



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE NO 49 OF 1994

ARTHUR MATERE OTIENO PLAINTIFF

VERSUS

DORINA MATSANZA DEFENDANT

JUDGMENT

The plaintiff Arthur Matere Otieno filed this suit against the defendant Dorina Matsanza averring that he is the registered proprietor of the parcel of land number Kakamega/Lugari/159, that the defendant without any authority from the plaintiff entered upon the said parcel of land committing acts of waste. By so doing the plaintiff has been greatly inconvenienced in that he has not been able to utilize his parcel of land since the defendant trespassed thereon and has therefore suffered loss and damage. The plaintiff therefore sought an eviction order to be issued against the defendant. General damages for trespass and costs and interest.

The defendant filed a defence on 21.12.1988 in HCCC No 4779 of 1988, which was amended on 11.11.97 and filed on 12.11.97 in HCCC 49/94.

The key averments are that the defendant was going to raise a preliminary point of law that the suit is bad in law and it should be struck out, denies that the plaintiff is the registered proprietor of land parcel number Kakamega/Lugari/159 and puts the plaintiff to strict proof, that the said parcel of land was allotted to her husband in the year 1964 which he accepted and paid the requisite deposit and was given possession, that in the year 1974 the deceased husband left for the United States of America and left her on the land after he had constructed a house on the land in which the family has been using uninterrupted to date, that while the husband was away in the States there was a fraudulent attempt by the employees of Settlement Fund Trustees to make a false report that there was nobody on the land when the defendant reported the matter to the

District Commissioner the matter became quiet and she continued to live peacefully on the land, it is her contention that if the land had been registered in the name of the plaintiff the same has been done fraudulently and the register should be rectified. The particulars of fraud are given as the plaintiff must have conspired to effect the registration in favour of the plaintiff this being a subject of Eld HCCC No 185/86, the deceased husband of the defendant who is the legal allottee has never transferred this plot to anybody, the plaintiff has acquired title through cheating by him or by his agent, that without prejudice to the foregoing she avers that she has always been receiving bills from the Settlements Fund Trustee upto

1994 and hence the records at the Settlement Fund Trustees indicated that her late husband is the legal owner of the property, the receipt of bills further confirm that the transfer was erroneous or by mistake and fraudulent, that if the said registration has been effected then the same has been done without the consent of or with an invalid consent of land control board, that she has been in quiet possession of the land uninterrupted since 1964 and hence she has acquired title under adverse possession.

In her counter claim she reiterates her defence and counter claim title of the aforesaid property as the said title has been obtained by fraud as per the particulars set out in paragraph 8 of the defence and hence the title should be rectified to reflect her name, that she has acquired title through adverse possession having been uninterrupted possession of the same for over 30 years, that the said title was wrongfully obtained or that the same was obtained by mistake as there was no consent of the Land Control Board for its transfer or that if there was any the same was invalid. In consequence thereof she prayed for the plaintiff's suit to be dismissed and judgment to be given in her favour on the counter claim. In the reply to defence and defence to counter claim the plaintiff joined issue with all the allegations contained in the defence and counter claim and puts the defendant to strict proof thereof, denied contents of paragraph 9 and 10 of the defence and put the defendant to strict proof thereof, denied that the defendant has acquired the said title through adverse possession nor that she has been on the suit land since 1964 and puts the defendant to strict proof thereof denied, the contents of pr 13, 14 and 15 of the defence and states that he was an innocent purchaser for value without notice, denied each and every allegation contained in the counter claim prayed for the defendant's defence and counter claim to be dismissed with costs to him.

