



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE 69 OF 1993

FRANCIS CHEPLAITI.....PLAINTIFF

VERSUS

W. A. CHEPKWONY.....DEFENDANT

JUDGEMENT

The plaintiff in HCCC No. 69 of 1993 Francis Cheplaiti filed this suit against one W.A. Chepkwony averring that by legal notice number 4260 and 4261 of 4.10.85 the government compulsorily acquired land in Tambach area for the purpose of constructing the Tambach Teachers college on the said land during which process the plaintiff's land parcel number 2579 measuring 0.7 hectares and comprising a permanent house and other improvements was compulsorily acquired valued by the government at 378,000/=, in lieu of a monetary award the plaintiff was allocated plot number 41 in Sergoit crown land measuring 48 acres by the government under the provisions of land Acquisition Act Cap 295 Laws of Kenya which decision was communicated in writing by the defendant on 23rd January 1993. The plaintiff accepted this arrangement and took possession of land parcel number 41 Sergoit crown land, on 21.4.93 the defendant purported to rescind the foresaid grant of land and sent a surveyor to the parcel of land to re-survey it in readiness for reallocation to other persons, that the purported rescission of the grant of parcel number 41 Sergoit is unlawful and is meant to deprive the plaintiff of his constitutional right to a just and prompt compensation for the compulsorily acquired plot number 2579 Tambach, that if the defendant is not restrained, he will have the plot number 41 sergoit, subdivided and given out to other undeserving people and deprive the plaintiff of his legally acquired property. In consequence thereof the plaintiff seeks a permanent injunction barring the defendant and his agents or servants from interfering with trespassing on or otherwise dealing with plot No.41 Sergoit crown land.

The defendants defence is that he agrees that the plaintiff is entitled to 48 acres in Sergoit crown land but denies that the plaintiff was allocated plot number 41 Sergoit crown land in pursuance thereof, that his letter dated 23rd January 1993 contained a typographical error and should have read plot number 77 and not plot number 41 as the later plot measures 5 acres which would not have been adequate compensation to the plaintiff and in any event was reserved as a public utility plot while plot number 77 measuring 48 acres which is the plaintiff's entitlement under the compensation scheme, that as soon as the typographical error was discovered the defendant in a letter dated 15.2.1993 notified the plaintiff of the error and advised him to return the earlier allotment letter and collect another one showing the right parcel of land, denied that the plaintiff took possession of plot number 41 Sergoit crown land or that he ferried it as alleged in paragraph 6 or at all and he puts him to strict proof, denied that he sent a surveyor to re-survey plot 41 on 21.4.93 or that he intended or intends to re-allocate the plot to other persons as alleged or at all and puts the plaintiff to strict proof, that the initial survey to Sergoit crown land was done between December 1992 and January 1993 with a view to settling all those who were to be allocated land

in the crown land in lieu of monetary compensation and no re-survey has been done nor is any contemplated either on plot number 41 or any other plot, that plot number 77 Sergoit crown land which is the plaintiff's rightful and just compensation is still vacant pending his taking possession of it.

That plot 41 which comprises 5 acres only adjoins other plots allocated to other persons, under the same compensation scheme and if the plaintiff takes plot 41 and insists on getting his 48 acres then he is going to displace 13 other allottees, which would cause untold suffering to those other people and their families who have already taken possession of their plots and would have to be removed this disrupting the whole scheme of a re-settlement. That the plaintiff is not entitled to an injunction against the defendant as he is just effecting the compensation scheme by resettling in Sergoit crown land, the people whose land was compulsorily acquired to make room for Tambach teachers college and the defendants acting as an agent of the Elgeyo Marakwet District Development committee of which he is the chairman which was mandated by the government to carry out the exercise on its behalf and to grant an injunction would amount to issuing an injunction against the government which cannot be obtained by virtue of the government proceedings Act Cap 40 laws of Kenya.

On the basis of the foregoing averments the plaintiff prayed for the suit to be dismissed with costs.

