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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 514 OF 2008

SOLLY MBOGO.....PLAINTIFF

VERSUS

JOHN MUGENI GITAU.....DEFENDANT

JUDGMENT

Background

1. This suit was commenced vide a plaint dated 1st October 2008 whereby the plaintiff sought for the following orders against the defendant:

a) *The Defendant be evicted from the plaintiff's land ESCARPMENT/ KINARI/ BLOCK 1/ 851.*

b) *That the said orders be effected with the assistance of the OCS Limuru Police Station.*

c) *Costs of the suit and interest thereon at court rates.*

d) *Any other relief as this Honourable Court may deem just and fit to grant.*

2. The Plaintiff's claim is that he is the registered owner of the suit land Escarpment/ Kinari/ Block 1/ 851 which the defendant occupied in or about 1999 and has been residing therein illegally despite the Plaintiff's several requests for the defendant to vacate.

3. The Defendant countered these accusations vide his statement of defence dated 18th November 2008 where he avers that he is the rightful registered owner of the suit property having been allocated the property in 1988 by virtue of being a squatter at Kinale. Thus any title to the suit property held by the Plaintiff should be declared null and void and the suit should be dismissed with costs.

4. I took over the matter on 5.10.2021 when the case was at the tail end of the trial. Through the consent of the advocates for the parties, the case proceeded from where the matter had stopped.

Plaintiff's Case

5. The plaintiff, **Solly Mbogo** testified as **PW1** where he adopted his witness statement dated 4th October 2013 as his evidence. Therein, he avers that he was born and raised at Kinale, where his father Cephaz Ndegwa Kagira was a forester. That in 1988, the forest reserve was turned into a settlement scheme to settle squatters who were residing in the forest. When the process of settlement commenced, the families of employees who worked at the department of forestry were to be evicted. But this was later rescinded and they were also considered and settled.

6. He stated that during that period, the DC Kiambu and Minister for Lands visited the area and took names of the squatters, and his name was included. He was given a 5 acre piece of land, issued with a title deed in 1988, took possession of the land, built a house and leased it to a tenant by the name Kamau Kibe (PW2). He leased out the land because he was leaving Kinale for

Mombasa.

7. He stated that when the tenant took possession of the land, the tenant wrote several letters to him informing him that the Defendant was claiming that the land was his. So in 1999, he forwarded a complaint to the area Chief and D.O, but the same was not actioned immediately. Him and the defendant were later summoned to the D.Os office where they met a land panel that interviewed them and he produced title to the suit parcel. The Defendant did not have evidence of ownership but stated that he would produce it with time.

8. He added that he attended more meetings on the same issue but the Defendant never appeared despite the fact that by that time, he had evicted the Plaintiff's tenant, taken possession of the suit land, demolished the house the Plaintiff had built and constructed his house and threatened the Plaintiff with physical harm.

9. By the time PW1 was giving his testimony in court, he stated that he lives in Voi where he is a business man.

10. In support of his case, the Plaintiff produced nine documents filed in his list dated 4th October 2017 as his exhibits 1-9. The said documents are;

1. Lease agreement drawn on 4th January 1994 between the Plaintiff and Andrew Kamau.

2. Letter from Peter Kamau to Sally Mbogo dated on 29/5/1997.

3. Letter from Peter Kamau to Sally Mbogo dated 11/10/1999.

4. Undated letter from Peter Kamau to Sally Mbogo.

5. Undated letter from Peter Kamau to Sally Mbogo

6. Letter dated 17th June 1999 by the Plaintiff to the District Officer Lari.

7. Letter dated 14th May 2005 by the Plaintiff to the Chief Kinale Settlement Scheme.

8. Demand letter dated 20th November 2007 from the Plaintiff's Advocates to the Defendant.

9. Copy of the Plaintiff's title deed to the suit land.

11. On cross examination PW1 Stated that he was 57 years old at the time of his testimony and he was given the land in 1988 while living in Kinale. He re-stated that his father was a civil servant working as a forester at Kinale and housed at the forest but he was not a squatter. The Plaintiff was the squatter, a businessman, and at some time, a lorry driver but he never worked in the military.

