REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 14 OF 2004

MALCOLM BELL……...……...PLAINTIFF

VERSUS

HON. DANIEL TOROITICH ARAP MOI…..…….……..…..1ST DEFENDANT

THE BOARD OF GOVERNORS MOI

HIGH SCHOOL, KABARAK)…….…..…....….2ND DEFENDANT

J U D G M E N T

The Plaintiff in this case is a white farmer who conducts large scale farming within Nakuru District. Normally he grows wheat and also keeps livestock.

On the other hand, the 1st Defendant is the former President of Kenya who now resides at his Kabarak Farm. He held the above position for a period of about 24 years. The 2nd Defendant is the Board of Governors of Moi High School, Kabarak whose details and constitution, the Plaintiff has stated is unknown to him. According to the Plaintiff, the 1st Defendant was the proprietor of the learning institution known as MOI HIGH SCHOOL, KABARAK. That apart, the Plaintiff has also stated that he is the registered owner of the parcel of land known as LR. NO.6207/02 situated within Kabarak area of Nakuru District and which land is adjacent to the said MOI HIGH SCHOOL KABARAK. The said land measures a total of 1028 Acres or thereabouts. In his evidence, the PW1 – MALCOLM JOHN BELL (hereinafter referred to as the Plaintiff) stated that a portion of his land on LR.6207/02has been occupied by the Defendant. The Plaintiff recalled that his late father Viz Walter Bell had bought the farm from one Mr. Thern Hill on 5th August, 1968 at a price of Kshs.190,000/- as shown by the Transfer Document. The above transaction was registered on 4th October, 1968. On the other hand, the Plaintiff was registered as the owner on 19th May, 2000 as shown by the Title Document. According to the Plaintiff, sometimes in 1981, some unknown people went to his father and informed him that they were representing some important people. However, these emissaries never mentioned the names of the said important people. In addition to the above, the emissaries never indicated the acreage that was required. However, the late Walter Bell was warned that if he never gave the land, then he would loose the entire parcel. According to the Plaintiff, he observed that his late father was very worried when he was telling him the above. Apart from the above, his late father stopped going to the land in question that was opposite Kabarak High School. Further to the above, the Plaintiff stated that his father informed him that he had not signed any Agreement between himself and anybody for the sale of the land. Thereafter, in 1986, the Plaintiff observed some people from Kabarak High School who blocked the access road from their farm to the main road. That is part of the Nakuru/Marigat Road. The said access road was blocked by putting a fence across the same. In response to the above, the late Bell who was by then under stress and fear – went to see the Principal of Kabarak High School. Eventually, after about 2 years, the road was unblocked. Apart from the above, the Plaintiff stated that around 1987, his late father was called by the “The School” to

sign a document to transfer the disputed land. Specifically his father told him that he had gone to see the former President in connection with the signing of the transfer. The late Bell was categorical that he never signed the transfer for the land. That apart, the Plaintiff stated that their water supply came from across the road and that the cattle dip was later knocked down together with the stores and water tanks. Due to the above destruction, the late Bell suffered for sometimes and later relocated the head of cattle to his adjacent farm. The Plaintiff stated that his father believed that he could not take the Head of State to Court. Unfortunately, the late Bell died on 19th July, 1997, as can be seen by the Death Certificate – P.Ex.4. Earlier, around 1994-95, the Plaintiff took over the father's land but refrained from taking action on the disputed land – since Hon. Daniel Arap Moi was still the Head of State. The Plaintiff denied any knowledge of his late father donating any land to Kabarak High School. He further pointed out that the Will does not mention the 1st Defendant nor Kabarak High School. The Plaintiff was categorical that he is the only child of the deceased and that nobody raised any objections before the Grant was confirmed.

In addition to the above, the Plaintiff stated that there are no encumbrances that have been registered with the exception of the charges. The Plaintiff recalled that in 1988, a stranger went to their farm while using an ambulance and talked to him about regularizing the situation. In response, the Plaintiff told the stranger to make a proposal. Consequently, somebody rang the Plaintiff in 1998, and wanted to regularize the transaction. Again he responded by telling him to make a proposal.

After some correspondence between himself and the 2nd Defendant, the Plaintiff and his Counsel viz, Mr. Kahiga, went to see the former President. Also present in that meeting was Mr. Kiplenge and Mr. Kipkemei, the advocate for the School. Apart from the above, Mr. Henry Kiplagat, the Principal of the School was also present at the meeting. After some exhaustive discussions, it was agreed that the former President would make an offer to the Plaintiff.

According to the Plaintiff, an offer was later made through a valuation that was carried out by Apple Cross Surveyor – P.Ex.16. The said report put the value of the land at Kshs.12.5M. Being dissatisfied by the above valuation, the Plaintiff instructed the farm of Prime Valuers to carry out another valuation. The latter valuers came out with a valuation of Kshs.20M as shown in their report – P.Ex.17. Despite the two valuation reports, the parties were unable to reach any amicable settlement.

Besides the above, the Plaintiff stated that his farm was connected to electricity from 1998 following an Agreement with the K.P.L.C. as shown by P.Ex.19. The said connection was done under the rural electrification programme after the Plaintiff paid a deposit of Kshs.6,000/. The Plaintiff denied that the excision of the 100 acres was done under the supervision of his late father. Apart from the above, the Plaintiff stated that the 1st Defendant is the owner of the Kabarak High School and that he had watched him construct and supervise the construction of the School. Though the Plaintiff conceded knowing Mrs. June Dykes as a friend of his father, he believed that the lady had a grudge against him. The Plaintiff was not amused that on 25th July, 1995, Mrs. Dykes and Mr. J.C. Mills had tried to obtain the following documents from the offices of Mr. Kagucia, Advocate:

- An original GrantNo.9304 dated 13th February, 1953.

- Transfer dated 13th February, 1996 from Walter Bell to Raw Hide Ltd.

- Original Memorandum of Charge by Deposit of Document of Title Deed 13th February, 1996.

- Discharge of Charge (duplicate) dated 13th February, 1996.

- Certificate of Registration of a Mortgage dated 13th March, 1977.

- Application for registration Land Control Board Consent and Application Form.

- Transfer dated 29th September, 1961.

- 2 Charge documents and photocopy of Land Rent Receipt.

When the Plaintiff raised issue with their acts, the two held a grudge against him. Despite the above, the Plaintiff conceded that Mrs. Dykes was named as a beneficiary in the Will and also appointed to benefit from the proceeds of sale of a house in Karen and residue of the Deposit Account at Derna Finance.

In view of his above evidence, the Plaintiff has prayed for an order directing the Defendants to move out of the disputed land since he is the registered owner. He has also prayed for mesne profits from 19th May, 2000, when he became the registered owner. The Plaintiff reckoned that, had he used the disputed land to grow wheat and keeping livestock he would have earned about Kshs.4,000/- per annum for an acre of land.

In her evidence, the DW.1 – Mrs. June Elizabeth Dykes stated that she has retired from farming and secretarial work. The DW1 further stated that she knows both the Plaintiff and his late father viz, Walter Bell. The DW1 recalled how in November, 1978, she was invited by the late Bell to go and stay there in a spare house to look after the 6 horses. In return, the DW1 was also to look after the horses of the late Bell. By then, her house was about ¼ kilometre from the house of the late Bell. They were only separated by a farm yard comprising a workshop, office and various stores.

Subsequently, in 1983, the Plaintiff came back from England and stayed for 2 months before going back. Apparently some love blossomed between the DW1 and the late Bell necessitating the gracious lady to move into the house of the latter. The DW1 stated that they stayed in his house and they got along very well. According to her, she qualified to be called his common law wife. Apart from living with him and looking after the house, she also nursed him whenever he was ill. She also revealed that she used to share a bed with the late Bell. When the Plaintiff came back to Kenya around 1985, he stayed in the house where the DW1 had vacated. The DW1 also stated that she knew the disputed parcel of land that was approximately 100 acres.

The DW1 recalled that around 1981, the former President came to see Mr. Bell to request him to sell the land opposite Kabarak High School. Though the DW1 was not present during the meeting, she was informed by the late Bell who was very pleased with what he had done. Later that evening, the late Bell went to her house for supper and told her that he had agreed to donate land to the School after the former President wanted the land for the School, and had requested whether they could purchase 80 acres. However, due to the position of the Plot, the late Bell decided to square it off at 100 acres. The DW1informed the Court that the late Bell did not want to be paid money. Instead the late Bell wanted:

- electricity to be connected to the farm.

- a bore-hole to be sunk.

- a new cattle-dip to be built on the remaining land.

Apart from the above, the DW1 informed the Court that the late Bell also informed her that they would no longer use that land. In addition to the above, the DW1 stated that the late Bell never informed her that his life was in danger. Knowing the late Bell well, the DW1, stated that he was never intimidated nor forced to give the land. She denied that the late Bell had been threatened. Further to the above, DW1 also stated that after two weeks of the former President's visit, the disputed land was fenced. The DW1 explained that she had stayed with the late Bell as his common law wife between 1983 to 1997 and concluded that he was not a cowardly man. That apart, the DW1 recalled that Kabarak School built the cattle dip almost immediately. It was only in the early 1990s that the late Bell approached the former President and informed him that he had not got the bore hole. In response, Kabarak High School sent some people who dug for about six months though they never got any water. Eventually, the school connected the farm with piped water from the main pipeline from Rongai.

The DW1 further stated that electricity was only supplied after the late Bell Senior died. According to the DW1, two weeks before the late Bell died, he had instructed the Plaintiff to go and see the Head Master of Kabarak so that electricity could be connected and the land transfer to be finalized. The DW1 was categorical that she was present in the bedroom at the Jackman Farm, Naivasha when the father of the

Plaintiff instructed him to transfer the land. The DW1 conceded that she had benefited from the Estate of deceased who left her with a portion of the sale of the property that had been sold at Karen, and a car. The deceased also bought and gave her Jackman Farm, Naivasha, that is 20 acres, 6 horses, a Land Rover – Model Defender. The DW1 was of the opinion that the total value of the property that she inherited after the death of the late Bell was roughly Kshs.6M.

The DW1 recalled that during her stay in the farm, the Plaintiff was not happy when his father sold 700 acres to Mr. Mills. The DW1 revealed that she stays on that farm which was named Raw Hide Ltd. Besides the above, the DW1 also revealed that the Plaintiff was upset with her after she collected some documents from Kagucia, Advocate on the instructions of the late Bell. She denied that the land was unlawfully and forcefully taken from the late Bell. In addition to the above, the DW1, stated that the School has farmed the disputed land continuously without any interruption for about 23 years. While referring to the Will of the late Bell, the DW1 stated that the same never instructed the executors to recover the disputed land. She concluded her evidence by stating that the Plaintiff should not have sued the former President.

In his evidence, the DW2 , Jolyon Cawley Mills introduced himself as a farmer at Kambi ya Moto, Nakuru. He related that he had known the late Bell from the late 1960s and he became his neighbour at Kambi Ya Moto in 1983. Since they were very good friends, the late Bell told him that he had donated a piece of land through the Ex-President to the School. In exchange for the land, the school had accepted to:

- replace the cattle dip on the donated land.

- try to find water to supply to his farm.

- supply mains electricity .

The DW2 also stated that the late Bell had told him that after the deal was complete, then the School would sub-divide the land and he would hand over the Title Deed. He recalled that the late Bell was very happy because he thought that he had got a good deal. According to the DW2 – there was no question that the late Bell had been forced to the deal. The DW2 described the late Bell as fearless, and a strong man that was highly respected in the community that he lived in.

As far as electricity was concerned, the DW2 who was a neighbour to the late Bell was supplied with electricity after paying a cool sum of Kshs.1,261,000/-. Since the DW2 was good friends with late Bell, he stated that if the deceased was intimidated, or forced to give his land, then he would definitely have told him. The DW2 confirmed that the School has been using the disputed land since 1985. The DW2 also revealed that he saw a new cattle dip being built in the late Bell's farm between 1985-86. The latter confirmed that the said cattle dip was being replaced by Kabarak High School. In addition to the above, the DW2 also saw a boredrilling rig from the Ministry of Water Development working on Lowling Farm in 1994. While talking to the late Bell, he confirmed that the same had been supplied by Kabarak High School as part of the land deal. That apart, the DW2 also stated that since water had not been found by 1995, the late Bell sent away the rig and basically accepted that no water could be found on the farm.

Significantly, about two weeks before his death, the later Bell told the DW2 that he had the Plaintiff to hand over the Title Deed to Kabarak once electricity had been connected to Lowling Farm. The DW2 confirmed that electricity was connected to the farm in June, 1998 – after the deceased passed away. The DW2 was surprised that the Plaintiff had denied knowing that Patricia Anne was the daughter of the father from the first marriage. According to the DW2, all the documents that were collected from Kagucia, Advocate were connected to his company viz Raw Hide Ltd. He also confirmed that as the deceased became weaker he authorized the DW1 to collect the documents on his behalf to hand over to the executors to facilitate the execution of the Will.

In his evidence, the DW3 – Hugh Peter Barclay introduced himself as a farmer and a friend to the late Bell. The DW3 also stated that he used to meet the late Bell on many occasions. Historically, their two families also come from Cambria in the United Kingdom. Apart from the above, the DW3 recalled that

the deceased was not only a farmer but also a cattle trader. Besides the above, the DW3 revealed that he knew the former President very well since he had met him on many occasions. In addition to the above, the DW3 also stated that he has been neighbours with the former President for many years. According to the DW3, around 1981-82, he heard that the late Bell had sold some land to the Kabarak School. Later on, the late Bell confirmed the above story and explained that there was a proposal to turn the school into an Agricultural College. Further to the above, the DW3 explained that the late Bell had agreed to avail about 100 acres for the purpose and was happy about the proposal. Instead of payment, the lateBell had asked the school to:

- supply electricity to his house and storage area.

- dig a bore-hole and rebuild a cattle dip to another site.

That apart, the DW3 also stated that the value of land in 1981 – around the disputed land was Kshs.2,000 per acre. That means that, had the late Bell bartered the land, then the same would have been valued at around Kshs.200,000. In his evidence, the DW3 was categorical that had the former President used any threats, then he would have known because that would have been common talk. According to the DW3, had the former President made such threats – then the same would have been meaningless and resented. To him, it would have been impossible for the deceased to succumb to such threats. The DW3 later recalled that he met the late Bell who informed him that the drilling rig had failed to get water and that he was ready to settle for electricity since he knew that the Agreement would be observed in due course. Apart from the above, the DW3 told the Court that he knew Mr. Henry Kiplagat – the current Principal of Kabarak School since they had made several contacts. The DW3 recalled that on 31st January, 2003, Mr. Kiplagat approached him with a view of discussing a letter that he had received from the Plaintiff's lawyer. Subsequently, the DW3 booked an appointment with the Plaintiff and they had a friendly meeting. However, the Plaintiff complained that the land had been taken illegally and when the issue of electricity was raised, he stated that he was a citizen of this country and therefore he was entitled to free electricity. The DW3 vividly recalled that the Plaintiff never complained that his father had been threatened nor did he complain of any untoward conduct by the former President. Around mid-February, 2003, the DW3 made another appointment with the Plaintiff and explained to him that nothing could be done to change the deal with the exception of payment of survey fees. In response, the Plaintiff insisted that the school could negotiate for a fair deal for 100 Acres – and that if a figure was agreed then there would be a sub-division and a Land Control Board consent. Otherwise, the school would have to hand back the land and compensate him for lack of user. The Plaintiff also told the DW3 to tell the school that they would not get cheap land since he knew the value of the land. The DW3 expressed surprise that the Plaintiff later decided to sue the former President.

In conclusion to his evidence, the DW3 stated that he knew Elizabeth June Dykes who has been his neighbour before 1980. He confirmed that the lady later moved to Lowling Farm where she looked for horses and acted for the late Bell in many transactions. He was of the view that they were good companions and wondered why the deceased never married her. He also recalled that the lady later moved in with the late Bell and behaved as husband and wife.

In his evidence, the DW4 – Raymond Kiprop Kipkenei who is a practising Advocate stated that in the year 2003, Mirugi Kariuki, Advocate wrote a letter to the Principal of Moi High School, Kabarak. Consequently, the latter handed over the letter to the DW4 and instructed him that the land had been donated by the late Bell to the school. Thereafter, the DW4 wrote a letter to Mr. Kariuki, Advocate explaining that the school had been using the land. Apart from the above, the DW4 later learnt of special arrangements to supply water through a bore-hole, electricity and a cattle dip. The DW4 was later told by the Principal of the school that the Plaintiff had participated in the above activities. On 31st January, 2003, Mirugi Kariuki, Advocate wrote a letter to the DW4 which stated that there was no written Agreement, Land Control Board consent and consideration. Besides the above, on 7th February, 2003, Kariuki, Advocate wrote a similar letter to the former President.

On 28th February, 2003, Kiplenge & Associates replied to that letter stating that the former President was a stranger to the claim and also denied forcefully entering the land as alleged. Instead of suing the school,

the Plaintiff opted to sue the former President. Apart from the above, the DW4 also stated that Moi High School has been his client from November, 1993. During that period, he had represented them in several cases including Nakuru HCCC No. 741 of 1993 and Nakuru HCCC No. 226 of 1994.

Both cases were concluded and judgments entered against the school. On his part, the DW4 advised his client to pay and they complied. Though the 1st Defendant was by then the President of the Republic of Kenya – he never interfered with the legal process. Having been the lawyer to the school, the DW4 was aware that it had registered buses and land in its own names. The DW4 confirmed that the land parcel No. Rongai/Block 1/15 measuring 152.60 Ha has been registered in the name of the school. Apart from the above, the bus registration No. KXE 113 is also registered in the names of the school. The DW4 was categorical that the school is a separate legal entity from the former President and that it was conducting its matters independently. He also pointed out that the school has been using the land for its own benefit – and not that of the former President. The DW4 also attended a meeting where the Plaintiff expressed his view that what the school did was not commensurate with what the father had donated. The Plaintiff had also expressed his displeasure that the school had blocked him from seeing the former President. According to the DW4, the former President eventually agreed to be an Arbitrator in the dispute and actually a planned meeting took place under his chairmanship. The meeting was attended by the Principal of the School, the Plaintiff, Mr. Kahiga Advocate and Mr. Kiplenge, Advocate. During that meeting, the Plaintiff complained about the inadequacy of what the school did – and that the same had not been included in the Will of the father. It was also mutually agreed that both the school and Plaintiff would do their own valuations. The DW4 clearly recalled that the Plaintiff never complained that the 2nd Defendant had taken land by force. Instead, the Plaintiff congratulated the former President for protecting the interests of the white minority. In response, the former President appreciated the above comment. In his evidence, the DW5 – Sammy Kaptum Kogo who is now working with the Central Bank and Banking Officer 1 stated that in November, 1996, he joined Moi High School, Kabarak as a Commercial Manager. By then, his responsibilities were to supervise all activities that generated income to the school. In addition to the above, he was given special duties in early 1997 to supervise the construction of a cattle-dip and installation of electricity in the late Bell's farm. The DW5 stated that the construction of the dip commenced in early 1997 and was completed in the year 1998. The DW5 stated that the school paid for the construction of the cattle-dip and that the last payment was Kshs.70,000. Subsequently, the DW5 started supervising the installation of electricity upto the end. That apart, the DW5 stated that during the construction of the cattle-dip, the Plaintiff visited the site regularly and even made suggestions on the kind of poles to be used. During his interaction with the Plaintiff, the DW5 learnt that the farmer complained that the workers who dug the bore-hole, never did a good job and that the school had taken too long to construct the cattle-dip and supply electricity. While still working for the school, the DW5 was aware how his employer was conducting commercial activities on the parcel of the land like planting maize, fodder and keeping pigs. Apart from the above, the school had also built some residential houses for members of its staff on the disputed land. Though initially the Plaintiff expressed his willingness to transfer the land to the school, he later changed his mind and even refused to give an audience to the DW5. In her evidence, the DW6 – Catherine Gitonga who is a clerk in the Nakuru High Court produced the files:

- HCCC No. 226 of 1994

Isaya Kibet Chebii Vs Moi Kabarak High School and

- HCCC No. 741 of 1973

Zipporah Sogome Kiborek Vs Moi High School, Kabarak.

Both files indicate that judgment had been entered against Moi Kabarak High School. In his evidence, the DW8 – Henry Kiptiony Kiplagat introduced himself as the Principal of Moi High School, Kabarak. He has been the Principal of the school from 7th May, 2001. While giving evidence, he stated that the school was registered in 1979 as an Aided School – as shown by the Provisional Certificate – D-Ex.3. Due to the expansion of the school, the same was registered afresh on 23rd May, 1983 as shown by the Certificate – D-Ex.1.

Thereafter, the school changed its status from a harambee school to a private school. It also changed its name from Kabarak High School to Moi High School, Kabarak. That apart, the school also changed its number of streams from three to five. He also explained that the school stands on 1,180 acres. Out of the above, the former President donated 1,080 acres while the late Bell donated 100 acres. According to the DW8 – the school is owned by a Trust – which is an irrevocable Charity Trust. He further added that the school is non-profit making and that the same has never declared any dividends. Apart from the above, the school has its own Pin No. – Ex.6 and that it has been paying its own taxes. In addition to the above, the DW8 produced the following Logbooks:

- for Motor Vehicle Isuzu – Registration No. KXE 113 – D-Ex.4.

- for Motor Vehicle Toyota – Registration No. KAC 458 A – D-Ex.5.

Both the Logbooks demonstrated that the two vehicles belong to the school. Besides the above, the DW8 also testified that the school owns land parcel No. Rongai/Rongai Block 1/15 which measures 152.6 Ha – as shown by the Title Deed – D-Ex.7. The DW8 confirmed that the school is a legal entity and has its own Board of Governors. He also confirmed that when the school was being sued, the former President was the chairman of the school. That apart, the DW8 recalled that in January, 2003 he received a letter from the Plaintiff's Counsel – Ex.13 which asked the school to vacate the land. Instead of the school being sued, the Plaintiff instead opted to bring the former President to the Court. Seeing the above, the DW8 instructed his Advocate to file the originating summons which was accompanied by a supporting affidavit. The DW8 was categorical that the school has been occupying the land since 1981 and that the same has been fenced and padlocked. Further to the above, the DW8 also testified that the Plaintiff has not been having any activities within the 100 Acres and that he has never directed the school to vacate the land. Neither has he sent any emissary to tell the school to vacate the land. The DW8 was categorical that the Plaintiff has never tried to interfere with the peaceful enjoyment of that land. He added that the school has been occupying the land openly since 1981 and has never been dispossessed of the same. He denied that the school was being guarded by any General Service Unit personnel. In conclusion, the DW8 prayed that the name of the former President be removed from the Suit and that the disputed land be registered in the name of the school.

This Court has carefully perused the above evidence together with the detailed and well researched submissions by all the Counsels. This court is indeed genuinely grateful to the research that all the Counsels conducted. From the outset it is apparent that the Plaintiff's father viz, Walter Ginger Bell and the former President had entered into an oral agreement to have the disputed land -–100 Acres be given to Moi High School. That was way back in 1981. According to the Defendant's witness the two had agreed that in exchange for the land, the School would supply the following:-

- electricity to the farm of the late Bell

- sink a bore hole for the farm

- and a new cattle-dip.

According to the evidence of Malcolm Bell his father never entered into any agreement with anybody for the sale of land. During his evidence, the Plaintiff denied any knowledge about the cattle-dip and bore-hole. As far as electricity is concerned, the Plaintiff stated that the same was connected through his initiatives and efforts in 1998 following an Agreement with the KPLC. The evidence on record clearly show that the disputed land is agricultural. It is also not in dispute that the 2nd Defendant has been using the land for planting maize, fodder and keeping pigs.

Section 6(1) of the Land Control Act, states as follows:-

(a) - The sale, Transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area

(b) - The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of…

(c) - … is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance to this Act. Whereas the transaction between the late Bell and the former President may be called an oral agreement or "gentleman's Agreement" the parties never appeared before any Land Control Board to obtain a Consent for the transaction. Neither did the parties obtain any exemption. That means that for all intents and purposes, the agreement could not be enforced legally. The Agreement became void after 6 months. Though the High Court has powers to extend the period for the parties, it is apparent that nobody moved it to save the situation. For all intents and purposes, the said agreement became void. In the meantime, the 2nd Defendant took physical possession of the land and commenced commercial activities in the same. This Court concurs with the sentiments that were expressed in the case of:

Simiyu Vs Watamala (1985) in which it was stated as follows:-

"The Agreement for sale of the suit land was a controlled transaction requiring consent of Section 6(1) of the Land Control Act 1967 and for this reason the transaction was void for all purposes…"

After the suit was filed by the Plaintiff, the 2nd Defendant filed an Originating Summons under Order XXXVI Rule 3D, Section 13(1), 37 and 38 of the Limitations Act, (Cap 22 of the Laws of Kenya), Section 3 and 3A of the Civil Procedure Act, (Cap 21 of the Laws of Kenya), the Registration of Titles Act (Cap 281 of the Laws of Kenya) and all enabling Provisions of the Law. The said Originating Summons seeks the determination of the following questions:-

(1) Whether the Plaintiff School is entitled under Section 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya to be registered as absolute prosecutor of 100 of LR. No.6207/02.

(2) Whether the Defendant should excise out the said portion and transfer it to the Plaintiff School and failure to which the Deputy Registrar of the High Court, Nakuru should execute the transfer documents to the Plaintiff.

When the Originating Summons came up for hearing on 16th November, 2004, the parties never objected to the same being consolidated with the suit that was filed by Malcolm Bell. Section 7 of the Limitation of Actions Act, Cap 22 states as follows:-

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action." Apart from the above, Section 13(1) of the Limitation of Actions Act, Cap 22 states as follows:-

"A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under Sections, 9 10,11,and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land."

This court has noted that in the case of Public Trustee Vs Wanduru (1984) KLR at page 324. Hon. Justice Kneller J.A.(as he then was) stated as follows:- "The absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from anyone in possession or actual occupation from the date of the possession or actual occupation from the date of the possession or actual occupation but if he does not exercise it he may not bring an action to recover land after the end of twelve years."

This Court also notes with approval, the sentiments that were expressed in the case of:- J. A. Pyne (Oxford) Ltd and Others Vs Graham & Another [2003] 1 AC 419 Where it was stated as follows:-

(1) In the absence of evidence to the contrary, the owner of the land with the paper title is deemed to be in possession of the land as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi").

From the evidence on record, it is crystal clear that the School (2nd Defendant) entered the land openly, peacefully and without interruption for 20 years. Both the Plaintiff and his late father never attempted to re-acquire the land from the School. Though the Plaintiff stated that the Defendants are synonymous, the evidence on record is in stark contrast. DW8 produced the Dex.1,2 & 3 that showed clearly how the School was registered. In addition to the above, the DW8 also testified that the School is owned by an irrevocable Charity Trust. The same was registered on 16th February, 1984. The latter information was revealed during crossexamination by the Plaintiff's Counsel.

After the above information the Counsel never pursued the issue. Besides the above, it is also apparent that the School had been sued on several occasions when the 1st Defendant was the President of the Republic of Kenya. In two cases Nakuru HCCC NO.741 of 1993 and HCCC No. 226 of 1994, Judgments were entered against the 2nd Defendant. There is no evidence to suggest that the Plaintiff in those cases were scared or intimidated by the fact that the 1st Defendant was by then the President of the Republic of Kenya. The assertion by the Plaintiff that his father believed that he could not take the head of State to court is not only erroneous but an afterthought. The Plaintiff has also not proved who actually threatened his father and whether those people had any connection whatsoever with the 1st Defendant. The only role that the former President seems to have played was to enter into an oral agreement or gentleman's agreement with the late Bell. He also attempted in vain to arbitrate between the School and the Plaintiff. The conduct of the former President is beyond any reproach. His conduct was also above board. There is also no evidence that he misused the coercive powers of the State to intimidate, harass or arm-twist the late Bell. The attempts to malign his name are unjustified and unwarranted. Given the fact that the former President had already donated over 1,000 Acres to the School, why should he try to obtain a paltry 100 Acres from the Plaintiff's father by using illegal means? That assertion does not make any sense since it is common knowledge that the former President owns large tracts of land.

Turning to the submissions of the Plaintiff's Counsel, he has on several occasions taken issue with the fact that the former President had declined to come to Court to give evidence. However, the basic principle in law is that whoever alleges a fact then he must prove the same. In this case, the former President had no obligation nor duty to help the Plaintiff to fill the gaps in his case. The Plaintiff has the burden to prove his case on a balance of probabilities. Apart from the above, the Plaintiff's Counsel argument that the Board of Governors of Moi High School, Kabarak had no capacity to sue the Plaintiff – it is apparent that they never objected when the Originating Summons was filed. Having failed to object to its appearance, it is strange and preposterous for the same Plaintiff to seek Orders against the body that had no capacity to sue. Once the law has donated powers to a body to sue, then it must also give a corresponding right to be sued. That is the other side of the coin that Mr. Kahiga failed to appreciate.

During the hearing of this case, I had the benefit of perusing the manner and demeanour of the witnesses carefully. Unfortunately, the Plaintiff never impressed me to be a truthful and honest person. In the first place, the Plaintiff denied knowing one Patricia Anne who is his half (step) sister from the 1st marriage of his late father. The said Patricia was also one of the main beneficiaries of the late Bell's will. Even if the Plaintiff hated the lady with a passion, the least that I expected was for him to acknowledge their relationship.

Secondly, the Plaintiff also never came out clean on the issue of swearing affidavits before two Advocates viz, Mr. Waiganjo and Mr. Gai. Initially, he denied categorically appearing before any of the two Advocates. During Re-examination, the Plaintiff completely changed his story. Given the above, this Court cannot believe that he has any respect for the truth. On the other hand, the Court was impressed by

the evidence of the Defence witnesses who were consistent, logical and truthful. The DW1 – Ms. June Dykes, the DW2 – Jolyon Mills and DW3 - Hugh Peter Barclay are senior and respectable citizens of this country, There was no evidence that they had any grudge against the Plaintiff. There was also no evidence that they were likely to benefit in any way should the Plaintiff lose the case. What was apparent was that all three of them were very close to the late Bell who had been described as a courageous man.

The evidence on record clearly show that the Plaintiff has failed to prove his case on a balance of probabilities. On the other hand, I hereby find that the 2nd Defendant has proved its adverse possession claim since it has been in possession of the disputed land for over 20 years. That is far in excess of the 12 years required by the law. That possession has been open, continuous and uninterrupted. Besides the above, even assuming for argument's sake that the 2nd Defendant had entered the land by consent, as argued by Mr. Kahiga – that could only have been for 6 months to cover the statutory period to obtain a Land Board Consent. That consent cannot be for 20 years. This court concurs with the reasoning in the Court of appeal Case No.49 of 1996 (unreported at page 4 which states as follows:-

"From the Respondent's Plaint, and although a passing averment had been made to his having been in occupation of the suit land from 1967, his claim of adverse possession of the suit land for the purposes of his action, could only have begun from the time the statutory period for obtaining the Consent of the Land Control Board lapsed and the agreement became void, prior to which, there was no evidence to establish…"

Briefly that means that the period of 12 years starts running from the date when the period for applying consent lapses. That apart, this Court is bound by the decisions of the Court of Appeal since the same is the highest Court in the land. In conclusion the Court hereby invokes Section 38 of the Limitation of Actions Act, Cap 22 to order that the 2nd Defendant be registered as absolute proprietor of 100 acres of land Parcel No. LR. No.6207/2.

- I hereby Order that Malcolm Bell should sign the Transfer and Sub-Division Forms in favour of the Moi High School, Kabarak within the next 30 days.

- In default, the Deputy registrar, Nakuru to sign the Transfer Form and Sub-division Form in favour of the school.

- Since costs follow the event, the Plaintiff to pay the same.

Those are the Orders of the Court.

Right of Appeal Explained.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of Mr. Kiplenge for 1st Defendant

Mr. Sunkuli for 2nd Defendant

Mr. Kahiga for Plaintiff

MUGA APONDI

JUDGE

31ST OCTOBER, 2005