A total of four witnesses gave evidence for the plaintiff and these are PW1 Arthur Matere the plaintiff, PW 2 Abdul Rehman Musa who claims to be the second allottee of the suit plot and one who sold the same to the plaintiff PW 3 Andrew Akelo District Land Registrar Kakamega who produced documentation on the history of the land at least from 1984 upto the date of the issuance of the title deed and PW 4 Samuel Wanyoike the Area District Land Settlement Officer Kakamega who produced the

Area Settlement Plot File exhibit 18 containing documentation on what transpired on the said plot from the date of allotment upto the time of trial. Two witnesses gave evidence for the defence namely DW 1 Dorina Matsanza the defendant and DW 2 Justo Abukuse Abedeneko a retired sub-chief and chief from 1977 to 1984 and thereafter chief till his retirement in 1996. The sum total of the evidence adduced is that in the year 1964 the defendant Dorina Matsanza with her deceased husband late Dixon Matsanza attended interview to be allocated a settlement plot and they were allocated plot number 159 Lugari settlement scheme. As they were successful the deceased husband duly signed or thumb printed all the requisite papers one of these documents was a letter of allotment found at folio 22 of exhibit 18. It was thumb printed on 28.2.64. The document has conditions for allotment and conditions attached to the loan given. Conditions I attached to the land given are:

1. Land shall only be used for agricultural purposes.
2. The land shall not be subdivided, charged, let, leased or transferred without the prior consent in writing of the Control Land Board.
3. The allottee shall within 12 months of the date upon which he takes possession of the land to the satisfaction of the Control Land Board.
 - (i) Cultivate at least one acre of arable land.
 - (ii) Erect a dwelling house of suitable material and

(iii) Erect a fence of suitable material or plant a hedge around the perimeter of the land.

It is further stated that upon breach of these conditions the land shall become liable to forfeiture to the Central Land Board but such forfeiture shall not be enforceable by re-entry suit or otherwise unless a notice shall have been served on the proprietor of the land.

(i) Specifying the particular breach complained of and

(ii) If the breach is capable of remedy requiring the proprietor to remedy the breach and

(iii) In any case requiring the proprietor to make compensation in money for breach and the proprietor shall have failed within a reasonable time thereafter to remedy the breach if it is capable of remedy and to make a reasonable compensation if any.

The reverse of that document shows that the late husband of the defendant accepted the conditions and endorsed the same. There are some other conditions set out in the same document but this court will not refer to the same as they are not related to the subject under inquiry herein. A perusal of the plot files shows that the allottee moved to have the land ploughed as shown at folio 2 vide letter-dated 18.2.65. It is noted on 10.5.65 at folio 3 that whoever was to plough the plot had not done so. The deceased was also granted a development loan.

The events leading to this case were sparked off, by one Wangila W Juma writing to the Minister of Lands stating that he has information that plot No 159 Lugari scheme was vacant and he was applying to be allocated the same. The letter is dated 2.5.75 at folio 28 of exhibit 18. That letter was replied to by the letter from the Area Settlement Officer dated 8.5.75 folio 31 to the effect that they have no technical report on the same. At folio 25 vide a letter dated 30.10.74 it is indicated that a notice to remedy breach had been sent to the Area Settlement Controller to serve on the plot owner to remedy the breach. At folio 32 there is mention that the writer had visited the plot in 1974 and the settler had not complied with the notice served. On 21.2.74 and if there are instructions from the Area Settlement Controller or Director of Settlement they be carried out. At folio 35 vide a letter dated 19th June, 1975 there is a letter from the Area Settlement Controller (n) that the plot was being developed and if there is proof that the plot has been neglected then a technical report should be filed. At folio 36 there is a letter dated 8.8.75 from one David Khakaba a driver in the settlement office Kitale to the effect that investigations had been carried out and it had been confirmed that the plot 159 Lugari Settlement Scheme had been deserted since 1964 and that he requests that it be allocated to him. The letter was addressed to the Minister for Lands late Jackson Angaine. At folio 37 there is a letter from the chief East Bunyala Location dated 18.2.76 exhibit D4 informing the District Settlement Officer Mautuma scheme Turbo that the owner of plot No 159 Mautuma left Kenya in the month of September, 1974 and he is now in the United States of America for further studies. This letter is in the plot file and so it is proof that it was received by office concerned. There is indication that it was replied to or acted upon vide letter dated 1.4.76 whereby Mrs Dickson Matsanza was being required to call on the Area Settlement Officer. At folio 42 there is a letter dated 13.4.76 to the effect that settlement officer Turbo has written to the wife of Dickson Matsanza to come to the office for questioning. At folio 43 there is a letter dated 12.3.1976 from the defendant to the settlement officer Kitale informing him that she received the letter late and that she would appear before the officer on 20.4.1976.

