



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU
Civil Suit 13 of 1996

M'RUKUNGA M'MBOROKI PLAINTIFF

VERSUS

JUSTUS M'INOTI M'MWAMBA 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

By a plaint dated 30.1.1996, filed in court the next day, the Plaintiff sought

- (a) A declaration that the transfer of land Parcel No.Nyaki/Thuura/1911 to the 1st defendant was illegal and hence null and void**
- (b) An order that the 1st defendant Justus M'Inoti M'Mwamba's name be cancelled from the above named parcel of land.**
- (c) An order that the 1st defendant herein do retransfer back to the Plaintiff the above title and in default the same be done through the Executive Officer of the court.**
- (d) Costs.**

Plaintiff's averments were that he was the registered owner of the Land Parcel No.Nyaki/Thuura/1911 which he occupied since 1979 when he purchased it from one M'Muguongo M'Maitai. That in 1989 the 1st defendant through deceit, fraud forgery and mis-presentation transferred the land to the 1st defendant. Plaintiff also averred that the Land Registrar Meru positively participated in the process of transferring the said parcel of land to the 1st defendant and thus alleged fraud, deceit, forgery and misrepresentation. Accordingly the Plaintiff joined the Attorney General as 2nd defendant on a vicarious capacity for the wrongful acts of the Meru Land Registrar.

The 1st defendant entered appearance but failed to enter defence. The 2nd defendant entered a defence in which he generally denied the averments in the plaint and sought proof of the facts in the plaint.

A quick glance of the plaint shows that the same was very poorly drawn both in language and substance. The suit was nevertheless up for a hearing on 30.6.2004 when the Plaintiff alone testified and the hearing was adjourned to 14.7.2004 for further hearing after the plaintiff was cross-examined by Mr. Njogu for the Attorney General. On 14.7.2004, the plaintiff called his one witness in the absence of the Attorney General who was not represented.

The substance of the plaintiff's evidence is that in 1979 he started purchasing a piece of land

measuring six acres being part of Land Parcel No.Nyaki/Thuura/380 from one M'Mwongo M'Maitai. He took possession of it immediately and started development on it. The process of purchase ended in 1986 when he obtained a title to the land sold to him, which became registered then as parcel No.Nyaki/Thuura/1911. In the meantime, on 23.2.90, there appeared in the Official Gazette notice No.665 an advertisement which stated thus:-

“Whereas M'Muguongo M'Maitai..... is registered as Proprietor of that piece of land known as parcel No.Nyaki/Thuura/1911,..... and whereas the Senior Resident Magistrate's court at Meru, in Civil Suit No.203 of 1980, has ordered that the said piece of land be transferred to Justus M'Inoti M'Mwambia,..... And whereas the Executive Officer of the court has, in pursuance of an order of the said court, executed a transfer of the said piece of land in favour of Justus M'Inoti M'Mwambia.....notice is given that after expiration of 30 days from the date hereof, provided no valid objection has been received within that period, I intend to dispense with the production of the said land title and will proceed with the registration of the said instrument of Transfer and issue Land Title deed to the said Justus M'Inoti M'Mwambia and upon such registration, the land title deed issue earlier to the said M'Muguongo M'Maitai shall be deemed to be cancelled and of no effect.

Dated the 23rd February,1990

J.GATHIGIRA

LAND REGISTRAR

MERU DISTRICT”

The Plaintiff's evidence is to the effect that he was not a party to the SRMCC No.203 of 1980 in which orders were made against one M'Muguongo M'Maitai. Nor was the order made against him, the plaintiff. He also testified that the Gazette Notice quoted above was not directed at him although the piece of land it concerned was his land. The plaintiff also testified that by 1999 when the above Gazette notice was issued, it was him and not M'Muguongo M'Maitai who was the registered owner of parcel No.Nyaki/Thuura/1911. That accordingly the notice was invalid and of no legal effect so that the transfer of the land to Justus M'Inoti after the above notice expired, was illegal and void. There is evidence on record also that when parcel No.Nyaki/Thuura/308 then registered in the name of M'Muguongo M'Maitai, was sub-divided it resulted into two parcels – i.e Nyaki/Thura/1911 which was transferred to the Plaintiff and Nyaki/Thuura/1912 which remained in the ownership of M'Muguongo M'Maitai.

Neither party produced the proceedings and judgment of Meru RMCC No.203 of 1980 although the Attorney General promised to do so. So the court could not appreciate the effect of the judgment therein. Nor is there evidence before this court as to how the result of that case related and legally affected the plaintiff herein. If the judgment bound the plaintiff in any way, it is likely that the defendants would have pointed that out not only in the written defences to be filed or actually filed against the plaintiff's claim, but also in the actual evidence to be or given in court in defence of the case. But as things happened, the 1st defendant failed to file his defence after filing his appearance and the 2nd defendant failed to plead any such defence in the written defence and failed to raise the same during the hearing of the case. It is not clear from the evidence on record that the plaintiff was aware of the aforementioned Gazette Notice No.665 dated 23.2.1990. If plaintiff was aware of the same, then the court would expect the defendants to raise such awareness and failure by him to plaintiff file objection against it, as a defence against the plaintiff. However, the defendants did not raise such defence and the court will accordingly assume that the plaintiff was not made aware of the notice.

Turning now to the issue before me, the plaintiff's case is that he was not a party in Meru RMCC No.203 of 1980 whose judgment and orders were not as well directed at him. How then could the effect of the judgment be allowed to affect him by depriving him of registered land, noting at the same time that the parcel of land which at the material time was registered in M'Muguongo M'Maitai, to whom Gazette

Notice was directed, was Nyaki/Thuura/1912 not Nyaki/Thuura/1911?

Taking into account the evidence before me and noting as well that the defendants did not, really defend the case, it is my view that the plaintiff has established his case on the balance of probability. I find and hold that the plaintiff was not a party in Meru RMCC No.203 of 1980 and that the orders made there under, whichever they were, did not affect the Plaintiff's rights of ownership of a piece of land which he had purchased since 1979 and the possession of which he had taken since then. I also find and hold that the Legal Gazette Notice No.665 aforementioned was not directed to nor served on the plaintiff and should not be held to affect him. I finally also find and hold that the transfer of parcel No.Nyaki/Thuura/1911 from the ownership of the plaintiff to that of the 1st defendant, Justus M'Inoti M'Mwambia was unlawful and unjustified as against the plaintiff. I also hold that the transfer was invalid and therefore void. I accordingly make the following final orders:-

ORDERS

- (a) A declaration that the transfer of parcel No.Nyaki/Thuura/1911 by the Meru Land Registrar was illegal and null and void is hereby made.**
- (b) The registration of the transfer of Land Parcel No.Nyaki/Thuura/19 in the name of Justus M'Inoti M'Mwambia on 16.11.1989, is hereby ordered cancelled.**
- (c) Restoration of the registration of Nyaki/Thuura/1911 in the name of M'Rukunga M'Mboroki ID No.8859575 or any other replacement of the said Identification Document, is hereby ordered forthwith.**
- (d) Costs of this suit are to the plaintiff.**

DATED AND DELIVERED AT MERU THIS 15th DAY OF SEPTEMBER,,2005

D. A. ONYANCHA

JUDGE