12. He stated that the provincial administration through the D.O and the D.C are the ones who prepared the list of squatters who were to be settled. He was issued with a title deed in year 1988 and this was done by the Provincial Administration in a ceremony held by the DC at Kinale.

13. He further stated that he could not recall the exact month when he took possession of the suit land but he built a timber house and lived on the land from 1988 to 1994 and then leased it to Andrew Kamau in 1994. The house was later demolished by the Defendant who moved into the suit land in 2000.

14. **PW2 Peter Kamau Kibe**, adopted his witness statement dated 4th October 2013 as his evidence. He contends that he leased the suit property from the Plaintiff in the 90s and farmed on this land until he was evicted by the Defendant who proceeded to take

possession and put up his own house.

15. On cross-examination he stated that he did not know the Plaintiff at the time of leasing the land since he was dealing with Plaintiff's agent by the name Peter Ngunyi. Prior to leasing the suit property, he lived in a neighbouring area called Magina and the defendant was known to him, but by then the Defendant was not living on that land.

16. He added that he once went to the Assistant Chief to verify ownership of the property but the Assistant Chief was unable to do so, hence he voluntarily vacated the property to avoid confrontation with the Defendant.

17. On re-examination he affirmed that when he leased the land, he had not met the Plaintiff, but there was a wooden house on the property. He also stated that at the time, the Defendant lived in Kamae which is about 3 kilometers away from Kinale.

Defendant's Evidence

18. **DW1- Samuel Karanja Ndugire** testified and adopted his witness statement dated 4.7.2015 as his evidence. He avers that he lives at Kinale of which in 1988 he was the Chief of Kinale location, while from 1976 to 1987, he was the assistant chief of Kamae sub location. That in 1987, the then president Daniel Moi authorized that squatters settled on Kamae forest be re-settled of which the resettlement was to be in Kinale. The District Officer and his administration conducted a house to house exercise within the villages of Kamae, Kinale and Kieni taking down the names of the residents to avoid invasions. The Defendant's name was taken as he lived in Kamae.

19. Sometimes in 1987, after the names were gathered, the lands officials visited the villages to enable the squatters to execute transfer documents and all those people who had clerical errors of names in the transfer forms did not sign, hence all the chiefs were requested to give the correct names.

20. Thus in 1988 he wrote a letter to correct a spelling error of Defendant's name and the letter was sent to the Senior Chief. He produced the letter as D-exhibit 1. The name of Defendant had been spelt as John Mwangi instead of John Mugeni.

21. He stated that the Defendant John Mugeni Gitau was member number 851 in Kinale Settlement and that the Plaintiff was not a squatter. He added that he knew all the residents.

22. He further stated that in September 1988, surveyors visited the area to show them their beacons which followed the sequence in which the names were taken. This meant that people bordered their previous neighbours. Thus the land of Defendant bordered that of Gitau Mugeni (his father) and Wainaina Njoroge, the same as they lived in Kamae.

23. After issuance of the 5 acres of land, they had 14 days to build their new homes and vacate the forest. He stated that he supervised the exercise and was informed that the Defendant got his title deed and has been residing in the suit land to date.

24. He avers that the Plaintiff was unknown to him.

25. On cross examination Dw1 stated that he had been a resident of Kinale from 1988 and his land was title number Escarpment/Kinale Block 1/957. He had known the defendant from 1958 and they lived together as squatters in Kamae forest from 1958 to 1988 which is about 6 kilometres from Kinale, adding that he also knew the defendant's parents.

26. He restated that he participated in the compilation of the names of allottees, and in 1987 it was discovered that some names had been misspelt which included the Defendant's name and he wrote to the Senior Assistant Chief for its rectification.

27. He added that he knew the defendant had been residing at Kinale since 1988 and was not aware whether the defendant had been evicted from his suit property.

28. On re-examination he stated that the correction of the Defendant's name was prompted by the transfer documents which had

the wrong name.

29. DW2- John Mugeni Gitau the Defendant adopted his witness statement dated 4th July 2015 as his evidence. He avers that he was born in 1942 and had lived on the suit land since 1997. He testified that the land was given to squatters by the late President Moi and he was issued with a title deed by the department of lands. The suit land had a dispute which was addressed at the DOs office.