I note that there is no application for the land in the plot file by one Abdul Rahman Musa PW 2 but he produced one exhibit 7. Dated 1.12.1974 addressed to the Minister for Lands J Angaine as he then was. On 16.9.1975 a notice was issued ref No 10/21/159/31 addressed to Dixon Matsanza c/ o plot No 159 Lugari scheme through the Area Settlement Controller Box 408 Eldoret. The heading of the document is

cancelletion of letter of allotment Lugari Settlement Scheme plot 159 the contents are that:

"I refer to my notice No LO/21/159/4 dated 29.1.74 calling upon you to remedy a breach or breached condition and regret to note that despite sufficient time having been given to you you have failed to rectify it or them. In the circumstances therefore as directed by the Settlement Fund Trustees I hereby cancel the letter of allotment issued to you on 28.2.1964 and ask you to vacate and hand over immediately the possession on service of this notice failing which I may lodge a complaint in writing with a view to prefer trespass proceedings against you under Trespass Act. It is indicated in free hand that the notice was received on the 11th July, 1976 having been forwarded on 8.1.1976.

Following the cancellation vide letter dated 15.3.1976 the plot was reallocated to PW 2 Abdul Rahman Musa. The copies of the allotment letters are at folio 48 and the same were executed by him on 12th March, 1976. There is another set executed by PW 2 on 4.4.1977 exhibit 10.

From the evidence of PW 2 himself he was taken round the plot by the settlement officers but he never settled on this land, never cultivated it, never developed it in anyway and put up a house on it and later on is when he sold the same to the plaintiff.

There are also subsequent correspondences on the file on the subject. That is a letter-dated 18.8.77 vide folio 52 by the District Officer Lugari Division which was addressed to the Permanent Secretary Ministry of Lands and Settlement. The gist of the letter is that the original allottee Mr Dixon Matsanza left for the United States in 1975 and he left his wife and seven children on the land. That she has been using the proceeds of the land to educate her children seven of them and she has been on the land all through and it was not proper for anyone to inform the settlement offices that there was no one on the land. The letter also gave an overseas address for the plot owner to be contacted vide a letter dated 12.10.77 at folio 53 the Director of Settlement was advised to advise the District

Officer on the relevant law to avoid confusion and to advise the current allottee to take action against the intruder. The District Officers letter was replied to vide a letter dated 4th October, 1997 at folio 56. The gist of the letter is that even if the original allottee Dixon Matsanza is said to have left for the United States in 1975 and left his wife on the plot then she must have been served to remedy the breach but she never complied and this led to the cancellation of her husbands letter of allotment as provided for under the terms and conditions of the same. That if the wife was developing the plot as claimed the husband would not have been served with the notice and the husband was being evicted from the plot because he had abandoned it. That is on this basis that the Minister for Lands and Settlement having been satisfied that the plot was abandoned by the first allottee and all legal steps taken to repossess it he therefore reallocated the plot to another applicant who has since then signed the legal letter of allotment of the plot. That though they sympathize with the situation they are unable to reverse the situation. The District Officer informed the defendant of the position vide his letter dated 1.11.77 at folio 54 that nothing could be done about it. At folio 57 there is a communication to the District Commissioner from the legal officer on behalf of the Director of Settlement. It is dated 14.11.77. The salient features of this letter are that according to the letter of allotment one of the conditions of offer was that the original allottee Mr Nixon Mtsanza was to develop the said plot to the satisfaction of the Settlement Fund Trustees and to erect a dwelling house of suitable materials thereon, that the allottee failed to observe these conditions and therefore became liable to eviction as per the letter of allotment aforesaid, that accordingly Mr Mtsanza was served through his wife who is representative with notice to remedy the breach of conditions in November 1973, January 1974 and 30th June, 1976. Not withstanding the above the wife of the allottee did not favour the trustee with an explanation about any problem she may have been experiencing on the land although this would in any case only would have been sought some form of indulgence not contained in the letter of allotment, that it is therefore difficult to symphasize with the

explanations offered by M/s Kaplan and Stratton advocates for Mr Matsanza on 20.8.76 in their letter to the Minister, that after re-possession the plot was subsequently allotted to Mr Abdul Rahman Musa who is now the legal allottee of the plot, that his office is satisfied that the necessary procedure to re-posses and allocate was correctly observed and that any attempt to interfere with Mr Musa's occupation would be trespass in law, that it is regretted that at this stage matters cannot be reversed to suit the party who is aggrieved.

