



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 63 OF 2015**

**RONALD GITOBU MWORIA.....PLAINTIFF**

*(Suing as the personal representative of the Estate of*

*Francis Arithi Mworira- deceased)*

**VERSUS**

**THE PRINCIPAL SECRETARY,**

**MINISTRY OF LANDS, HOUSING AND**

**URBAN DEVELOPMENT.....1<sup>ST</sup> DEFENDANT**

**THE PRINCIPAL SECRETARY,**

**MINISTRY OF FINANCE.....2<sup>ND</sup> DEFENDANT**

**THE CHIEF LANDS REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In the Amended Complaint dated 10<sup>th</sup> September, 2019, the Plaintiff averred that the late Francis Arithi Mworira (*deceased*) was and still is the lawful registered owner of land known as L.R. No. 21990 (IR No. 72055) and L.R. No. 21991 (IR No. 72050) (*the suit property*).

2. It was averred by the Plaintiff that the late Francis Mworira (*deceased*) had been enjoying quiet possession of the suit property until sometimes in the year 2009 when he discovered that some people unknown to him had put up a fence around the whole area, including the suit property and that he later on learnt that it is the 1<sup>st</sup> Defendant who had put up the said fence.

3. The Plaintiff finally averred that he filed a Judicial Review Application number 356 of 2009 in the High Court at Machakos; that in a Ruling delivered on 29<sup>th</sup> September, 2014, the court dismissed the said Application on the ground that Judicial Review proceedings would not adequately address the issue at hand which was the ownership of the suit property and that the Plaintiff was illegally issued with an alleged Allotment Letter to the said properties by the 3<sup>rd</sup> Defendant way after the same land had been allocated to the deceased.

4. The Plaintiff has prayed for the following prayers in the Amended Complaint.

*a) A declaration that the Estate of Francis Arithi Mworira (deceased) is entitled to exclusive, unimpeded right of possession and occupation of all the suit properties and that the Defendants are accordingly trespassers on the same.*

*b) An order revoking the certificate (sic) the Letter of Allotment issued by the 3<sup>rd</sup> Defendant to the 2<sup>nd</sup> Defendant and vesting the registration of title in the Plaintiff.*

*c) That a permanent injunction do issue against the Defendants whether by themselves, their agents, servants, employees and/or representatives stopping them from trespassing on the suit property or interfering with it whatsoever.*

d) *General Damages for trespass.*

e) *In the alternative and without prejudice to the above an order directed at the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to compensate the Estate of Francis Arithi Mworira (deceased) for the land illegally acquired for their development needs without any legal authority.*

f) *Costs of the suit.*

g) *Any other relief this Honourable Court deems fit to grant.*

5. In its Ruling dated 19<sup>th</sup> November, 2017, the court allowed the Attorney General to file a Defence on behalf of the Defendants. The said Defence was to be filed and served on the Plaintiff within fourteen (14) days of the Ruling. The said Defence was filed on 8<sup>th</sup> December, 2017.

6. In the Defence, the Defendants averred that the suit properties belong to the Government and are designated for the purpose of developing low cost housing units; that the fencing around the suit property was done to safeguard the public interest and that the title documents in possession of the Plaintiff were obtained by the deceased fraudulently.

7. This matter proceeded for hearing on 1<sup>st</sup> October, 2020. Although the Attorney General was served with a hearing notice, none of the Defendants or their representative attended court. The Plaintiff, PW1, informed the court that he is the son of the registered proprietor of L.R. No. 21990 and L.R. No. 21991, who is now deceased.

8. PW1 informed the court that although his late father is the registered proprietor of the suit properties, the 1<sup>st</sup> Defendant fenced off the said properties in the year 2009 and that the 1<sup>st</sup> Defendant did not have a justifiable reason to fence off the suit properties. PW1 produced in evidence the Grant that was issued in respect of L.R. No. 21991 and L.R. No. 21990 in favour of the late Francis Arithi Mworira on 3<sup>rd</sup> December, 1996.