30. He avers that before 1987, he lived in Kamae as a squatter, but the D.O. came with his administration and took down the names of the squatters. In September of 1987, they were asked to sign transfer documents, that is when he noted that his name had been misspelt as Mwango instead of Mugeni.

31. In 1988 when the titles were issued, he did not get his title, but surveyors came onto the land and showed them their respective boundaries. He was shown the beacons of his 5 acres of land. He put up his residence with his family and commenced farming. However, in 1989, the D.O came with police and burnt down his house on the basis that he did not have a title deed.

32. He then moved back to his father's house who was his neighbour and later a man called Kamau started farming on the suit land as a tenant of someone he had never met. He eventually met the plaintiff in 1999 when he was summoned to the DOs office Lari whereby the plaintiff laid stake on the land.

33. He stated that upon conclusion of investigations on double allocation of some parcels of land in the area, he was summoned by the Ministry of Land and Settlement in 2007 and advised to pay for his title deed which he deed and was issued with a title deed on 26th June 2007.

34. DW2 produced documents filed in his bundle as exhibits 2-8 noting that item one had already been produced as D-Exhibit 1, while item 9 and 10 were statutes. The said documents (D-exhibits 2-8) are;

2. *Letter by the Permanent Secretary Office to the D. C. dated 7.5.1992.*
3. *Letter by the Permanent Secretary Provincial Administration to the Commissioner of Lands dated 8.3.1994.*
4. *Letter by the Chief Land Registrar Nairobi dated 22/1/2007.*
5. *Letter by the Director Land Adjudication dated 8/5/2007.*
6. *Receipt for payment of Title Deeds.*
7. *Transfer of Land in Settlement Scheme dated 29th June 2007.*
8. *Title Deed in respect of L. R. No. Escarpment Kinale Block 1/851.*

35. On cross examination, DW2 stated that in 1996 he was a resident at Kamae and he came to the suit land in 1997. He affirmed that the list of allottees was compiled by the DC and DO and that the plaintiff obtained his title before he obtained his. He stated that during allocation of the land, his name was listed as John Mwango instead of John Mugeni. He noted the error when names of allottees were called out.

36. He stated that in 1992 he was evicted from the suit land by the DC and DO because he did not have title to the land, an issue that he had been pursuing until he was issued with a title in 2007 by Ardhi House after conclusion of investigations. He also noted that Peter Kamau (PW2) who had rented the suit land, was known to him.

37. DW3 Sarah Njuhi Mwenda introduced herself as a Chief Land Registrar and an advocate of the High Court. That she had been summoned by the court to testify and produce records regarding the suit property. She requested for more time to compile and

file a report. Thus she was stood down, but she did not turn up again.

38. DW4- David Muchiri Karurua testified that he was a farmer and a resident of Kinari and between the year 1981 and 2005, he was the Assistant Chief in charge of Kinale Sub-location. He adopted his witness statement dated 4th July 2015 as his evidence. He testified that he did not know the Plaintiff who was also not among the people who were allocated land in Kinale. He stated that the suit property was allocated to the defendant but his name was wrongly written as Mwango instead of Mugeni. He stated that Defendant was from Kamae sub location and was allocated land in Kinari sub location. He knew where the Defendant was allocated land which he built on but his building was demolished. However, at the time of his testimony, the Defendant was residing on the land allocated to him.

39. He stated that in 1998 the Defendant constructed on the suit land and had been living there since. He neither knew the Plaintiff nor his father Cephas Ndegwa, stating that he knew someone by the name Gacoka as the forester at the time of the allocation. He stated that investigations were conducted and persons whose land had been illegally taken away were issued with titled deeds which included that of the Defendant.

40. On cross examination he stated that he knew the Defendant who resided at Kamae because when the Assistant Chief of Kamae (Mr. Samuel Karanja Ndugire DW1) would be away, he would serve as the Acting Assistant Chief.

41. He stated that the land allocation lists were prepared by clerks from the DC's office and Assistant Chiefs were not involved in the compilation of the lists. Once the lists were prepared, the assistant Chiefs were then given the list relating to their area of jurisdiction. The allocation covered Kamae and Kinari forests but he did not have the said list with him. He also stated that the Defendant was not on his list but on the list that covered Kamae forest which was with Samuel Karanja (DW1). His list had 800 people.

