



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 64 of 2003

JULIUS KIRUMA KARIUKI PLAINTIFF

VERSUS

KAMAU MWANGI 1ST DEFENDANT

NAHASHON MWANGI MBOGO 2ND DEFENDANT

PETER GITHINJI 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

J U D G M E N T

In this suit, the Plaintiff has sued the defendants seeking the following prayers:-

- (a) A declaration that the Plaintiff is the bonafide owner of all that parcel of land known as Loc. 6/Matharite/Kiaheho/181 as shown in the original survey of the plot and which parcel includes/comprise the parcel of land known as Loc. 8/Matharite/Kiaheho/698 and further that the purported sub-division/excision of the latter parcel from the former without the knowledge or consent of the Plaintiff who is the owner thereof is unjust, illegal, null and void.**
- (b) An injunction do issue restraining the third Defendant whether by himself, successors or assigns or any one of them from disposing of, leasing, charging or dealing with the portion of land curved off from the parcel known as Loc. 8/Matharite/ Kiaheho/181 and which is specifically referred to as Loc. 8/Matharite/ Kiaheho/698.**
- (c) The fourth defendant be ordered to rectify the register of land by cancelling the sub-division and or allocation or change of ownership of that portion of land that has been renamed as Loc. 8/Matharite/Kiaheho/698 and that the same do revert back to the Plaintiff so as to form an undivided parcel known as Loc. 8/Matharite/Kiaheho/181 measuring 2.22 hectares (5.5. acres).**
- (d) Costs of this suit together with interest thereon at court rates.**
- (e) Such other or further relief as the court may deem just and fit.**

Essentially this is a boundary dispute pitting the plaintiff's land being **Loc. 8/Matharite/Kiaheho/181** and that of the 2nd and 3rd defendants who allege that they do have proprietary interest in **Loc.**

8/Matharite/Kiaheho/698.

The plaintiff's case is that the defendants' alleged land being **Loc. 8/Matharite/Kiaheho/698** was irregularly and fraudulently hived off from his parcel of land being **Loc. 8/Matharite/Kiaheho/181**. The Plaintiff had purchased and took possession of his land aforesaid in the year 1987 which then measured 5.6 acres. Earlier on to be precise on 27th January 1987 the 1st defendant had sold and transferred the same parcel of land, **Loc. 8/Matharite/Kiaheho/181** measuring 2.22 hectares (5.6 acres) to the plaintiff at a consideration of Kshs.300,000/= . In the year 2000 the plaintiff undertook a subdivision of the parcel of land which henceforth I shall refer to as "*the suit premises*" in 3 and 2.5 acres respectively. It was then that the surveyor advised him that the whole land measured 4.5 acres and was thus less by one acre. It was his contention that the 3rd defendant's land being **Loc. 8/Matharite/Kiaheho/968** was fraudulently hived from his land at a time and on facts unknown to him. Circumstances surrounding the subsequent acquisition and transfer of the portion of the suit premises was not clear as the 2nd defendant sold the entire and undivided suit premises to the first defendant who in turn sold it to the plaintiff. It is also the contention of the plaintiff that the aforesaid secret alteration of the suit premises amounts to fraud and that the 3rd defendant in the circumstances is not entitled to benefit from the fraudulent allocation of the suit premises owed by the plaintiff. The plaintiff went to give as required in law the particulars of fraud.

On being served with summons, the Attorney General filed a defence in which he raised the issue that the suit was incompetent as it had been filed in contravention of the mandatory provisions of sections 13A and Section 16 of the Government proceedings Act. Further the Government pleaded that the suit was statute barred. Otherwise all the allegations of the Plaintiff touching on the Attorney General were denied each and singular.

The 2nd and 3rd defendants filed a joint defence too through **Messrs C.K. Mwhia & Co. Advocates**. They denied the allegations in the plaint and put the plaintiff to strict proof thereof. It was their case that the plaintiff purchased the suit premises as it was on the ground having ascertained the boundaries and the said defendants were not privy to the sale agreement between the plaintiff and first defendant to whom he would have had recourse to in case of any misrepresentation as to any defects as to the size and or title to the suit premises. As far as they were concerned land parcel **Loc. 8/Matharite/698** was legally theirs as of right, absolutely and have had a good title and quite possession thereof from beginning without any changes affecting it or their neighbours.

This suit was initially filed in the High Court of Kenya at Nairobi. However on 20th June 2003 an order was made by Aluoch J. as she then, transferring the same to this court. However on 23rd October 2006, the suit against the 1st defendant was discontinued.

This suit before and after the transfer has seen a myriad of applications by the Plaintiff with several supporting and replying affidavits with annexures thereto on issues of fact and law. Indeed by the time the case came up for hearing the parties agreed that since the dispute involved acreage and boundary to the two parcels of land, Murang'a District Land Surveyor should visit the said parcel of land and carry out a survey and come up with a report on the findings as far as the boundary dispute was concerned which findings it was agreed would form the basis of the respective parties submissions in this case. The consent order was couched in the following terms:

"1. The Land Registrar be and is hereby directed to have the Murang'a District Land Surveyor visit the lands in dispute herein being Land Parcel Numbers Loc. 8/Matharite/Kiaheho/181 and Loc. 8/Matharite/Kiaheho/698 with the annexed maps, titles and green cards to ascertain the boundary between the two parcels and mark it on the ground and amend the map accordingly.

2. That upon visitation of the suit lands by the Murang'a District Surveyor a report on the findings be made by him which shall form the basis of the final submissions in this suit upon which the court shall pronounce judgment.

3. That the visit by the Murang'a District Land Surveyor be made to the suit land within 30 days of

filing and pronouncement of this Consent Order by the court.”

The said Consent Order was subsequently adopted as a court order on the same date which order was extracted and served upon the Murang'a District Land Surveyor for execution. By this step, the parties in principle had agreed to forego the formal hearing of the case. Accordingly no witnesses in support of or in opposition to the case were called.

The surveyor in the company of the land Registrar Murang'a duly visited the disputed parcels of land and compiled a report which was availed to and read to the parties. Subsequently parties filed and exchanged written submissions over the report which I have carefully read and considered. I have also carefully perused the report. I note however that the Attorney General did not file his written submissions. That notwithstanding my take on the dispute is that following the visit of the surveyor to the suit parcels he concluded thus:-

“Checking from the records held in my office (District Land Office Murang'a) it shows that

parcel No. 698 is 0.4 Hectares and parcel No. 181 is 2.22 Hectares, but this means that parcel No. 181 R.I.M measurement and the ground measurements are almost the same but they are less by about 0.4 Hectares compared to that which is shown on the green card held in my office.”

My interpretation of that finding is that there is a hiving off of 0.4 Hectares of the plaintiff's suit premises. Following those findings therefore it is clear that land parcel No. **Loc. 8/Matharite/Kiaheho/698** should not exist in the first instance as the same being 0.4 hectares is what was curved out from the suit premises. Thus if at all the 2nd and 3rd defendant's land **Loc. 8/Matharite/Kiaheho/698** is said to exist, the same was brought into being fraudulently as alleged in the plaintiff's amended plaint whose particulars have been given.

The alteration of the suit premises in my view was done irregularly and the defendants cannot feign ignorance for the

suit premises initially belonged to them as a whole. They sold it as a whole to the 1st defendant who in turn sold it as a whole to the Plaintiff. It is only the 2nd & 3rd defendant who may know at which stage they conspired to hive off 0.4 hectares of the suit premises. The plaintiff maintains that the suit premises he purchased were 2.22 hectares and not 1.822 hectares he discovered when he called in the surveyor for purposes of sub-division. When he followed-up the matter he discovered that the 2nd and 3rd defendants land which was non-existent at the time had mysteriously come into existence and his boundary moved so as to accommodate the same. In the process his suit premises were lessened by 0.4 hectares so that instead of the suit premises being 2.22 hectares it now measured 1.822 hectares.

It is instructive that from the records kept by the land's office the 2nd defendant is the one who sold the suit premises to the 1st defendant which measured 2.22 hectares i.e. 5.6 acres. Subsequently thereto the 1st defendant sold the same parcel of land to the plaintiff as a whole. Indeed upon completion of all formalities regarding the transfer the 4th defendant issued to the plaintiff a title deed with the acreage indicated therein as 5.6 acres. Before buying the suit premises, the plaintiff had conducted a search and confirmed the aforesaid acreage. The 2nd and 3rd defendant are closely connected with the suit premises. Indeed the 3rd defendant is the son of the 2nd defendant and as correctly stated in the plaint he cannot in the circumstances be said to be innocent of the fraud perpetrated on the plaintiff. I do not agree with the submissions of the advocate for the defendants and or their pleadings that the plaintiff purchased the suit premises as it was on the ground. Land is not like any other chattel where you can buy as it is where it is. It involves documentation such as the title deed that will no doubt show the acreage, obtaining the consent of the relevant land control board to the transaction, execution of a transfer, subsequent registration of the said transfer and issuance of a fresh title. All these documents will no doubt show the acreage of the parcel of land involved. All along these documents show that the suit premises measure 5.6 acres. It is apparent to me therefore that the 2nd defendant and by extension the 3rd defendant cannot

claim to be blameless to the fraud that led to the portion of the Plaintiff's suit premises measuring 1 acre being hived off. Clearly they played a role in the mischief.

I am also aware that this dispute was subject of Kahuro land disputes tribunal which found favour with the Plaintiff.

Parties having agreed that I should be guided by the report of the District land Registrar/Surveyor in resolving the dispute, I have found as a fact that **Loc. 8/Matharite/ Kiaheho/698** was hived off from the suit premises in mysterious circumstances only known to the 2nd and 3rd defendants. Accordingly, I find the case of plaintiff irresistible. I would therefore grant prayers (a), (c) and (e) of the amended plaint dated 26th May 2003. The District Land Registrar, Murang'a shall forthwith rectify the register of the suit premises by cancelling the subdivision and or allocation or change of ownership of that portion of land that has been renamed as **Loc. 8/Matharite/Kiaheho/698**. The same should revert back to the Plaintiff and form undivided parcel of land hitherto known as **Loc.8/ Matharite/Kiaheho/181** measuring 2.22 Hectares.

I need not consider however the defences advanced by the 4th defendant since no submissions were made on them. The 2nd and 3rd defendants shall pay the Plaintiff costs of the suit.

Dated and delivered at Nyeri this 18th day of June 2009

M. S. A. MAKHANDIA

JUDGE