



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

**CIVIL SUIT NO. 4090 OF 1992**

**LOIS HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**NDIWA TAMBOI & 53 OTHERS.....DEFENDANTS**

**JUDGEMENT**

This case started as Civil Suit No. 207 of 1991, at the High Court at Eldoret. The Plaintiff, dated 1<sup>st</sup> October 1991, pleads as follows:

- (a) the Plaintiff is and was at all material times the legal owner of the parcels of land L.R. 6416/6; L.R. 5335/2; and L.R. 6485 situate in Endebess, Trans-Nzoia District.
- (b) In 1985 or thereabouts the Defendants unlawfully invaded the Plaintiff's parcels of land and occupied portions thereof, and even erected illegal structures thereon.
- (c) The Defendants were arraigned before the Court on 11<sup>th</sup> July, 1986, charged and convicted in Criminal Case No. 3409 of 1986 at Kitale and were ordered by the Court to vacate the farm by 1<sup>st</sup> August, 1987.
- (d) The Defendants ignored the Court Order and continued to remain on the Plaintiff's parcels of land.
- (e) The Plaintiff now claimed vacant possession and general damages for trespass against the Defendants, their agents, servants and relatives from occupying, cultivating, farming, digging, grazing or otherwise dealing with the Plaintiff's parcels of land.
- (f) The Plaintiff was praying for general damages for trespass.
- (g) The Plaintiff was asking for costs of the suit.
- (h) The Plaintiff was praying for interest payment on damages and costs.
- (i) The Plaintiff was praying for any further relief such as the Court may deem fit.

Only on 2<sup>nd</sup> August, 1994, nearly three years later, did the Defendants file a Defence, and by that time the case had been transferred, first, from the Eldoret High Court to the Nakuru High Court and now to the High Court at Nairobi, as Civil Suit No. 4090 of 1992. The Honourable Mr. Justice Aganyanya on 12<sup>th</sup> March, 1992, at the High Court at Eldoret, ordered that the case be transferred to the High Court at

Nakuru and gave temporary injunctions against the Defendants and in favour of the Plaintiff.

The Defendants asserted in their Statement of Defence as follows:

- (a) In 1985 the Defendants, same as the Plaintiff, had wished to purchase one of the suit parcels of land, L.R. No. 5335/2 at Endebess.
- (b) The Management of the Co-operative Bank reneged on an agreement regarding the proposed purchase by the Defendants, and ensured the property was sold to the Plaintiff.
- (c) They accuse the Plaintiff of a breach of trust, which resulted in the purchase of the suit lands by the Plaintiff and not the Defendants themselves.
- (d) The Defendants assert that they have occupied the lands in question for more than 12 years and they are now the ones who should be recognised by the owners.
- (e) The Defendants deny that they were the exact persons who had been ordered in criminal case No. 3409 of 1986 to vacate the Plaintiff's lands.

Amid the shifts of the case from one High Court station to another, an Order was apparently made on 20<sup>th</sup> June, 2001 dismissing the suit for want of prosecution. On 7<sup>th</sup> March, 2003 the Plaintiff filed an application by Notice of Motion, seeking Orders:

setting aside the Orders of 20<sup>th</sup> June, 2001 and allowing the Plaintiff to prosecute the suit.

It was asserted on the face of the Notice of Motion that the Court had dismissed the suit without notice to the Plaintiff, and that the Court file could not be traced while it went through the Nakuru High Court, and so normal follow-up became impossible at a time when changes of Advocates to handle the case had also taken place. Only in October, 2002 had it been possible to trace the Court file in Nairobi, where it appears to have ended because of congestion at the Nakuru Court, and the transfer had taken place without notice to the parties.

The case was restored to life with the Notice of Motion application and with the Ruling of the Honourable Mr. Justice Ransley which was delivered on 26<sup>th</sup> May, 2003. The learned Judge said:

“The Court has a discretion whether or not to reinstate the case. I am satisfied that good reason has been shown why the Plaintiffs were not aware that the suit had been dismissed and why they did not set the matter down for hearing. I will reinstate the suit on condition that within 14 days the Plaintiff takes steps to set this case down for hearing in the Registry...”

Nine days later, on 4<sup>th</sup> June, 2003 the Plaintiff's Advocates wrote to the Defendants' Advocates requesting a meeting at the High Court Registry for the purpose of fixing a hearing date. And on 23<sup>rd</sup> June, 2003 the Plaintiff's Advocates sent a hearing notice to the Defendants' Advocates. There is on file an Affidavit of Service by Pella Amugune Tsisaga, an authorised Process Server of the High Court, dated 6<sup>th</sup> August, 2003.

Paragraph 3 of this Affidavit states:

“THAT on [the] 22<sup>nd</sup> day of July 2003 I travelled to Kitale and caused the said Hearing Notice to be served upon the said firm of J.M. Wafula & Co. Advocates [i.e., Advocates for the Defendants] wherein the clerk of the said firm duly acknowledged service by stamping and signing at the back of the principal copy herein returned to the Court duly served.”

The Hearing Notice served on the Defendants' Advocates indicated that “this matter is coming up for Hearing on 1<sup>st</sup> and 2<sup>nd</sup> December, 2003 at the High Court, Nairobi at 9.00 a.m. or soon thereafter.”