42. He added that he knew the Defendant is the one who was allocated the suit land because he could not build without the allocation. However, he was not present when the said land was allocated to Mugeni.

43. He stated that the Defendant was evicted from the land in 1989 and his structure demolished through an operation undertaken by the Provincial Administration led by the area DO with APs. For about 10 years he was not on the land and returned in 1997. During that time, the land was occupied by Kamau who stayed on the land for about six or seven years. Kamau was Solly's tenant. When the defendant returned, he indicated he had acquired a title deed for the suit property.

44. On re-examination he stated that every forest had a forester who was a government officer and that retired civil servants were not included on the list of the beneficiaries in the settlement.

45. His role in the process was to mobilise people to remain in their homes for identification purposes. Upon identification of the settlement panels, each settler was required to construct within one month. The Defendant constructed but his house was demolished.

46. DW5 David Nyandoro introduced himself as the Acting Senior Deputy Chief Land Registrar. He explained that on 20th November 2019, the then Chief Land Registrar Ms. Sarah Njuhi Mwenda had taken oath in court as DW3 and promised to present a report, but she was subsequently redeployed to the office of the Attorney General which transfer was stayed by the High Court.

47. He testified that he was aware that in January 2020 an undated report was presented to the Court which he had reviewed and found that it was incomplete. This is because it was undated; it did not bear the name and signature of the author. In that regard, he followed up with the Kiambu Land Registry and received a task force report dated 14th October 2002 marked 'confidential'.

48. He testified that the task Force was constituted by the Ministry of Lands & Settlement to look into the issue of Kinale Settlement Scheme and among the issues addressed was the issue of original allottees. He said that the report was drafted by Mr. Opar, Deputy Secretary Land Administration and Mr. Ngatia, Chief Land Registrar. Some of the things in the report were issues of disputed titles.

49. He pointed out that according to the report, the suit property was not among parcels of land whose titles were cancelled; nor was it among parcels of land whose titles were not cancelled due to pending court cases. Similarly, it was not among the matrix of titles that related to the public utilities that were irregularly issued. He stated that with the suit property missing from the key matrix he consulted the Kiambu Land Registry about that parcel's register and the registry informed him that they did not have a parcel register for that particular land.

50. He later learnt that there was another task force report dated May 2016 which he sought court's leave to avail at a later date of which such leave was granted. He did avail the said "task force report" which he allegedly filed in court on 27.9.2021 (dated 24.9.2021). He produced this report as well as the one of 14.10.2002 as exhibits. He averred that as per the original member's list, the names of the Plaintiff and defendant are there but Defendant's parcel is 850 as it bears the name Gitau Mugeni.

51. On cross examination, he asserted that the Plaintiff was the owner of parcel 851 as per the register, but this parcel was missing in the earlier report. He owned up to be the author of the report of 27.9.2021 and that he was not calling it a task force. He further stated that Annexure 1 in his report was the area list and did not indicate names of allottees, while Annexure 2 at page 187 was an extract and did not have names of the land owners. Annexure 3 was the main members register. He stated that it was wrong to call it an extract because when the Settlement Scheme Squatters names were taken and survey undertaken, the register was created showing the parcels scheme block 1, the parcels numbers and the names of the registered people.

Plaintiffs' Submissions

52. In his submissions, the Plaintiff drew the court's attention to the letters from his tenant outlining the threats he was facing from the Defendant and a letter addressed to the DO Lari dated 17th June 1999 seeking a resolution of the dispute, a letter dated 14th May 2005 addressed to the Chief Kinale to have the forcible occupation of his land by the Defendant resolved which was followed by a demand letter dated 20th November 2007.

53. It was further submitted that the Defendant was evicted from the parcel of land in 1988 due to lack of title documents but he returned in 1998, yet he did not have a title.

54. It was also submitted that the Defendant did not adduce any documents to show that his name had actually been mis-spelt. The Defendant could also not justify how the transfer document was dated 29th June 2007 but the title deed was issued on 26th June 2007.

55. It was further submitted that DW4 contradicted his witness statement because he testified that he did not accompany the surveyors but in his witness statement, he had stated that he was present when the Defendant's land was allocated to him.

