



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 396 OF 1999**

**PETER GITHAIGA GICHURU (Being an administrator**

**of the Estate of GICHURU WANG'OMBE.....PLAINTIFF**

**-VERSUS-**

**CHEGE NJUGUNA .....1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL (Sued on behalf of**

**The Commissioner of Lands).....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**1. Background**

At the centre of the Dispute hereof is ownership of two land parcels within Elburgon, Nakuru County. The plaintiff lays claim on land known as **Elburgon/Turi Block 2/86 (Ndenderu)** measuring 1.6080 Hectares or thereabouts while the 1<sup>st</sup> Defendant has a claim over **Title No. Elburgon/Turi Block 2/612**, measuring 0.6113 or thereabouts.

This Land dispute was filed in 1999 before the establishment of the **Environment and Land Court by an Act of Parliament in 2011** pursuant to **Article 162(2) (b) of the 2010 Kenya Constitution**.

2. The case was part heard at the High Court (Musinga J as he then was, 2004) but the court file went missing. An order for reconstruction of a skeleton court file was thus made and the court file eventually reconstructed. The plaintiff and the first defendant testified before the Hon. Musinga, Judge(as he then was).

I took evidence of the 2<sup>nd</sup> Defendant having a special power to hear the Land case vide the Hon. **The Chief Justice Practice Directions of 2014** that all parheard land cases be finalised by the High Court. I therefore have the requisite jurisdiction to hear and determine the case.

**3. The Pleadings**

By his Amended plaint dated 31<sup>st</sup> May 2004 the plaintiff, being the legal representative of the Estate of the late Wang'ombe Gichuru pursuant to Letters of Administration issued on 15<sup>th</sup> December 2003 claimed ownership of the land Parcel Elburgon/Turi Block 86 comprising of 0.6080 Hectares which the deceased was allocated and title registered in his favour on the 2<sup>nd</sup> August 1989. The 1<sup>st</sup> Defendant was allocated Block 2/73 and title issued in his favour on the 26<sup>th</sup> July 1989, comprising 0.6113 Hectares.

4. The plaintiff however claims that on or about 8<sup>th</sup> June 1999 the 1<sup>st</sup> defendant unlawfully demarcated the plaintiff's land and fraudulently caused an amendment to the layout and plans and caused registration of part of the said land to his name and obtained Title, with collusion with the 2<sup>nd</sup> defendant's the Commissioner of Lands, represented by the Hon. The Attorney General, and generated **Title No. Elburgon/Turi Block 2/612** carved from his land portion, **Block 2/86** being his land portion.

5. He therefore seeks the following orders:

*a) Declaration that the late Gichuru Wang'ombe is the absolute proprietor of all the land known as Elburgon/Turi Block 86 (Ndenderu) measuring 1.6080 Hectares or thereabouts.*

*b) Mandatory injunction compelling the 2<sup>nd</sup> Defendant, his agents and servants to cancel Title No. Elburgon/Turi/Block 2/612 or any other portion claimed by the plaintiff from the 1<sup>st</sup> Defendant.*

*c) Rectification of the land Register and/or plans in respect of Title No.Elburgon/Turi Block 2/612 to cancel the 1<sup>st</sup> Defendant proprietorship thereof.*

*(d) Permanent injunction restraining the 1<sup>st</sup> defendant by himself, servants and agents from claiming ownership, trespassing and/or otherwise interfering with with Gichuru Wang'ombe's title No. Elburgon/Turi Block/2/86 (Ndenderu) measuring 1.6080 Hectares or thereabouts.*

*(e) An order of Eviction of the 1<sup>st</sup> Defendant from LR No. Elburgon/Turi Block 2/86.*

*(f) Costs and interest.*

6. In his statement of Defence dated 15<sup>th</sup> October 1999 and filed on even date, the 1<sup>st</sup> defendant avers and reiterates his ownership of **Title No. Elburgon/Turi Block 2/73** and denies all other allegations against him by the plaintiff.

The plaintiff and the 1<sup>st</sup> defendant filed their documents in support of their respective claims.

#### **7. Issues For Determination**

**1. How and from where did land title No. Elburgon/Turi Block 2/612 created and registered in the 1<sup>st</sup> defendant's names.**

**2. Was Title No. Elburgon/Turi Block 2/612 registered in the 1<sup>st</sup> defendant's names hived from the plaintiff's Title No. Elburgon/Turi Block 2/86(Ndenderu) and if so, was it created and registered in the 1<sup>st</sup> defendant's names fraudulently?**

**3. Whether the plaintiff is entitled to the Prayers sought.**

#### **Analysis of Evidence, submissions and findings**

#### **8. Issue Number 1**

There is no dispute that the plaintiff is the registered owner of **Land Parcel Title No. Elburgon/Turi Block 2/86** (Ndenderu) approximate 1.6080 Hectares, having obtained title in his favour on the 2<sup>nd</sup> August 1989 as shown in the certified copy of register and so is the 1<sup>st</sup> defendant's title **No. Elburgon/Turi Block 2/73**, registered on the 24<sup>th</sup> July 1989 and comprising of 0.6113 Hectares, but later changed to **Elburgon/Turi Block 2/612**, and comprising of 1.570 Hectares.

