



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC NO.264 OF 2009**

**LEPIC SCHOOL LIMITED.....PLAINTIFF**

**=VERSUS=**

**GEORGE KIONI.....1<sup>ST</sup> DEFENDANT**

**BOARD OF GOVERNORS,ST. GEORGE ATHI**

**SECONDARY SCHOOL.....2<sup>ND</sup> DEFENDANT**

*as consolidated with*

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO.2255 OF 2007**

**LEPIC SCHOOL LIMITED.....PLAINTIFF**

**=VERSUS=**

**GEORGE KIONI**

**(Sued on behalf of Athi Ngundu Self -Help Organization).....DEFENDANT**

**JUDGEMENT**

**Introduction**

1. This is a Judgement in respect of two files which were consolidated on 1<sup>st</sup> October 2014. The lead file is ELC 264 of 2009 (Lepic School Limited Vs George Kioni and Board of Governors St.George Athi Secondary School). The other file is ELC 2255 of 2007 ( Lepic School Limited Vs George Kioni and Benson Manyara (sued on behalf Athi Ngundu Self Help Organization)).

2. In both suits, the subject matter is LR No. Nairobi/Block 126/564 ( suit property) which is registered in the name of the Plaintiff. In ELC 264 of 2009, the Plaintiff seeks the following reliefs:-

***a. a declaration that the Plaintiff is the duly registered owner of all that property known as LR No. Nairobi/Block 126/564.***

***b. The recovery of possession of land parcel Nairobi/Block 126/564 vide an eviction order issued against the Defendants.***

*c. In the alternative a mandatory injunction compelling the Defendants either by themselves ,agents and or servants to deliver to the Plaintiff or its authorised servants and/or agents all that property known as Nairobi/Block 126/564 within 14 days of the issuance of the Decree herein.*

*d. In default of delivery of the Plaintiff of all that property known as LR No. Nairobi/Block 126/564 within the time limited at prayer (b) above or such other time as this Honourable Court may be pleased an Eviction Order to be executed by a nominated Court Bailiff.*

*e. Mesne profits;*

*f. Costs of this suit;*

*g. Interest on (e) and (f) above at Court rates from the date of trespass until payment in full.*

*h. Such other or further relief that this Honourable Court may be pleased to grant.*

3. In ELC 2255 of 2007, the Plaintiff seeks the following reliefs:-

*a. A prohibitory injunction against the Defendants jointly and severally , to restrain them, either by themselves, their agents or servants or otherwise whosoever from selling, alienating, encumbering, charging, interfering or in any way parting with the title of all that property known as Title Number*

Nairobi /Block 126/564;

*b. A mandatory injunction to evict the Defendants, their agents or servants from all that property known as Title Number*

Nairobi /Block 126/564;

*c. In the alternative to (b) above, an order that the Defendants, agents or servants do vacate from all that property known as Title Number Nairobi /Block 126/564;*

*d. An order that the OCS Ruai Police Station and or any other police officers to enforce the orders prayed for in (a) , (b) and*

*(c) above;*

*e. A declaration that the Plaintiff is the rightful owner of all that property known as Title Number Nairobi /Block 126/564;*

*f. General damages for wrongful deprivation of private property.*

*g. Costs of the suit;*

*h. Interest on (f) and (g) above at Court rates.*

4. The Plaintiff is a Limited Liability Company incorporated under the Companies Act Cap 486 Laws of Kenya. The 1<sup>st</sup> Defendant in ELC 264 of 2009 is a male adult residing at Ruai within Nairobi County. The 2<sup>nd</sup> Defendant is a Public Secondary School duly registered under the Ministry of Education. The National Land Commission (NLC) applied to be enjoined in ELC 264 of 2009 as a 3<sup>rd</sup> Defendant. The application was allowed vide a ruling delivered on 20<sup>th</sup> June 2017 but the pleadings were never amended to include it as a 3<sup>rd</sup> Defendant as directed. The NLC however filed its submissions in this case. The two Defendants in ELC 2255 of 2007 are adult individuals who were sued on behalf of Athi Ngundu Self Help Organization. The 2<sup>nd</sup> Defendant has since died and the suit against him abated.

5. The suit property comprises about 15 acres. Currently on the suit property is a public secondary school called St. George Athi Ngundu Secondary school. The directors of the Plaintiff Company are Joel Njenga Kori (now deceased), Beatrice Njeri Kori and Philip Gatheca Kori . The deceased was husband to Beatrice Njeri Kori and father to Philip Gatheca Kori.

