

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE 11 OF 2001

NJERU KAVANDANGO.....PLAINTIFF

VERSUS

MBOGO NYAGA & 33 OTHERS.....DEFENDANT

JUDGMENT

The history of this case is long. On the 8/1/1985 a plaint was filed in Embu subordinate Court and registered as No. 3 of 1985 between Njeru Kavandango and Mbogo Nyaga. The dispute was in respect of parcel Gaturi/Githimu/1312. "During land demarcation the defendant made himself to be registered" as owner of that land that is what plaintiff said. The suit was later transferred to the High Court and numbered 156 of 1986. And later the High Court transferred the case and ordered the Trial Magistrate at Embu to refer the dispute to arbitration.

On 26/6/1991 the award was made by the panel of Elders appointed for dealing with the matter. Again a third party joined the suit. There was a demand that the award read by court be set aside. By a ruling of court dated 19/8/92 the court ruled that the third party was without locus. Later on 23/9/1992 Judgment was entered as per the Arbitrators Award. The Judgment was "parcel of land No. Gaturi/Githimu/1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383 and 1384 be vested in the applicant's name" (Plaintiff). The applicant was Njeru Kavandango the plaintiff.

On 17/1/1994 the court presided over by E.M. Mutahi R.M made order authorizing the Land Registrar Embu District to rectify the land Register under Section 143 (1) Cap.300 by cancelling several names of persons registered as owners of several pieces of land mentioned in the said order. Plots were to be registered in the names of the plaintiff, Njeru Kavandango in accordance with the Arbitration award. This court order was put in effect by Land Registrar Embu District when he published Gazette Notice No.934 of 4/3/1994. The gazette is exhibited.

Judicial Review proceedings were instituted by several persons who sought orders to quash the said orders of ***Resident Magistrate being Misc Civil Application No. 26/1994 HCC at Nyeri***. The outcome of these Judicial proceedings were that "the trial Magistrate to give the applicants herein a hearing". That was the cancellation of the award. There was another application for the transfer of the suit being Misc.Civil Application No. 64 of 1997. In this application P.M CMC No.3 of 1985 was by consent of parties transferred for hearing to Embu High Court on 11/10/2000.

A new chapter started. The case was allocated a fresh number HCC11 of 2001. The plaint was amended to include all the parties affected in cancellation of titles. And they have filed a statement of defence. Then the plaintiff died on 30/11/2004. And a grant of letters Administration was issued by this court in favour of the son named DAVID MURIUKI NJERU who has been substituted to proceed in this case in place of his deceased father. Thereafter the hearing of this case commenced on 20/12/2006. PW1 produced green card opened on 6/12/1961 which shows that parcel No.Gaturi/Githimu/1312 measuring 123.43 acres was registered in the name of Trust Land Board also known County Council of Embu. The title was closed upon subdivision and new titles No.1370-1383 were registered. In their defence the surviving defendants state that the land in dispute was reserved for the Ngeri clan. The land was

subdivided on 25th May 1965 by county Council of Embu into 15 parcels which were registered on second registration in the names of the 15 defendants listed under paragraph 4 of the statement of Defence namely plots 1370-1384.

It is the evidence of the plaintiff that his father was never registered as owner of any of these subdivision and that he was unlawfully left out. And it was Mbogo Nyaga first Defendant who took the land. He divided among the 15 people, 3 who were his relatives. At this point the court notes that defendant exhibited 3 showing that several subdivisions were registered in the name of Embu County Council namely 1371, 1372, 1375, 1377, 1382, 1383 and were thereafter transferred from the County Council to several persons named therein all being subdivision from parcel 1312. The transfer was made by the Council not by the first Defendant who is said to have been in Tribal Police Force. The plaintiff testified that the subdivision was unlawfully. It is not explained how it was unlawful as it was done by County Council.

On cross examination the plaintiff PW1 said the land was given to his family in 1959 and the land was held by County Council and that the Council was to hold in trust and consent to the allocation not to give the land to people. Further evidence for the plaintiff was given by PW2 who said he was a neighbour of the plaintiff's clan and that he knew the plaintiff and his father Njeru Kavandago PW3 gave evidence and said he is a leader of a group of people who were existing before Embu County Council was established. He talked of the order to take the case to elders. There are 3 houses in the clan. Marindu divided the land. There was Njue house and Plaintiffs Ngiri house. It was decided they divide their land. Kavandago was awarded 1 unit. On cross-examination he said that Nyaga was given land because he was a Government Officer.