9. According to **PW1 Zakary Muraya Marifu**, a licenced surveyor who acting on a court order to visit the two land parcels and take ground measurements to confirm acreage of each and file a report. Upon visiting the land parcels and obtaining official searches of the properties, he unearthed the following that is stated in his report dated 9<sup>th</sup> May 2001.

- **That parcel 86 was 1.6080 Hectares equivalent to 3.973 Acres, but on the ground it was 1.2170 Hectares or 3.0001 Acres, a difference of 0.391 Hectares or 0.966 Acres and that the parcel belonged to the plaintiff.**
- **That Parcel No.612 was 1.570 Hectares or 3.879 Acres but on the ground it was 1.590 Hectares or 3.929 Acres, and bigger by 0.0200 Hectares or 0.050 Acres, and that it was owned by the 1<sup>st</sup> defendant.**

10. It was his testimony that parcel 612 was created out of a subdivision as a result to an amendment to the registry map that affected parcel number 73 and 86 and that the said amendments and subdivisions and an amendment to the registry map affected Parcel No. 73 and 86. He further testified that such subdivisions and amendments cannot be effected without involving the consent of the parties and the Land Control Board, whose consents were sought.

11. However, **PW2** a son of the deceased original (plaintiff) owner told the court that his father never consented to the subdivision but nevertheless it was subdivided and it reduced his father's Parcel No.86 acreage on the ground to 1.6 Hectares instead of 1.608 Hectares and thereby created Parcel No. 612. He confirmed that the 1<sup>st</sup> defendant's land Parcel No. 73 is now Parcel No. 612.

12. **DW1 the 1<sup>st</sup> defendant** confirmed having been issued with a new parcel No. 612 after he returned the title deed for parcel No. 73 after the subdivision and amendment of the registry map which had omitted his initial Parcel No.73, but denied that it was excised from Parcel No.86.

13. I agree with the plaintiffs submissions that on the ground, parcel No.612 (1<sup>st</sup> defendant's) encroaches on the plaintiffs **Parcel No. 86, by 0.0200 Hectares (0.050 Acres)**, and in terms of the general boundary identified by the Land Surveyor, PW1.

14. From the narrative and submissions by the 1<sup>st</sup> defendant, **Parcel No.612** was not created out of Parcel. No.86 but by taking some 0.0200 Hectares and adding it to the original Parcel No.73 to create Parcel No.612, with 1.570 Hectares.

Looking at the acreage of the original Parcel No.73, being 0.611 hectares in the Register while parcel No.86 is shown as 1.6080 there is a **clear a difference of 0.9967 Hectares.**

Parcel No.612 was created to substitute parcel No.73 which was 0.6113 Hectares but omitted from the registry map. It is not clear why after the substitution Parcel No.612 was given more acreage than the original Parcel No.73 had, thereby depriving the owner of Parcel No.86 of 0.9967 Hectares.

15. It is my considered opinion that the subdivision of parcel No.86 should not have reduced its acreage to give an unfair advantage to Parcel

No. 612. Parcel No. 612 created in favour of the 1<sup>st</sup> defendant should have retained the original acreage of Parcel No.73 at 6.113 Hectares as at 26<sup>th</sup> July 1989 when it was issued. No rationale has been given why it should have been increased by 0.9967 hectares to the disadvantage of the plaintiff.

16. If indeed Parcel No.612 was not partly created from Parcel No. 86 but only renamed or substituted as submitted by Rubua Nguere Advocate for the 1<sup>st</sup> Defendant, why then would it have more acreage as it had at first registration? The Land Surveyor (PW1) confirmed the acreages on the ground. There is no dispute whatsoever that Parcel No.73 now Parcel No.612 gained 0.6200 Hectares/0.050 Acres.

17. Having found as above, was parcel No.612 created fraudulently in favour of the 1<sup>st</sup> defendant?

The land surveyor(PW1) explained extensively on the procedure of registry map amendments and correction of mistakes that occur during the survey exercise.

Unfortunately, the procedure was not adhered to. A general boundary was fixed as opposed to a fixed boundary that would have had correctly measured dimensions in terms of **Section 18 (1) of the Land Registration Act 2012** which defines general boundaries as **“the approximate boundaries and approximate situation only of the parcel.”**

18. I have considered the surveyor's report. On the ground, the plaintiff's Parcel No. 86 is just about 1 Acre (0.966 Hectares) less than the 1<sup>st</sup> defendant's that is bigger by 0.050 Acres – as compared to area indicated in their respective title deeds.

