seeking the orders of the court to have the defendant evicted from the suit land. He further asked the court to award him costs of the suit. The plaintiff conceded that he found the defendant on the farm. He admitted that he did not know the year that the defendant took occupation of the land. He reiterated that he was allocated the land by Kalenjin Enterprises. He testified that he accepted the land in spite of the fact that he had been informed that there was someone residing on the land. He stated that he wrote a letter to the defendant asking him to vacate the suit land, but the defendant refused to adhere to the notice. The plaintiff reiterated that when he was initially allocated the land by Kalenjin Enterprise, there was no one on the said parcel of land.

After the close of the plaintiff's case, the defendant (DW1) testified that he entered the suit land which was then known as Plot No. 250 in 1985. He had exchanged the land with one Wilson Ngetich – who was now deceased (*hereinafter referred to as the deceased*) with his farm at Mafuta Farm – Moiben (*Uasin Gishu District*). He states that when he sought the title in respect of the suit land in 1997 from Kalenjin Enterprises, he was informed that the title in respect of the same had been issued to the plaintiff. He was told to get the person who they had exchanged the land with. He went and was able to get the widow of the deceased. He was however informed by the widow of the deceased that he should sue Kalenjin Enterprises to issue him with the title in respect of the suit land. The defendant narrated how he sought to have the matter adjudicated upon at various forums including the Provincial administration and the Land Disputes Tribunal in vain. Finally he was assisted by the directors of Kalenjin Enterprises who agreed to offer the plaintiff another parcel of land so that he could forfeit his claim over the suit land.

According to the defendant, the plaintiff refused the alternative parcel of land and insisted that he still wanted the parcel of land occupied by the defendant. It is the defendant's testimony that in spite of the fact that the plaintiff has title to the suit land, he (*the defendant*) was entitled to it because he had resided on the said parcel of land for a period of twenty years. In his view, the plaintiff should have sought out the issue of the land with Kalenjin Enterprises who have given the plaintiff an offer of an alternative parcel of land. The defendant produced a bundle of documents (*produced as defendant's exhibit No. 1*) to prove that the suit land is his. He testified that he had extensively developed the suit land including erecting a house and planting trees. He had also connected water to the said parcel of land.

The defendant urged the court to find in his favour as he was the person currently residing on the suit land. The defendant admitted that he was not a member of Kalenjin Enterprises but lay claim on the suit land on the basis that Wilson Ngetich, the person whom he exchanged his land with, was a member of Kalenjin Enterprises. The defendant conceded that the plaintiff was the registered owner of the suit land but insisted that he ought to be allowed to continue residing on the suit land and the plaintiff accepts the offer of an alternative piece of land offered by Kalenjin Enterprises. The defendant further conceded that in the agreement that he had entered between himself and Wilson Ngetich for the exchange of land, the number of the plot was not specified. He testified that he paid the requisite fees to Kalenjin Enterprises so that the suit land could be transferred to him. He reiterated that the reason why the number of the plot to be exchanged was excluded from the agreement was due to inadvertence.

The defendant called Elijah Kiplagat Chelaite, (DW2) a director of Kalenjin Enterprises (*hereinafter referred to as the company*) to testify on his behalf. He testified that he was aware of the problem concerning the suit land. He gave a history of how the titles in respect of the parcels of land owned by the members of Kalenjin Enterprises were issued. It was his testimony that between the year 1984 and 1989, the members of Kalenjin Enterprises discovered that a clerk in the office had issued fake share certificates to non-members. A process was put in place by Government whereby genuine members were identified and non-genuine members weeded out. One of the persons who was found to be residing on the suit land but did not have a genuine share certificate was one Nyambura Chege, who is the mother of the defendant. She explained that she had exchanged the said parcel of land with one Ngetich who took her parcel of land at Moiben.

DW2 testified that it was then established that the said Ngetich was not a genuine shareholder. It was then that the parcel of land was allocated to the plaintiff who is a genuine member of Kalenjin Enterprises. The plaintiff was then issued with a title to the suit land. After the plaintiff had been issued with the title, the defendant went to Kalenjin Enterprises and made his case. DW2 testified that the company agreed to help him provided he became a shareholder of Kalenjin Enterprises by purchasing a share from an existing member. The defendant did as he was advised. He purchased a share from one David Kiplimo. The company then allocated the suit land to the defendant. The plaintiff was requested to surrender the title deed that had been issued to him so that he could be allocated another piece of land at Subukia. The plaintiff declined to surrender the title. Instead he insisted that he should be given possession of the parcel of land that had been allocated to him and that which he had been issued with the title deed.

According to DW2, the company's position is that the suit land is owned by the defendant not the

plaintiff. He however concedes that at the time the title deed of the suit land was issued to the plaintiff, the status of the defendant and that of his mother (*Nyambura Chege*) has been established as being not genuine members of the company. The defendant regularized his position later. He admitted that the mother of the defendant moved into the parcel of land on the basis of false documents. He stated that the company made a mistake in issuing the title deed to the plaintiff without first establishing and resolving the dispute with the defendant, a person in occupation of the suit land. DW2 conceded that the land which was being offered to the plaintiff, although comprised of two acres, was less valuable than the 1<sup>1</sup>/<sub>2</sub> acres that he was issued with the title deed and which the defendant was claiming. That is the respective case of the plaintiff and the defendant.

