



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. NO. 532 OF 2009**

**ELIJAH KARIUKI KURIA..... APPLICANT**

**VERSUS**

**KENNETH OBAE.....RESPONDENT**

**JUDGMENT**

This suit was commenced by way of a Plaint dated 16<sup>th</sup> October 2009 filed on the same day by the Plaintiff.

**The Pleadings**

In that Plaint, the Plaintiff stated that the suit property is a parcel of land known as Land Reference Number 21190/III/109 which was hived out of the larger parcel of land known as Land Reference Number 21190 registered in the name of the National Social Security Fund Board of Trustees. The Plaintiff claimed that the suit property is registered in his name and is currently awaiting approval from the Nairobi County Government. He further stated that he is in possession of the suit property with the blessings of the National Social Security Fund who is the title holder of the larger parcel Land Reference Number 21190. He then stated that on or about 8<sup>th</sup> February 2008, it became apparent that the Defendant wrongfully entered and took possession of the suit property, commencing some construction thereon. He confirmed having reported the matter to the provincial administration and the police when the Defendant became confrontational. He reported that he has suffered loss and damage owing to the Defendant's illegal occupation of the suit property. He therefore sought the following prayers:

1. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of occupation of the suit property and that the Defendant is wrongfully in occupation thereof and is, accordingly, a trespasser.
2. An injunction restraining the Defendant from constructing, erecting, completing any structures or remaining on or continuing in occupation of the suit property.
3. General damages for trespass
4. Costs of this suit together with interest thereon.

The Defendant filed his Statement of Defence dated 6<sup>th</sup> April 2010 and filed on 22<sup>nd</sup> April 2010 in which he denied the entire contents of the Plaint. Further, the Defendant filed his Amended Defence dated 26<sup>th</sup> March 2012 and filed on 28<sup>th</sup> March 2012 in which he stated that the Plaintiff has never been in

possession of the suit property yet he proceeded to enter into a Tenant Purchase Agreement with the registered owner thereof with a view to defeat the Defendant's lawful claim to the suit property.

The Plaintiff filed his Reply to Amended Defence dated 4<sup>th</sup> April 2012 in which he stated that he bought the suit property while vacant and was given possession by NSSF who officially identified it to him and issued him with a beacon certificate. He indicated further that the Defendant only forcefully took possession of the suit property after the Plaintiff was issued with a beacon certificate and after commencing excavation. He further denied that the Defendant ever purchased the suit property from NSSF. He further added that the Tenant Purchase Agreement he entered into with NSSF only came after he had already registered with NSSF.