56. He submitted that the testimony by DW5 the acting Chief Land Registrar affirmed that parcel 851 was allocated to the Plaintiff while 850 was allocated to Gitau Mugeni. It was submitted that the Plaintiff was the indefeasible first registered owner of the suit property and Defendant could not be legally issued with land that had been alienated to someone else. As such, the Defendant should be evicted since his title was not traceable nor verifiable.

Defendant's Submissions

57. It was submitted that the Confidential interim report by the Ministerial Task Force on Kinale Settlement Scheme had revealed that there were illegal allocations; Double/Triple allocations; Illegal sub-division; Missing original allocation list; Missing original mutations, Uncontrolled and uncoordinated manner of allocations; Irregularities of allocations to undeserving people who were not Forest Squatters; Sub-division of reserved public utilities and marshy areas as well as deprivation of rightful Allotees of their land.

58. It was submitted that the Plaintiff had admitted to being a son of a forest officer, hence he was not a squatter as targeted by the settlement scheme. He submitted that the issue of civil servants not being eligible to benefit from the scheme was also part of the report.

59. It was submitted that the defendant was allocated the suit property and immediately took possession and put up a dwelling

house which was demolished in 1989. Adding that the defendant did not receive his title deed since his name was spelt as Mwango instead of Mugeni. That a letter dated 22nd January 2007 by the then Chief Land Registrar Nairobi confirmed that the name John Mugeni Gitau appeared in their records held at the Lands Registry.

60. It was also submitted that the Acting Chief Land Registrar filed his own analysis of the Task Force Report dated 24th September 2021 and not the report requested by the court, noting that the said officer had indicated that he suspected parcel 850 registered to Gitau Mugeni to be the land of Defendant.

61. The defendant pointed out that DW5 had admitted that plaintiff's title deed was not serialized but the defendant's title was serialized. He stated that the Chief Land Registrar's evidence was inconclusive and did not clarify the mystery of the two title deeds.

62. It was submitted that the issuance of title to a non-squatter was against the purpose of which the land had been set aside. To this end, reference was made to the case of **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** where Court of Appeal held that:

"...where a Title to a parcel of land was under challenge, it was not enough to dangle the Instrument of Title as proof of ownership but one needed to go further and establish how the same was acquired to prove that the same was free from any encumbrances..."

Analysis and Determination

63. The issues falling for determination are:

i. Who is the lawful owner of the suit property Escarpment/Kinari Block 1/851"

ii. What reliefs should be granted to the aggrieved party"

64. The Plaintiff's claim is that he was allocated the suit property in 1988 and issued with a title deed the same year. He then proceeded to build a house where he lived until 1994 when he left for Mombasa and leased the property to Peter Kamau Kibe. The Defendant countered this and stated that he was allocated the suit property in 1988, constructed a dwelling house where he moved in with his family but was evicted from the suit land in 1989 by the Provincial Administration for lack of documentation to prove ownership. The Plaintiff adduced a copy of title deed dated 20th January 1988, while Defendant also has a copy of title deed dated 26th June 2007.

65. It is quite intriguing though not an uncommon phenomenon for one parcel of land to have two different titles. In the case of **Sanrisa Ltd & Another v Samuel Kamau Macharia & 2 Others (2020) eKLR**, it was stated that:

"The existence of title deed perse only raises a rebuttable presumption of ownership of land. The existence of two documents of title in respect of one parcel of land is not only highly irregular and anomalous but it is also forbidden by law"

66. This suit is marred by accusations and counter-accusations between the two litigants. The determination thereof will still be on the balance of probabilities. In the Court of Appeal Case of **John Kanyungu Njogu v Daniel Kimani (2000)eKLR**. It was held that:

"I can only decide the case on a balance of probability if there is evidence to enable me to say that it was more probable than not that the second Defendant wholly or partly contributed to the accident..."

67. The titles of both litigants are under challenge. And as rightly submitted by the defendant, where a Title to a parcel of land was under challenge, it was not enough to dangle the Instrument of Title as proof of ownership but one needed to go further and establish how the same was acquired to prove that same was free from any encumbrances-See **Munyu Maina v. Hiram Gatuiha (Supra)**.