In High court civil case NO.46 of 1994 the plaintiffs are John Chepchirchir Cheserem, Taprandich S. Barngetuny, Chruiyot A. Chebii, William Kipkoech Cherop, Lazaro Chirchir Rotich, John Kipkosgei Kangogo, David Kiplimo Kimaiyo, Joseph Chepkok, Anin Secondary school while the defendant is Francis Cheplaiti the plaintiff in High court civil case no. 69/93. The averments are that on 23.1.93 all the plaintiffs were allocated plots of land numbers: 141, 140, 145, 142, 139, 119, 120, 122 and 41 respectively by the government of Kenya in Sergoit holding ground unit located in Uasin Gishu, Moiben Division, that the defendant is also an allottee in the said holding ground being the allottee of plot No. 77, that on or about January 1994 the defendant unlawfully and without any reasonable cause interfered with the plaintiff's possession of their respective parcels of land as stated in paragraph 3 hereof by trespassing on the said land and leaving his own land no.77 that they are the rightful allottees of the parcels enumerated in paragraph 3 hereof while the plaintiff is the allottee of plot No.77 in the holding ground, that the plaintiffs interference on their respective parcel is wrongful and without any justification in that the said defendant has not been allotted the said parcels and his continued interference will deprive the plaintiffs of their right to use, occupation and possession, he has threatened to plough the said parcel for the 1994 farming season which action is likely to deprive the plaintiffs of their harvest from the 1994 season, thus cause them irreparable loss and damage. On the basis of the above averring the plaintiffs pray that the defendant be restrained by a permanent injunction from interfering with the plaintiff's parcel of land, the plaintiffs be declared the rightful allottees of their respectful parcels, that the defendant do pay costs of the suit and the court do grant any other relief that the honourable court deem fit to grant.

In his defence the defendant denied paragraph 4 of the plaint and put the plaintiff to strict proof, denied the contents of paragraph 5 of the plaint and that he shall prove by documentary evidence that the defendant was allocated plot number 41 measuring 48 acres in Sergoit crown land by way of compensation for the defendant's land compulsorily acquired by the government of Kenya for construction and setting up of Tambach Teachers College, that he then took possession of plot No.41 measuring 48 acres in Sergoit crown land long before the plaintiffs came into the picture and that subsequently some politicians and administrators using the plaintiffs as a front decided to lay a claim on the defendant's entitlement foresaid, and when he defendant realized that his rights were at stake he filed Eldoret High court civil case number 69/93 which is still pending and that this suit is solely brought to defeat the earlier suit and the same is incompetent as it has been presented under fraud and offends the provisions of section 6 of Cap 21 Laws of Kenya, that the documents relied upon by the plaintiffs were recently fabricated to suit the intention the defendants detractors in the earlier suit, that the plaintiffs were not even gazetted earlier as persons who were entitled to be compensated for the compulsory acquisition of their parcels at Tambach area for setting up of Tambach Teachers College, denied paragraph 6, 7 and 8 of the plaint and states that he fenced off the land immediately after the defendant had been allocated the same as aforesaid and he has developed the same to the exclusion of the plaintiffs, denied paragraph 9 and 10 and put the plaintiffs to strict proof, that he will raise a preliminary objection, that the suit is incompetent presented in bad faith and an abuse of process of court hence the same ought to be struck out

with costs.

On 31.3.94 the two suits were consolidated and heard together as one. On 13.6.94 an oral amendment was made whereby an additional paragraph 10'A' to read the plaintiff, further prays for declaration orders of court to the effect that plot 41 Sergoit crown land which was allocated to the plaintiff vide plaintiffs allotment letter dated 23.1.93 and measuring 48 acres rightfully and lawfully belongs to the plaintiff. An additional relief to that effect was added. A total of nine witnesses gave evidence for the plaintiff and these are P.W.1 Francis Kipruto Cheplaiti, P.W.2 Cosmas Chelimo, P.W.4 Josephine Rono, P.W.5 Mosei Muindi, P.W.6 Peter Kipkoros, P.W.7 Michael Kipkorir Cherop, P.W.8 Francis Kimuge and P.W.9 Francis Kipkoros Chebiego.

