



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Suit 150 of 2008

**DANIEL MBURU GICHAMBA.....1ST
PLAINTIFF**

SAMUEL NJENGA GICHAMBA.....2ND PLAINTIFF

**VERSUS
ELIUD MBUGUA**

KIMANI.....DEFENDANT

JUDGMENT

It is the case for the plaintiffs that the suit property, No. NAIVASHA/MWICHIRINGIRI 1/709 was unlawfully and fraudulently transferred from No.1/134 and registered in the name of the defendant. That the property properly belongs to the late Joseph Gichamba Thuku, whose personal representatives are the plaintiffs.

The defendant on the other hand has maintained that he is a purchaser for value and without notice, explaining that he purchased the suit property from Rev. Oscar Thande who in turn had bought it from the defendant's aunt, Rachael Wamaitha.

The question this dispute presents is whether the suit property is part of the estate of the late Joseph Gichamba Thuku. To prove their claim, the plaintiffs through the 2nd plaintiff, Samuel Njenga Gichamba stated that the suit property was originally part of No.1/134 which was registered in the name of the deceased. The portion comprising the suit property has all along been used by the plaintiffs' brother, Gichuhi, who vacated it when this dispute arose. It is further contended by the plaintiffs that in 2005, they were surprised to see the defendant occupy the suit property claiming its ownership. He maintained that their deceased father never told them that he had sold any portion of his land. Geoffrey Kibowen, the Deputy District Survey, Nakuru, a witness called by the plaintiffs opined that in his view, the suit property was subdivided from No.134, but found it strange that No.134 would be retained after the subdivision and creation of No.709.

According to him, the original title ought to have been extinguished and new numbers created. But he was unable to conclusively say what may have happened as he could not obtain from their offices all the relevant documents in relation to the two properties.

The District Land Registrar, Naivasha testified for the defendant and confirmed that the suit property is properly registered in their records just as No.134 is; that the two parcels are distinct; that the suit property has had two previous owners before the defendant.

The defendant reiterated that he entered into a written contract with Rev. Oscar Thande; obtained Land Control Board's consent and a title deed issued to him. Before transacting with Rev. Thande, the defendant conducted an official search and ascertained that the property was registered in the name of Rev. Thande. The defendant happened to be a nephew of the original owner of the suit property, Wamaitha. He learnt from her that Rev. Thande had no immediate use for the property hence his decision to sell it to the defendant. Even before concluding the sale Rev. Thande permitted the defendant to utilize the suit property.

I have considered the above summarized evidence presented by both sides. I reiterate that the sole question in the dispute is whether the suit property ought to be part of the estate of the deceased, Joseph Gichamba Thuku. The plaintiffs, upon whom the burden of proof lay, believe that the suit property is part of the estate of the deceased because:

- i) it has been part of PLOT No.134;
- ii) the deceased did not tell them that he had sold it;
- iii) the alleged previous owner from whom the defendant purchased the suit property, Rev. Oscar Thande had surrendered the title deed on 25th September, 1997 after it became clear that it was irregularly issued;
- iv) the suit property has been under the use of one of the sons of the deceased until 2005 when the defendant invaded it;
- v) according to the area map the suit property is subsumed in Plot No.134, making it part of the later;
- vi) the sub-division in terms of the mutation came much later (in 2005) after the alleged sale, which itself appears irregular for the reason that No.134 having been subdivided and the suit property created the original parcel ought not to have retained the same No.134.

Have the plaintiffs discharged the burden of proof placed on them?

The defendant has to my satisfaction explained that he sought the services of a surveyor when he discovered that the suit property was omitted, like other properties in the area, from the map. He did this in 2005 in order to have electricity supplied to this property. Secondly, according to the copy of the green card in respect of the suit land, the title was created first in 1984 while that of plot No.134 was created seven years later in 1991, both having been previously held by the Government. The two parcels are for that reason distinct and independent of each other, vesting in both the registered proprietors absolute and indefeasible title in terms of **Section 27 and 143** of the **Registered Land Act**, under which the two parcels were registered.