Upon a court order dated the 15<sup>th</sup> February 2001 directing M/S Muritu & Associates Land Surveyors to visit the two land parcels and take measurements, and to file a report if their findings are in agreement with the area shown on the respective Title deeds, the report was filed. It is dated 9<sup>th</sup> May 2001. It shows the following:

**Area on Title Deed Area on Ground Difference**

Parcel No.	Acres		Hectares		Difference	
	Hectares	Acres	Hectares	Acres	Hectares	Acres
<b>Elburgon/Turi</b>						
	1.6080	3.973	1.2170	3.0007	-0.391	-0.966
<b>Block 2/86(Ndenderu)</b>						
<b>Elburgon/Turi Block</b>						
	1.570	3.879	1.590	3.929	+0.0200	+0.050
<b>2/612(Ndenderu)</b>						

19. Looking at the report, it is obvious that the acreage of the two parcels of land are different on the ground as opposed to the Titles, meaning that the 1<sup>st</sup> defendant's parcel is bigger by 0.0200 Hectares/0.050 Acres. The surveyor also confirmed that both land parcels share a boundary, and the two parties have lived harmoniously since 1982, respecting the general boundary aforesaid.

Upon cross examination the land surveyor testified that:

***“if there is a problem with the registry map, the land registrar is authorised to make alterations to the registry map --- if that happens the parcel number should be cancelled and a new one given. There is a fixed general ----”***

20. I do not think there was any fraud involved though the Land Registrar and the Surveyor ought to have involved both the defendant and the plaintiff while the amendments were being done. I am alive to PW2's evidence that the family was called upon to attend meetings at the lands offices to discuss before the registry map and plans were being considered for amendments but they refused to attend.

They can therefore not impute acts of fraud on the part of the 1<sup>st</sup> or the 2<sup>nd</sup> defendants officials.

21. In the final analysis and based on the surveyors report (PExt 1). I come to the findings that as **Parcel No.73** was changed and or substituted and given a different number **Parcel No. 612** for reasons stated above it ought to have retained the original acreage as stated and shown on the Title Deed for Parcel No.73, that is 1.6080 Hectares (3.973 Acres), and not more acreage as stated in Parcel No.612.

**22. It therefore follows that land Parcel No.612 encroaches onto land Parcel No.86 by 0.0200 Hectares meaning, the 1<sup>st</sup> defendant is unlawfully in occupation of the plaintiff's Parcel No. 86 to the extent of 0.0200 Hectares.**

23. Upon the above findings, the Nakuru County surveyor, **is directed to move onto the two land parcels and place a fixed boundary between them, land Parcels No.86 and 612 taking into account the area of encroachment by the 1<sup>st</sup> defendant into the plaintiff's land parcel No.86, and to be guided by the Survey Report PExt 1.** This is with a view to create a fixed boundary as opposed to the general boundary that now exists on the ground. It should be so fixed with accurate, linear and angular measurements so as to create a long lasting boundary that will resolve the boundary dispute once and for all. - See **Ali Mohamed Salim -vs- Faisal Hassan Ali (2014) e KLR.**

24. The court was told, and evidence adduced that the parties to this suit have lived peacefully as good neighbours since 1982. The court will not be party to disrupting the peace that exists between them. The dispute as I see was not initiated by either of the parties. Having found that the 1<sup>st</sup> defendant was not fraudulently involved in the change of his initial parcel No.73, but due to a mistake by the Land Ministry officials(2<sup>nd</sup> Defendant), and further their failure to place a fixed boundary on the ground, I shall not penalise any of them. However, the 2<sup>nd</sup> Defendant by its officials shall take responsibility and move swiftly to correct and rectify the mess they put the two good neighbours into, in an amicable manner.

25. The upshot is that the plaintiff has proved his case on a balance of probability, the required standard.

**Consequently**, judgment is entered for the plaintiff against both defendants as hereunder:

- 1. That a declaration is issued that the plaintiff is the absolute proprietor of all land known as Elburgon/Turi Block 2/86(Ndenderu) measuring 1.6080 Hectares or thereabouts, title having been issued on the 2<sup>nd</sup> August 1989.***
- 2. That the 1<sup>st</sup> defendant is the absolute proprietor of Land Parcel now known as Elburgon/Turi Block 2/612 measuring 1.570 Hectares as stated in the original title to land parcel Elburgon/Turi block 2/73 issued on the 26<sup>th</sup> July 1989, which was cancelled and returned to the Commissioner of Lands, and replaced with Elburgon/Turi Block 2/612.***
- 3. That the Land Registrar Nakuru County is ordered and directed to rectify the register in respect of Title No. Elburgon/Turi Block 2/612 to correct the area shown thereto to read 1.570 Hectares forthwith within a period of 60 days from the date of this judgment.***
- 4. That the Nakuru County Surveyor is directed and ordered that upon the Nakuru Land Registrar rectifying the register in the manner stated in Order 3 above, to within a period of 60 days, to move and place a fixed boundary between Land Parcel Elburgon/Turi Block 2/86 and Elburgon/Turi Block 2/612 upon acreage as stated, guided by the Land Survey Report dated 9<sup>th</sup> May 2001.***
- 5. Each party shall bear own costs of the suit.***

Dated, signed and delivered this 28<sup>th</sup> Day of June 2018.

J.N. MULWA

JUDGE