A total of eight (8) witnesses gave evidence for the defence, D.W.1, the late Honourable Paul Ruto Chepkok, D.W.2 Lazaro Chirchir, D.W.3 Francis Cheruiyot Chebii, D.W.4 Raymond Kinja, D.W.5 Taprandich Barngetuny, D.W.6 John Kipkosgei, Kangogo, D.W.7 David Kiplimo Kimaiyo and D.W.8 WILLIAM Kipkoeh Cherop. An over view picture of the evidence on the record is that there was need to expand the facilities at Tambach Teachers College. The government decided to compulsorily acquire land in the neighbourhood for this purpose. The intention was gazetted and a list of those persons and the parcel numbers acquired were also gazetted vide two gazette notices No.4261 of 4.10.85 and number 4260 of the same date as shown on exhibit two and three. P.W.1 was among those listed with 3 parcels of land. The compensation was to be paid for in form of money but later on the people affected petitioned the government to compensate them in form of land. D.W.1 the late Honourable Paul chepkok was involved in the exercise as the area M.P. and after negotiations the government decided to settle those affected in Sergoit crown land or Sergoit holding ground unit.

The land was duly subdivided and plot numbers of various sizes established which were to be allocated to those concerned. P.W.8 the then area Chief convened a baraza attended by those concerned, the area District Commissioner and the then area M.P. D.W.1. The message given out to the persons is what is contained in the letter exhibit 4 dated 26.8.1988 giving the person affected 60 days to vacate the land in question. This did not materialize till after allocation of the land in the crown land, which came later on in 1993. The process followed for allocation was that the area Chief, P.W.8 had to give clearance before one surrenders the old title deed and then goes to collect the allotment letter. It is not in dispute that the plaintiff herein was cleared to be compensated for 3 portions of land as shown in exhibit 5 being parcel number 2579A, 2579 B and a council plot. P.W. 8 confirmed in his evidence that he duly cleared him for allocation of land at Sergoit crown land. He also confirmed that he owned land parcel number ELGEYO/MARAKWET/KAPTARIK/2579 by producing a certified copy of the title deed exhibit 1 confirmed that his parcels of lands were taken possession by the government as shown by notices of taking possession by the land Registrar exhibit 16 dated 4.12.1994 and another from the District Valuation officer exhibit 17.

Following the government taking over possession of land and having been cleared by P.W.8 to be allocated other land P.W.1 proceeded to the District Commissioner and he was issued with three allotment letters exhibit 6 for plot no.41, 7 for plot 16 and 8 for plot 25 equivalent to 3 plots, he had surrendered. Plot 41 was the larger one where he intended to settle and he moved to make developments. He went to the land and was shown the land by the surveyor and he was shown where the beacons were. He then hired P.W.2 Cosmas Chelimo a neighbour to put 4 posts marking the boundary one at each end and P.W.2 did so. He made arrangements to purchase cedar posts which he did vide exhibit 15 and he transported them to the land in question as shown by exhibit 10 dated 14.4.93. He took facilities from the Agriculture Finance corporation to do farming on the land as shown by exhibit 19.

Trouble started when the persons affected complained in the newspaper that the land meant to compensate those who had surrendered land for the development of Tambach Teachers College was being given out to undeserving people. Those complaints were highlighted in the standard newspaper of Friday April 2nd 1993, Nation newspaper of Saturday, 3rd April 1993 and standard newspaper of Wednesday January 26th 1994, cuttings of the same were produced to court as exhibit 11(a), (b), (c), (d) and e, also Daily nation of 22nd April 1993. It is the evidence of P.W.1 that the complaints in the newspaper were levelled against the area M.P and the then District Commissioner whom he sued as the

defendant whom they accused of allocating land to undeserving people and yet those other people had not given any land to the government. This allegedly caused disharmony between him and the District Commissioner and the then Area M.P. D.W.1 .It is P.W.1 's evidence that the then District Commissioner told him to his very face that he was going to do the cancellation.

That threat was carried into effect when the then District Commissioner W.A. Chepkwony wrote a letter exhibit 12 dated 15.2.1993 to the plaintiff informing him that the plot allocated to him was not No.41 but it should be 77 and that plot nO.41 belongs to a school and requiring him to return the earlier allotment letter and collect the correct one. P.W.1 was thus aggrieved and he moved to this court filing civil suit No. HCCC 69/93 against the District Commissioner as a person. He obtained an injunction to stop the repossession until the matter is heard and determined. It is his evidence that the District Commissioner did not heed the injunction order and he went ahead to instruct the surveyor to go and subdivide plot 41 into 5 acre parcels or less. The surveyors went to the land using motor vehicle registration number G.K. 5301 and G.K. J760 as shown by the work tickets exhibit 21 and 22. In the meantime P.W.1 had hired a private valuer. P.W.5 Moseti Muindi to carry out valuation of plot number 77 and determined its agriculture viability.

