



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 128 OF 2013**

**JAMLECK MBOGO WARUI.....PLAINTIFF**

**VERSUS**

**MARTIN NDEGWA GITHINJI.....DEFENDANT**

**AND**

**CHARITY WAIRIMU NDEGWA.....APPLICANT**

**JUDGMENT**

**INTRODUCTION**

By a plaint dated 29<sup>th</sup> March 2012, the plaintiff sought an order for recovery of his entitlement to land parcel No. KABARE/NGIROCHE/464 and a declaration that the transfer of the same by the defendant was illegal and unlawful and the Land Registrar Kirinyaga District be ordered to revert back the ownership to the plaintiff. The plaintiff also sought costs of the suit. The suit was filed contemporaneously with an application under certificate of urgency dated the same date in which the plaintiff/applicant was seeking a temporary injunction orders restraining the defendant/respondent by himself or through his

agents and/or employees from entering into, cultivating, disposing or evicting, and/or in any other manner interfering with the applicants quiet possession over land parcel No. KABARE/NGIROCHE/494 pending hearing and determination of that application and the suit.

When the application was placed before the duty Court on 11<sup>th</sup> April 2012, the same was certified urgent and temporary injunction orders issued pending the hearing and determination of the said application. The said orders were later confirmed by consent of the parties pending hearing and determination of the main suit. On 7<sup>th</sup> May 2012, the defendant filed a statement of defence and counter-claim to the plaintiff's suit.

**PLAINTIFF'S CASE**

On 23<sup>rd</sup> July 2017, the plaintiff's case was dismissed and the defendant ordered to proceed with his defence and counter-claim.

**DEFENDANT'S CASE AND COUNTER-CLAIM**

The defendant by way of a counter-claim stated that by an agreement dated 7<sup>th</sup> December 2000, he agreed to advance the plaintiff a friendly loan of Ksh. 91,000/= which was refundable on or before the 8<sup>th</sup> February 2001. The defendant alleged that it was a further term of the said agreement that in the unlikely event that the plaintiff fails to repay back his money, he would transfer the subject of the security which was land parcel No. KABARE/NGIROCHE/494 which he did after he failed to repay him back his monies. The defendant also stated that the plaintiff transferred him the suit land after complying with all statutory formalities freely and voluntarily. The defendant further contends that he allowed the plaintiff to utilize the suit land as he had a young family. However, sometimes in November 2011, the defendant took possession of the whole property until February 2012 when the plaintiff filed a H.C.C.C No. 14 and 16 of 2012 (Embu) respectively.

In conclusion, the defendant seeks an order of eviction of the plaintiff and his family from the suit property or an alternative to pay him the loan of Ksh. 91,000/= plus interest at 45% per month from December 2000 until payment in full.

**ANALYSIS AND DETERMINATION**

I have considered the evidence of the defendant in support of his counter-claim. I have also looked at the exhibits produced in evidence. the defendant claims that he advanced to the plaintiff a friendly loan of Ksh. 91,000/= on 7<sup>th</sup> December 2000 which was to be repaid in or before

8<sup>th</sup> February 2001 failure to which it will attract an interest of 45% per month from 7<sup>th</sup> December 2000 until payment in full. The plaintiff also surrendered his title deed for land Reference No. KABARE/NGIROCHE/494 as security. The parties executed an agreement before an advocate and surrendered all transfer documents including consent from the Land Control Board with the defendant.

The plaintiff refused to pay the loan advanced plus interest as agreed. The plaintiff refused to prosecute his claim until it was dismissed for want of prosecution. He did not attend Court during the hearing of the defendant's counter-claim which proceeded ex-parte. It is not in dispute that the parties entered into a friendly loan agreement voluntarily and willingly with terms and conditions which they intended to bind them. That agreement was executed in the presence of a lawyer. The plaintiff refused to pay back the loan plus interest. The title deed and the statutory consents which were deposited in custody of the defendant were presented to the Land Registrar who effected the transfer of the land in favour of the defendant. The plaintiff then moved to Court and filed this suit in 2012 simultaneously with an application for injunction which was allowed pending the hearing of the main suit. The plaintiff went to sleep until the suit was dismissed. The defendant is the registered proprietor of the suit property being No. KABARE/NGIROCHE/494.

**Section 25 of the Land Registration Act No. 3 of 2012** states as follows:

**25 (1) The rights of a proprietor, whether acquitted 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, but subject:**

**(a) to the leases, changes and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.**

Again, **Section 26** of the same Act provides as follows:

**26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts 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 that proprietor shall not be subject to challenge, except:**

**(a) On the grounds of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.**

The plaintiff had instituted this suit against the defendant challenging the manner in which the title was acquired. However, the suit was dismissed and the defendant's evidence on the proprietorship of the suit land remains absolute and indefeasible. Before I conclude my analysis, I wish to note that from the evidence adduced by the defendant, the loan of Ksh. 91,000/= was advanced to the plaintiff on 7<sup>th</sup> December 2000 which he agreed to refund together with interest on or before 8<sup>th</sup> February 2001. When the plaintiff instituted this suit in the year 2012, the defendant filed a defence and counter-claim. In paragraph 16 of his counter-claim, the defendant sought an order of eviction of the plaintiff and his family, and/or agents from the suit land with an alternative payment of Ksh. 91,000/= plus interest. The plaintiff did not repay back the defendant's money plus interest which they agreed he will pay. Having said that, I find and hold that the defendant has proved his counter-claim on the required standard. I therefore enter judgment for the defendant against the plaintiff in the following terms:

**(1) The plaintiff, his family, agents and/or servants to vacate the defendant's land parcel No. KABARE/NGIROCHE/494 within three (3) months from today failing which they shall be evicted.**

**(2) The caution placed on land parcel No. KABARE/NGIROCHE/494 be removed forthwith.**

**(3) The plaintiff to bear the costs of this suit and the counter-claim.**

READ, DELIVERED and SIGNED in open Court at Kerugoya this 20<sup>th</sup> day of September, 2019.

**E.C. CHERONO**

**ELC JUDGE**

**20<sup>TH</sup> SEPTEMBER, 2019**

In the presence of:

1. Mr. Maina Kagio holding brief for Ngigi for Defendant

2. Plaintiff/Advocate – absent

3. *Charity Wairimu Ndegwa – present*

4. *Mbogo – Court clerk – present*