68. Both parties are in agreement that the suit land came to be out of the creation of a settlement Scheme known as Kinale settlement. Thus the crux of the matter relates to the process of acquisition of the rights and interests in the aforementioned settlement.

69. For the plaintiff, he has not availed even one single document that touches on the process of allocation of the suit land. All his documents are primarily letters between him and the tenant (PW2) and all of them bear the dates after the issuance of the title.

70. On the other hand, the Defendant's documents are in tune with his evidence and they give a consistent account of the process culminating into the issuance of his title. Exhibit one is the letter of 26.5.1988 from the Sub-Chief of Kamae forest (DW1) who was informing his immediate boss, the Chief that Defendant's name was wrongly spelt in the list which the District Commission's Team had generated.

71. The issue of Defendant's interest was followed up by the Ministry of Lands and Housing vide their letter of 7.5.1992 to the District Commissioner, Kiambu. Vide a letter written for the Chief land Registrar, Ministry of lands dated 22.1.2007, that letter was informing the District Commissioner that John Mugeni Gitau's name was contained in their records dated 20.1.1988.

72. Finally, Vide the letter of 8.5.2007, the Ministry of lands and settlement eventually issued the defendant with the **letter of offer** of the suit plot to Defendant of which he was required to pay Kshs. 9,000. He paid this amount on 25.6.2007 which paved the way for the issuance of his title.

73. There is no doubt that the land in question belonged to the government but was being allocated to the individuals. Thus the input of the allocating authority was paramount in the process of acquisition of the rights and interests in the suit land. And from the analysis herein, it is quite apparent that the Defendant has given a plausible history of the root of his title. To this end, it is clear that the team which had undertaken the task of generating names of beneficiaries of the land had deliberately bungled the name of the Defendant. It is no wonder that they remained unresponsive to the queries made by the allotting authority. On the other hand, the Plaintiff's title appear to have just sprouted in 1988 from nowhere, and in particular there was no involvement of the allotting authority.

74. In the case of **E.M. Ngure v District Land Adjudication and settlement Nyandarua & 2 Others (2017) eKLR**, the court had this to say in relation to a dispute of Land in a settlement Scheme:

"The process of allotment of land includes and is not limited to the issuance of the letter of allotment which is an agreement/contract between the Lessor and Lessee and binds the lessee to meet the conditions set therein."

75. I take judicial notice that the provincial administration of Yester years were a rather powerful lot. They certainly played a big role in matters "settlement of people" in the schemes. Nevertheless, the Government mostly through the Settlement Funds Trustee under the ministry of lands and settlement was the allotting authority in relation to land in settlement schemes. It was therefore not sufficient for the Plaintiff to state that he was issued with a title by the provincial administration. As between the two protagonists, the Defendants is the one who received a **letter of offer** from the Government while Plaintiff had none.

76. It is not lost to this court that in such allocation of land, the process involves a vigorous process involving the surveying of the land, demarcation of the individual plots, the placement of beacons and the beneficiaries are then shown their parcels. The Defendant gave a plausible account of how this process was conducted in 1987 and he was even shown the beacons to his land, he took possession and built a house. The only problem which arose is that his name had been misspelt by the team which had collected the data of the squatters. The plaintiff has not the slightest history of this process of survey and demarcation.

77. Another point for consideration relates to the question of how and why the settlement was born. The Plaintiff states that the Kinale Settlement Scheme was created so as to settle squatters and he was one of them as his father had worked as a Forest Officer. The Defendant on the other hand states that the people who were to be settled were the squatters in the forest.

78. What then is a settlement" It can be said to be a colony or small community of people. *" If a bunch of people build houses on the moon together, they become the first Lunar settlement."*

79. Both the Assistant Chief of Kamae sub-location (who became Chief of Kinale Location and the then Sub-Chief of Kinale Sub-location (Dw1 & 4) have given a firm and consistent account as to who was being resettled. The beneficiaries were the squatters who had been in villages of Kamae and Kinale in Kamae forest. The allocation was meticulous such that the resettlement followed the pattern of occupation of the land in the villages. To this end, the Defendant was allocated land bordering that of his father Gitau Mugeni and Wainaina Njoroge. Both Dw1 and Dw2 did not know the Plaintiff.