Further perusal of the correspondence show that the defendant resisted eviction from the land and so PW 2 never settled on this land, never put up a house on it and never developed the same.

The records produced by PW1, 2 and 4 show that the land was first registered in the name of the Settlement Fund Trustees on 8.2.1983. After all the liabilities to the Settlement Fund Trustees were settled the Permanent

Secretary Ministry of Lands and Settlement as the officer administering the find signed discharge of charge in respect of the said land exhibit 11, executed a transfer in favour of PW 2 exhibit 12, 15. The transfer was registered in favour of PW 2 on 31.5.85. Before this registration on 18.8.84 PW 2 sold the land to the plaintiff as per the agreement exhibit

1. On 31.5.85 the same date PW 2 was registered as an owner parties applied for consent to transfer from the Area Land Control Board as shown by exhibit 13, 6. Consent was given on 11.6.85 vide exhibit 2, transfer given to the plaintiff on 27.12.85 as shown by exhibit 15 and title issued to the plaintiff on 27.12.85 as shown by exhibit 16, 17 and 5.

At the close of the whole case only the plaintiff filed written submissions. The major points relied upon by the plaintiff in relation to these proceedings are that the plaintiff filed originating summons in Nairobi HCCC No 4036 of 1986 which was transferred to Eldoret and given file no 49/94.

2. That the defendant had filed a suit against the Settlement Fund Trustees and Abdul Rahman Musa no 185/1986 but to date the plaintiff does not know what became of it.

3. That the defendant knew the conditions given by the Ministry of Lands and Settlement when she signed the agreement of 28.2.1964 and she accepted these conditions by signing the certificate of acceptance. It was a condition that she pays the registration fee of 80/= which she paid on 30th day of June, 1964. It was further a condition of the said agreement that he pays the loan within 10 years. It is on record that as at 1974 the defendant had neglected and or refused to pay the said loan.

(ii) It was a condition that she develops the land but the defendant took the loan and then went to develop her land at Bunyore where she settled and lives to the present day and when her husband died in 1987 he was buried at Bunyore.

(iii) That the defendant never stayed on the said land for more than 30 years as stated by the advocate. She deserted the said land and that is why the same was repossessed and she only came to put up a temporary structure when she was served with the notice that she was no longer the owner of the said land.

(v) She was duly served with the notice for gross breach but she did not respond or make arrangements on how she could repay the loan. She has never been a registered owner from 1974-85 as the registered owner was

Abdul Raham Musa who transferred the land to the plaintiff who before paying for the land carried out a search and confirmed that the seller was the registered owner of the land and the names of the defendant or her deceased husband did not appear.

v) The defendant knew that the parcel of land was not hers and that is why she never placed a caution against the title to prevent a transfer.

(vi) He still maintains that the defendant never lived on the said land and that is why notices for repossession were pinned on a tree.

(vii) The defendant produced no documents to show that the late husband left for the United States as the passport she produced had no photograph of her deceased husband and no certificates were produced had no photograph of her deceased husband and no certificates were produced to show that the late husband ever went to study in America. The passport further shows that he left the country in 1975 and so he was around in 1974 when the land was repossessed. Even if the said defendant's husband left the country the defendant could have made arrangements to settle on the land and make arrangements to repay the loan and it was not necessary for her to wait for her husband for 13 years to come to repay the loan. She therefore neglected to observe the condition set by the Settlement Fund Trustees.

(viii) That the invoices mentioned to have been received by the defendant relate to the development loan given to her late husband which amount stands unpaid to date. The defendant knew that they were living on the land illegally and that is why her husband was buried on his land in Bunyore.

