



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KERCIHO**

**ELC CASE NO. 31 OF 2015**

**JULIUS GITHERE KINUHI.....PLAINTIFF**

**VERSUS**

**THE BOARD OF MANAGEMENT URAFIKI PRIMARY SCHOOL.....DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 3<sup>rd</sup> July 2013 and amended on 14<sup>th</sup> December 2017, the Plaintiff herein instituted this suit against the Defendant seeking for orders that:

- i. A declaration be made by this honorable court that the Plaintiff is the rightful and legal owner of the suit property.
- ii. An eviction order against the Defendant by itself, agents, servants, employees or any other party acting on its behalf to vacate plot number No. LR Kericho/ Chilchila/Kunyak/Block 2 Urafiki 84 upon a proper survey being carried out and acreage of the parts (sic) entitlement is ascertained.
- iii. An order of permanent injunction restraining the Defendant by itself agents, servants, employees or any other party through whom they may be acting from interfering with, trespassing onto, sub dividing, selling, transferring, assigning, fencing, erecting structures thereon and/or doing any other act which is prejudicial to the Plaintiff's proprietary interest on No. LR Kericho/ Chilchila/Kunyak/Block 2 Urafiki 84.
- iv. Costs and interest.
- v. Any other relief the Court may deem fit and just to grant.

2. The Defendant having failed to either enter appearance or file a defence despite having been duly served, the matter was set down for formal proof hearing on the 7<sup>th</sup> February 2019.

3. The Plaintiff testified as PW1 to the effect that he had come to court because his parcel of land No. Kericho/Chilchila/Kunyak/Block 2 Urafiki/84 measuring 3.238 hectares had been unlawfully occupied by Urafiki Primary School. He testified that he had the original title deed (original shown to court) and a copy produced as Pf exh 1. He also produced a copy of his Identity Card No. [...] (original shown to court) as Pf exhibit 2 and a copy of his Pin Certificate NO.[...] as Pf exhibit 3.

4. He went on to testify that he had been one of those people who had fought for Uhuru (Independence) whereby he had been detained at Manyani. That upon his release, he had joined other former detainees and together they had formed Urafiki Farmers' Co-operative Society Ltd as a member. That they had thereafter raised money to buy land. That subsequently they had been informed that there was land at Kerubo that belonged to one James Norman Wilkinson. He produced a letter of consent for transfer of Land parcel No 7233/2 through sale issued to Urafiki Farmers Co-operatiave Society Ltd by Londiani/Fort Ternan Divisional Land Board as Pf exhibit 4. That he had then bought land through his shares in the Co-operative Society.

5. He produced receipts for the payments he had made to the said Co-operative Society as Pf exhibits 5(i)-(x) and confirmed that he had been given 3 shares which entitled him to 12 acres of land. That he was only given 8 acres worth 2 shares and had authorized the Co-operative Society to transfer one share to his wife Priscilla Njambi through a letter dated the 25<sup>th</sup> May 1978 which he produced as Pf exhibit 6.

6. That he had paid the survey fees amounting to Kshs. 4000/= and had been issued with an official receipt dated 29<sup>th</sup> November 1990 which he produced as Pf exhibit 7.