PW4 was Nyaga Njagi. He was one of the elders appointed to hear this case. He said the award was in court file. That is true. That was the evidence offered by the plaintiff. The first witness was sixth defendant Simon Njuki. He confirmed that first Defendant had died. He testified that Mbogo Nyaga did not take possession of plot No.1312. This land was of Ngiri clan and the registered owner was Trust Land Board same as Embu County Council. He produced EDW Exhibit 1. That land was to go to Ngeri clan. There was agreement with County Council that the plot be given 15 persons. However Njeru Kavandago was not one of them. He had been allocated another piece. Njeru Kavandago was of Marindu house. He got land in that house Mbogo Nyaga first Defendant got land in that house Mbogo Nyaga first Defendant got six acres. DW1 produced exhibit D No 2 minutes showing that a meeting was held by a Committee of Embu County Council on 10/11/1964 where land matters were discussed and the issue of subdivision of Kithegi/Ngeri clan 93.45 acres was discussed. It is recorded that the land had been registered under Trust Land Board during Land consolidation when the clan elders failed to agree. The committee was informed that the elders had agreed (1964) and the subdivision was recommended as listed thereunder 14 persons were given land. Again minute 3/64 of 23/1/1964 it is shown that subdivision of land at Kithegi Gaturi/Kithimu/location of Ngiri clan. The minutes records that the land was registered under Trust Land Board during land consolidation when the clan elders failed to agree. The committee was informed that the elders had now (1964) agreed and 5 persons listed therein were allocated to 6 acres each. DExhibit 4 was produced by PW1. It is dated 2/12/61 concerning the lands of "Ngiri" clan. This exhibit shows that there were two houses in the Ngiri clan, the house of Marindu and house of Njue. Each house was allocated 6 acres. In cross examination he said that the land have now been subdivided and transferred to other people and that the land holds about 200 persons. He also said that Kavandago was one of the elders who allocated the land. He also testified that the plaintiff's father was given land No. 73 Kiandari measuring 7 acres named Njuguna Kavandago not Njeru Kavandago. That was the close of Defendant's evidence.

It now remains for the court to examine the evidence produced on both sides taking into consideration that this dispute has been going on since 1985 and has occupied the time and minds of those concerned for such a long time.

Firstly the court has to consider issues raised by the Defendants in their submissions. The defendants say the plaintiff has no locus in this suit. I will not make such a finding. The court is dealing with rights customarily before land Registration inverted in tribal groups where land was owned by large members of

people who comprised a group known as clan. Any members of clan had a personal right in common with members of his clan and had a right to defend or make claims in his own behalf and on the behalf of the clan members. Furthermore it is to be noted that it is late in the day to raise this issue. A party is bound to raise any point of objection at the earliest possible time in any litigation to avoid the waste of costs in pursuing the litigation.

On the issue of the suit being time barred this litigation commenced on 1985. The titles were issued on 1965. Up to that time, the matter of who was to own what land was still in the hands of the elders. This is another issue raised without notice to the plaintiff. In paragraph 3 of the amended plaint the evidence is that the land in dispute was in the hands of Embu County Council who were holding the land in trust for the clan elders who was unable to agree as to who was to be allocated. The registers regarding the pieces of land No.1312 was opened on 6/12/61 in the name of The Trust Land Board. It was not in the hands of the plaintiff's father. The clan elders were to decide who was to be allocated the land. Regarding paragraph 4 of the amended plaint the first defendant who is said to be dead now was not the registered owner of the disputed land. He was allotted land by the clan elders. He was given 6 acres. He was issued with a title and was entitled to deal with the land as he chose.

Regarding paragraph 5 of the amended plaint evidence is that the allocation of land to Defendants was not in the hands of first Defendant, but within the clan elders with the County Council of Embu acting as Trustees. Therefore I do not find any evidence of forceful seizure or unlawful act in the circumstances. It should be remembered that the Tribunal proceedings which resulted in the cancellation of the names of several defendants as published in Gazette exhibition 3 was quashed and set aside by High Court at Nyeri on the ground that the defendants were never given a chance to be heard. Also when the High Court ordered a rehearing of the suit in Principal Magistrate's Court both parties agreed to transfer the cause No. 3 of 1985 to High Court Embu when the plaintiff amended his plaint. The pleading contained the 3rd, 4th and 5th paragraph which the court have mentioned above. I do not find any evidence that the original plot No.Gaturi/Githimu was at any time owned by the plaintiff. The court is therefore unable to make declaration as prayed under prayer one. Furthermore I do not find any evidence to support prayer two thereof. The plaintiff's case is therefore dismissed. I do not make any order as to costs. It would be oppressive to order plaintiff to pay costs to his relatives who have lost nothing.

Dated this 14th December, 2007.

J. N. KHAMINWA

JUDGE

14/12/2007

Khaminwa –**Judge**

Njue – **Clerk**

Plaintiff present in person

Defendant (son) present in person

Read in open court.

J. N. KHAMINWA

JUDGE