(ix) The defendant never produced any receipts for payment for the land in question and neither did she produce the letter from the District Commissioner authorizing her to continue staying on the said land neither did she summon the said District Commissioner to come and give evidence. She also admitted in evidence that she never paid for the said land.

(x) It was not necessary for the plaintiff to inform the chief and the assistant chief that he was buying land as the land in question was Government land which had been lawfully allocated to Abdul Rahman Musa the seller.

(xi) All the evidence in the plot file all goes to show that the land in question was repossessed in 1974 lawfully allocated to another person and lawfully sold to the plaintiff and this Court should ignore the evidence of DW 2 Abuguse who was not present when the land was repossessed.

Further he had no power to interfere with government land and that is why DW 2 referred him to the settlement office for a solution.

(xii) The plaintiff asserts that he followed the correct procedure to acquire the land and it should be given to him and the defendant evicted there from.

I failed to trace submission for the defence on the file and also no agreed issues were filed. The plaintiff filed seven issues namely whether the suit is bad in law and therefore incompetent, whether the plaintiff is the registered proprietor of the suit land, whether the defendant is lawfully on the suit land and if so when did she take possession, whether there was any fraud in the transfer of the land from the Settlement Fund Trustees to

the plaintiff and if so was the plaintiff a party to the fraud, can the plaintiff in law rely on Eldoret HCCC No

185 of 1986 in the present case, whether the plaintiff is entitled to the prayers he is seeking and what should be the order as to the costs. This Court will consider these issues in the assessment of the evidence herein.

On the Court's assessment of the evidence herein it is clear that there is no dispute that the late Dixon Matsanza who was husband of the defendant was allotted the suit plot in 1964 as per the letter of allotment exhibited in the plot file. There were conditions attached to the said allotment one which was for the allottee to take up possession and start developing the land. Correspondences in the plot file show that there were allegations that the plot had been abandoned and people who were interested in it started applying to the Minister for Lands and Settlement to be allotted the same.

This prompted the officers of the Ministry concerned to issue a requisite notice to the allottee to remedy the breach or otherwise have the plot repossessed. There is no officer who confirmed that he had in fact been to the land and served the notice but it appears that the notice was pinned on a tree in the farm. It has also transpired that the original allottee had left for overseas for further studies. The defendant produced a passport exhibit D1 to that effect. The plaintiff has attacked this document saying it does not bear a photograph. Indeed it bears no photograph but it has the names of the deceased and at page 11 of the same it shows that the visa to the United States was granted on 20.9.74 and it was stamped in New York on 2.9.74. There was also a confirmation from the chief of Bunyore that that is the correct position vide exhibit D4. There are correspondences to show that efforts were being made to reach the defendant so that she could remedy the breach but that was to no avail and that gave birth to the issuing of the notice exhibit D6 cancelling the allotment to the late husband of the defendant thus paving the way for the allotment to PW 2 who later sold the land to the plaintiff herein. The writer of the said notice stated that the addressee who was late husband of the defendant had been served with the notice.

(ii) That he failed to remedy the breach and the Settlement Fund Trustees had given the writer instructions to repossess the said plot. It however transpired that the notice never reached the allottee because he was overseas. When this was brought to the administration in the Ministry of Lands and Settlement as observed by the contents of the letter dated 14.11.77 they contended that the allottee was served through his wife and she could have remedied the breach on his behalf and on the basis of that the department was adamant that the position could not be reversed and they had no sympathies.

The question to be asked here is whether the officers who were involved in the process acted within the rules. The officers concerned purported to enforce clause (d) of the conditions which states "upon any breach of these conditions the land shall become liable to forfeiture to the Central Land Board but such forfeiture shall not be enforceable by re entry suit or otherwise unless a notice shall have been served on the proprietor of the land. A construction of the foregoing condition shows that the body which was to forfeit the land in the event of default or breach of any of the conditions was Central Land Board and the forfeiture could only be effected after notice to the proprietor. From the evidence adduced herein especially the correspondences in the plot file the notice was not served on the proprietor as no officer said that the notice was served on the proprietor who was allegedly overseas. It was pinned on a tree. The condition does not say that substituted service is appropriate.