At the hearing of this case on 1<sup>st</sup> December, 2003, the Defendants were not represented. Moreover, their Advocates had not apparently designated anyone to hold brief for them. But curiously, the Advocates for the Defendants, on 12<sup>th</sup> November, 2003 filed a Notice of Motion under Section 3A of the Civil Procedure Act (Cap.21) and Order XLVI Rule 5 of the Civil Procedure Rules. The application is not certified urgent, and although it states on its face that it is to be served upon the Advocates for the Plaintiff, no Affidavit of Service is attached to show that it was indeed served.

The application states:

“TAKE NOTICE that this Court shall be moved on this [sic] 20<sup>th</sup> day of January, 2004 at 9.00 a.m. or soon thereafter as the Court may decide to hear an application by the counsel for the Applicant for the following Orders:

(a) That the suit be transferred to Kitale High Court for hearing and formal disposal.

(b) Costs in the course [sic] .

.....”

It is clear that the Court and the parties were already committed for a hearing of the suit before the filing of the Defendants’ application by Notice of Motion, and there is in any case serious doubts as to whether the application was duly served. However that may be, the case was rightly heard on 1<sup>st</sup> December, 2003.

At the hearing, Mr. Kinongo held brief for Mr. Onyambu of Nyaundi Tuiyott & Co. Advocates. Mr. Kinongo made his opening remarks before examining the witness who was sworn, Mr. Douglas Gituma Kimbui. It emerged that three parcels with different registration numbers, all belonging in every respect to the Plaintiff, were the subject of suit. These are L.R. No. 6416/6, L.R. 5335/2 and L.R. 6485, all situate at Endebess.

The witness, Mr. Douglas Gituma Kimbui, a doctoral student in the Faculty of Commerce at the University of Nairobi, is the Manager of Lois Holdings Ltd., the Plaintiff. He did not know the Defendants personally, though he had dealt with them in relation to the disputed occupation by them of the Plaintiff’s properties. Lois Holdings originally belonged to the witness’s father and mother. As a company, they bought two parcels of land, from ITE Farmers Co-operative Society in 1985. There was a Sale Agreement, and they gave consideration in the form of a payment of Kenya Shillings 1.2 million, in respect of two plots, L.R. No. 6485, and L.R. No. 6416/6. These plots were sold with vacant possession. Later ITE Farmers Co-operative Society sold to Lois Holdings the third parcel L.R. No. 5335/2. These parcels were duly transferred, and payment was facilitated through the Co-operative Bank. On 19<sup>th</sup> December, 1985, the witness was registered as the owner of the plots and he started using the land. The third plot, L.R. No. 5335/2 was the last that ITE Farmers Co-operative Society had at Endebess. When this plot was sold, it had workers who resided there, and they were duly informed that the plot had been sold; so they would have to seek employment elsewhere, unless they made new employment arrangements with the new owners. Those who did not move were, in Criminal Case No. 3409 of 1986, charged for trespass, found guilty and ordered to vacate the land, and this applied to each and all of the 54 of them. They did appeal to the High Court at Eldoret, against the conviction. Their Appeals were dismissed (Exhibit 4). Owing to the presence of the Defendants on the suit plots, the owner is prevented from using his land. The witness said he had raised an administrative complaint with the District Commissioner (D.C.) responsible for the Endebess area, and the D.C. advised him to seek an eviction order; and it is this advice that led him to file Civil Suit No. 207/1991 which later became Civil Suit No. 4090/92. The witness said he was making all the prayers set out in the Plaintiff dated 1<sup>st</sup> October, 1991.

The evidence before the Court shows that the Plaintiff is the rightful owner of the three parcels of land in question: L.R. No. 6416/6, L.R. No. 5335/2 and L.R. No. 6485 in the Endebess area. The Plaintiff has every right under the law of uninterrupted, peaceful enjoyment of his three parcels of land. The continued presence of the Defendants upon the Plaintiff’s land, without his consent and in breach of lawful orders

of the Court, is a serious violation of the law of the land, against which this Court must firmly set its face. Much financial loss has been occasioned to the Plaintiff by this illegal occupation of his land by strangers. The Defendants have produced no evidence or legal submission whatsoever, to controvert the Plaintiff's case founded on the Plaint dated 1<sup>st</sup> October, 1991. Even the pleadings of the Defendants, in the form of their Statement of Defence, has made no concrete assertion of fact on the basis of which some colour of right might be founded; indeed, their Defence has been no more than an argumentative document which hardly at all helps their cause.

In the circumstances, I give judgement in favour of the Plaintiff, and order as follows:

1. The Defendants shall forthwith vacate the suit properties, L.R. No. 6416/6, L.R. No. 5335/2 and L.R. No. 6485 in the Endebess area.
2. The Defendants shall pay general damages to the Plaintiff, in such sums as may be determined by formal proof in an application to be lodged by the Plaintiff, and such damages to be paid with interest.
3. I grant a permanent injunction to restrain the Defendants, their agents, servants and/or relatives from all unauthorised activity on the suit property, such activity including but not limited to occupation, cultivation, farming, digging, grazing, visiting or sojourning.
4. The Defendants shall pay the Plaintiff's costs, as taxed, with interest.

**DATED and DELIVERED at Nairobi this 16<sup>th</sup> day of December, 2003.**

**J.B. OJWANG**

**Ag. JUDGE**

**Coram: Ojwang, Ag. J.**

**Court clerk: Mutea**

**For the Plaintiff: Mr. Kinongo, Instructed by M/s Nyaundi Tuiyott & Co. Advocates**

**On record for the Defendants: J.M. Wafula & Co. Advocates**