



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Suit 24 of 2009

ALBERT BUNDI M'IKIUGU.....PLAINTIFF

VERSUS

AUGSTINE MURITHI M'NGARUTHI DEFENDANT

LAND LAW

v Rectification of the register of land

v Grounds – for rectification or amended – fraud or mistake – registered land Act (Cap - 300, Laws of Kenya) s. 143

JUDGEMENT

By a plaint dated and filed on 2nd March 2009, the Plaintiff herein sought out one order, An order for the rectification of the Register of Title No. **NYAKI/NKABUNE/100** and title No. **NYAKI/NKABUNE/210** to read the names of the deceased. The Plaintiff also sought costs of the suit.

Summons to enter appearance was issued on the same day of 2nd March 2009 and were together with the plaint served upon the Defendant on 3rd March 2009 at 11.00 a.m. by a process server Kithinji M'Kiambati at the Defendant's home in Kathita Village, Nkabune Sublocation, Ntima Location. The process server so depones in paragraphs 3 of his Affidavit of Service of Summons to Enter Appearance sworn on 17th March 2009 and filed on 25th March 2009.

The process server also depones in the same paragraph that the Defendant upon receiving the summons to enter appearance and requiring him to sign at the back of the copy, accepted service, took copies but declined to sign at the back of the original copy. The process server also deponed that the defendant was pointed out to him by the plaintiff who had accompanied him during the service.

Upon the expiration of fifteen (15) days stipulated for entering appearance, the Plaintiff's advocates L. Kimathi Kiara & Co. Advocates by letter dated 30th March 2000 requested for interlocutory Judgment. The Deputy Registrar entered an interlocutory judgment on 28th April 2009. The matter came for formal proof on 23rd June 2009. The only witness who testified was the Plaintiff himself.

In his testimony the Plaintiff stated firstly that he knows the Defendant, Augustine Murithi M'Ngaruthi. His dispute with him is over land Title No. **NYAKI/NKABUNE/100** which is registered in the name of M'Mkkaria Ikiugu Mburugua who died on 14th March 1976 and of whose estate he (the plaintiff) was the administrator. He was issued with a Grant of Letters of Administration on 21st January 2008 and he therefore has the necessary locus standi to institute

and prosecute this suit.

The plaintiff also produced as copy of the Green Card which contains the property and proprietorship Sections of the Register. The said Green Card shows the suit land NYAKI/NKABUNE/100 measuring 0.08 Ha and proprietorship section shows the deceased Mukaria Ikiugu Mburugu as the registered owner from the 28th March 1969 and that he himself had been in occupation of the land for the last fifteen (15) years.

The Plaintiff also testified that arising from claim from the Defendant he carried out a search at the Lands Office of the Land Register and found that during adjudication and demarcation of land at Nkabune in 1969, the deceased was settled on Title Number **NYAKI/NKABUNE/210** (owned by the Defendant) and the Defendant was settled on Title Number **NYAKI/NKABUNE/100** (owned by the plaintiff), each believing their respective portions were registered accordingly in the Lands Register at the Lands Office.

The Plaintiff testified that when found this out he asked the Land Registrar what he should do as both he and the Defendant had extensively developed their respective portions of land with permanent buildings and cash crops such as coffee . He was advised to remain on the portion he had developed on plot No. 210 the defendant who was in his company refused to heed the Land Registrar's advice.

In the circumstances therefore the Plaintiff's claims for an excision of an area of 0.08 Ha. from title No. **NYAKI/NKABUNE/210**, equivalent to the area of **NYAKI/NKABUNE/ 100** which the Defendant currently occupies and equally developed. As the Defendant declined to either to enter an appearance or file a defence herein, the court can only be guided by the Plaintiff's pleadings, (the plaint) and his evidence, and the law. The evidence is as already set out above. The relevant law is Registered Land Act Cap. 300 Laws of Kenya) S. 143 which provides –

“14 3(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”

In the case of **CHAUHAN VS OMAGWA [1985] KLR.656** the court of Appeal held:-

(1) Two prerequisites to the immunity of a party from the rectification of land register under section 143 of the Registered Land Act (Cap 300, Laws of Kenya) are that the registration of that party was a first registration and that the party is in possession of the land having acquired it for valuable consideration and without knowledge of my omission, fraud or mistake.

(2) Once the court was satisfied that the registration in favour of the appellant was made by fraud by the vendor, it was authorized by section 143 to order rectification of the register even if the plaint did not disclose a cause of action against the appellant. It was the registration by the fraud of the vendor which permitted an order for rectification to be made by the court.

In the case at hand it is clear from the Plaintiff's evidence and averments in paragraphs 6-8 inclusive that there is no question of either fraud or omission. This is a question of pure mutual mistake by the respective first registered proprietors, (the late Mukaria Ikiugu Mburugua) and the Defendant **Nyaki/Nkabune/100** occupied and developed by the Defendant and **NYAKI/NKABUNE/210** (occupied and developed by the Defendant to the extent of 0.08 Ha. Plaintiff to the extent of 0.08 Ha. There is also no question that the respective titles were a first registration and would under the Act (the Registered Land Act) be immune from rectification for under the Court of Appeal Chauhan vs Omagwa (supra). What happens as in this case, where there is a mutual mistake, that is to say, a mistake where the situation believed by the two proprietors did not correspond to the facts on the ground?

In contract law a court will often either revise or nullify a contract leased on a mutual mistake about a material term. Where like in this case, parties having been living and laboring to develop their parcels of land under the mistaken belief that their developments on the ground corresponded to their respective titles when in fact they were not, the court is entitled under both section 143(1) of the Registered Land Act on the grounds of mistake even if it were a first registration, to rectify or amend the register.

If I were wrong in respect of that finding under Section 143(1) of the Registered Land Act, I would in exercise of the court's inherent jurisdiction under section 3A of the Civil Procedure Act to make such orders as may in necessary for the

interest of justice direct and order as follows:-

- 1.that the District Surveyor carry out a survey and demarcate the equivalent of nought decimal nought eight 0.08 Ha of the parcel of land known as NYAKI/NKABUNE/210 (currently occupied by the plaintiff) and submit his deed survey plan to the District Land Registrar who shall issue title thereto to in the name of the Mukaria Ikiugu Mburugua). The plaintiff shall heed the cost of both the survey and new title.**
- 2. Any balance from the said survey be amalgamated with land parcel No. Nyaki/Nkabune/100 occupied by the Defendant and title issued in the name and cost of the Defendant.**
- 3. The survey ordered herein be carried out within sixty (60) days of the date hereof.**
- 4. Costs herein be born by each party.**

There shall be orders accordingly.

Dated, delivered and signed at Meru this17th day ofJuly2009

ANYARA EMUKULE

JUDGE