



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO.722 OF 2012

TIRAS KARANJA NGATHA... ..1ST PLAINTIFF

VERSUS

SILAS GATHUGU NGUGI 1ST DEFENDANT

THE LAND REGISTRAR KIAMBU 2ND DEFENDANT

RULING

The 1st Defendant/Applicant by a Notice of motion dated 3rd May 2013 expressed to be brought under section 80 civil Procedure Act and Order 45 Rules 1 and 2 of the Civil Procedure Rules seeks the following orders-

1. THAT the court be pleased to review its ruling dated 16th April 2013.
2. That the court do grant any other or further order it may deem appropriate for ends of justice to be met.
3. Costs be provided for.

The application is predicated on the following grounds:-

- a. That title NO. **Kiambaa/Kihara/458** measures approximately 2.2acres whereas title NO. **Kiambaa/Kihara 467** measures about 2.7 acres.
- b. That going by the court order the plaintiff/Respondent will unfairly retain 0.5 acres over the applicants notwithstanding that **L.R.Kiambaa/Kihara/467** lawfully belongs to the estate of the late **Ngugi Waweru Munga**.
- c. That it is necessary and fair for the court to review its order and add the portion measuring 0.5 acres on **L.R Kiambaa/Kihara/467** to **L.R. Kiambaa/Kihara/458** to enable the estate of **Ngugi Waweru Munga** to fully benefit from what was lawfully and actually theirs.

The 1st Defendant/Applicant has further sworn a supporting affidavit dated 3rd May 2013 where he annexes a copy of the extracted order and ruling of 16th April 2013 and copies of search certificates issued by the Land Registrar in respect of Land titles **Kiambaa/Kihara/467** and **Kiambaa/Kihara 458**.

The searches show that the properties measure 2.7 acres and 2.2 acres respectively. The 1st Defendant applicant contends that if the order issued by the court on 16th April 2013 is implemented “as is” it would result in the plaintiff benefiting by an extra 0.5 acres at the expense of the applicant. The plaintiff’s entitlement is as per title **Kiambaa/Kihara/458** which is 2.2 acres while the 1st Defendant’s entitlement is as per title **Kiambaa/Kihara/467** which measures 2.7 acres such that if the two titles are swapped/rectified as per the order the plaintiff will be unjustly enriched to the extent of the additional 0.5 acres which is comprised in title **Kiambaa/Kihara/467** where he is resident.

The plaintiff respondent has filed a replying affidavit dated 24th July 2013 in opposition to the application and avers that there is no discovery of any new matter or evidence that was not available to the applicant at the time he filed the earlier application and further avers that the estate of **Ngugi Waweru Munga** did not have any claim over land parcel **Kiambaa/Kihara/467** or any portion thereof. The plaintiff further avers that the orders have since been executed and rectification has been effected as per certificate of search annexed and marked “TKN1” and states that the status in regard to the suit parcels ought to be maintained as it existed on the ground without requiring any party to do anything to prejudice their interest.

The parties filed written submissions highlighting their respective positions. The court in this application is being called upon to review its ruling/order of 16th April 2013 on the basis that when it directed rectification of the register in regard, to the swapping of the positions of the parcels of land on the ground the question of the sizes of the parcels of land was not considered and/or addressed.

The rectification of the parcels of land was to the effect that “**The land Registrar Kiambu do rectify the titles Kiambaa/Kihara/458 and Kiambaa/Kihara/467 to correspond with parcels occupied by the registered owners**”. The effect is that the plaintiff whose original parcel as from 1958 was Title NO. **Kiambaa/Kihara/458** measuring 2.2 acres would now become registered as owner of Title **Kiambaa/Kihara/467** which measures 2.7 acres on the ground and for the 1st Defendant vice-versa meaning the 1st Defendant would become registered as owner of Title would become registered as owner of Title **Kiambaa/Kihara/458** which would be less than 0.5 acres of the original title **Kiambaa/Kihara/467** which ought to be the 1st Defendant’s.

There is no dispute between the parties that their rights of entitlement and occupation of the parcels of land flow from the original titles issued in 1958 and each of the parcels which each was supposed to occupy had an ascertained acreage. It was not the fault of either of the parties that each of them occupied and developed the plot intended for the other. Rectification was merely to have that title which each holds to correspondence with the position on the ground otherwise the other option was to require that each of the parties vacate and yield vacant possession of their current properties and to move to their rightful plots as per the Registry index map (RIM). That would have caused inconvenience and difficulties as each of the parties would have to remove and/or forfeit their developments o move to their rightful plots. To avoid this prospect and inconvenience the court issued an order to have the status on the ground rectified.

The plaintiff’s land as per the title he held before the rectification was 2.2 acres and with the rectification as he is to be issued with title for parcel **467** his land becomes 2.7 acres which is 0.5 acres more than he is entitled to and the 1st Defendant equally would following rectification be issued with title for parcel **458** which is 0.5 acres less than his title before rectification.

Under order 45(1) of the Civil Procedure Rules a court can review its judgment, decree or order if there is discovery of now and important matter or evidence that was not available at the time the judgment or order was made or on account of some mistake or error apparent on the face of the record, or **for any other sufficient reason**. In the present matter it is clear that at the time of making the order sought to be reviewed there was no consideration of the varying sizes of the two parcels of land. The plaintiff by reason of the rectification order would get a parcel of land that is 0.5 acres larger than the plaintiff’s parcel of land as per his title before rectification. The 1st Defendant on the other hand would receive a title that is 0.5 acres less than the size of the title he held before the rectification.

The intention of the court in ordering rectification was never to confer on any party a benefit and/or advantage that he was not entitled to or to take away any party's right or benefit. In the premises I am satisfied there is sufficient cause and/or reason for the court to review its order of 16th April 2013 pursuant to order 45 Rule 1 of the Civil Procedure Rules 2010 and I accordingly order that the order be reviewed in the following manner:-

- i. That the plaintiff/Respondent after the rectification be and is hereby required to compensate the 1st Defendant for the additional 0.5 acres he has gained upon being registered as owner of title number **Kiambaa/Kihara/467**.
- ii. That the value of 0.5 acres (undeveloped) be agreed between the parties and paid to the 1st Defendant within the next 90 days from the date of this ruling and if the value is not agreed the Kiambu County Government valuer to carry out the valuation for 0.5 acres (undeveloped) of Title **Kiambaa/Kihara/467** which valuation shall be final.
- iii. **Alternatively** the plaintiff shall subdivide Title number **Kiambu/Kihara/467** and cause a portion of 0.5 acres to be transferred to the 1st Defendant as administrator of Estate of **Ngugi Waweru Munga** (deceased).
- iv. The costs of the application shall be in the cause.

Ruling dated, signed and delivered this **27th** day of **June** 2014.

J.M. MUTUNGI

JUDGE

In the presence of:

..... For the plaintiff

..... For the Defendants