



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 253 OF 2012

MUHIA MUCHIRI NG'ANG'APETITIONER

VERSUS

JULIUS WAHINYA KANG'ETHE1ST DEFENDANT

JULIANA WARIGI KANGETHE.....2ND DEFENDANT

CATHERINE GATHONI KOGI3RD DEFENDANT

MONICAH WAMBUI KANG'ETHE.....4TH DEFENDANT

NG'ANG'A KANG'ETHE.....5TH DEFENDANT

KINYANJUI KANG'ETHE6TH DEFENDANT

JUDGMENT

(Suit by plaintiff to recover land; plaintiff and defendant being at boundary of two settlement schemes; claim by plaintiff that defendants crossed over and took over part of his land; evidence showing that defendant's land as per settlement records being less than the title issued to them; sufficient evidence that defendants took part of plaintiff's land; judgment entered for plaintiff; defendants' titles cancelled and to revert back to original boundary of the two settlement schemes).

1. This is a very old case commenced by way of plaint way back in the year 1988 and was originally filed at the High Court in Nairobi as Nairobi High Court Civil Suit No. 1012 of 1988. The original plaintiff was one Mariah Wangari Muhia (Maria) who was substituted for the current plaintiff Muhia Muchiri Nganga, who is her son. The substitution was made on 6 July 2001 for the reason that the original plaintiff had become old and unable to pursue the case. The case as filed in the year 1988 was against one defendant, who was named as Kangethe Wahinya. The original plaint pleaded that Maria was the registered proprietor of the land parcel described as Plot No. 231 Mkungu Settlement Scheme. It was claimed that Kangethe Wahinya had taken possession of about 10 acres of the plaintiff's land. The prayers sought in the original plaint were for orders of injunction to restrain Kangethe Wahinya from the plaintiff's land and damages for trespass.

2. Kangethe Wahinya entered appearance and filed a Defence on 12th May 1988. He pleaded that he is the owner of the land Plot No. 214 situated in Nandarasi Settlement Scheme. He averred that the plaintiff's land lies in Mkungu Settlement Scheme and that in between the two Schemes lies a road and

that he has never crossed that road to trespass into the plaintiff's land as claimed.

3. The matter appeared to the many judges who handled the matter to be a boundary dispute and was quite on a number of occasions referred to the District Land Registrar Nyandarua, to determine. But despite several orders directed at the District Land Registrar, no formal determination was ever filed, or at least, I have not seen one.

4. The original plaintiff was amended on 12 November 2007. The reason for the amendment was that the defendant's Plot No. 214, now fully described as Nyandarua/Nandarasi/214 had been subdivided by the defendant into 10 other parcels which were now registered in the names of Julius Wahinya Kangethe and his wife Juliana Wahinya Kangethe. I later came to learn at the hearing of the case, that Julius is the son of Kangethe Wahinya and that Kangethe Wahinya had died. The subdivisions were identified as the land parcels Nyandarua/Nandarasi/22301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2377 and 2378. It was claimed that part of the defendants' original land parcel Nyandarua/Nandarasi/214, had absorbed 10 acres of the plaintiff's land and that the defendants thereafter subdivided it into the several plots. The prayers in the amended plaintiff were extended to seek a cancellation of all the titles of the defendant which were said to fall within the plaintiff's land. The plaintiff also sought orders of eviction of the defendants from the 10 acres which he believed fell within Maria's land parcel No. Mkungi/213.

5. In the course of time, the file was transferred to the Nakuru High Court and with the establishment of the Environment and Land Court, it was transferred to this court, the Environment and Land Court sitting in Nakuru. The hearing of the matter commenced before me on 9th July 2015. The plaintiff testified in chief (I will go to his evidence shortly), and in the course of his evidence, it emerged that some of the land parcels that resulted from the subdivision of the original land parcel No. Nyandarua/Nandarasi/214 had been transferred to sons and daughters of Kangethe Wahinya. I directed that the plaintiff be amended to include all proprietors before embarking on cross-examination.

6. Pursuant to this, a further amended plaintiff was filed on 20th July 2015. The Further Amended Plaintiff introduced four other defendants, namely Catherine Gathoni Kogi, Monicah Wambui Kangethe, Nganga Kangethe, and Kinyanjui Kangethe, bringing the total number of defendants to six. The acreage claimed to have been encroached and taken over by the defendants was also amended to read 12 acres instead of 10 acres. The case of the plaintiff remained that Wahinya had taken over part of the plaintiff's land parcel No. Mkungi/213 so that it became part of the land parcel No. Nandarasi/214. It is stated that the subsequent subdivisions were done maliciously while the matter was pending in court. The plaintiff also added a prayer for mesne profits for the portion of his land occupied by the defendants.