7. That he had made a further payment of Kshs. 2300/= being survey fees for the parcel of land that was transferred to his wife, and payments towards the Co-operative welfare and was issued with a receipt which he produced as Pf exhibit 8(a-b) and exhibit 9(a-b) respectively.
8. Subsequently, he had been issued with a letter dated 15<sup>th</sup> October 1990 produced as Pf exh 10, from Urafiki Co-operative Society confirming that he had 3 shares in the society. He also produced a list of members of Urafiki Farmers Co-op Society confirming that he was member No.81, as Pf exh 11.
9. The Plaintiff further testified that they had balloted for the said plots via ballot paper No.84 which he produced as Pf exhibit 12. He also produced a sketch of the sub-division showing the position where his parcel of land was, as Pf exh 13 and a survey Map showing his plot as Pf exh 14. His further testimony was that he had conducted several searches to confirm that he was the owner of the said plot which Certificates of Official Search and relevant payment receipts he produced as Pf exh 15(a-c).
10. Further to his evidence, he testified that in the year 1999, he had discovered that a caution had been placed on his land by the Defendant
11. He proceeded to testify that via a letter dated 15<sup>th</sup> February 2020 the Kenya Anti-Corruption Commission had written to one of their members Geoffrey Njuguna confirming that they had received his letter of 6<sup>th</sup> January 2000 concerning the disappearance of Urafiki Farmers Title deeds and that they had forwarded the matter to the District Commissioner (DC) Kericho for necessary action. The said letter was produced marked as Pf exh 17. He also produced a letter from the Ministry of Lands addressed to Geoffrey Njuguna of his complaint about his land which was marked as PMFI 18.
12. That on the 20<sup>th</sup> September 2000, he had attended an AGM of Urafiki Farmers Co-op where members were urged not to interfere with each other's land. According to the minutes, it had been confirmed that indeed he had been allocated plot No. 90. He produced the minutes as Pf exh 19.
13. That thereafter a letter dated 20<sup>th</sup> January 2005 had been addressed to the Defendant and copied to him by the District land Registrar informing him that the restriction that had been placed on his land by the Defendant would be removed within 30 days of the said letter unless the Defendant had an objection. He produced the letter as Pf exh 20.
14. He also produced as Pf exh 21, a certificate of official search dated 29<sup>th</sup> February 2000 showing that plot No. 90 was issued to one Margaret Nyambura Murithi, and went on to testify that a further search conducted on 20<sup>th</sup> December 2006 confirmed that Plot No.90, which was his plot had been registered in the name of Margaret Nyambura. He produced said search certificate as Pf exh 22.
15. His testimony was that he had written several letters through his advocate to the Defendant to remove the restriction, which letter he produced as Pf exh 23, and further that he had even tried to involve the Ministry of Lands to resolve the dispute between him and the Defendant by writing to the Ministry through a letter herein produced as Pf exh 24.
16. That he had also written to the Defendant through the firm of E.K.Korir Advocates via a letter dated 22<sup>nd</sup> May 2013 herein produced a Pf exh 25, demanding that they vacate from the suit land and also wrote a letter dated 23<sup>rd</sup> May 2013 to the Ministry of Education issuing them a notice of intention to sue the Government.
17. That the Ministry had written back to him vide a letter dated 23<sup>rd</sup> November 2015 herein produced as Pf exh 26, stating that the land belonged to the Defendant.
18. It was is evidence that Members of the society had also been given commercial plots wherein he had been given plot No. 229 as per the sketch plan which he produced as Pf exh 27. That later he had conducted a search, herein produced as Pf exh 28, and had established that the plot was still registered in the name of Urafiki Farmers Co-op Society.
19. His evidence was that in the year 1995, he had filed a case against the Defendant but the same had been dismissed for want of prosecution wherein he had produced the Court orders as Pf exh 29. He confirmed to having had taken possession of the suit land wherein he had planted bananas. He produced photographs of the suit property were as Pf exh 30 and proceeded to testify that the last photograph depicted the house of the person who sold the land to the Co-operative. He produced a green card to the suit land as Pf exh 31 and share register as Pf exh 32.
20. The Plaintiff sought that he be declared the rightful owner of the suit land, for an eviction order and permanent injunction against the Defendant as well as costs of the suit and mesne profits. He added that he had been dispossessed of the suit land in the year 2002.
21. The next Plaintiff witness Geoffrey Njuguna Ng'ang'a testified as PW 2 to the effect that he used to stay at Urafiki Farm in Kipkelion but had left after the post-election violence.
22. He sought to rely on his statement recorded on 15<sup>th</sup> March 2019 as his evidence in Chief and testified that he was a member of the School Committee of Urafiki Primary School from 1999 to 2001. That Urafiki farm covered about 2000 acres and that he had been allocated plot No.147 wherein Urafiki Primary School had been allocated 4 acres on plot No. 85. He confirmed that the Plaintiff had been given an allotment letter in 1991 and that the school had later grabbed part of the Plaintiff's land measuring 4 acres on plot No. 84.
23. He further testified that he had been dropped from the School Committee after having revealed the secret that the school had grabbed the Plaintiff's land. That the school had written to him a letter dated 4<sup>th</sup> April 2001, herein produced as Pf exh 34 informing him that the Committee members had lost faith in him wherein it had decided to remove him from the school committee with effect from therein.

