



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO.349 of 2019**

**LUCY NJERI MUGWERE**

**ANNE MUGURE MUGWERE AGIMBA**

**JOHN MURUTU MUGWERE**

**CHRISTINE WATHUA MUGWERE**

**(Suing jointly as administrators of the Estate**

**of the late Godwin Perminahs Mugwere.....PLAINTIFFS**

**VERSUS**

**EMBAKASI RANCHING COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**ANNE WANJA NDUNG'U .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced through a plaint dated 6<sup>th</sup> November 2019 where the following orders were sought against the Defendants:

*a) An order restraining the 1<sup>st</sup> Defendant by themselves, their employees, agents, servants, and/or workers from selling, dealing with, transferring, disposing off or in any way whatsoever alienating or interfering, with the suit property to the 2<sup>nd</sup> defendant or any other party whatsoever.*

*b) An order that the estate of the late Godwin Perminahs Mugwere be declared as the registered owner of the suit property parcel Number 4805.*

*c) Costs of this suit.*

*d) Any other further relief that the court may deem fit to grant.*

2. I did not see any pleadings of the Defendants even though the 1<sup>st</sup> Defendant was represented in court on 27.10.2020 and again on 17.2.2021 when an order to file and serve their bundle of pleadings, witness statements and documentary evidence within 60 days was made.

3. The Plaintiffs case was advanced by the 2<sup>nd</sup> Plaintiff, Ann Mugure who adopted her witness statement dated 6<sup>th</sup> November 2019 as her evidence. She also produced 5 documents as their P-exhibits 1-5, of which the first 4 are contained in the list filed on 7.11.2019, while the lone document was produced at the time of the trial.

4. The Plaintiffs aver that their late father Mr. Godwin Perminahs Mugwere who passed on in year 2013 had purchased a plot of land, Parcel Number 4805 Q36 of Block 136 from the 1<sup>st</sup> Defendant. Due consideration was paid on or about 1984 and he was subsequently issued with a share certificate number 3589 as proof of ownership of the said property.

5. Before his demise, Mr. Godwin could not trace the original share certificate allocated to him and he initiated the process of recovery with the 1<sup>st</sup> Defendant. The Plaintiffs stated that their father had reported the loss, took out an abstract and handed it to the 1<sup>st</sup> defendant accompanied with a sworn affidavit.

6. On 1<sup>st</sup> November 2019 when the Plaintiffs were in the course of administering the estate of the deceased, they learnt that the suit parcel bearing the same share certificate number had been allotted to the 2<sup>nd</sup> Defendant without their consent or information. They contend that the 1<sup>st</sup> Defendant is liable for fraud for illegal issuance of the share certificate to the 2<sup>nd</sup> Defendant being aware that the deceased had lost his share certificate.

7. PW1 stated that when they were following up on the issue of the share certificate, they were asked to pay a fee of KShs. 75 which they did and were issued with a receipt. They were also promised to get a title after they ascertained that their father's share number was there. She further stated that on 18<sup>th</sup> February 2021, the 1<sup>st</sup> Defendant was ordered to allocate them the suit land but this had not been done.

8. The Plaintiffs in their submissions averred that they had met the criteria set out in **Section 107 and 112 of the Evidence Act** by proving that the deceased was the rightful owner of the suit land and that this evidence has not been controverted. Thus they had discharged their duty. The Plaintiffs aver that they had demonstrated that the deceased acquired the property legally and was entitled to protection in line with the provisions of **Article 40 of the Constitution**.

9. In support of their case, the Plaintiffs relied on the case of Koinange & 13 Others vs Koinange (1986) KLR 23 which stated that *...he who alleges must prove...., Evans Nyakwana vs Cleophas Bwana Ongaro (2015) eKLR*, where it was stated that *... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue... And William Kabogo Gitau vs George Thuo & 2 Others [2010] 1 KLR 526 ... In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities....* The case of Munyu Maina vs Hiram Gathiha Maina [2013] eKLR was also cited where it was held that: *... the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."*

### **Determination**

10. A perusal of the documents availed by the Plaintiffs indicate that the name of the 2<sup>nd</sup> Defendant is shown against Nos 3589, 4803 in the list of members who are to be issued with leases in Block 136, Embakasi Ranching. The Plaintiffs claim that this was their fathers land and they have a grant of representation thereof. The question then for determination is whether indeed this land belonged to their father. If this is in the affirmative, then the claim of the Plaintiffs would surely succeed.

11. The provisions of **Section 107 of the Evidence Act** stipulate that;

***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".***

12. In Samson and Maitai and another VS African Safari Club Limited and Another 2010 eKLR, it was stated that;

***"Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption. In civil cases the court makes its decision on the "balance of probabilities"."***

13. The contents of paragraph 5 and 6 in the plaint are that;

***"5. Subsequently, the deceased was presented with Share Certificate Number 3589 as proof of ownership of the above mentioned suit property***

***6. In the following years to come, the Deceased was***

***unable trace the Original Share Certificate that had been allotted to and therefore initiated the process of recovery by taking out an abstract reporting the Certificate as lost as well as accompanying it with a sworn affidavit and handing the same to the 1st Defendant. It is paramount to note that all this was done by the Deceased during his lifetime prior to his death."***

14. None of the documents presented by the Plaintiffs are in tandem with the averments set out in the aforementioned paragraphs. The document produced as exhibit 5 is not a copy of a share certificate but something to do with dividends. None of the other exhibits 1-4 demonstrate that the deceased had pursued the issue of his alleged interest in the land during his life time spanning about 34-35 years as from 1978 when the plot was allegedly purchased (see letter of 22.10.2019 Pexh.4). All the said documents (1-4) are issued post the demise of Godwin, the father of the Plaintiffs.

15. It is quite apparent that the land parcel in dispute was in the hands of a land buying company (read the 1<sup>st</sup> Defendant). In Ibrahim Gatobu v Mwichwiri Farmers Co. Ltd [2020] eKLR, I stated that;

***" Usually in land buying companies, the process under which one acquires an interest in land is rigorous going through various steps. A person will buy shares from a land buying company to become a share holder and he is then issued with a share certificate, balloting is done for one to be placed at a particular site and various payments are made culminating in survey and***

*eventual issuance of title deeds-”*

16. The document availed as exhibit 5 cannot be termed as an acquisition of an interest in the suit land.

17. Further on 17.2.2021, Judge Eboso only directed the Plaintiff to confirm the titling status of the suit land and if necessary, Plaintiffs were at liberty to amend the plaint. No orders were issued to the effect that the 1<sup>st</sup> Defendant was to issue the Plaintiffs with a title as claimed by the said Plaintiffs.

18. In the South African case of *South African Veterinary Council -v- Szymanski, 2003(4) S.A. 42 (SCA)* at [paragraph 28] the Court held as follows:

*“The law does not protect every expectation but only those which are 'legitimate”.*

19. I find that though the claim appears undefended, there was no sufficient evidence to place the deceased as the owner of the suit parcel. The suit is hence dismissed with no orders as to costs.

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

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Moraya holding brief for Mr. Agimba for the Plaintiff

Court Assistant: Eddel Barasa