



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2482 OF 1996

MAAMI NDUNGI & OTHERSPLAINTIFFS

VERSUS

BENARD KIONGO NJAUDEFENDANT

JUDGMENT

The disputed land herein is Ndumberi/Ndumberi/282 measuring 3.7 acres. It was originally registered in the name of four (4) proprietors, namely Maami Ndungi, Marara Ndungi, Munji Ndungi and Njau Ndungi. The registration was in 1958.

Of all these proprietors, the court was told only Maami Ndungi – the first plaintiff was alive; the rest having died.

From the proceedings, a dispute between the parties arose when they wanted to sub-divide the land so that each of them gets title to his own portion. The court was told since then there have been various disputes and that the present case was only but one of them. Here, the plaintiffs sued the defendant on 4th October 1996 as legal representative of his fathers estate, to claim from him the following: namely;-

- (a) a declaration that the transaction which resulted in the subdivision and transfer of Ndumberi /Ndumberi/282 to parcels Ndumberi/Ndumberi/1458 and Ndumberi/Ndumberi/1459 was fraudulent and therefore null and void.
- (b) an order that the Land Registrar Kiambu do rectify the Register by canceling the sub-division and transfer of L.R. No. Ndumberi/Ndumberi/282 and reverting the parcel to the original owners as proprietors in common.
- (c) General damages
- (d) Costs of the suit
- (e) Any other relief as the Honourable Court may deem just under the circumstances.

A defence filed to the case by the defendant denied that any fraud was committed and/or that the case was res judicata, the matter in dispute having been heard and finalized by the Resident Magistrate in Kiambu Civil Suit Number 53 of 1990.

The defendant further stated that he had no locus standi in the matter as the suit was still registered in the name of his late father.

The case was heard on 21st November 2001 and 10th July 2002 when parties appeared and testified therein. The plaintiffs were represented by Joseph Ndungu Munji who gave evidence that during 1990 a case was filed in Kiambu court in respect of this matter by the defendant against the first plaintiff but that later all the other plaintiffs were enjoined.

That in that case, the defendant wanted the land to be registered in his name. He said he did not know while in court then that the suit land had already been subdivided into two parts and that the plaintiffs discovered this in 1991.

That the new titles discovered were Ndumberi/Ndumberi/1458 and 1459 registered in the names of the plaintiffs and the defendant respectively. According to this witness, the plaintiffs were not informed when the land was being sub-divided.

The witness stated that in fact titles issued – Ndumberi/Ndumberi/1458 and 1459 bore the names of Marion Mungai and Njeri Mungai who were not known to the plaintiffs. That in any case, these title numbers were given in 1986 before the suit land was sub-divided and this is why the plaintiff's discovered there was a fraud.

The witness said there were no green cards in respect to the subdivision of the suit land.

That even the mutation forms the defendant submitted to the Land Registrar Kiambu for the sub-division of the suit land were not approved by the Survey of Kenya, yet there was a sub-division of the suit land with two titles issued.

According to the witness the parties had attempted to have the matter settled at the family level but that the defendant had refused.

He testified that they had no access road on the land and that they had only got one from a neighbour. He prayed that the new titles issued be cancelled and that the plaintiffs be given the right of way. That the suit do succeed with costs.

During cross-examination the witness stated that in the Kiambu case the defendant wanted to grab the plaintiffs land and not to have a share thereof transferred to him.

He also acknowledged that it was later he learned the defendant's father had obtained title to his $\frac{1}{4}$ share of the suit land but he maintained that this title had been issued by fraud.

According to him the defendant/father was entitled to only 0.63 of an acre and not 0.93. He denied the defendant had given the defendant an access road to their portions.

The defendant also testified and said this case was an expansion of a longstanding dispute between the plaintiff's and his late father and by extension to himself.

He said the dispute concerned an attempt by the plaintiff's to dispossess his father of 0.3 of an acre of his share in Ndumberi/Ndumberi/282 and that the dispute started long before the land was partitioned.

That it was his late father who caused the sub-division of the suit land into Ndumberi/Ndumberi/1458 and Ndumberi/Ndumberi/1459 in compliance with Section 104(1) of Chapter 300 Laws of Kenya after the plaintiff rejected official partition of the land.

According to him, it was correct as the plaintiff's witness testified that the suit land was jointly owned by the plaintiffs and the defendant's father on $\frac{1}{4}$ share basis, adding that it had been subdivided along traditional boundaries.

He stated that according to the Register, it measured 3.72 acres and that each of the parties to this case was entitled to 0.93 acres.

The plaintiff's land was registered as Ndumberi/Ndumberi/1458 measuring 2.79 acres while his father's parcel was registered as Ndumberi/Ndumberi/1459 measuring 0.93 acres.

The green card show that the plaintiffs lost nothing hence had no grievance against the defendant's father.