The register in respect of the suit land can only be rectified if it is shown that the defendant was part of a fraud, omission or mistake which has necessitated the rectification. The plaintiffs have not demonstrated that there was any such fraud in the creation; acquisition and registration of the suit property.

The other point to note is with regard to the size of the suit property. According to the title deed, the green card and the last will of the deceased, plot No.134 measures 2.731 hectares which translates to 6.748 acres. The last will of the deceased distributed to the beneficiaries a total of 6.5 acres.

The suit property on the other hand is reflected in both the title deed and the green card as 0.4047 hectares which is equivalent to approximately 1 acre. This extra acreage if part of plot No.134 is not accounted for in the will or in the title deed. The last will of the deceased does not mention the existence of the suit property even though the will was written in 1997, thirteen (13) years after the register in respect of the suit property was opened.

The only conclusion that can reasonably be drawn from this is that the deceased having disposed of the

suit property excluded it from his assets. After all, the defendant has given a clear history of how the suit property has devolved since 1984. It is clear from the green card that from the Government of the Republic of Kenya the property was registered in the name of Rachael Wamaitha Thande and land certificate issued to her on 17th July, 1985. On 24th July, 1995 a title deed was issued. Two years later on 25th September, 1997, the property was transferred to Oscar Ndiba Thande and on same date it is recorded that the title deed was surrendered. But in the remarks section, it is recorded that the title deed was issued. Thereafter, the entry of 4th February, 2002 shows the transfer to the defendant and title deed issued.

Regarding the entry of surrender of title deed, the plaintiffs have argued that the title deed having been surrendered by Oscar Ndiba Thande, that surrender signified that the creation of the suit property was irregular and that the subsequent acquisition by the defendant was fraudulent as no good title could arise after the surrender.

The defendant and his witness explained the issue of surrender of the title deed to signify a transfer of title upon sale where the old title is surrendered and a new one issued. The last suggestion is more persuasive and logical than the first one.

The words “*surrender*” and “*issued*” are used in the same line so as to suggest, in my view, that, Rachael Wamaitha Thande’s title deed was surrendered upon the purchase by Oscar Ndiba Thande and at the same time a fresh title deed was issued to the latter.

This position is fortified by the provisions of **Sections 32(1), proviso (i) and 33(2) of the Registered Land Act**. The former stipulates that:

“32. (1) The Registrar shall, if required by a proprietor of land or a lease where no title deed or certificate of lease has been issued, issue to him a title deed or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease:

Provided that:

(i) only one title deed or certificate shall be issued in respect of each parcel of land or lease.”

Section 33(2) provides:

“33(2) If the disposition is a transfer, the certificate if produced shall be destroyed, and in that case a new certificate may be issued to the new proprietor.”

What has emerged from the evidence is that the suit property measuring approximately 1 acre was registered in the name of Rachael Wamaitha Thande six years before the register for plot No.134 was even opened. It is therefore illogical to suggest that the suit land was carved out from plot No.134 which did not exist at the time. It is apparent from the green card that in 1991 plot No.134 was still in the name of the Government of Kenya. The alleged sale by the deceased to Francis Thande Mbatia, the husband of Wamaitha on 17th May, 1982 cannot for the above reasons be in relation to the suit property. The alleged sale was in respect of Plot No.121A1.

It appears to me that the suit property pre-existed plot No.134 which upon being created was imposed on the suit property. The fact that the suit property existed independent of plot No.134 and that the title is genuine was summarized by the concluding evidence of P.W.2 Geoffrey Kibowen, Deputy District Surveyor, Nakuru who said:

“I cannot confirm that the title to 709 is reflected in the RIM. We have no request for its removal.”

D.W.2, Susan Wareithi Mucheru, the Land Registrar, Naivasha was categorical that:

“The two parcels were not related. 709 could not have been a subdivision of No.134 – at least I cannot see any evidence.”

For the foregoing reasons, I come to the conclusion that the plaintiffs have not proved their claim on a balance of probability. The suit is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 26th day of July, 2012.

**W. OUKO
JUDGE**