24. He also testified that there were many underhand dealings at Urafiki Primary School such that on 6<sup>th</sup> January 2000 he had written a letter to Kenya Anti-Corruption Commission to report the said corruption. That he had also reported that the Chairman had been unlawfully keeping 15 title deeds that belonged to members of Urafiki Farm in his house. Subsequently the District Officer had instructed the Chairman to return the said title deeds to the office, he did not comply but sold the plots to other people instead.

25. He confirmed that the Plaintiff's plot was No. 84 and that he had been issued with its title but despite this, Urafiki Primary School had still grabbed his land. He also testified that despite Plot No. 90 being set aside for the construction of a nursery school, the same was never constructed but had been sold to one Wanjiru instead.

26. He sought that the Plaintiff be given back his plot, and further stated that he did not know if Urafiki Primary School transferred the Plot No.84 to their name.

27. Before closing their case, the Plaintiff's Counsel sought leave to file a valuation report which leave was granted and the said valuation report was filed on 1<sup>st</sup> February 2021 but no evidence was led on the same.

### **Determination**

28. I have reviewed and considered the uncontroverted evidence of the Plaintiff, which was precise and to the point, in support of his claim.

29. I find the issue for determination as being whether the Plaintiff is entitled to be declared as the registered owner of the suit property.

30. Having duly considered the evidence adduced before court by the Plaintiff an old man aged 85 years old, his evidence came out to me as believable as it was backed by corroborating evidence from Pw2 as well as by documents that were not contested since the Defendant neither filed their response nor appeared at the hearing either in person or through counsel. I find that all the Plaintiff wanted from the Defendant was for it to return part of the parcel of land it had grabbed from him.

31. It is evident that the Defendant herein was served with the summons to enter appearance but failed to enter appearance and did not defend the case. However, even if the suit is not defended, the Plaintiff still had the duty to formally prove his case on the balance of probabilities as required by law.

32. The Plaintiff through the production of documentary evidence proved that he was a member of the Urafiki Farmers Co-operative Society Ltd which society had bought land that had originally belonged to a white settler one James Norman Wilkinson. That it had been through his shares in the said society that he had balloted for and had been allocated the suit land herein after payment of the requisite dues.

33. That pursuant to a survey and sub-division of the land he had been issued with title to the said parcel of land measuring 3.238 hectares on the 1<sup>st</sup> August 1991. That therein after, he had conducted several searches to confirm that he was the owner of the said plot and was shocked to learn in the year 1999 that a caution has been placed on his land by the Defendant.

34. The Plaintiff's evidence was that all effort had been made to have the Defendant remove the restriction, in vain. That subsequently the Defendant trespassed on a portion of his land to which he now came to court seeking for eviction orders as well as an injunction against the Defendant.

35. I have also considered the sentiments of a letter from the Ministry of Education Science and Technology dated the 23<sup>rd</sup> November 2015, addressed to the Plaintiff's Counsel M/s E. K Korir & Company Advocates and produced as Pf exh 26 in which the author had stated that via a hearing held by the Kericho Land Disputes Tribunal on the 10<sup>th</sup> June 2005, the said tribunal through its determination, had found that the suit land herein belonged to the Defendant.

