



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

Civil Case 964 of 1988

MUIRURI MUTHOKA PLAINTIFF

VERSUS

NDUNGU MUTHOKADEFENDANT

CONSOLIDATED WITH

Civil Case 2452 of 1981

GITHIA MUTHOKA PLAINTIFF

VERSUS

MUIRURI MUTHOKA "A" DEFENDANT

CONSOLIDATED WITH

Civil Suit 96 of 1985

MUIRURI MUTHOKAPLAINTIFF

VERSUS

NDUNGU MUTHOKA DEFENDANT

JUDGMENT

The plaintiff sued the defendant, who is his step brother seeking a declaration that,

- (1) "L.R No. Githunguri/Gathangari/1633, belongs to him".
- (2) "An order directing the defendant to transfer land parcel No. Githunguri/Gathangari/1633, to him".
- (3) "An order directing the Land Registrar, Kiambu to cancel and or revoke the title issued in

the name of the defendant, in respect of L.R No. Githunguri/Gathangari/1633’.

(4) “An injunction directed at the defendant to restrain him and his servants, agents or employees from interfering, using, selling or otherwise disposing of L.R No. Githunguri/Gathangari/1633, until further orders of the court,”

(5) “Mesne Profits”.

In his defence, the defendant admitted that he had filed HCCC No. 96 of 1985, claiming 4 acres from the plaintiff’s land No. L.R Githunguri/Gathangari/325. He also admitted the contents of para 3 of the plaint to the effect that he obtained an ex parte judgment in the said HCCC No. 96 of 1985, and four acres of land was transferred to him, and given a new number, i.e. L.R Githunguri/Gathangari/1633, but the ex parte judgment plus all the consequential orders were set aside and the suit ordered to proceed to hearing.

The defendant contended further in his defence that the suit he filed was misconceived and filed by error because the plaintiff was never the registered proprietor of land Ref. No. Githunguri/Gathangari/325.

In para 3 particularly the defendant contended that,

“the parcel of land which was subdivided to become Githunguri/Gathangari/1633, was parcel Githunguri/Gathangari/1574 and was not the subject matter of the suit HCCC No. 96 of 1985”.

The defendant filed an amended defence in which he stated at para 4 that,

“That the land parcel No. Githunguri/Gathangari/325, was subdivided as a result of a judgment in HCCC No. 2452 of 1981 between the plaintiff and one Gitiha Muthoka. That the plaintiff appealed against the judgment in that suit, but his appeal was dismissed by the Court of Appeal”.

It was the contention of the defendant that the plaintiff accepted the decision in that judgment, and more after the land had been partitioned as he had dealt with his portion. The defendant also brought in the issue of the land being ancestral land that’s why the plaintiff accepted that the defendant was entitled to a portion of it

In court during the hearing of the suit the plaintiff Muiruri Matheka, described the defendant as his step brother who lives in Elburgon, and has never lived in Githunguri, Gitiha village.

Describing the defendant further, he explained that his late father Muthoka Njuguna, was also the defendant’s father. That the old man had 7 wives, and he died before emergency in 1952.

According to the plaintiff, their father did not have any land, but nevertheless he lives on family land – i.e. **“Mbari Kinene clan”**. That it was this clan which had come from Murang’a who gave him land and during that period, the defendant was living in Elburgon with his mother and did not come to claim land. That the defendant does not even know where their father was buried.

The clan gave the plaintiff 10 acres of land, together with his brother the late Macheru, who had no wife or children, so the plaintiff gave him only one acre of land and remained with 9 acres. He prayed the court to order the defendant to return his land as he lamented that he is now aged 80 years old and should have all his land intact.

The plaintiff was not aware of any case which subdivided the land. He only recalled the defendant coming to the land with policemen. He also denied having sold any piece of this land to anybody.

The plaintiff called one Jacob Kariuki Muiruri, a farmer in Gitiha sub-location in Githunguri Division of Kiambu District. He described the defendant as his step-brother who lives in Elburgon and has never resided in Githunguri. He explained that the land in dispute, i.e. Githunguri/Gathangari/1633 was partitioned form Githunguri/Gathangu/1574.