### **The Evidence**

In his testimony, the Plaintiff PW1 stated that while the larger parcel of land being L.R. No. 21190 is registered in the name of NSSF Board of Trustees, he purchased a portion thereof L.R. No. 21190/III/109 being the suit property from one John Kipngeno Chirchir, a squatter thereon. He emphasized that he purchased Mr. Chirchir's squattership with the approval of the registered owner, NSSF Board of Trustees through the assistance of Kwa Ndege Self Help Group. He stated that the NSSF had allowed Kwa Ndege Self Help Group to identify the squatters on L.R. No. 21190 for purposes of regularizing their occupation thereof with NSSF, the registered owner. He added that prior to purchasing the suit property, he conducted a search at the Lands Registry and confirmed that L.R. No. 21190 was registered in the name of NSSF Board of Trustees. He also confirmed having visited Kwa Ndege Self Help Group where the Chairman thereof, one Mr. Lawi, confirmed to him that the suit property is owned by the said Mr. Chirchir. He testified further that officials of Kwa Ndege Self Help Group accompanied him to the area whereby using a big map, they identified the suit property and confirmed that it belongs to Mr. Chirchir. He also confirmed having checked with the NSSF where he confirmed that Mr. Chirchir was the recognized owner of the suit property. He further stated that he and Mr. Chirchir proceeded to NSSF to effect the transfer of the suit property into his name. He confirmed that it is the NSSF which prepared the sale agreement he entered into with Mr. Chirchir dated 21<sup>st</sup> November 2007 upon payment of Kshs. 1,000/- being the transfer fee and a further Kshs. 45,000/-. He stated that he was informed by the NSSF Officer serving them that he has acquired the status of squattership and that he should continue to pay the sum of Kshs. 4,500/- every month to NSSF under a Tenant Purchase Agreement that he entered into with NSSF towards the purchase of the suit property. He confirmed that he had since completed all the necessary payments to NSSF and had a letter from NSSF dated 24<sup>th</sup> May 2011 confirming this position. He said that he was now waiting for the title deed to the suit property to be issued to him. He added that he also obtained a Beacon Certificate after the surveyor took him to the suit property. He stated that during all this time, the suit property was vacant but added that when he went there on 8<sup>th</sup> February 2008, he found building material deposited at the suit property by someone he did not know. He confirmed having reported to the Chief in the area as well as to the NSSF but was assured that they do not know the person. He testified further that he came to learn later that it was the Defendant who was preparing himself to commence construction on the suit property. During cross-examination, he conceded that he was not able to pin point where the suit property was located on the Deed Plan for the larger parcel of land being L.R. No. 21190. He confirmed that he has no title deed or Deed Plan for the suit property.

In his defence, the Defendant DW1 testified that in the year 2002, he purchased 6 plots, including the suit property, from one James Muithia, a member of Kwa Ndege Self Help Group. He confirmed that this was by virtue of a sale agreement dated 18<sup>th</sup> July 2002. He further stated that the said James Muithia introduced him to the officials of Kwa Ndege Self Help Group who were the Chairman Lawi Nyateng, the secretary Daniel Ndambuki and the treasurer R. Onyango. He testified further that the plots he purchased were within a larger parcel of land known as L.R. No. 21190 registered in the name of NSSF Board of Trustees. He confirmed that he came to learn that the said officials of Kwa Ndege Self Help Group, specifically Mr. Lawi Nyateng, had been appointed by NSSF as their agent for selling plots within that larger parcel to squatters with the consent of NSSF. He further stated that NSSF placed advertisements in the newspapers directing the squatters on this parcel of land to register with NSSF through Kwa Ndege Self Help Group. He testified having tried to register his 6 plots, including the suit

property, with NSSF but was unsuccessful and was directed to get a clearance from Mr. Lawi Nyateng first. He confirmed having tried to get this clearance but stated that Mr. Lawi Nyateng asked him to pay an additional Kshs. 40,000/- per plot to secure the clearance, which he declined to pay. He further testified that he together with 400 other aggrieved buyers decided to form a company known as Kwa Ndege III Development Company and filed suit against NSSF in **HCCC No. 26 of 2006**, which is still pending. He testified further that in 2007, NSSF put out an advertisement in the newspapers addressed to occupants of Tassia II and III informing them to purchase their plots from NSSF through Tenant Purchase Scheme terms. He stated that when he tried to register with NSSF, he was again referred to Mr. Lawi Nyateng for clearance. He added that he declined to go back to Mr. Lawi Nyateng, alleging that he was a conman. He disputed the Plaintiff's Tenant Purchase Agreement in respect to the suit property, stating that it did not specify whether it was for Tassia II or III. He further stated that the Plaintiff has never been in occupation in the suit property, emphasizing that he is the one who has been in occupation of the same since the year 2002. He added that he has built a perimeter wall and a parking lot on the suit property. He conceded that the larger parcel of land being L.R. No. 21190 within which the suit property lies is registered in the name of NSSF and has never been subdivided. He confirmed that there is a Deed Plan for that larger parcel but that there are no Deed Plans for the individual plots, including the suit property. He confirmed that all his 6 plots are not registered and he has no Tenant Purchase Agreements with NSSF for them because of the condition to clear with Mr. Lawi Nyateng. In cross-examination, he confirmed that the Plaintiff's Tenant Purchase Agreement with NSSF relates to the suit property. Further, he confirmed that he conducted a search at the Lands Registry on L.R. No. 21190 and found out that the same is registered in the name of NSSF. He also confirmed that NSSF has not officially subdivided that larger parcel of land within which the suit property lies. He confirmed having written to NSSF requesting them to register him as the owner of the suit property, among others, but received no response. He confirmed further that he has no official receipts from NSSF. He confirmed that he is still in occupation of the suit property. He clarified that NSSF has not evicted him out of the suit property. He also denied that he is a trespasser on the suit property.