36. The tribunal was established under the Land Disputes Tribunals Act No. 18 of 1990 (now repealed) (herein referred to as the 'Act') wherein Section 3(1) of the Act sets out the cases over which the tribunal had jurisdiction as follows:-

3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to—

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land, shall be heard and determined by a Tribunal established under section 4.(2).

37. Looking at the provisions of Section 3(1) of the Act above, the same stipulate the jurisdiction of the Tribunal as being in regard to matters related to the division or determination of boundaries; claims to occupy or work land; and trespass to land. The Land Disputes Tribunal therefor did not have jurisdiction to issue declaratory orders on the ownership of land and neither did it have jurisdiction to determine disputes revolving around ownership of land, more so matters under the *Registered Land Act, Cap 300* (now repealed) and specifically registered land.

38. I find that the Kericho Land Disputes Tribunal determined a matter which dealt with titles that had been registered under the Registered Land Act, Cap 300 (now repealed). The said tribunal therefore acted *ultra vires*, null and void and in excess of its jurisdiction as it was prohibited, by operation of the law, from undertaking a determination with respect to title to land. It therefor goes without saying that any orders and or proceedings arising from the said award would also have been a nullity since a decision made by a tribunal which had no

jurisdiction to entertain the dispute before it, must of necessity be null and void and therefore subject to challenge.

**39. In the case of Republic v Kajiado North District Ngong Land Disputes Tribunal & another Ex-Parte Caroline Wambui Ngunjiri & 2 others [2014] eKLR**

In my view if the said Tribunal had no jurisdiction to entertain the matter, whatever proceedings flowed from its decision would be null and void since a decision made by a tribunal which has no jurisdiction to entertain the dispute before it must of necessity be null and void. This is in line with the celebrated decision in **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 to the effect that** that where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance of actions taken in breach of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse.

**40. The Court of Appeal in the case of Nicholas Njeru v Attorney General & 8 others [2013] eKLR held that;-**

“ .....It is well settled principles of law that the High Court is given supervisory powers to check the excess of jurisdiction and compliance with the rule of Law by inferior tribunals and other public bodies or persons discharging such public acts”.....

We agree these prayers could have perfectly fitted the bill under judicial review as they seek to supervise the powers of persons exercising public authority. However we do not entirely agree with the learned Judge’s observation that the court had no jurisdiction to grant a declaratory order. We know of no limit to the powers of the court to grant a declaratory order except such limit as it may in its discretion impose upon itself.

**41. The provision of Section 24(a) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows;**

‘the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....’

**42. Section 25(1) of the Land Registration Act also stipulates that ;**

‘The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...’

**43. The law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:**

‘the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party
- b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

**44. In light of the above, this court finds that the Plaintiff has established that he is indeed the duly registered proprietor of the suit property and is entitled to all the rights appurtenant thereto.**

**45. It has been demonstrated that despite service, the Defendant failed to file its papers and/or defend the suit. The court thus finds in favour of the Plaintiff and makes the following orders:**

- i. It is herein declared that the Plaintiff is the rightful and legal owner of the suit property.
- ii. The Defendant by itself, agents, servants, employees or any other party acting on its behalf do forthwith vacate the land plot number No. LR Kericho/ Chilchila/Kunyak/Block 2 Urafiki 84 within 30 days of the delivery of this judgment and upon a proper survey being carried out and acreage of the parties’ entitlement is ascertained.
- iii. A permanent injunction is hereby issued restraining the Defendant by itself agents, servants, employees or any other party through whom they may be acting from interfering with, trespassing onto, sub dividing, selling, transferring, assigning, fencing, erecting structures thereon and/or doing any other act which is prejudicial to the Plaintiff’s proprietary interest on No. LR Kericho/ Chilchila/Kunyak/Block 2 Urafiki 84.
- iv. Costs to the Plaintiff at the lower scale since the suit was undefended.

**DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 8<sup>TH</sup> DAY OF APRIL 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**