The report is exhibit 26 and P.W.5 said that the land is not agriculturally arable land and he gave its value as 5,000/= on the way back they P.W.1 and 5 passed by plot No.41 and found the surveyor going about the sub-division of plot 41 as shown by the photographs exhibit 25 (a) PW 5 also took photographs of the disputed plot 77 which show that it is rocky exhibit 25(a) (h). P.W.1 also produced a plan of the area exhibit 20 showing that the original plot 41 was sub-divided into 14 portions forming plot 41, 122, 138, 139, 140, 141, 142, 143, 119, 120, 136, 137, 144, 145, layout plans were offered in evidence but not produced. M.F.I.28 showed plot 41 as one whole unit while MFI 27 showed it having been subdivided. They were not however produced in evidence as exhibits. The stand of P.W.1 is that he was lawfully allocated plot 41 as confirmed by the documents and a neighbour. P.W.4 who assisted P.W.1 by keeping his farm inputs. She also confirmed that other persons came ploughed portions of the same land and that is when the dispute arose.

Commenting on the case of the defendants P.W.1 stated that the defendants who are the plaintiffs in Eldoret High Court Civil case No.46 of 1994 were transported and planted in his portion in order to settle the differences he had with the then area M.P. D.W.1 and the District Commissioner, it is his evidence that if they were genuine Allotees they would have been given a stencilled letter but signed in free hand by the area District Commissioner like the one given to P.W.7 Michael Kipkorir Cherop who produced his as exhibit 29 for plot 44. Other witnesses for the plaintiff were P.W.3, John Kiprop Kitum a board member of Anin secondary school by local arrangement between the community and then headmaster P.W.9, Francis Kipkoros the appointment was not by the Minister of Education but by local arrangements as shown by exhibit 23, 24. The proper board was the one constituted as shown by exhibit D4a (b), (c), (d) (e) (f) (g) (h), (i) and D13.

Moving to the defence case the key witness was D.W.1 the then area M.P. who stated that while agreeing that the government agreed to compensate those who had given land to the Tambach Teachers Training College with land at Sergoit holding ground at the same time the government also decided to compensate other individuals who had surrendered their land for the expansion of other public utilities in the area like secondary schools, primary schools and health centres. The documents relied upon by D.W.1 were not produced as exhibits and do not qualify to be considered in the assessment of the evidence but I will set them out in this judgement for purposes of the record:

(1) For Anin secondary school the headmaster, P.W.9 stated he sent in the application dated 22nd March 1993 exhibit 30 and yet the allocation had already been given to them vide letter M.F.I.D.2 dated 23.1.93 M.F.I.D.5 dated 18.2.93 purports to acknowledge allocation of plot 41 to them which was to be given to the person who had given land for the expansion of the school but the same is not signed.

(2) The allotment to kapkonga primary school is for 25 acres comprising plot 94, 95 and 80 and 15 signed in stencil M.F.I.D6R.

