



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI  
Civil Appeal 53 of 1995**

**MICHAEL GITHINJI KIMOTHO.....  
.....APPELLANT**

**AND**

**NICHOLAS MURATHA MUGO.....  
.....RESPONDENT**

**(Appeal from the decree of the High Court of Kenya at Nairobi (Justice Shields)**

**dated 16<sup>th</sup> December, 1993**

**IN**

**H..C.C.C. NO. 4768 OF 1991)**

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**JUDGMENT OF THE COURT**

Michael Githinji Kamotho (the appellant) has filed this appeal from the decree of the High Court at Nairobi(Shields J) dated 16<sup>th</sup> December, 1993 in Civil Case No. 4768 of 1991 in which Nicholas Muratha Mugo (the respondent) sued the appellant claiming that he was at all material times, the registered proprietor as owner of a parcel of land known as Dagoretti/Kangemi/269 as lessee from the Government of Kenya; that on or before 30<sup>th</sup> January 1991 the appellant wrongfully entered that land and trespassed thereon; that by reason thereof the respondent had been deprived of the use and enjoyment of the said parcel of land and has thus suffered loss and damage and that despite demand being made and the notice of intention to sue having been given, the appellant had refused to vacate the said parcel of land. The respondent therefore sought judgment for possession of the suit land and damages for trespass to it against the appellant.

The appellant by his defence contended that he had been in possession of the land since 1972 as a squatter and had carried out some developments including semi permanent buildings thereon. The appellant had also contended in his defence that the allocation of the suit land made to the respondent by the Government of Kenya was unlawful and erroneous.

The respondent then moved the court for summary judgment and for an order to strike out the appellant's defence on the ground that it was frivolous and vexatious and an abuse of the process of the court.

The appellant did not deny in the Superior Court that the respondent was the registered owner of the

suit land by virtue of a lease from the Government of Kenya for a term of 99 years commencing from 1<sup>st</sup> March, 1990. He had however alleged that the allocation of the suit land to the respondent was erroneous.

By his crisp four line judgment dated 16 December, 1993 Shields J said:

“Plaintiff is a lessee from the Government. Defendant had buildings and has been there for a long time. I see no defence to the claim. I strike out the defence and give judgment as claimed by the plaintiff with costs.”

The appellant conceded before us that he had been in possession of the suit land as a squatter and that he had no right or title to the suit land. But his argument is that the suit land had been erroneously allocated to the respondent and that by his letter dated 23 November 1992, the commissioner of Lands wrote to the respondent stating that the allocation to the respondent was erroneous and requested him to surrender the suit as arrangements were being made to allocate him with an alternative site. He also said that by a subsequent letter dated 3 June, 1993 the Chief Lands Registrar forwarded to the respondent a surrender instrument which the respondent had refused to sign and return to the Chief Lands Registrar. He went on to say that the Land Registrar had therefore placed a restriction on the respondent’s title prohibiting all further dealings until a surrender of the lease had been registered.

The appellant confirmed to us that in pursuance of the decree of the superior court he had already been evicted from the suit land.

The gist of the appellant’s memorandum of appeal is that the learned Judge of the superior court erred in holding that there was no defence to the respondent’s claim.

If the appellant had been in occupation of the suit land as a squatter without any right or title to the suit land in his favour, he was obviously in no position to resist the respondent’s claim. Though the appellant had for along time been in occupation of the suit land which was government land before it was allocated to the respondent, this could not have helped him in resisting the respondent’s claim where the latter is registered as owner of the land. Similarly if he, the appellant had carried out any development on the suit land, he did so at his own peril and he could not expect any compensation in that respect. Even if for argument’s sake the suit land had been erroneously allocated to the respondent, the appellant as a squatter in the suit land had no locus standi and the so called erroneous allocation could not be an answer to the respondent’s claim for his evidence. His position as a trespasser could not have given him any protection against the respondents claim for possession as the registered owner of the suit land. The issue whether the allocation of the land to the respondent was erroneous or not can only be an issue between the Commissioner of Lands and the respondent. The protected rights of a proprietor under s. 28 of the Registered Land Act cannot be defeated except as provided in that Act, and certainly not at the instance of the appellant.

We therefore agree with the learned Judge that the appellant had no defence to the plaintiff’s claim. As such we do not see any merit in his appeal and hereby dismiss it with costs.

Dated and delivered at Nairobi this 20<sup>th</sup> day of March 1997.

R. O. KWACH

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**