2. The department was contended with service onto the wife as a representative. There is no indication in that condition which permits service on a representative. That aside there is no evidence that even the defendant herein as a wife of the proprietor was served. In fact the correspondences show that even after the notice was served by pinning the same on a tree efforts were being made to trace the defendant. There is no correspondent from the field officers concerned to show that they ever traced her and then formally called upon her to remedy the breach.

3. From the correspondences there is no mention that the case was ever forwarded to the Central Land Board for deliberation and a decision of the Control Land Board passed confirmed by minutes to the effect that the land be repossessed. In the letter from the legal officer dated 14.11.77 it was stated that instructions came from the Minister to take such action.

The said letter does not state when the application for reallocation was made to the Minister, it does not mention when the Minister gave that decision to repossess and to reallocate. Neither is anything produced which is contained in the plot file which confirms that such decision was ever taken.

The repossession notice is dated 16.9.75 by which time the proprietor was overseas. The central message in the said letter is that "in the circumstances therefore as directed by the Settlement Fund Trustees I hereby cancel the letter of allotment issued to you" As stated earlier on the conditions gave authority to repossess to the Central Land Board and not the Settlement Fund Trustees. Further the said letter does not state when the Settlement Fund Trustees took the decision to repossess the said land neither is a copy of the same contained in the plot file.

The Settlement Fund Trustees is a body corporate having a perpetual seal set up under section 167 of the Agriculture Act (cap 318) of the Laws of Kenya. The members stipulated under section 167 (1) are the Minister for the time being responsible for Agriculture and the Minister responsible for Finance. Under section 168(3) the trustees had the power to appoint one for their officers or a public officer to be the officer responsible for administering the fund under section 172. The Settlement Fund Trustees may delegate such for their powers conferred on them by this part as they may decide to the officer administering the fund who in turn may delegate those powers to an officer of the trustees approved by them. Functions of the fund are set out in section 171 of the Act section 174 empowers the Fund to recover monies due to it as a civil debt where the same has not been paid over. There is nothing in that section which empowers the Fund to repossess land purchased with funds financed by them. A perusal of the subsidiary legislation made in this chapter there is no subsidiary legislation rules and or regulations made governing the Settlement Fund Trustees.

The upshot of the foregoing is that the allocation or parcel number Kakamega/Lugari/159 was not properly cancelled and re-allocated to PW 2 Abdul Rahman Musa because of the following:-

1. The plot file exhibit 18 does not contain a letter of application from PW 2 to the Minister asking to be allocated the land.
2. The letter of remarks or instructions from the then Minister for Lands and Settlement approving the reallocation to PW 2 is not exhibited and so there is no evidence to show that the Minister approved the second reallocation.
3. According to the instructions from the allotment form the right to repossess or forfeit land was the preserve of the Central Land Board. Here in no minutes and no instructions have been exhibited to show that the Central Land Board had notice and approved of the forfeiture of that land reallocation of the same. Neither is there evidence to show that those who took the said action were acting on behalf of the Central Land Board. In the absence of proof that action was taken by the Central Land Board or anybody on their behalf the right to forfeit the said land cannot hold.
4. The correct procedure was not followed as personal service was not effected onto the proprietor of the plot and since substituted service is not provided for under the rules it means that the requirement that the proprietor of the land be notified was not complied with. The plaintiff has maintained in his submissions that the plot owner had notice of the notification of the breach and that he left for the States

after forfeiture had been effected. However it is clear that from the correspondences in the plot file there is nothing to show that he was served personally with the notice to remedy the breach neither was his wife served although such service would not be appropriate under the rules.

5. The letter of re-possession stated that the instructions to repossess had come from the Settlement Fund Trustees but no such instructions were exhibited or found in the plot file. Further this Court has found that in law as set out elsewhere in this judgment the Settlement Fund Trustees has no power to repossess land they have assisted to finance. The only remedy available to the fund in the event of default of repayment is an action through civil debt collection procedure. There is no right of repossession.

The foregoing goes to show that PW 2 was not properly vested with the re allotment followed by title which he could pass on to a 3rd party. DW 1 as the legal representative of the estate of her late husband has a right to make a follow up of this property for her benefit and that of the other beneficiaries.

Turning to the second aspect of the plaintiff's case I find that the extract of title shows that the Settlement Fund Trustees were registered as owners on 8.2.1983. The sale agreement between the plaintiff and PW 2 was made on 18.8.84. As at that time PW 2 did not have title which he could pass on to a 3rd party. Title being vested in the Settlement Fund Trustee and him as an allottee holding a reversionary interest he could only sell with the consent of the title holder that is the Settlement Fund Trustees. No such consent is shown to exist in the plot file neither was any produced in this Court as evidence in the absence of such proof PW 2 sold what he did not own and so he could not pass title to a 3rd party or any interest in the suit land. From the extract exhibit 17 PW 2 was registered as an owner on 31.5.85 and that is the date he was vested with authority to pass title. It follows that exhibit 1 the sale agreement cannot help the plaintiff in anyway. Further that agreement has been faulted by the fact that consent was required to be given within 6 months from 18.8.84 which should have been before 18.2.85. The document exhibited shows that application was made on 31.5.85 which was outside the 6 months period. The plaintiff and PW 2 were obligated to enter into another agreement or renew the one entered into in 1984 and then proceed to the Land Control Board for consent. In the absence of a renewal of the agreement or a fresh agreement being entered into the consent relied upon being exhibit 2 was not validly and lawfully granted as the same is outside the requisite 6 months period and the same has been faulted.

The plaintiff has argued that nobody came to object. Indeed nobody objected. The only person who could have objected was DW 1 the defendant. There is no evidence to show that she was notified of the proceedings to grant consent and she failed to object she says she would have objected. This is confirmed by the move she has put up all along to resist settlement on the land by PW 2 and the plaintiff. The plaintiff has further argued that he is a beneficiary purchaser for value without notice and he is not involved in any fraud. From the documentation the plaintiff was not responsible for the divesting of the property from the late husband of DW 1 unto PW 2. However as a prudent purchaser he should have gone to the land and carried out inquires to see if the title is clean or not. PW 2 says and some correspondences in the plot file show that his move to settle on the land was resisted by DW 1 and indeed he never settled on this land. According to his evidence he was unable to settle on the land and so he sold it to rid himself of the problem and the person sold the land was the one who was to deal with that problem. This Court cannot believe that PW 2 never mentioned to the plaintiff the problem of the land. PW 2 said when he wanted to settle on the land he was prevented by DW 1 and if that was the case then this Court does not see how come PW 1 says there was nobody on the land and the trespasser came after he had purchased the land.

In fact the conduct of DW 1 negatives the allegation that the plot had been deserted. She DW 1 was not

aware of what was going on in the Government offices and so it was not possible for her to get to know of the move in question in order to come and invade the land after the sale to PW 1. The Court believes PW 2's evidence that when he came on the land he found DW 1 and she prevented him from settling on the land. DW

2 has confirmed that DW 1 has all along been on the land. If that had not been the case PW 1 would not have gone to seek assistance from him. It was incumbent upon the plaintiff to make inquiries about the property he was buying whether it had dispute on it or not and had he done so PW 2 would have informed him of the problem and it follows that the PW 1 purchased the property with full knowledge of the existence of the dispute on it and so his plea of an innocent purchaser does not hold.

As regards the sanctity of his title the Court finds that it is not first registration as the Settlement Fund Trustees were the first registered owners and so the plaintiffs title can be faulted under the law.