- (3) M.F.I.D6A relates to Anin secondary school and it is not signed.
- (4) M.F.I.D.6 (b) relates to Cheboret primary school and it is dated 17th August 1993 for plot 68. It is not signed. P.W.6 had said that this plot was given to his school Kaplamai primary school but the same was rejected by the school because it was rocky.
- (5) M.F.I.6© relates to Kaplamai primary school in respect to plot 69. It is not signed. (6) M.F.I 6(d) relates to Kibargoiyet primary school comprising 9 acres in plot 70. It is not signed.
- (7) M.F.I.63 relates to Karkitony primary school in respect of 5 acres in plot number 71. It is only signed in stencil.
- (8) M.F.I. 6 (f) relates to Kipkaa primary school in respect to plot 72 signed in stencil. www.kenyalaw.org Francis Cheplaiti v W. A. Chepkwony [2003] eKLR 10
- (9) M.F.I. 6g relates to Chepkoiki primary school in respect to plot, 73 of 5 acres.
- (10) M.F.I.6H relates to Kupkisum secondary school in respect of plot 76 of 10 acres, it is signed in stencil. (11) M.F.I.6I relates to Chepkoki primary school it relates to plot 81 of 5 acres. It is not signed.
- (12) M.F.I. 6,J5 relates to Kapingo primary school in respect to plot 84 10 acres, it is signed in stencil.
- (13) M.F.I.6K relates to Bugar primary school in respect to plot 85 of 10 acres
- (14) M.F.I.6L relates to Kapsisi primary school in respect of plot No. 62 of 5 acres each signed in stencil.
- (15) M.F.I.6M relates to Cheberon primary school in respect to plot no. 63 of 5 acres. (16) M.F.I.D6N relates to Kipchowat primary school in respect of plot No.64 of 5 acres.
- (17) M.F.I.D6(0) relates to Chebokokwo primary school in respect to plot 65 of 5 acres.
- (18) M.F.I.6P relates to Kibendo primary school in respect to plot number 66 of 5 acres.
- (19) M.F.I.6Q relates to Kiptabus primary school in respect to plot no.67 of 5 acres.
- (20) M.F.I.D.7A relates to Kipkorir Chemweno allocated plot 133 of 1 ½ acres in compensation of plot 83 but it is not signed.
- (21) M.F.I.D7 (b) relates to Clement Toroitich who was allocated plot number 134 of 2 ½ acres in compensation to plot 83. It is not signed.
- (22) M.F.I.D7© relates to Simion Kiproop Marti who was allocated plot no. 135 of one acre in compensation of plot 83.

D.W.1 further added that proceedings relating to the foregoing allocations are in the District Commissioner's office as the allocations were discussed and approved in the District Development Committee meetings and he could produce the same given time. These documents were not produced.

Commenting on the first allocation letter in respect to plot 41 given to P.W.1 D.W.1 said that P.W.1 confused the D.O.1 when the D.C. was out and told him he had been given plot 41 and the secretary typed plot 41 and it is a forgery, this court was informed that the plaintiff in 46/94 John Kipchirchir withdrew from the case. The second plaintiff in that file Taprandich Barng'etuny gave

evidence as P.W.5 and her evidence is that she gave out 3 ¼ acres to Sergoit secondary school and a church and the health centre and then she was allocated plot 140 of 2 ½ acres vide exhibit DII which is signed in free hand by the district commissioner. She however agreed that she has nothing to show that she gave out her land to the institutions named.

William Kipkoech Cherop who gave evidence as D.W.8 said he was allocated plot 142 of 2 ½ acres, which is signed by the district commissioner exhibit D8. He says he did not surrender any land to any institution in order to qualify for the plot allocated to him. He says he sent in an application to be allocated land but he had nothing to show that he applied for any land.

Lazaro Chirchir the 5th plaintiff in 46/94 gave evidence as D.W.2 and said that he did not lose any land to any institution but he applied to be allocated land in 1992 and he was given one plot 139 in exhibit 8 for 2 ½ acres. He however failed to produce the letter of application.

John Kipkosgei Kongogo gave evidence as D.W.6 defendant number 6 also stated that he did not lose any land to any institution. He just applied for land but he does not have a letter of application. He produced a photocopy of the allotment letter as F1 D.12 saying he does not know where the original went as he misplaced it.

David Kiplimo Kimaiyo gave evidence as D.W.7. He has no land and the photocopy of the allotment letter M.F.I.D13 does not say what he was being compensated for. D.W.3 the 3rd plaintiff in high court civil case 46/94 says he was allocated plot 145. He lost land to Sergoit secondary school in 1987 but there are, no minutes to prove that and the evidence to show that there were lists of names submitted to the D.C.'s office among them his own name to be considered for allocation of land. He only had a photocopy of the letter of allotment. He says that he ploughed the land and planted as confirmed by P.W.4 but the plaintiff ploughed it down and his father had the damages assessed and shown by M.F.I.D.4 but he has not taken any action as he is waiting for this case to be finalized before action can be taken.

D.W.4 Raymond K. Kinja was allocated plot 143 of 2 ½ acres and he was shown land on 20.1.93 but he applied for it in March 1993 as shown by M.F.I.D.10 which is a photocopy. The letter does not show him to have surrendered any land to any institution. All he knows is that he applied for land and he was allocated but there is no letter of application exhibited by him.