#### Plaintiff's Case.

6. During the hearing, Beatrice Njeri Kori testified on behalf of the Plaintiff. She testified that in the year 2000, she and her deceased husband approached Ngundu Farmers Co-operative Society Limited and negotiated for the purchase of the suit property. The purchase price was agreed at **Ksh.1,350,000/=**. The process of transfer started and culminated in the registration of the suit property in the name of the Plaintiff on 9<sup>th</sup> May 2007.

7. The Plaintiff took possession of the suit property which was vacant and started putting up a school in 2003. After the Plaintiff put up four classrooms, the school was set to open its doors to students in 2008. After the demise of the deceased director, the 1<sup>st</sup> Defendant under the umbrella of an unregistered organization calling itself Athi Ngundu Self Help Organization invaded the suit property claiming ownership on the ground that the suit property was public land. The Self Help Group forcefully took over the structures and infrastructures on the suit property where a public school was set up.

8. The Plaintiff's witness testified that the 1<sup>st</sup> Defendant invaded the school as he had political interest in the area and that the school is named after him. The Plaintiff therefore contends that as the registered owner of the suit property, the Defendants are mere trespassers who should be removed from the suit property.

### **1<sup>st</sup> Defendant's case.**

9. The 1<sup>st</sup> Defendant testified that he is a resident of Kamulu area of Ruai in Nairobi . The 1<sup>st</sup> Defendant owns LR No. Nairobi/Block 126/622 which is about 400 metres from the suit property. The area which is generally known as Ngundu Farm was owned by Ngundu Farmers' Co-operative Society Limited. The society sub divided its land through M/s Olweny & Associates Surveyors before the plots were given to members during a balloting exercise. During the subdivision, some plots were reserved for public purposes such as schools and markets. One such public plot was the suit property.

10. Between 2000 and 2002 some NGO started putting up a school which was said to benefit the public from the area. When the school was about to open to the public, the members of public noticed that the admission letters were issued by a private school. This is when it was noticed that the suit property had allegedly been acquired by the Plaintiff which is a private company. It is upon this discovery that members of the public moved into the suit property and started a public school which was initially run by a local committee. The school was later taken over by the government in the year 2010. Teachers from TSC were posted there and the school is now being run as a public secondary school.

11. The 1<sup>st</sup> Defendant denied that he is on the suit property or that he has anything to do with the running of the school.

### **2<sup>nd</sup> Defendant's Case**

12. The 2<sup>nd</sup> Defendant's case was stated by DW1 Francis Mukhwana the principal of the 2<sup>nd</sup> Defendant. He testified that he is a registered teacher with the TSC. His TSC No.is 204868. He was posted to the school in June 2010 as Deputy Principal but was later promoted to school Principal. He stated that the school is a duly registered public government school.

### **Analysis and issues for Determination.**

13. I have carefully considered the Plaintiff's evidence as well as that of the Defendants. I have also considered the written submissions filed by the parties herein. There is no contention that the Plaintiff is the registered owner of the suit property. The question which is to be determined is whether that registration was procedurally obtained. The other issue to be determined is whether the Defendants have trespassed to the Plaintiff's land and lastly whether the Plaintiff should be granted the reliefs sought.

14. Though the Plaintiff is the registered owner of the suit property, the title to the suit property has been challenged on the ground that firstly, the suit property had been reserved for public purposes and secondly, the process through which the Plaintiff obtained the title was not regular and procedural. It is the Plaintiff's evidence that it purchased the suit property from Ngundu Farmers Co-operative Society Ltd at a consideration of Kshs.1,350,000/=. Though the Plaintiff claims to have paid the entire purchase price, the only documents produced relate to a payment of Kshs.200,000/= made to Ngundu Farmers Co-operative Society , Ngundu management committee on 5/11/2002 and another payment of Kshs.100,000/= made on 9/9/2003 to Ngundu Development Association . This is as per cheque payment vouchers from the Plaintiff. These two payments were said to be by cheque but there was no evidence of any cheque payments made and in any case the payments if at all were made, were not made to Ngundu Farmers co-operative Society Limited who are alleged to have sold the land to the Plaintiff.

