



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 34 OF 2001

NATIONAL CEREALS & PRODUCE BOARD.....PLAINTIFF

VERSUS

COUNTY COUNCIL OF NAKURU.....DEFENDANT

JUDGMENT

The plaintiff filed suit against the defendant praying for judgment to be entered against the said defendant in terms of:

- (a) *A permanent injunction barring the defendant either by itself, its agents or servants from trespassing onto, claiming rights over or in any way dealing with and interfering with the plaintiff's quiet possession of parcel number **Subukia/Subukia Block 13/2 (Kinawe)**.*
- (b) *A declaration that the plaintiff is the legal owner of all that parcel of land known as **Subukia/Subukia Block 13/2 (Kinawe)**.*
- (c) *Any other remedy as the honourable court may deem fit and applicable in the circumstances of the suit.*
- (d) *An order that the defendant do bear the costs of the instant suit.*

At the time of filing of the suit, the plaintiff filed an application for interim injunction which application after interpartes hearing was allowed as prayed pending the hearing and determination of this suit. The defendant filed a defence to the plaintiff's suit. The essence of the said defence is that the defendant denied that the plaintiff was the absolute proprietor of the freehold interest in the parcel of land registered as *Subukia/Subukia Block 13/2 (Kinawe)*. The defendant further averred that it had a right to claim the parcel of land that was in dispute. Finally the defendant averred that the plaintiff had fraudulently obtained the title of said parcel of land.

During the hearing of the case the plaintiff called one witness who testified on its behalf. PW 1 Patrick Mbuthia, the Senior Legal Officer of the plaintiff testified that the suit land was allocated to the plaintiff by the defendant. A title deed was issued to the plaintiff on the 26th of March 1999. The parcel of land situate at Subukia, measured 1.681 Hectares. The title deed of the parcel of land which is known as *Subukia/Subukia/Block 13/2 (Kinawe)* was produced as plaintiff's exhibit No. 1. A certificate of search

issued by the Land Registrar, Nakuru on the 25th November 2003 was produced as plaintiff's exhibit No. 2. PW 1 testified that after the said parcel of land had been allocated to the plaintiff, the defendant later turned around and claimed that the land allocated to the plaintiff was bigger than it had intended to allocate to the plaintiff. The defendant therefore sought to excise from the parcel of land registered in the name of the plaintiff (*hereinafter referred to as the suit land*) what it claimed to be excess portion of land. The defendant then purported to allocate the "excised" portion to third parties. The third parties claimed that the land had been allocated to them by the defendant.

When the plaintiff became aware of the encroachment on their parcel of land it wrote a letter of protest to the District Land Registrar, Nakuru. The plaintiff complained that the beacons had been tampered with (*letter produced as Plaintiff's Exhibit No. 3*). PW 1 testified that one Danson Mugwe had claimed that the defendant allocated him part of the parcel of land owned by the plaintiff which he purported to refer to as Plot No. 118. The said Danson Mugwe had made the claim by a letter dated the 26th of October 1999 (letter was produced as Plaintiff's Exhibit No. 4) subsequently thereafter the plaintiff was issued a letter of allotment by the Commissioner of Lands (*produced as Plaintiff's Exhibit No. 5*). Attached to the letter of allotment was a Part Development Plan (PDP). The PDP indicated that part of parcel of land belonging to the plaintiff had been excised.

PW 1 testified that the plaintiff was surprised that it was being issued with a letter of allotment and yet they had already obtained a title to the said parcel of land. The plaintiff wrote a protest letter to the Commissioner of Lands complaining that the suit land area had been reduced and part of it excised. The protest letter was produced as Plaintiff's Exhibit No. 6. The Commissioner of Lands instituted investigations to address the plaintiff's complaint. The letter of the Commissioner of Lands was produced as Plaintiff's Exhibit No. 7. To protect its interest on the said parcel of land, PW 1 testified that a decision was made to fence off the suit land. The defendant however gave the plaintiff notice to demolish the fence because it claimed that the plaintiff was putting up an illegal fence. The notice was produced as Plaintiff's Exhibit No. 8. The defendant followed up the notice with a letter dated the 18th of January 2001 which ordered the plaintiff to remove the fence or else the defendant was going to forcefully remove the fence at the plaintiff's own expense. The letter was produced as Plaintiff's Exhibit No. 9. The plaintiff tried to arrange a meeting the defendant to resolve the issue but the defendant was not keen on such a meeting.

PW 1 testified that after their efforts to meet the defendant were rebuffed they filed this suit and obtained a temporary injunction against the defendant. The plaintiff produced the Registered Index Map (R.I.M.) of Subukia under reference 105/3/25 & 119/1/5 as Plaintiff's Exhibit No. 10. The map showed the boundaries of the parcel of land number Subukia/Subukia Block 13/2 (Kinawe). It also showed the part that the defendant attempted to excise from the said suit land. PW 1 testified that on the 7th of February 2002, the Commissioner of Lands wrote to the plaintiff indicating that the letter of allotment (Exhibit No. 5) together with the annexed PDP had been cancelled. PW 1 testified that the defendant's attempt to allocate part of the plaintiff's parcel of land was illegal. The plaintiff urged the court to allow the prayers sought in the plaint.