The defendant. In High court civil case no. 69/93 did not give any evidence. Written submissions were filed by the three parties. The points relied upon by the plaintiffs are that they maintain that the plaintiff has proved his case on a balance of probabilities because :

(1) The plaintiffs allotment of plot number 41 Sergoit crown land was pursuant to the earlier decision by the government to compulsorily acquire his land parcel Elgeyo Marakwet/Kapterik 2579 and after assessment was found out that only plot 41 could compensate him.

2. Sergoit crown land was being given out to persons whose land had been compulsorily acquired and given to Tambach Teachers College evidence by the fact that letters of allotment were copied to the principal Tambach Teachers College.

3. No evidence was offered by William Chepkwony as to why he cancelled the letter of allotment for plot 41 to P.W.1 and since no explanation has been given the court to hold that the cancellation was void and not justified. No evidence as to where and when he got the authority to cancel the same and this court should issue declaratory orders to allow the plaintiff to continue occupying plot 41 Sergoit crown land.

4. None of the defendants lands were compulsorily acquired to warrant them being allocated any of the said crown land.

5. The plaintiffs land parcel number Elgeyo Marakwet/Kapterik/2579 was valued at 378,000/= and can only be compensated for by plot 41 and not 77 which was valued by P.W5 to be 5,000/=.

6. The plaintiff has settled on this land and developed the same and he cannot be injuncted and evicted by persons who were not part of the land acquisition process.

7. The plaintiff is entitled to injunction because none of the defendants had been allocated land before him and their allocation was made well after the plaintiff had been allocated his and settled on the same land:

(ii). No reason has been given to support the cancellation of the said letter.

(iii). The basis for allocation was surrendering land compulsorily acquired and all the defendants denied surrendering any land to the Teachers Training College.

(iv). No reasons have been given as to why the plaintiff should move to plot 77. 8. Since the plaintiff's interests were acquired first in time they take priority over those of others.

9. D.W.1 alleged forgery by the plaintiff but no evidence was tendered by him to support that, neither were particulars of the same given and so that allegation has no basis.

10. The alienation of land to the defendants is not valid as they had not surrendered any land which had been compulsorily acquired and the allocation given should be cancelled.

11. They maintain it is plot 41, which is equivalent to the value of land compulsorily acquired from the plaintiff. On the basis of the foregoing they urge the court to allow the plaintiff's claim and dismiss the defendant's claim in High court civil case No.46/94 with costs.

The state submissions on behalf of the defendant in High court civil case 69/93 is that the said defendant was the then District Commissioner Elgeyo Marakwet District and he presided over the compulsory acquisition of land where now Tambach Teachers College stands vide gazette notice number 4260 and 4261 of 4.10.85.

2. The evidence from both sides show that at first P.W.1 was allocated plot number 41 and when it was realized that there was a mistake it was cancelled and he was allocated plot number 77 which comprised 48 acres while plot 41 only comprised 5 acres.

3. D.W.1 gave oral evidence as to why some institutions were given land at Sergoit crown land and yet they had not surrendered any land to Tambach Teachers College. He D.W.1 said that Sergoit holding ground was not only meant for people who had surrendered land to Tambach Teachers College but to all those who had surrendered to other public institutions.

4. They urge the court to find that the plaintiff was allocated plot 77 comprising 48 acres and he should take possession of the same. He plaintiff should surrender plot 41 and the value of developments be calculated and paid to him after subtracting value for the use of the same.

5. If he does not want plot 77 he should go for monetary compensation calculated to date.

6. The plaintiff should be asked to surrender allotment letter for plot 77 as he plaintiff did not come to court with clean hands.

On the basis of the foregoing they urge the court to dismiss the plaintiff's case with costs.

Counsel for the plaintiffs in High court civil case 46/94 who are defendants in High court civil case no.69/93 stressed the following points.

(1) That Sergoit holding ground is government land for which they applied to be allocated portions of the same covered by plot numbers 62-76, 80-85, 41, 94-95 all of which allocated to various schools and 140-141, 143-145, 136-139 all which were allocated to the defendants

while plot number 77 was allocated to the plaintiff.

(2) The allegation that there was an original allocation to the plaintiff of plot 41 which was cancelled does not hold as the same was not proved. Plot 77 is the rightfully allocated plot to the plaintiff over which the defendants have no claim and he should get it.

(3) The surveyor who did the sub-division did not come to prove that there was a cancellation.

(4) That the surveying was done by the plaintiff despite the injunction in favour of the defendants in High court civil case 46/94.

(5) That allocations were not given to people who lost land to Tambach Teachers College but it was given for expansions of schools in the area by people in the neighbourhood of those schools surrendering their land to the schools and taken land allocated to the schools in the crown land and the fact that the defendants names did not appear in the Kenya gazette for compulsory acquisition of their land does not mean that they were not entitled to the said land. They applied for it and they were issued with allotment letters and it was not necessary to prove that a person surrendered land to the Tambach Teachers College before he was allocated alternative land.

(6) It is not proper for the plaintiff to continue occupying land which the authorities have allocated to other persons and putting those other persons into unnecessary disputes.

(7) The defendants contend that they are in occupation of their respective plots and if the plaintiff is not happy with plot 77 he should sue the authorities concerned.

On the basis of the foregoing they urge the court to dismiss the plaintiff's suit with costs.

A total of 12 issues were agreed upon between the parties for determination by the court and this court will proceed to examine them taking an over view of the entire evidence adduced. Issue No.1 and 2 are inter related and will be considered together. The stand of the plaintiff is that he was rightfully allotted plot 41 as per exhibit 6 which is duly signed by the then District Commissioner William Chepkwony which states that he had been allocated plot 41 comprising 48 acres. It is evidently clear that this allotment was cancelled by exhibit 12 which cancellation the plaintiff has resisted leading to these proceedings. Wilson Chepkwony in his letter exhibit 12 stated it was erroneous as plot 41 only comprises 5 acres.

He did not however explain how the error arose. He did not offer evidence and attend court for cross examination. D.W.1 attempted to explain the error as having arisen because P.W.1 cheated the then district officer 1 a Mr. Cheboi that he had been given plot 41 comprising 48 acres and the secretary allegedly went to type out plot 41 on the said paper. D.W.1 was not present when that was allegedly done and in the absence for the evidence of then district officer 1, Mr. Cheboi and the secretary what D.W.1 told the court is hearsay and cannot be acted upon. Failing to offer explanation by Wilson Chepkwony and the ouster of the hearsay evidenced by D.W.1 has to be considered against the explanation given by P.W.1. He said the change was caused by the fact that him and other residents who were meant to benefit from the compensation scheme had complained in the press that other undeserving people were benefiting from the scheme. He proved these by producing newspapers cuttings one of them exhibit 11(e) is dated 26.1.94 exhibit 11(d) is dated 3.4.93, 11(b) dated April 2 1993 and 11(c) dated 22.4.93.

The plaintiff is named as one of those voicing the discontentment. The acquisition was levelled at powerful politicians and D.W.1 was a politician in the area and senior government officers, William Chepkwony was a senior government officer. D.W.1 gave evidence and said that he read the complaints and refuted the same but he did not take any action against P.W.1 The court therefore believes that indeed P.W.1 was among those who raised complaints in respect to the allocation and so his assertion that cancellation came after the raising of the complaints cannot be ruled out proved by the fact that William Chepkwony chose

not to give evidence and since no explanation was given for his non attendance, the court is entitled to draw an adverse inference against him that had he attended court the evidence would have been against the defence.

Further to fortify his case P.W.1 produced the map exhibit 20 which shows the disputed portion as the one marked in green. The marking of the plots inside is 41, 122, 138, 139, 140, 141, 142, 143, 119, 120, 136, 137, 144, 145 compared to the other numberings around on this lay out plan it is this court's findings that serial numbering methods as opposed to random numbering methods was being employed by the surveyors. It follows that if serial numbers were to be applied the given portion would have contained plot numbers 41-55. By numbering 41 and then jumping to 122, 138 e.t.c. it shows that the smaller subdivisions were brought at a later stage. This goes to prove that plot 41 was initially 48 acres when it was allotted to P.W.1 and it was unjustifiably subdivided in order to get him out of the same. He was further supported on this allegation by the photographs he produced showing that the area had been sub-divided earlier and fencing posts put by the beneficiaries and then a re-survey done. This is further confirmed by the fact that the defence who were in possession of evidence from the survey officers who were to come and confirm on how and when the smaller sub-divisions were done were not called to give this evidence. They have the proper persons to give an explanation. Failure to call them shows that had they been called their evidence would have been adverse to the defence.

