



Case Number:	CIVIL CASE NO 34 OF 1985
Date Delivered:	08 Dec 1993
Case Class:	Civil
Court:	High Court at Nakuru
Case Action:	Judgment
Judge:	David Maitai Rimita
Citation:	MWANGI KINYUA v WAWERU KINYANJUI & 4 OTHERS [1993] eKLR
Advocates:	-
Case Summary:	Land Law-Trespass -suit for a declaration that the land in question belonged to the plaintiff and the defendants were tress passers-where the land in dispute was a settlement area-where the evidence showed that the plaintiff had sold the land to the first defendant- whether the plaintiff had proved his case on a balance of probabilities
Court Division:	Civil
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	-
Case Outcome:	Case dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO 34 OF 1985

MWANGI KINYUA PLAINTIFF

-versus -

WAWERU KINYANJUI)

DIRECTOR OF SETTLEMENT)

MACHIRA MACHARIA)... .. ACCUSED

DANIEL KOGI GITHU)

DANIEL MUHIA)

JUDGMENT

The plaintiff seeks the following orders against the 5 defendants:

- (a) Declaration that LR No 450 OI Joro Orok West belongs to the plaintiff and that defendants 1, 3, 4 and 5 are trespassers
- (b) That the 2nd defendant do re-issue the plaintiff with a certificate of outright purchase.
- (c) A declaration that the sale agreement between the plaintiff and the defendant became valid on the first defendant's failure to honour his part of the agreement.
- (d) Eviction orders against 1st, 3rd, 4th and 5th defendants.

There is an alternative prayer for payment of the balance of the purchase price. There is also a prayer for mesne profits costs and interest.

The defendants have denied the plaintiff claims.

At the hearing it was said that the plaintiff since filing the case had become of unsound mind and could not prosecute the case. PW1 had been appointed as his guardian and litem and prosecuted the case on behalf of the plaintiff. The plaintiff was present throughout the proceedings. I will refer to the later in the judgment.

The evidence adduced before me show that the land in dispute is in a settlement area. The plaintiff was one of the luck few who were allocated with land in an area called OI Joro West in Nyandarua. He was allocated Plot No 450 which measured about 22 acres.

The plaintiff wished to sell either the whole of Plot No 450 or part of it Exhibit 2 which is Defence Exhibit A drawn. There is a dispute as to whether Exhibit 2 or Defence A sold the whole land or part of it. The plaintiff says that the contents of Exhibit 2/Defence A are all correct except that the plaintiff was selling to the defendant only 2 acres. The first defendant says that he was buying the whole LR No 450.

It is agreed by the parties that application for consent of Land Control Board was filed but it is not agreed whether the parties attended the Land Control Board for consent – copy of the application was for transfer of the whole parcel known as Plot No 450 of Joro Orok West measuring 22 acres.

The plaintiff says that whatever the application said on the acreage it did not matter to him because he did not appear before the Board for consent. The first defendant says that at the time, the Land Control Board had only a few members. That is the DC or the DO of the area and some officers from the office of the Settlement Trustees. Some forms were filled in presence of the Settlement Trustees Officers then there was no need to attend the Board for consent. It was left with the said officer for approval or disapproval by the Land Control Board. This appears to be true or the transfer which was for official use only was filled and signed by the parties. A copy of the transfer is dated 5th October 1971 and was produced as Exhibit C. There is a typing error in the transfer form as the transferor is described as Mwangi Kinyanjui instead of Mwangi Kinyua. I find this as of no consequence as the names are properly given in the places provided for signature of the transferor and the transferee. The transfer was followed with a charge by the 1st defendant in favour of the Settlement Final Trustee. A copy was produced as Exhibit F. What I understand this to mean is that the boom which was to be paid for purchase of the land from the Settlement Fund Trustee by the plaintiff was never taken out and was to be repaid by the first defendant. The matter on question of loan repayment was between the settlement trustee and the first defendant.

It would appear that all was well up to the stage and that the possession of the disputed land was given to the first defendant.

The first defendant however over-stayed in Tanzania where he was doing business and did not pay the loan to the Settlement Fund Trustee. PW1, a neighbour of the parties who knew about the transaction between the plaintiff and the first defendant appears to have discovered the default and used it to his advantage. He took the plaintiff to the Settlement Fund Trustee Officer and paid the loan in the PW1's evidence. This was discovered by the first defendant's brother DW3 who complained and later was advised to pay the money to PW1.

Exhibit G, was drawn between PW1 and DW3 who signed on behalf of the first defendant. This is to enable PW1 get the refund of the money he had paid to the Settlement Fund Trustees and leave the first defendant and his family with some money for other use.

PW1 visited the offices of Settlement Fund Trustee in Nairobi to find that the disputed land was still in the value of the plaintiff. He then refused to carry on with the agreement exhibit G alleging that the land was the plaintiff's and not the first defendant's.

The first defendant could not therefore sell the same to PW1 or to any other person.

On 9th November 1983, a certificate of outright purchase in respect of the disputed land was issued to the plaintiff by the Director of Settlement.

The first defendant complained and the Director of Settlement cancelled the certificate by Exhibit 8. The certificate is exhibit 7 – exhibit 8 explains clearly that the land i.e. Plot No 450 – O1 Joro Orok West had

been sold to the first defendant and he was the rightful owner. Exhibit 7 was issued to the plaintiff by mistake.

From the evidence placed before me I have no difficulties in finding that LR No 450 OI Joro Orok West Scheme measuring 22 acres was sold by the plaintiff to the first defendant in October 1971. See Exhibit 2 and Exhibit A. The trouble we have here has been caused by PW1. PW1 appears to be interested in the land for himself. He took advantage of the first defendant's absence from the country but fortunately for the first defendant the Settlement Fund Trustee had kept their records properly.

I find that the purchase price had been paid by the first defendant to the plaintiff in cash in the sum of Shs 3135/- and the balance used to pay for the plaintiff's shares in a land buying company.

The loan repayment by PW was done in an effort to deny the sale between plaintiff and 1st defendant. It was a payment to do injustice to an innocent party. I am therefore unable to order its refund.

All in all I find that the plaintiff has not proved his case on a balance of probabilities as required in civil case – land known at Plot No 450 OI Joro Orok West no longer exists. It has been sub-divided and sold to innocent purchasers without notice.

I will dismiss the case and order the PW1, the guardian and litem do pay the costs of the 1st (First) and the 3rd (Third) defendants.

Delivered at Nakuru this 8th day of December, 1993.

DM RIMITA

JUDGE

8/12/93



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