The defendant testified that after the official sub-division it was revealed that there were some coffee trees belonging to the 1st and 2nd plaintiff's on the land belonging to the defendant's father – Ndumberi/Ndumberi/1459 and that this is the portion the first plaintiff was alleging the defendant wanted to grab from the plaintiffs through Kiambu Civil Case No. 53 of 1990.

But according to the defendant the Kiambu case concerned the plaintiff's refusal to sign the mutation form and this is why the Land Registrar signed it on their behalf and because of this part of that case, relating to the signing of mutation forms was discontinued.

That even then the plaintiffs refused to move from the defendant's portion of land and that due to their refusal to sign mutation forms, titles to the respective portions were not issued until 14/5/1990.

That in protest over the issuance of titles, the 1st plaintiff led others in damaging the new boundaries and the access road.

The defendant testified that on 15.4.91 the plaintiff witness registered an injunction against his land through the Kiambu Case No. 53 of 1990 and soon after this witness led other relatives in an attempt to kill him and that is why he was convicted in Criminal Case No. 173 of 1992 for causing the defendant grievous bodily harm.

That thereafter the fraud allegations were concocted to persuade this court to legalize the plaintiff's unlawful occupation of the defendant's land through the nullification of the official partition of Ndumberi/Ndumberi/282.

He denied fraud allegation in paragraph 4 of the plaint and said his father had obtained consent of the Land Control Board Kiambaa to partition his quarter share from Ndumberi/Ndumberi/282.

That the Land Registrar had, from 30/11/93 to 23/5/94 summoned all the parties to his office to show him how the partition should be done and that all the time the plaintiff's witness obstructed the sub-division by claiming the consent had not been issued by the District Officer's Office.

And that at one time he demanded that the share of the defendant's father be reduced to 0.63 of an acre.

This is why, according to the defendant, the Kiambu District Officer intervened and directed the Land Registrar to partition the suit land on 31/10/85.

That this suit has been filed in order to forestall eviction of the plaintiff's from his father's land. That the injunction which is still on his land has hindered the transfer of land Ndumberi/Ndumberi/1459 from his father's name to his name.

The defendant asked this court to dismiss this suit, order rectification of the damaged boundary and removal of injunction from Ndumberi/Ndumberi/1459. In cross examination, the plaintiff defendant stated that he attended the Land Registrar over the question of the partition of the suit land with the plaintiffs always and that letters from the Land Registrar's office were sent to each of the parties. That at one time the plaintiff's witness armed himself and ordered the land officers out of this land.

According to him the land was equitably distributed amongst the brothers.

I have heard and recorded this evidence from the witness. It is straight forward.

The main issue in this case is the fraud allegedly perpetrated by the defendant to subdivide the suit land in

order to grab part of the plaintiff's land.

In an attempt to establish this the plaintiff's witness produced green cards (exhibits 6A & 6B) for parcel numbers Ndumberi/Ndumberi/1458 and 1459 in the names of Marion Mugure Mungai and Lucy Njeri Mungai in a partition carried out in 1986.

But what this witness failed to observe or that he did observe but simply wanted to mislead the court, was that this particular partition was in respect to parcel number 851 while the partition in our case was in respect of parcel number Ndumberi/Ndumberi/282. This, otherwise misguided evidence caused a very substantial crack in the plaintiff's case.

Another issue was whether the sub division of the suit land was done with or without the knowledge of the plaintiffs. The evidence adduced on both sides on this issue is on record. I have considered it carefully and am of the view that the defendant's side had an edge over that of the plaintiff's over this issue.

I watched the demeanour of the parties as they testified and was convinced the plaintiff's did not tell the truth. The defendant testified that the plaintiffs were always at the Land Registrar's office when he asked how the parties wanted the land to be partitioned but it was always the plaintiff's witness who blocked the partition alleging the letter of consent produced as Def-exhibit 2 did not originate from the District Officer's office Kiambu. There was even the evidence of the Kiambu Case No. 53 of 1990 over this.

To my mind the consent was genuine and I favoured the Defendant's evidence to that of the plaintiffs and found that the plaintiffs knew about the partition but ignored it.

The plaintiff's witness hinted in his evidence that the defendant's father was only entitled to 0.63 of an acre from the suit land.

But simple mathematics would show that if the suit land measured 3.72 acres to be shared between 4 proprietors, each would be entitled to 0.93 of an acre.

I think the problem arose here when it was discovered, after the official partition, that some of the plaintiff's coffee plants were found to be on the defendant's side. But this was a problem to be solved by these plaintiffs asking the defendant to pay for the coffee plants or by them offering to pay for that portion instead of wanting to grab it for free by making the false fraud allegations against the defendant.

I think this case against the defendant was malicious and calculated to hinder him from developing his portion of the land. But my advice to the plaintiffs is that this court should not be used this way. I dismiss this suit with costs. The issue of the boundary can be sorted out by the Land Registrar Kiambu.

Delivered this 17th day of July, 2002.

D.K.S. AGANYANYA

JUDGE