



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 151 OF 1998**

KILONZO KIMANYI.....PLAINTIFF

VERSUS

JOHN NZESYA MBALUKA & ANOTHER.....DEFENDANT

**JUDGMENT**

Plaintiff seeks four substantive reliefs in the plaint. The main relief is for an order that defendants and their families be evicted from land parcel No. Muranga /thanga phase 1/389. He also claims general damages for trespass.

Plaintiff pleads in para 4 of the plaint that he is the owner of the suit land. He avers in para 5 that defendants wrongfully entered into the land in about 1995 took possession and erected residential houses and structures plaintiff in his evidence testified, inter alia, that:

- (a) That he is a brother of NZIOKA KIMANYI who was allocated the suit land by Government in 1968
- (b) That the land was in a settlement scheme.
- (c) That after death of his brother on 28.1.94 he filed High Court succession cause no. 2607/94 in High Court Nairobi and the High Court eventually confirmed the Grant on 29.9.95 and ordered that the suit land be registered in his name.
- (d) That he was eventually registered proprietor of the suit land Title Deed issued to him on 21.5.96
- (e) That he has never lived on the land in dispute

First defendant gave evidence and called one witness Stephen Kariuki (DW2)

First defendants evidence is in summary as follows:

- (i) He was given the land in dispute by officer in charge of settlement and the Chief in 1969 and he and his brother (2nd defendant occupied the land in 1969.
- (ii) He and his brother then built on the land and developed it
- (iii) He did not know Nzioka Kiamnyi or the plaintiff and neither of them lived on the land or claimed the land.

(iv) They were called to the settlement office in 1985 and asked to pay shs 1000 for the land and they paid shs 1000 on 19.2.85 (receipt Ex D1) (v) On 28.7.87, first defendant was issued with a certificate of outright purchase (Ex D.2.)

(vi) First defendant came to know plaintiff in 1997 when first defendant was called to D.O.'s Office and informed that plaintiff had a title Deed to the land.

(vii) That he did an Official search at the land office on 28.2.2000 and found that the land in dispute is still registered in the name of the government. (Certificate of official search dated 28.2.2000 (Ex D 3(b)).

(viii) Before he (first defenedant) could file a suit for nullification of plaintiffs title, he was served with summons in this suit.

(ix) He (first defendant) was not served with documents in respect of the succession case or informed that there was such a case.

This is a case where plaintiff is claiming possession of the land on the basis of the Title Deed issued to him through a succession case. There is however ample evidence that first defendant and his brother (second defendant) have live on the land for many years. Plaintiff himself has never lived on the land. There is no concrete evidence that plaintiffs deceased brother Nzioka Kimanyui ever took possession of the land and cultivated it. It is common ground that the land belonged to the Government. It appears that before plaintiff filed the succession cause the only document he had to show that land was allocated to NZIOKA KIMANYI is the receipt dated 6.11.69 for payment of Kshs 5 (five) as licence fees for the plot in dispute. Stephen Kariuki (DW2) explained that settlement land was being given to deserving people and after a receipt like the one produced by plaintiff for shs 5 was issued , person issued with the receipt was expected to take possession of the land and if he did not, the settlement office would allocate the land to somebody else. He explained further that there are many people who were issued with similar receipts but were not allocated the land. The receipt produced by plaintiff 6.11.68 (Ex 4) clearly shows that the shs 5/= was paid on account of licence fees and not on account of allocation fees.

Plaintiff filed the succession case in 1994. About 10 years earlier first defendant had paid shs 1000 for purchase of the land in dispute from the government and the receipt dated 19.2.85 (Ex D1) confirms so. Further about seven years earlier first defendant had been issued with a certificate of out right purchase dated 28.7.87 which confirms that first defendants is the allottee of the suit land.

So by the time the grant was being confirmed on 29.9.95, first defendant had already purchased the suit land from the Government had had been confirmed as the allottee over seven years before. Further by 28.1.94 when Nzioka Kimanyui died he had not been officially allotted the land indispute. Rathar the land had been allotted to the first defendant over seven years before his death.

From the foregoing it is clear that the land in dispute had not passed to the estate of Nzioka Kimanyui by the time of his death.

The succession case was done without the knowledge of the first defendant. Therefore first defendant would not have laid a claim to the land at the time of confirmation of the Grant. From the foregoing I am not satisfied that plaintiff hqas a better title to the land in dispute than the first defendant.

I dismiss the suit with costs and leave the defendant to decide on the next action to take.

E. M.Githinji

Judge

6.10.2000

Mr. Muli absent

Plaintiff present

Mr. Mbiyu absent

2nd defendant present