### **Issues for Determination**

1. Is L.R. No. 21190 registered in the name of the NSSF Board of Trustees as alleged?
2. Is L.R. No. 21190/III/109 (the "suit property") hived off from L.R. No. 21190 as pleaded?
3. What was the role of Kwa Ndege Self Help Group and did they have power from the registered proprietor of L.R. No. 21190 to sell the same?
4. Did the Plaintiff purchase the suit property as alleged?
5. Is the Defendant in possession of the suit property and if so, when did he take possession and in what capacity?
6. Has the Plaintiff suffered loss and damage as a result of the Defendant's occupation of the suit property?
7. Is the Plaintiff entitled to any of the reliefs sought?
8. Who is to bear the costs of this suit?

### **Determination**

1. Is L.R. No. 21190 registered in the name of the NSSF Board of Trustees as alleged?

It is conceded by both the Plaintiff and the Defendant that L.R. No. 21190, within which the suit property is located, is registered in the name of NSSF Board of Trustees. The Plaintiff annexed a copy of the Certificate of Title to prove this position and both the Plaintiff and the Defendant confirmed having conducted searches at the Lands Registry and found this to be the position.

2. Is L.R. No. 21190/III/109 (the "suit property") hived off from L.R. No. 21190 as pleaded?

It is also common ground between the Plaintiff and the Defendant that the suit property variously referred to as Plot No. 109 or L.R. No. 21190/III/109 is located within L.R. No. 21190. Both the Plaintiff and the Defendant confirmed that the suit property has not been officially subdivided out of the larger parcel of land L.R. No. 21190.

3. What was the role of Kwa Ndege Self Help Group and did they have power from the registered proprietor of L.R. No. 21190 to sell the same?

On this issue, the Plaintiff's position is that Kwa Ndege Self Help Group was appointed by NSSF to be their agent in selling off portions of L.R. No. 21190 to the squatters who had settled therein. On the part of the Defendant, he confirmed that he purchased the suit property from one Mr. James Muithia, a member of Kwa Ndege Self Help Group. The Defendant further confirmed that his efforts to be recognized by NSSF as the owner of the suit property were defeated by the fact that the NSSF referred him back for clearance from Mr. Lawi Nyateng, the Chairman of Kwa Ndege Self Help Group. My conclusion on this issue is that NSSF Board of Trustees, the registered owners of L.R. No. 21190 within which the suit property is located, duly appointed Kwa Ndege Self Help Group as their agent for the purpose of selling off the same to the squatters occupying this land.

4. Did the Plaintiff purchase the suit property as alleged?

The Plaintiff testified that he bought the suit property from one Mr. John Kipngeno Chirchir, a member of Kwa Ndege Self Help Group. He exhibited his sale agreement dated 21<sup>st</sup> November 2011, which he stated was prepared by an officer of NSSF. The Plaintiff also testified that he entered into a Tenant Purchase Agreement dated 22<sup>nd</sup> June 2009 with NSSF, the registered owners of the suit property through which he made the agreed payments for the purchase of the suit property from NSSF. He produces copies of the receipts from NSSF showing his payments. He confirmed that he had since completed these payments and was now the recognized owner of the suit property by NSSF. To further support this position, the Plaintiff produced a letter dated 24<sup>th</sup> May 2011 from NSSF Board of Trustees which stated as follows:

“To Whom It May Concern

Re: SALE OF L.R. No. NBI/BLK 21190/III/109

The above matter refers

This is to confirm that the Board of Trustees, National Social Security Fund has sold the above referenced property to ELIJAH KARIUKI KURIA of P.O. Box 16117 – 00610 NAIROBI and National Identity 14439645. He has fully paid the purchase price.