He stated further that the land in dispute is registered in the name of Ndungu Muthoka the defendant since 8.7.86. He produced a copy of the green card, as Ex. 1, and explained further that the defendant became so registered following an order in a case filed by him.

The witness said further that when this subdivisions came to light, they moved to court to set aside the orders which was done to the court ruling dated 23.7.86. This was produced as Ex. 4, when the court directed that the ex parte order of 5.3.86 plus all consequential orders be set aside and further, that the defendant (Muiruri Muthoka) do have unconditional leave to defend the suit and defence was to be filed within 15 days.

That the plaintiff in that case Ndung'u Muthoka withdrew that suit, that is why his father, Muiruri Muthoka filed this present suit as Ndung'u Muthoka's title has never been cancelled as per the court order.

He claimed that title No. Githunguri/Gathangari/1633, is being used by his father, who has planted trees, fruits, tea and built houses. He lives on the plot as well as the witness. That they also live on parcel No. 1632. That since the order of 1988 Ndung'u Muthoga has never lived on the land, neither has he ever come to chase his family. He prayed that the defendant's title be cancelled so that his father can be registered on the land.

The defendant Ndung'u Muthoka claimed that his step brother Muiruri Muthoka took his land which the clan subdivided into 5 home steads. The 1st homestead got 5 acres, 2 homesteads got 4 acres each.

He claimed that the plaintiff has his own piece of land, registered as Githunguri/Gathangari/1632 whilst he has land No. 1633, to date.

The defendant is employed at Elburgon department of Forest, since 1975. He lives in Elburgon, since 1956. He does not reside in his 4 acre piece of land registered as Githunguri/Gathangari/1633, but he started cultivating it in 2004, though he claimed that the plaintiff his brother, took his own 5 acre piece of land together with his 4 acres.

He prayed the court to order the plaintiff to give up his land, title No. 1633, because the plaintiff had his own land, title NO. 1632, which he has eventually sold and moved to Loitokitok, in 2004.

Several questions were put to the defendant to which he said that the plaintiff has already sold his land to 3 people. The defendant answered further that he lived in Elburgon with his children for many years, but he has now moved back to Githunguri.

The defendant called two witnesses, one Dauglas Muiruri Muthoka who identified the plaintiff and defendant as his brothers.

He asserted that the land in question belongs to the defendant Ndung'u Muthoka. That it was the portion subdivided to him by the clan after the death of their father. He stated further that the plaintiff who had 5 acres of land has sold it and moved to Loitokitok.

The defendant's 2nd witness, Edward Kimani, bought the land which was originally allocated to Githia Muthoka. That before he bought it, there was a case filed by Githia Muthoka against Muiruri Githoka. The court granted the prayer that Muthoka Muiruri held 4 acres of land in L.R No. Githunguri/Gathangari/325, in trust for Githia Muthoka.

I considered the oral evidence on record, as well as the pleadings and the exhibits produced in court. Though the parties agreed to file written submissions I did not find such submissions in the court file.

That notwithstanding, what is clear in this dispute is that both Githunguri/Gathangari/1632 and 1633 were subdivisions from a title Githunguri/Gathangaru/1574. Reading through the judgment of Ransley, Commissioner of Assize, (as he then was), in HCC Misc. Application No. 2453 of 1981, a copy of which

was produced by the defendant as Exhibit B, pages 3 and 4 of that judgment gives the history of the original 23 acre piece of land and how the sub-divisions were effected. The judgment goes on at page 5 to say that no application has ever been made to set aside the order of the court effecting the sub-division of the original 23 acres. What there has been are proceedings between the plaintiff and defendant, and indeed their other brothers, in which they want to take land from one another.

So in HC. Misc. 2452 of 1982, the court declared that Muiruri Muthoka "A" held 4 acres out of Githunguri/Gathangari/325 in trust for Githia Muthoka, one of his brothers and a subdivision was effected which produced 2 titles, i.e. 1574 and 1575. Again in HCCC No. 96 of 1985, the court granted the declaration that Muiruri Muthoka held 4 acres out of land No. L.R Githunguri/Gathngari/325 in trust for his brother Ndung'u Muthoka, who moved to effect the transfer, and got a title deed in his name, being L.R. Githunguri/Gathangari/1633.

