



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 324 of 2006

FRANCIS IRERI JOTHAM PLAINTIFF

VERSUS

ABISHAGI RUFUS

LLOYD MUGENDI MUKETHA

MWIMBI LAND DISPUTES TRIBUNAL DEFENDANTS

JUDGMENT

I: Background

1. The subject of this Originating Summons concerns Land parcel LR Kiera/East Magutuni/555. It was originally in the name of the husband to the late Abishagi Rufus who sub divided the same to four of his sons. The further sub-division of two portions of land was reserved to the grand children of his unmarried daughters.

2. Lloyd Mugendi Muketha (2nd defendant respondent) a grandson was allocated LR Kiera/East Magutuni/555 as his ancestral home. He then, at the age of 30 years old sold 1½ acres to his neighbour Francis Ileri Jotham (the plaintiff herein) for a sum of Ksh.250,000/-. The purpose he did so was to buy a house in Nairobi. He actually was in the process of buying ½ an acres and to construct the same.

3. The sale transaction was entered into between the parties and both attended the Land Control Board on 13 January 2000. A title deed was then issued to the plaintiff who is now the registered owner of the land.

4. Before selling the land to the plaintiff Lloyd Mugedi Muketha went and consulted his mother and his wife. The said consultation was never communicated to his grand mother Abishagi Rufus.

5. On the 2 November 2000 the said Abishagi Rufus and another filed a Lands Disputes Tribunal Court case being No. LDT/MWI/15/00 questioning the sale of the land. She did so as the plaintiff had given a notice for her eviction from the land.

6. The Land Disputes Tribunal on hearing the parties held that the plaintiff do refund the purchase price and return the said land to Abishagi Rufus.

7. Lloyd Mugedi Muketha the grand son stated he was not interested in the land as he had sold it. At his death he will not be buried in the ancestral home but at the Langata Cemetery. The land, he stated

belonged to the plaintiff.

II: Multiplicity of suit

i) Resident Magistrate Court case No.3/01 Chuka (No.3

8. An application was filed in the Resident Magistrates Court at Chuka 3/01 seeking to confirm the award of the Lands Disputes Tribunal [The court file proceeding indicates the case as No.35 of 2001 at Chuka.]

9. The plaintiff filed through his then Advocate M/s Njue Mwachandi & Co. Advocates of Nairobi an application in that said file under a certificate of urgency seeking an injunction to restrain the applicant Abishagi Rufus from evicting the plaintiff. That the said file be dismissed by court on grounds that she held no letters of grant for her late husband to file a matter with the Lands Disputes Tribunal. **That the award be declared a nullity.**

10. The trial magistrates one M.M. Omosa on 9 October 2001 on hearing both parties gave a very brief ruling in which he stated that the said Francis Ileri Jotham held title which cannot be impeached. He then allowed the application and stated that the applicant to file remedies in the high court.

ii) CA 115/01

High Court at Meru (Mulwa J)

11. The said Abishaghi Rufus appeal to the High court at Meru against the said decision.

12. Mulwa J (as he then was) admitted the appeal for hearing on 19 June 2000. By his judgment of 3 July 2002 the Hon. Judge sated that the trial court lacked jurisdiction to make the orders that he did. He stated:-

“The provision of the Lands Disputes Tribunal No.18 of 1990 is quite clear on the procedures and the law as to the jurisdiction of the courts a decision of the Tribunal is challengeable and the award filed with the court either through the appeal procedures provided in the act or through the High Court via Judicial Review.

The act has no provision for a challenge by a subordinate court (emphasis supplied).”

13. The Hon. Judge further found that the application made by Francis Ileri Jotham before the Magistrates Court had no suit pending therein the main file. That therefore the court had **no jurisdiction** to deal with the matter as it did **“Even if the magistrate felt that the act was wrong.”**

14. The appeal was allowed with the costs to Abishaghi Rufus in the High Court and in the subordinate court.

15. Francis Ileri Jotham was not satisfied. He applied for a review before Onyacha J on 25 July 2003. The same was dismissed for lack of prosecution.

16. Abishagi Rufus went for taxation and attached Francis Ileri Jotham goods for non payment of her costs. The said Francis Ileri Jotham filed an application, which on the face of it asked four prayers in one application one being for a new Advocate Ngugi B.G. to come on record. He was heard and the Hon. Judge, Sitati J held that the application to have the attachment set aside be dismissed as it lacked merit. The said Francis Ileri Jotham appealed.

iii) Court of Appeal

CA 139/05 at Nyeri

17. Surprisingly the appeal against Sitati J's decision was on the main appeal heard by Kasanga Mulwa J and not specifically on taxation. This appeal was still pending.

iv) CMCC 296/05

Milimani Commercial Courts

18. The said Francis Ileri Jotham then sued the seller Lloyd Mugeti in the Milimani Court case 296/05 seeking orders of injunction against the seller Lloyd Mugendi Muketha Moses Mugabi Muketha and Abishagi Rufus. He also sought specific performance and he be awarded and be declared the sale proprietor.

v) Hccc 324/06

20. Subsequently Francis Ileri Jotham filed this current suit against the said Abishagi Rufus, Lloyd Mugedi Mukethi and the Mwimbu Land Disputes tribunal. An Originating Summons was filed. This was not a claim for adverse possession but to declare that he is the rightful owner of the suit property.

21. On the 13 November 2007 when this suit came before me for hearing and on discovering the multiplicity of suit I stayed the said suit together with all pending suits until the finalization of the Court of Appeal decision.

22. The said Francis Ileri Jotham returned to this court through his advocate by way of application 21 May 2008 whereby he informed the court that he has withdrawn all pending cases including the court of appeal case. That what is now left, is this case for this court to make a decision.

23. None of the respondents appeared to the hearing, although, duly served.

III: Opinion

24. Kasanga Muwla J made it very clear as to the procedure these courts takes on matters concerning the Lands Disputes Tribunal.

25. It is a fact that Francis Ileri Jotham holds a title deed to the property. It is further a fact that the effect of the decision by the tribunal was to cancel his title deed.

26. The procedure would have been to appeal against such decision to the Lands Disputes appeals Tribunal or alternatively to file a Judicial Review in the High Court. Instead his advocate filed an application for an injunction which was wrongly entertained by the learned magistrate. The task of a magistrate is ministerial. Once the award is filed in the magistrates court the magistrate is to record the award as judgment of the court for purposes of execution and nothing more.

27. Instead of pursuing the appeal on Judicial Review the said Francis Ileri Jotham did nothing. Abishagi Rufus appealed and the appeal was allowed. The multiple cases herein filed thereafter have no basis and should never have been filed including this current suit. They serve no purpose as there is no procedure in law that provides for the various cases to be filed.

28. Francis Ileri Jotham has only two option, either to appeal against the Lands Disputes Tribunal or to file a Judicial Review. In both cases this must be done within the Limitation of Action under Cap.22 Laws of Kenya. I believe he may apply for leave to file such application out of time.

29. I find that suit before me must fail. It is hereby dismissed with there be no costs as the respondents are absent.

DATED THIS 19TH DAY OF JUNE 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

B.G. Njugi instructed by B.G. Njugi & Co. Advocates for the plaintiff - present

Abishangi Rufus defendant is unrepresented and absent.