There was issue of failure to bury the husband of DW 1 onto the disputed land as being proof that the land had been divested from her husband and that it belonged to another person. DW 1 explained the hospital where he died was near Bunyore where they have another home and due to lack of transport they decided to bury the deceased at Bunyore. PW 1 could only controvert that evidence if he can show that DW 1 had means to hire transport to transport the body to Lugari instead of Bunyore which has not been shown and so DW 1 is to be believed when she says she had no transport. Secondly burial of ones relation alone cannot vest a party with ownership of land. There was also issue raised about the statements exhibit D2a – J which were coming in the name of the deceased. A perusal of the plot file also shows that some statements came out in the name of the deceased and other statements came out in the name PW 2. PW 1 said these were for the development loan that the husband of DW 1 had taken and which remain outstanding to date. The Court's finding on this is that it is only the settlement officials who could competently say why statements came out in the names of the deceased and PW 2 and what the amount was for.

PW 1 further argued that the deceased was a loan defaulter as he did not pay the loan within 10 years from the date of allocation. DW 1 agreed that no loan was paid because the husband had gone overseas and what she was struggling to get from the land went to pay fees for her children and after the land had been changed to PW 2 she could not pay for it. This was confirmed in some of the correspondences in the plot file. The Court's finding on this is that failure to pay the loan is not one of the conditions for repossession and so it is immaterial that the deceased and DW 1 had not paid anything towards the loan. The Settlement Fund Trustees who funded the purchase had a remedy of recovering the same through civil debt recovery action.

All the foregoing go to show that the plaintiff's claim cannot succeed for the reasons given. Turning to the defendant's counter claim in answer to paragraph 7 and 8 of the defence it is the finding of this Court that indeed there were false reports filed by the settlement officials that there was nobody on the land when DW 1 was on the land confirmed by the fact that after PW 2 had been reallocated the land he went and found her on the land and she refused to move away forcing PW 2 not to settle on the said land at all, the circumstances behind the scenes leading to the alteration of the deceased's allocation of the suit land are not clear and so the Court cannot say for sure the evidence proves fraud to the standard required in law. However it is sufficient to say that the deceased husband of DW 1 was unprocedurally and unlawfully divested of his interest in the suit land and if any wrong was done it was committed before PW 1 came into the scene but him PW 1 crowned that wrong and clothed it with the clothe of finality when he purchased the land knowing that it had a dispute of ownership on it. As regards paragraph 9 and 10 of the defence it is the finding of this Court that despite the sending of statements in the names of the deceased long after the wrongful re-allocation had been done, the deceased was

divested of legal ownership of the said suit land erroneously and by mistake. As regards paragraph II of the defence, the Court's finding is that it is correctly pleaded that the consent exhibit 2 is invalid as per the reasons given in this judgment. As regards paragraph 12 where the defendant has pleaded adverse possession, it is clear that legal titleholder to suit land before title changed to PW2 was the Settlement Fund Trustees who are not parties herein. Title against PW2 started running in 1977 after re-allocation which has continued to the present day with PW1 who purchased the land from PW2 and so it cannot be said that the defendant has had peaceful occupation. Further that plea of adverse possession cannot succeed, as it cannot be advanced by way of counter claim in a suit. It has to be championed by way of counter claim in a suit. It has to be championed by way of originating summons. As for the other claim of the defendant it is bound to succeed because the evidence and this finding of this Court have shown that the proprietorship of the suit land did not move procedurally from the late husband of the deceased to PW2 and the eventually to PW2 therefore the re-allocation to PW2 and eventually transfer to the plaintiff, has been faulted and it cannot stand.

The final orders of this Court are as hereunder:

(1) The plaintiff's suit filed herein against the defendant be and is hereby dismissed with costs to the defendant.

(2) The registration of land parcel number KAKAMEGA/LUGARI/159 in the name of the plaintiff be and is hereby cancelled.

(3) Since DW 1 has already succeeded the late original allottee late Dixon Matsanza, the title to the land will have to revert to her.

(4) The plaintiff is at liberty to pursue PW 2 for a refund of the purchase price paid with interest.

(5) PW 2 is at liberty to pursue DW 1 for the refund of any dues paid to Settlement Fund Trustee for the loan in respect to the said land being the plot purchase loan only.

(6) DW1 will also pay dues owed by the deceased in respect to development loan taken by her deceased husband if the same has not been written off.

(7) The defendant will have costs of the counterclaim.

Dated and delivered at Eldoret this 23rd day of May, 2003

R.N. NAMBUYE

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JUDGE



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