15. The lease in favour of the Plaintiff was not executed as required. The Plaintiff was issued with a share certificate on 27<sup>th</sup> March 2004 . The Plaintiff is said to have had six (6) shares at Ngundu Farmers Co-operative Society Ltd. The evidence by the 1<sup>st</sup> Defendant is that the Plaintiff had never been a shareholder of Ngundu Farmers Co-operative Society Ltd. If the Plaintiff claims to have purchased the suit property, then one wonders why it was being allocated six (6) shares on 27<sup>th</sup> March 2007.

16. The suit property had been earmarked for a secondary School. It is clear from the subdivision scheme prepared by Oleweny & Associates that the suit property had been set aside for Public purposes. It is common knowledge that before a subdivision scheme can be approved, there has to be provision for public utility such as schools. Ngundu Farmers Co-operative Society Ltd could not have reserved the suit property for public purposes and then later turn around and sell it.

17. In **Munyu Maina Vs Hiram Gathia Maina ( 2013)** the Court of Appeal Judges sitting in Nyeri had this to say:-

***“ we state that when a registered proprietor's root to title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership . It is this instrument which is under challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal.....”.***

18. The Plaintiff in its submissions states that it has an indefeasible title. In this regard the Plaintiff relied on the case of **Dr Joseph Arap Ngok Vs Justice Moiwo Ole Keiwa & 5 Others Civil Appeal No. CA 60 of 1997** where the Court of Appeal stated as follows:-

***“ Section 23 (1) of the Act gives absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.***

19. Section 26 of the Land Registration Acts guarantees the sanctity of title and gives instances when the title can be impeached. However the indefeasibility of title is not absolute. It can only be indefeasible if it is procedurally obtained. In **Funzi Island Development Limited & 2 others Vs County Council of Kwale & 2 others ( 2014) eKLR**, Justice Maraga J A ( as he then was) stated as follows:-

***“ a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A Court of law cannot on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title”.***

20. In **Nelson Kazungu Chai & 9 others –vs- Pwani University [2014]eKLR** Justice Angote had this to say:-

***“Where land has been reserved for public purpose, like in this case, any allocation of such land to private persons cannot be recognized by the court. Public interest in land will always outweigh an individual’s right to own the same property. It therefore does not matter that the Plaintiffs had a legitimate expectation to be allocated the suit property.”***

21. In **John Peter Mureithi & 2 Others –vs- Attorney General & 4 Others [2006] eKLR** Justice Nyamu J ( as he then was) stated as follows:-

***“courts of this country cannot countenance a situation where the public good is subjugated to and sacrificed at the multifarious altars of private interests. Nor will they sit idly by and see land cartels, briefcase investors and speculators with high connections use Public land as tickets to individual largesse in the wake of public inconvenience.”***

22. The cases I have quoted hereinabove speak to the present circumstances. The land had been earmarked for public purposes. The Plaintiff came in and pretended to be building a school which would benefit the Public under the guise of an NGO. When the school was about to open, the public realized that the school was not a public school. A sample of an admission letter was produced by the defendants. This is the time that the public said no to public land being controverted to a private school. There is now a public secondary school which is duly registered and run by teachers from TSC.

23. The conduct of the plaintiff clearly shows that the Plaintiff was aware that what it was being offered by the officials of Ngundu farmers Co-operative Society Limited was land which had been set aside for a public school. The Plaintiff wanted to get in and take over as a private property. The members of the public for whose interest the land had been set aside would not allow it. I therefore find that the Plaintiff did not acquire the land procedurally. The title was acquired through a corrupt Scheme which included the officials of Ngundu Farmers Co-operative Society Limited.

24. On whether the Defendants have trespassed to the suit property, the evidence is clear that the land had been reserved for a public purpose. It has been put to that public purpose by the establishment of the school. The 1<sup>st</sup> Defendant does not have control of the school and he cannot be said to be a trespasser. The school is not a trespasser too. This being the case, I find that the Plaintiff’s suit lacks merit.

**Conclusion:**

25. Having found that the Plaintiff’s title was not acquired procedurally, I find that the plaintiff’s claim must fail. None of the prayers can be granted. The two consolidated suits are hereby dismissed with costs to the Defendants.

**Dated, Signed and Delivered at Nairobi on 17<sup>th</sup> this day of October 2019**

**E.O .OBAGA**

**JUDGE**

In the presence of:-

M/s Mwangi for Mr Luseno for Plaintiff

Mr Kamau for M/s Kiarie for 1<sup>st</sup> Defenant

Mr Mwenda for Mr Njeru for 3<sup>rd</sup> Defendant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**