However, the Fund may at a future date require the purchaser to pay additional money to cater for other costs including but not limited to development of infrastructure, survey fees etc.

Kindly note that approval of the subdivision plan for the scheme is being awaited from Nairobi City Council, the Commissioner of Lands and the Department of Survey. As soon as this process is complete the title deed to the property will be prepared and the Fund will transfer the same to the purchaser.

Yours faithfully

A. Nyandong

For: Managing Trustee”

On the other hand, the Defendant claims to have purchased the suit property from one Mr. James Muithia, a member of Kwa Ndege Self Help Group. However, unlike the Plaintiff, the Defendant confirmed in his testimony that he has never been introduced by Kwa Ndege Self Help Group to NSSF for registration as the owner of, among other plots, the suit property. The Defendant admitted that he did not see eye to eye with Mr. Lawi Nyateng, the Chairman of Kwa Ndege and called him a conman. The Defendant has therefore not been recognized as the owner of the suit property by NSSF as the Plaintiff. The Defendant produced his letter to NSSF dated 17<sup>th</sup> September 2009 in which he made the following admission:

**“Pursuant to your notice dated 9<sup>th</sup> September 2009, I came to register my already developed plots but to my surprise your officers informed me that the aforesaid plots are already registered in some people’s names...”**

This goes to prove that the Defendant was never approved by NSSF to purchase the suit property. However, as has been demonstrated earlier, the Plaintiff is recognized by NSSF as the owner of the suit property and NSSF has further undertaken to have a title deed to the suit property issued to the Plaintiff when the necessary approvals of the subdivision scheme are granted by the Nairobi County Government, the Chief Land Registrar and the Department of Survey. It is my finding therefore that the Plaintiff is the duly recognized owner of the suit property and the Defendant is not.

5. Is the Defendant in possession of the suit property and if so, when did he take possession and in what capacity?

The Plaintiff testified that it was on 8<sup>th</sup> February 2008 that he learnt that the Defendant has deposited building materials at the suit property in preparation for some construction work thereon. On his part, the Defendant has admitted that he is the one in possession of the suit property where he erected a perimeter wall and a parking bay. The Plaintiff did not deny this assertion. My finding therefore is that the Defendant is the one in possession of the suit property since 2008 to date.

6. Has the Plaintiff suffered loss and damage as a result of the Defendant’s occupation of the suit property?

In his testimony, the Plaintiff stated that he purchased the suit property for the purpose of having a residential house constructed thereon for him by his employer at the time. As my finding is that the suit property belongs to the Plaintiff and the Defendant has been in wrongful occupation thereon as a trespasser for a period exceeding 8 years, I do find that the Plaintiff is entitled to general damages for trespass.

7. Is the Plaintiff entitled to any of the reliefs sought?

In light of my findings above, I enter judgment in favour of the Plaintiff as follows:

1. I declare that the Plaintiff is entitled to exclusive and unimpeded right of occupation of the suit property and that the Defendant is wrongfully in occupation thereof and is, accordingly, a trespasser.
2. I issue an injunction restraining the Defendant from constructing, erecting, completing any structures or remaining on or continuing in occupation of the suit property.
3. I award the Plaintiff general damages for trespass in the sum of Kshs. 100,000/- per year for the 8 years the Defendant has been in wrongful occupation of the suit property.
4. Costs of this suit together with interest thereon are awarded to the Plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup>**

**DAY OF MAY 2016.**

**MARY M. GITUMBI**

**JUDGE**