7. Despite being served, the 3rd to 6th defendants did not enter appearance. Neither did any of them, or the 1st and 2nd defendants and their counsel M/s Kahari & Kiai Advocates, appear in court on 20th January 2016, when the matter proceeded further, despite the hearing date having been taken by consent. On this day, the plaintiff continued to give additional evidence in chief and closed his case.

8. In a nutshell, the evidence tabled by the plaintiff is that their land parcel No. 31 lies within Mkungi Settlement Scheme. The land of the defendants lies in Nandarasi Settlement Scheme. The land in dispute lies at the border of these two Settlement Schemes. The plaintiff testified that around the year 1986, the defendants started encroaching into their land parcel No. 31 in Mkungi and that so far they have taken over about 12 acres of their land. He testified that the original of the defendants' land, which is the land parcel Nyandarua/Nandarasi/214, measured 18 hectares according to the official search dated 17 November 1986 when the land was still in the name of the Settlement Fund Trustees (SFT). However, the defendants got a title, issued on 21st June 2000, while this case was still pending, for 23.1 hectares. He testified that the defendants later subdivided this land parcel No. 214 to create the further titles some of which were transferred to the 3rd to 6th defendants who were said to be the children of the 1st and 2nd defendants. He testified that some of the subdivided parcels fall within their land parcel Mkungi/31. He testified that the defendants use their land to farm potatoes, vegetables and maize. He testified that an acre of land in that area can produce about 20 bags of maize and 3,000 cabbages, or 120 bags of potatoes in 3 to 4 months. He stated that a sack of potatoes costs between Kshs. 1,000/= and Kshs. 3,000/= depending on the season, while a cabbage will fetch between Kshs. 20 and Kshs. 40 and at times Kshs. 50 per piece.

On the other hand, he testified that a sack of maize costs Kshs. 2,800/=. He stated that the defendants have now used the plaintiff's land for about 28 years and they should pay for the duration of time that they have used the land. In his further evidence in chief given on 20th January 2016, the plaintiff testified that all the subdivisions should be cancelled so that the land reverts back to the original land parcel Nyandarua/Nandarasi/214 and the boundaries reinstated to what they were originally.

9. As I mentioned earlier, the defendants and their counsel did not appear in court on 20th January 2016. The plaintiff's evidence is therefore unchallenged. I have carefully assessed the same. There is no question that the plaintiff's family are owners of the land parcel described as Plot No. 231 in Mkungi Settlement Scheme. That land borders land in the Nandarasi Settlement Scheme. The original abutting land was the land parcel Nyandarua/Nandarasi/214. The claim of the plaintiff is that the original owner of this land encroached into their land and hived off 12 acres and absorbed it into his land parcel Nyandarua/Nandarasi/214 and obtained title for the combined acreage. That land has now been subdivided into several portions and distributed amongst the defendants. I note that all this went on while this case was still pending.

10. I have seen the search of the land parcel Nyandarua/Nandarasi/214 which was issued on 17 November 1986 while the land was still under the SFT. The acreage of this land is shown as 18.0 hectares. The title deed issued on 21 June 2000, for the same land, which as I have noted was issued while this case was ongoing, shows 23.10 hectares. I do not know how the defendants managed to increase their acreage from 18.0 to 23.10 hectares. This lends credence to the position of the plaintiff, that this extra acreage is from their land parcel No. 231 in Mkungi Settlement Scheme. In their list of documents, the defendants annexed a copy of a mutation which appears to be what transferred the disputed acreage into the land parcel Nyandarua/Nandarasi/214. I have looked at it and it is clear to me that the mutation runs afoul the original boundary between the Mkungi and Nandarasi Settlement Schemes. The plaintiff in his evidence, produced the original SFT maps for the two Settlement Schemes.

11. From the above, I have no doubt in my mind that the defendants schemed to steal 12 acres of the plaintiff's land comprised in the land parcel No. 231 in Mkungi Settlement Scheme. The land parcels in issue fell under the regime of the Registered Land Act (CAP 300) (now repealed). Section 143 of the said statute gave power to the court to order a rectification of the register. It was drawn as follows :-

143 (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

12. The modern law is comprised in the Land Registration Act, Act No. 3 of 2012. Section 26 and 80 also allows the court to order a cancellation of title which is irregularly obtained. They are drawn as follows :-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

80. *(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.*

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

13. It will be observed from the above, that title can be cancelled where obtained by fraud or mistake or misrepresentation, where the title holder is a party. Under Section 26 (2), a title can be cancelled if obtained illegally, unprocedurally or through a corrupt scheme.