After the close of both the plaintiff's and the defendant's case, the issue for determination by this court is simple; who is the legal owner of the parcel of land known as DUNDORI MUGWATHI/BLOCK 2/250 (referred to as the suit land). In his testimony before court, the plaintiff testified that as a member of Kalenjini Enterprises, he was allocated the suit land in 1997. He was issued with the title in respect of the said suit land (*copy of the title produced as plaintiff's exhibit No. 2*). From the certificate of official search produced as plaintiff's Exhibit No. 1, it is evident that the plaintiff is the first registered owner of the said parcel of land. Upon being issued with the title in respect of the suit land, the plaintiff went to the suit land only to discover that the same was being occupied by the defendant. He asked the defendant to vacate the suit land but the defendant refused (*plaintiff's exhibit No. 3*). The defendant told the plaintiff that he was the legal occupant of the suit land. The plaintiff did not buy the defendant's story. He filed this suit in his bid to secure the eviction of the defendant from the suit land. The plaintiff has craved the orders of this court to declare him to be the owner of the suit land and order the defendant to give him vacant possession. The defendant has resisted the plaintiff's claim.

He testified that he was the legal owner of the suit land having exchanged the same with one Wilson Ngetich who is now deceased. He testified that he has been on the suit land since 1985 and had undertaken enormous developments on the said parcel of land, including erecting a house thereon and planting trees. He testified that when he discovered that the title to the suit land had been issued to the plaintiff, he made frantic efforts to have the situation reversed. He succeeded in persuading Kalenjini Enterprises, the company which was charged with the responsibility of issuing titles to its member, to allocate the plaintiff an alternative parcel of land. The plaintiff however did not accept the company's offer. The plaintiff still insisted that he should take occupation of the parcel of land which he had been registered as the owner thereof.

DW2 Elijah Chelaite, a director of the company confirms the evidence of the defendant as regards the offer which was made to the plaintiff but which offer the plaintiff refused to accede to. He however also gave an account of how the title in respect of the suit property was issued to the plaintiff in the first place and not to the defendant. He stated that the defendant and his mother called Nyambura Chege, had occupied the suit land initially on the basis of false documents. It appears that the person whom they exchanged their parcel of land in Uasin Gishu District, had been issued with a share certificate of the company that was not genuine. DW2 conceded that when the title to the suit land was issued to the plaintiff, the position as per the records of the company was that the plaintiff was a genuine shareholder whilst the defendant was an imposter. However, when the defendant explained his case, the directors of the company sympathised with his situation and advised him to regularize his stay on the suit land by purchasing a share from a genuine member. The defendant followed this advise and purchased a share from an existing member. The company then sought to reverse its decision allocating the suit land to the plaintiff. They offered the plaintiff an alternative parcel of land. He refused to play ball hence this suit.

After carefully evaluating the evidence adduced by the plaintiff and the defendant I do hold that the plaintiff has established on a balance of probabilities that he is the legal owner of the suit land. When the plaintiff was allocated the suit land by Kalenjini Enterprises, the position in the records of the company was that the defendant was a non-member of the said company. He was not possessed of a genuine share certificate. When investigations were conducted by the company it was established that the person whom the defendant exchanged the land with was a non-member of the company. He had been issued with a fake share certificate. When the defendant realized that the plaintiff has been issued with the title of the suit land he sought to regularize his stay on the suit land. He was able to persuade the company to let him

stay on the suit land after the company agreed to offer the plaintiff an alternative parcel of land. DW2 testified that the defendant's membership in the company was regularized after the plaintiff had been issued with the title to the suit land.

From the evidence adduced it is evident that the defendant regularized his position with the company in the year 2002. This was five years after the plaintiff had been issued with the title of the suit land. In my considered view, the company could not purport to make a decision affecting a parcel of land which it no longer controlled. If the company wanted to assist the defendant, then it ought to have settled the defendant elsewhere and not on the parcel of land legally belonging to the plaintiff. DW2 conceded that the land which was being offered to the plaintiff was less valuable than the land currently occupied by the defendant. It is no wonder that the plaintiff declined the offer to be settled elsewhere. I do find that the evidence offered by the defendant supported the plaintiff's claim that he was the genuine allottee and therefore the legal owner of the suit land. The company should do the decent thing and allocate the defendant another parcel of land instead of giving him false hopes that he still has any claim over the suit land which belongs to the plaintiff, a first registered owner of the same.

In the premises therefore judgment is hereby entered for the plaintiff as against the defendant as hereunder:

(i) The defendant is hereby declared to be a trespasser on the plaintiff's parcel of land known as DUNDORI/MUGWATHI BLOCK 2/250.

(ii) The defendant is hereby ordered to deliver vacant possession of the suit land to the plaintiff within FORTY FIVE (45) DAYS upon being served with the decree of this court in default thereof, an eviction order is hereby issued evicting the defendant from the suit land. The plaintiff shall be at liberty to secure the eviction of the defendant.

(iii) The counterclaim filed by the defendant is hereby dismissed with costs.

(iv) The plaintiff shall have the costs of this suit.

**DATED at NAKURU this 21<sup>st</sup> day of September 2005.**

**L. KIMARU**

JUDGE