Evidence showed that the orders in HCCC No. 96 of 1985 were set aside, but this was after the subdivisions had been effected and different parcel numbers given. Muiruri Muthoka was given unconditional leave to defend that suit, file defence within 15 days but there is no evidence that he do so.

The judgment which resulted in Ndung'u Muthoka getting the 4 acres of land which he registered as Githunguri/Gathangari/1633, was delivered on 5th March 1986, but subsequently set aside on 25.6.1986, with unconditional leave to Muiruri Muthoka, to defend the suit after filing a defence within 15 days. The defence was filed, in which Muiruri Muthoka denied the existence of trusteeship, and said he was the sole owner of Land Githunguri/Gathangari/325. That defence was, however, not canvassed as the suit was withdrawn by Ndung'u Muthoka on 11.1.88.

I need to point out at this stage that two suits were consolidated for hearing with this present one (HCCC No. 964 of 1988). These were:-

HCCC No. 2452/81, the one in which the court directed the sub-division of Githunguri/Gathangu/325, to enable 4 acres of land thereof to be transferred to Githia Muthoka. At the time, the parcel 325, was registered in the one of Muiruri Muthoka, but subdivision and transfer caused 2 titles to come out of 325, these were Githunguri/Gathangu/1575, and Githunguri/Gathangu/1574.

It was Githunguri/Gathangaru/1574, which was registered in the name of Muiruri Muthoka and which was later sub-divided by the ex parte judgment of 5.3.86, in HCCC No. 96 of 1985. According to a copy of the green card found in the file, Ndung'u Muthoka was registered as owner of 4 acres, and his land became L.R Githunguri/Gathangaru/1633, and Muiruri Muthoka got 5.2 acres and was registered as owner of Githunguri/Gathangaru/1632.

There is also evidence in the suits, as consolidated that Muiruri Muthoka sub-divided his land No. 1632 further to Josephine Nduta, who became registered on Githunguri/Gathangari/1848, and he remained with the portion L.R No. Githunguri/Gathangari/1847.

When I considered the oral evidence as well as the evidence in the 3 suits as consolidated, I found that the piece of land No. L.R Githunguri/Gathangaru/1633 and 1632, came from Githunguri/Gathangaru/1574, and not Githunguri/Gathangu/325. To this effect therefore, the claim by Ndungu Muthoka of 4 acres piece of land in Githunguri/Gathangaru/325, in HCCC No.96 of 85 was misconceived because that tile had been closed upon subdivision following HCCC No. 2452 of 1981.

I have established from the cases as consolidated that land title No. Githunguri/Gathangu/325, was family land.

To come back to the plaintiff's prayers in HCCC No. 964 of 1988, I find myself unable to direct the defendant Ndung'u Muthoka to transfer land parcel No. Githunguri/Gathangari/1633 to the plaintiff Muiruri Muthoka because, the same was no excised from land title Number L.R Githunguri/Gathangari/325, as claimed by the plaintiff, but from title No. L.R Githunguri/Gathangari/1574. Because fo this, I cannot declare that land title No.

Githunguri/Gathangari/1633 belongs to the plaintiff, neither can I direct the Land Registrar, Kiambu to cancel and or revoke the title issued in the name of Ndung'u Muthoka, the defendant, in respect of L.R No. Githunguri/Gathangari/1633.

Finally, I decline to grant an injunction order "restraining the defendant, his servants and or agents and employees from using, selling interfering or otherwise disposing of land title No. L.R Githunguri/Gathangari/1633.

Because the plaintiff has lost the suit, I cannot award him any "**mesne profits**" as prayed.

As this suits involves family members I have decided that each party should pay their own expenses occasioned by these proceedings.

Dated at Nairobi this 14th day of July, 2005.

JOYCE ALUOCH

JUDGE