PW 1 conceded that the suit land was within the jurisdiction of the defendant. He admitted that the plaintiff possessed a freehold title of the said parcel of land and not a leasehold. He testified that the plaintiff took occupation of the suit land in the 1987- 88 period. It was his further testimony that the suit land measured in acreage as reflected on the title deed and on the map. PW 1 further stated that there were people who were in occupation of the disputed portion of land including the person who was claiming part of the suit under a letter of allotment. PW 1 reiterated that the title deed of the suit had been issued before the letter of allotment which was produced as Plaintiff's Exhibit No. 5. He stated that the PDP annexed to the letter of allotment did not reflect the true position of the said parcel of land on

the ground. He further testified that the letter of allotment (Plaintiff's Exhibit No. 5) was expunged by the Commissioner of Lands after the suit had been filed.

PW 1 testified that the defendant had been sued because it was the cause of all the trouble that the plaintiff was facing in respect of the suit land. PW 1 conceded that Danson Mugwe was a total stranger to them. Likewise the persons who had encroached on the plaintiff's said suit land. PW 1 testified that the plaintiff hired a private surveyor who had confirmed the boundaries of the suit land in the absence of the defendant, who had declined the offer to witness the said re-survey. PW 1 reiterated that its claim against the defendant was valid. He urged the court to find in favour of the plaintiff. PW 1 testified that the disputed portion of the land was the portion which adjoined the road. He reiterated that the plaintiff was constrained to come to court when the defendant threatened their occupation of the suit land.

The defendant called one witness; Michael Otieno K'odero, the clerk to council of the defendant (DW 1). He admitted that the plaintiff was the registered owner of parcel number *Subukia/Subukia/Block 13/2*. The plaintiff's title was a freehold title. The land was situated within Subukia township which is under the administrative jurisdiction of the defendant county council. He admitted that the suit land was allocated to the plaintiff through the Commissioner of Lands. He however contested the fact that the plaintiff had been issued with a freehold title instead of a leasehold title as the land in question was initially trust land. DW 1 denied that the council had allocated part of the said parcel of land to any other person. He testified that although a demolition order of the perimeter fence erected by the plaintiff had been issued by someone in the council, the said order had been issued without the authority of the council.

He testified that the defendant had no dispute with the plaintiff over the said suit land. He denied that the defendant had any interest in the suit land. He further testified that the defendant had no connection whatsoever with the people who were purportedly claiming part of the suit land. He reiterated that the defendant had not issued a letter of allotment to any other person to occupy part of the suit land. In his view, the defendant should not have been sued by the plaintiff. DW 1 reiterated that after looking at the map of the area, the defendant did not dispute the ownership of the suit land by the plaintiff. DW 1 was not aware that part of the said parcel of land had been allocated to any other person as a petrol station. DW 1 conceded that the entire parcel of land which comprised the suit land belongs to the plaintiff.

He stated that the defendant did not dispute the boundaries of the said parcel of land. DW 1 disowned the demolition order which was purportedly issued by the defendant. It was his testimony that the said order had been issued by an unauthorised person working for the defendant. In his view, when the plaintiff received the demolition order, it ought to have confirmed the same from the clerk to council of the defendant. DW 1 disowned exhibit "OKLI" which had been annexed to the affidavit of Onesmus Langat, the clerk to council at the time the suit was filed. DW 1 reiterated that the defendant lacked capacity to allocate land where a title deed had already been issued to someone else. He conceded that if anyone attempted to do so, it would constitute an illegal act. DW 1 admitted that the suit land was properly allocated to the plaintiff by the Commissioner of Lands.

At the close of the trial the plaintiff and the defendant agreed by consent to present written closing submissions to the court. Both the plaintiff and the defendant filed written submissions. I have considered the evidence that has been adduced by the parties to this suit. I have also carefully read the written submission presented to this court. The issue for determination by this court is whether the plaintiff is the legal owner of all that parcel of land known as Subukia/Subukia/Block 13/2 (Kinawe) comprised of 1.681 Hectares. The other issue for determination is whether, the defendant had any right

to allocate a portion comprised of the said suit land to a third party. The final issue for determination is whether on the evidence adduced, the plaintiff had established that it is entitled to the prayers sought in the plaint.