It is therefore the finding of this court that plot 41 was allocated to P.W.1 as a block and the sub-division came later to settle the differences between P.W.1 and those complained against. Failure to offer an explanation shows that the revocation was unlawful and unjustified more so when no proof was given to show that the plaintiff instigated the allocation of the said plot to himself

2. Issue 3 and 4 are inter related. It is agreed the plaintiff compensation entitlement was 378,000/=. It is admitted so in the defence. That entitled him to an equivalent value of 48 acres. Plot 77 is indicated to be rocky and was valued at Khs.5, 000/= by D.W.5 It was for the defence to counter that report and show that plot 77 as shown measures up to the value of Khss.378,000/=. In the absence of that there is no justification for the offer of plot 77 in lieu of the earlier allotted plot 41.

Issue 5 and 6 are related and they will be dealt with together. It is in evidence and it was admitted to by D.W.1, 2, 3, 4, 5, 6, 7 and 8 that the persons and the institutions named did not appear in the land acquisition process as shown by exhibit 2 and 3. They did not give out any land to Tambach Teachers Training College. They did not loose any land to the government. D.W.1 tried to explain that those named had surrendered land to other public institutions but he produced no such proof. He said further that the process involving those named was one of voluntary surrender of land to Public Utilities in offer to being allotted land in the crown land but no proof of the same was given. D.W.1 said he would produce evidence given time but none was produced. His evidence was contradicted by D.W.3, 4, 6, 7 and 8 who said they had not lost any land to any institution, that they had just applied for the land but produced no letters of application to that effect. Those who claimed to have lost land to the institutions being D.W.2 to Sergoit secondary school and D.W.5 to Sergoit secondary school, a church and a health centre produced no evidence to show that they owned a land near the said institution or that they surrendered any.

The defence counsel has submitted that they lawfully applied for the land and were lawfully allocated the same but there were no application letters exhibited. Some had only photocopies as proving allotment. The basis for the allotment to these people among them the defendants has not been given. No record of procedure followed to allocate the same was exhibited and it is the finding of this court that those allocations for purposes of this case were irregular.

As regards issue no. 7 there is nothing to show that the land was erroneously allocated. The reasoning by this court assigned to issue no. 1 and 2 explains the true position.

As regards issue no.9 it is the finding of this court that William Chepkwony was sued in his own personal capacity and not official capacity. Issue number 8, 10, 11 and 12 will be dealt with together. The totality of the evidence on the record shows that the plaintiff P.W1 moved to the land first. After the

resub- division the defendants and/or their agents attempted to move onto the land but the plaintiff kept them out. He is using the land to date having been assisted by an injunctive order.

Finally the two competing interests when weighed together, the court finds that the plaintiff P.W.1 is the right person to keep plot 41 as it originally was before resub-division on it as it is the one which answers his compensation claim in respect to the land surrendered to the government. The defendant's claim in respect to this plot fails as they were imposed by the then district commissioner William Chepkwony to serve his own ends of settling scores with P.W.1 because of the complaints raised about the allocation of the land in question.

(1). The final orders of this court are that the claim in Eldoret High Court civil case nO.46/1994 is dismissed with costs to the defendant therein.

(2). The claim in Eldoret High court civil case nO.69/93 is allowed on the following terms:

(i) An order be and is hereby made that declaration orders of court to the effect that plot No. 41 Sergoit crown land initially allocated to the plaintiff and now comprising plot numbers 41, 122, 138, 139, 140, 141, 142, 143, 119, 120, 136, 137, 144 and 145 as aforestated measuring 48 acres lawfully and rightfully belongs to the plaintiff.

(ii) The said numbers 122, 138, 139, 140, 141, 142, 143, 119, 120, 136, 137, 144 and 145 introduced later on are to be blotted out or obliterated leaving plot number 41 alone for the said portion.

(iii) The said plot number as enumerated in number

(ii) above are to be re-allocated elsewhere in any portion of vacant land.

(iv) A permanent injunction be and is hereby issued against the defendant and his agents or servants or any one claiming through them barring them from interfering with trespassing or as otherwise dealing with plot no.41 Sergoit crown land area as originally allocated.

(3). The plaintiff in Eldoret High court civil case number 69/93 will have costs of the suit.

Dated, read and delivered at Eldoret this 23rd day of May, 2003.

R. NAMBUYE

JUDGE