9. The Plaintiff also produced in evidence the photograph showing the fence that was put up by the Defendants, the demand letter and the Ruling in Machakos Miscellaneous Civil Application number 356 of 2009.

10. In his submissions, the Plaintiff's advocate submitted that the Plaintiff is the registered proprietor of the suit properties; that under Section 26(1) of the Land Registration Act, the Plaintiff is the absolute and indefeasible owner of the suit properties and that the Defendants' pleadings do not disclose any fraud and or misrepresentation on the part of the Plaintiff.

11. Counsel submitted that no evidence was produced by the Defendants to prove that the two suit properties were reserved for public purpose prior to the Plaintiff acquiring the titles; that the Defendants have not tendered any Letter of Allotment that was issued in favour of the Defendants and that in the event, the Plaintiff's titles which were issued on 1<sup>st</sup> March, 1995 takes precedence over any Letters of Allotment that could have been issued subsequently. Counsel relied on several authorities which I have considered.

12. The evidence produced in this court shows that the late Francis Arithi Mworira (*deceased*) was issued by the Commissioner of Lands, on behalf of the President, with two Grants for L.R. No. 21990 and 21991. The two Grants were issued by the then Commissioner of Lands on 3<sup>rd</sup> December, 1996 and registered in favour of the said Mr. Mworira on 8<sup>th</sup> January, 1997.

13. The Grants that were issued to the deceased are governed by the Registration of Titles Act (*repealed*). Section 23(1) of the said Act provides as follows:

*“(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”*

14. The Defendants alleged in their Defence that the suit properties were reserved for the construction of low cost housing by the government, and that they were not available for allocation. The Defendants averred that the two Grants that are in possession of the Plaintiff were fraudulently acquired.

15. It is trite that the particulars of fraud must be pleaded and proved by a party alleging the same. Order 2 Rule 10(1) (a) of the Civil Procedure Rules provides as follows:

*“10. (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-*

*(a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies.”*

16. The Defendants in this matter did not particularize fraud or misrepresentation in their Defence. Indeed, the Defendants did not produce any evidence to prove the allegations of fraud as against the Plaintiff or the deceased.

17. In the case of **Jennifer Nyambura Kamau vs. Humphrey Mbaka (2013) eKLR**, the Court of Appeal held that under Section 109 of the Evidence Act, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.

18. Even if it is true that the Defendants were allocated the suit properties, if the said allocation was done after the issuance of the two titles to the Plaintiff had been done, the said allotment is null and void. This is the position that the Court of Appeal took in the case of **Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 Others (2015) eKLR** in which it held as follows:

*“The legal effect of the registrations made in 1907 and 1911 was to convert the suit property at that time from unalienated government land to alienated government land with the consequence that the suit land became private property and moved out of the ambit and confines of the GLA. This made the suit property unavailable for subsequent allotment and alienation of the Commissioner of Lands or the President of Kenya.”*

19. Considering that the Plaintiff is in possession of titles in respect of the suit properties, and in the absence of evidence to show that the said parcels of land were acquired fraudulently or by misrepresentation, it is my finding that the Plaintiff has proved his case on a balance of probabilities.

20. For those reasons, I allow the Amended Plant dated 10<sup>th</sup> September, 2019 as follows:

***a) A declaration be and is hereby issued that the Estate of Francis Arithi Mworira (deceased) is entitled to the exclusive, unimpeded right of possession and occupation of all the suit properties known as L.R. Nos. 21990 and 21991 and that the Defendants are accordingly trespassers on the same.***

***b) That a permanent injunction do issue against the Defendants whether by themselves, their agents, servants, employees and/or representatives stopping them from trespassing on L.R. Nos. 21990 and 21991 or interfering with the suit properties in any manner whatsoever.***

***c) The Defendants to pay the costs of the suit.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2021.**

**O.A. ANGOTE**

**JUDGE**