To prove its case, the plaintiff called its Senior Legal Officer, Patrick Mbutia Karanja to testify on its behalf. Patrick Mbutia Karanja (PW 1) testified that the parcel of land known as *Subukia/Subukia/Block 13/2 (Kinawe)* was owned by the plaintiff. The plaintiff was allocated the said parcel of land by the defendant. A title deed was issued to the defendant on the 26th of March 1999 (*certified copy was produced as Plaintiff's Exhibit No. 1*). A certificate of search obtained from the District Land Registrar Nakuru confirms that the plaintiff is indeed the registered owner of the suit land (*Plaintiff's Exhibit No. 2*). From the evidence adduced, it is evident that after the defendant had allocated the said parcel of land to the plaintiff, it sought to renege on its decision allocating the plaintiff all the area comprised in the suit land. The defendant was of the view that it had allocated to the plaintiff a larger portion of land than it intended to. The defendant then made a clumsy attempt to repossess the land. The defendant sought to reverse the entire allotment process. Liking bungling amateurs, the defendant once again commenced the allocation process of the parcel of land comprised in the suit land. This was in spite of the fact that the plaintiff already had a title to the said parcel of land as delineated in Registered Index Map (R.I.M.) No. 105/3/25 & 119/1/5 which was produced as Plaintiff's Exhibit No. 10.

The defendant then had the Commissioner of Lands issue the plaintiff with another letter of allotment dated the 6th of April 2000 (*produced as Plaintiff's Exhibit No. 5*). Annexed to the letter of allotment was a Part Development Plan (PDP) which clearly showed the intention of the defendant in embarking on the said futile exercise. The sole purpose of the said exercise was to excise part of the suit land, which is situated next to the road. The plaintiff protested this move. (*Plaintiff's Exhibit No. 3*). The plaintiff was later surprised that the said portion "excised" from its portion of land had been allocated to one Dadson Mugwe by the defendant and given a provisional number 118 (Subukia Township) (*Plaintiff's Exhibit No. 4*). It was now manifest that the only reason why the defendant made allegations that it had allocated to the plaintiff a "larger" portion than it intended to, was for the purpose of benefiting a private individual. The plaintiff pursued the revocation of the said letter of allotment and the PDP (*Plaintiff's Exhibit No. 6*) with the Commissioner of Lands. The Commissioner of Lands, after investigating the complaint by the plaintiff (*Plaintiff's Exhibit No. 7*) cancelled the letter of allotment and expunged the PDP "excising" a portion of the parcel of land belonging to the plaintiff (*Plaintiff's Exhibit No. 11*).

When the plaintiff sought to erect a fence to delineate the boundaries of its parcel of land, the defendant was not amused. It issued a demolition order (*Plaintiff's Exhibit No. 8*). It further notified the plaintiff that it would demolish the fence if the plaintiff persisted with its move to fence off the said parcel of land (*Plaintiff's Exhibit No. 9*). When the plaintiff filed the present suit, the defendant filed a defence making averments, inter alia, that it had a right over the portion of land that it considered to be "extra" or "outside" the boundary of the parcel of land belonging to the defendant. The defendant further stated that it would contend at the hearing of the case that the title deed issued to the plaintiff had been fraudulently obtained.

During the hearing of the case, DW 1, the clerk to council of the defendant completely changed his tune. He testified that the defendant had no dispute whatsoever with the plaintiff over its ownership and possession of the suit land. The only problem, a minor one at that, which the defendant seem to have, was that the plaintiff had been issued with a freehold title instead of a leasehold title. Otherwise the defendant did not see the reason why it was sued. The defendant disowned all the correspondences between itself and the plaintiff. DW 1 testified that the said letters, which were produced in evidence, were written without the authority of the defendant.

I have evaluated the evidence adduced. There is no doubt that the plaintiff is the owner of all that parcel of land known as *Subukia/Subukia/Block 13/2 (Kinawe)* comprised of 1.681 Hectares and whose area has been delineated in Registry Map Sheet No. 105/3/25 & 119/1/5 (*produced as Plaintiff's Exhibit No. 10*). It is also evident that the defendant made attempts to hive off a portion of the said parcel of land with a view of allocating the same to one Dadson Mugwe. When the defendant's efforts were thwarted by the Commissioner of Lands, the defendant changed tact and now agree that the suit land belongs to the plaintiff. The defendant now acknowledges that it had no dispute with the plaintiff over the suit land. This is inspite of the fact that its defence gave a contrary picture.

What I have deduced from the evidence is that the defendant's action at the material time was an instance where a public body is commandeered to serve the interest of an individual. In the instant case, the defendant used its resources to assist one Dadson Mugwe to gain an illegal foothold on the parcel of land owned by the plaintiff. I do find that the plaintiff has proved its case on a balance of probabilities. The defendant's protestations of innocence comes too late in the day, when it had already been caught with its pants down.

I therefore enter judgment for the plaintiff against the defendant as prayed in the plaint. This court issues the following orders:

(i) The plaintiff is declared to be the legal owner of all that parcel of land known as Subukia/Subukia/Block 13/2 (Kinawe)

(ii) The defendant, its agent and or servants are hereby permanently restrained from trespassing into, claiming rights over or in any way dealing or interfering with the plaintiff's quiet possession of parcel No. Subukia/Subukia/Block 13/2 (Kinawe).

(iii) The plaintiff shall have the costs of the suit.

DATED at NAKURU this 18th day of February 2005.

L. KIMARU

JUDGE



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