80. Indeed the Plaintiff does not claim to hail from any of the villages that were beneficiaries of the allocation. He claims to have built a structure on that land, but there is no evidence that he ever settled there. The lone witness of the Plaintiff, one Peter Kamau Kibe appears to be unsure of his knowledge of the Plaintiff. In his recorded statement, he states that:

“I know the Plaintiff herein very well as he had leased the suit land herein situated at Kinale to me. By then he had built a house on the land. I would always write to Plaintiff who was a resident in Mombasa.

81. However in cross-examination, PW2 had stated that:

“I did not know Mr. Mbogo when I leased the land. I dealt with his agent Peter Ngunyi”.

82. In Re-examination, he again stated that:

“I had not met Mr. Mbogo when I started farming on the land...”

83. What resonates from this evidence is that Plaintiff was a stranger in the area and he certainly did not become part of the community of settlers at Kinale. There is nothing binding him to the settlement. He is not in tune with the settlers and the history of the settlement. He was not a squatter to warrant a beneficial interest in the settlement scheme.

84. In the case of **John Mwangi Ngania v Mary Mukiru (2017)eKLR**; I held that:

“it is common ground that such settlement schemes are set up for the needy people, mostly, people who have been displaced from elsewhere...”

In cases of this nature, where there are settlements, the residents tend to know each other. They have a common history. They assist each other wherever one of them falls into some peculiar difficulties”

85. In the case of **Chege Mbuthia v Mary Nyawira (sued as the legal representative of the estate of Alexander Muriuki (Deceased) and Another (2019)eKLR**, I was dealing with a dispute involving a suit parcel in Kinale/Block1 where I stated that:

“ There is nothing to indicate that Plaintiff was ever in the list of squatters. Still, even if he was in such a list there is nothing to show that he was actually allocated the suit land”

86. This far, I find that the Defendant has managed to successfully challenge the Plaintiff’s title.

87. It is quite apparent that the intrigues of the two titles matured at the Kiambu Land Registry. The evidence of DW3, one Sarah Njuhi, a land Registrar is disregarded as she was stood down to avail a report but she never came back to court. The evidence of her counterpart DW5 only revealed the mess oozing at the the Kiambu Land Registry which evidence was not helpful at all. Dw5 admits that the two titles emanated from Kiambu Land Registry but there were no parcel files thereof!. Ordinarily, such a registry ought to be the custodian of the important documents appertaining to transfer, transition and registration of land. But what did DW5 avail, an alleged interim report of Kinale Settlement Scheme of 14.10.2002 which has no author and it is not dated and worse, it doesn’t capture anything about the disputed Parcel Nos 851, hence it is a useless report in this matter.

88. The other document that DW5 produced as an exhibit was actually his own report filed on 27.9.2021. He admitted during cross-examination that when Kinale settlement scheme squatters name were being taken and survey was being done, the register

was created showing the following:

- Parcels Scheme Block 1/Kinale
- The Parcels Numbers
- Names of the people who were to be registered.

89. He admitted that whatever he availed was not in tandem with what ought to have been the register of Kinale settlement scheme as annexures 1 was the area list which had no names of allottees, annexure 2 is an extract that does not have names of the Land Owners while annexure 3 is a main register and is far fetched to call it an extract!. In short, the document which DW5 relied on to say that Plaintiff was the owner of the suit land cannot be termed as the area list transmitted to the Land registry for the generation of titles, thus his claims are unfounded and without any legal basis.

90. The provisions of **Article 40(6)** of the **Constitution** stipulate that:

“(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

91. I find that this is not a situation where the court can go the way of : “ *First in time*” as in **Gitway Investment Limited v Jaymat Limited & 2 Others (2006) eKLR**. This is a case whereby the Plaintiff just holds a paper title with not the slightest evidence as to how he acquired the same.

92. In conclusion, I find that the plaintiff has not proved his case on a balance of probabilities and his case is dismissed with costs to the Defendant. In order to restore sanity in the registration record, the title held by the Plaintiff is to be cancelled forthwith.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23TH DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mrs. Muhuhu for the Defendant

Mrs. Maangwa for the Plaintiff

Court Assistant: Eddel Barasa



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