14. I do not see how the defendants could have obtained title without their own involvement in the fraud. They knew that the matter was in court and they knew that the plaintiff was claiming that they have stolen about 12 acres of their land. They still proceeded to get a title for this land in dispute. Even assuming that there was no fraud involved, the title of the defendants could not have been obtained lawfully or procedurally. What the defendants were entitled to is a title for 18 hectares and no more. For reasons that remain inexplicable, they got title for 23.1 hectares part of which falls within the land of the plaintiff. I am unable to allow the plaintiff to be defrauded of her land. The titles have to revert back to what they were originally, and the acreage of the title to the parcel Nyandarua/Nandarasi/214 must reflect only 18 hectares, and must not include the land of the plaintiff which is land parcel No. 123 in Mkungi Settlement Scheme.

15. There is the claim for eviction which I allow. The defendants must move out of the land that forms part of the land parcel No. 123 in Mkungi Settlement Scheme. This is clearly identifiable as the disputed area and there should be no doubt about its location. The original boundaries of Mkungi and Nandarasi Settlement Schemes must be respected.

16. There is also the claim for mesne profits. There is no contest that the defendants have been using the plaintiff's land and deriving benefit from it. They must pay for its use. The plaintiff gave some figures to demonstrate the value of loss that he has suffered. I believe that the amounts he mentioned are current. I note that the litigation herein has spanned about 28 years. I do not think that there is doubt that the prices have been changing with time and using the current values may be unfair to the defendants. The plaintiff did not also factor in the cost of production. Be as it may, the plaintiff' quantification of loss is as follows for every acre of land:-

(a) If potatoes are produced - 120 bags of potatoes in 3 -4 months. Price range is Kshs. 1,00/= to Kshs. 3,000/=. The average price being Kshs. 2,000/=. For 120 bags, this will be Kshs. 240,000/=. For 12 acres this will be Kshs. 2,880,000/=.

(b) If maize is produced - 20 bags per acre. Price given being Kshs. 2,800/= per bag. For 12 acres this will be Kshs. 672,000/=.

(c) If cabbages are produced- 3,000 cabbages per acre. Price range being between Kshs. 20 and Kshs. 50 per piece. Average price being Kshs. 35/=. Thus Kshs. 105,000/= per acre and for 12 acres Kshs. 1,260,000/=.

17. These amounts vary. I opt to take the lowest of them which is Kshs. 672,000/=. I will reduce it by 50% to take into account production costs. This of course is a rough estimate but it is the best I can do in the circumstances. This gives us Kshs. 336,000/=. I will reduce this by 1/4 to cover the span of time of litigation and the increase in price. This gives us, Kshs. 84,000/=. I will take this to be the loss per annum

and multiply it by 28 years, which gives the sum of Kshs. 2, 352,000/=. I am prepared to consider this as the value of mesne profits to be paid by the defendants to the plaintiff. This claim is akin to one for special damages and will attract interest from the date of filing of the suit till settlement in full. This award in my view will also take care of the claim for general damages for trespass and I therefore make no separate award for it.

From the above, I now make the following final orders :-

- (1) *That the defendants' titles to the land parcels Nyandarua/Nandarasi/2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2377 and 2378 be cancelled forthwith and upon cancellation of these mentioned titles, the defendants' land do revert back to the land parcel Nyandarua/Nandarasi/214 with its original proprietorship.*
- (2) *That I hereby declare that the land parcel Nyandarua/Nandarasi/214 is 18.0 hectares or thereabouts and in any event, that said land ought to be confined within the previously existing Nandarasi Settlement Scheme which scheme is defined in the original survey maps published by the Survey of Kenya in April 1983 and produced in this case as plaintiff's exhibits numbers 5 and 6, and should not extend to the previously existing Mkungi Settlement Scheme.*
- (3) *That the Registry Index Map be amended to align itself with the judgment herein.*
- (4) *That I declare the defendants to have trespassed into the plaintiff's Plot No. 213 situated at Mkungi Settlement Scheme by about 12 acres or thereabouts and I order them to vacate forthwith from the said land, and confine themselves to the land parcel Nyandarua/Nandarasi/214 as defined in order 2 above.*
- (5) *The plaintiff is awarded the sum of Kshs. 2, 352,000/= as against the defendants jointly and/or severally together with interest from the date of filing of suit till settlement in full.*
- (6) *The plaintiff shall have costs as against the defendants jointly and/or severally.*

18. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 17th day of February, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Ms. Barbra Wangari holding brief for Mr. Waiganjo Mwangi for the plaintiff.

No appearance on part of M/s Kahari & Kiai Advocates for 1st & 2nd defendants.

No appearance on part of the 3rd - 6th defendants.

CA: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU