



Kambura (Suing as the legal representative of the Estate of Norman Ntongai alias Ntongai Ambu) v Kirema & 3 others (Environment & Land Case 50 of 2018) [2024] KEELC 1829 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEELC 1829 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 50 OF 2018**

CK YANO, J

APRIL 4, 2024

BETWEEN

ALICE KAMBURA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NORMAN NTONGAI ALIAS NTONGAI AMBU) PLAINTIFF

AND

EVANGELINE GATTU KIREMA 1ST DEFENDANT

JOSEPH BUNDI 2ND DEFENDANT

DIRECTOR OF SURVEYS 3RD DEFENDANT

THE HON ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

Introduction

1. The plaintiff instituted this suit vide a plaint dated 4th December, 2018 which was amended on 29th September, 2021 seeking the following orders:-
 - a) An order for a permanent injunction to be issued restraining the defendants, their servants and/or assignees from entering into, invading, trespassing, encroaching, curving out, subdividing or in any other manner whatsoever dealing and/or interfering with the plaintiff's ownership, occupation and possession and use of the land parcel No. Kianjai/Kianjai/7768.
 - b) An order to be issued directing the director of Surveyors to correct or amend the maps involving the ground location of land Parcel No. Kianjai/Kianjai/7768.
 - c) Costs of this suit and interest thereon.



2. The plaintiff's claim was denied by the defendants. The 1st defendant filed an amended defence dated 26th January, 2022 while the 2nd defendant filed a statement of defence dated 17th December, 2019. The 3rd and 4th defendants filed a joint statement of defence dated 23rd May 2022.

The Plaintiff's Case.

3. The plaintiff pleaded that she is the legal representative and administrator of the estate of Norman Ntongai alias Ntongai Ambau (deceased) the registered owner of all that parcel of land known as No. Kianjai/Kianjai/7768 (hereinafter referred to as the suit land) out of which parcel No. Kianjai/Kianjai/7772 has illegally been superimposed. The plaintiff averred that on or about 10th August 2018, the 3rd defendant herein together with armed police officers went to the suit land and attempted to curve out a portion allegedly owned by the 3rd defendant.
4. The plaintiff averred that the 1st defendant sold a portion of parcel No. Kianjai/Kianjai/7772 to the 3rd defendant and unlawfully and without consent superimposed it on the plaintiff's land parcel No. 7768 and are trying to curve out parcel No. 7772 from the suit land. The plaintiff stated that her land has been displaced by the defendants from its correct position on the ground touching the Meru Maua Road and placed it at the rear.
5. The plaintiff stated that the defendants' actions on the suit land are illegal, unlawful and are an infringement of her proprietary rights as enshrined in *the constitution* of Kenya 2010 and are intended to unlawfully displace and or dispossess the plaintiff of her ownership of the suit land. The plaintiff has listed particulars of illegality on the defendants' part as forceful entry and curving out a portion of the plaintiff's land, illegally superimposing land parcel No. 7772 on the plaintiff's parcel No. 7768, forceful encroachment into and grabbing of the plaintiff's land, unlawfully interfering and illegally preventing the plaintiff from enjoying quiet possession of the suit land, and infringing the proprietary rights of the plaintiff over the suit land.
6. The plaintiff contended that the defendant's actions have caused her to suffer great loss and damage as it has interfered with the plaintiff's use, ownership, possession and occupation of the said land.
7. The plaintiff testified and adopted her witness statement filed in court as her evidence in chief and was cross examined and re-examined. The plaintiff's evidence is that she is the registered owner of the suit land which was previously registered in the name of her late husband Ntongai Ambau who had in turn gotten the land from his father, Ambau Ithela who owned the parent parcel No. Kianjai/Kianjai/51.
8. The plaintiff testified that her father in law shared land parcel No. Kianjai/Kianjai/51 to his children, including the plaintiff's late husband who was allocated the suit land whose frontage touched the Meru Maua road while the rear part extended to a feeder road and in which the plaintiff has developed.
9. The plaintiff testified that the 1st defendant is the widow of her late brother in law Richard Kirema (deceased) who was allocated land parcel No. Kianjai/Kianji 7769 which does not touch the tarmac. That the 1st defendant sold parcel No. 7769 to the 2nd defendant. The plaintiff produced the certificates of official searches, Limited grant, "Original" Map sheet for parcel No. 51, a copy of Title deed for LR. No. Kianjai/Kianji/7772, and alleged altered map showing the positions of parcel Nos 768 and 7772 as P exhibits 1 to 6 respectively. The plaintiff wants the court to restore the parcels of land to the original map. She denied knowledge of any succession cause No. 20 of 2015 filed by the 1st defendant and added that she was not aware of a criminal case No. 1172 of 2018 which she termed as fake.
10. The plaintiff admitted that a surveyor came to the land, but was not aware if the surveyor filed a report in court pursuant to a court order.



The 1st Defendant's Case

11. The 1st defendant stated that land parcel No. Kianjai/Kianjai/7768 is registered in the name of Norman Ntongai Ambau (deceased) while land Parcel No. Kianjai/Kianjai/7772 was registered in the name of Kirema Ambau. She averred that there was a court order issued in succession cause No. 20 of 2016 authorizing the 3rd defendant to survey the land with the assistance of the police.
12. The 1st defendant testified as D.W 1 and adopted her statement filed on 7th January, 2020 as her evidence in- chief and was cross examined. The 1st defendant testified that the late M'ambau M'ethera subdivided his land No. Kianjai/Kianjai/51 and gave the plaintiff's deceased husband a portion measuring 0.70 acres being parcel No. 7768 and parcel No. 7772 measuring 0.60 acres which was given to the 1st defendant late husband. The 1st defendant's evidence is that she sold 0.10 acres of land parcel No. Kianjai/Kianjai/7772 to the 2nd defendant who was to share it equally with one Dennis Mwenda Ikuamba, leaving a balance of 0.5 acres which gave rise to land parcel No. KIANJAI/KIANJAI/7769.
13. The 1st defendant testified that she filed a succession cause No. 20 of 2015 in Tigania Principal Magistrate's court in respect of the estate of her deceased husband and was issued with a certificate of grant and awarded the whole of land parcel No. Kianjai/Kianjai/7769. That the court also awarded 0.05 acres of Kianjai/Kianjai/7772 to the 2nd defendant and 0.05 acres to Dennis Mwenda Ikuamba. The 1st defendant produced the title deed for Kianjai/Kianjai 7772, certificate of official search, chief's letter, certificate of confirmation of a grant, ruling, order and copies of proceedings and judgment in Tigania Principal Magistrate court Criminal case No. 1171 of 2018 as D exhibits 1 to 8 respectively.

The 2nd Defendant's Case

14. It is the 2nd defendant's case that he bought 0.10 acres out of land Parcel No. Kianjai/Kianjai/7772 jointly with one Dennis Mwenda Ikuamba from the 1st defendant and were awarded their respective parcels by the succession court in succession cause no.20 of 2016 at the Principal Magistrate court at Tigania. That he sought consent of the land control Board for subdivision. He denied encroaching on the suit land. The 2nd defendant testified as D.W 2 and adopted his statement filed on 7th January, 2020 as his evidence- in chief. He was cross examined and re-examined.

The 3rd And 4th Defendants Case

15. In their defence, the 3rd and 4th defendants also denied the plaintiff's claim. They pleaded inter alia, that the plaintiff's suit is time barred, that the plaintiff lacks locus to file the suit, that no reasonable cause of action is disclosed against the defendants, that the suit is filed without the mandatory notice of intention to sue as per the provisions of section 13A of the [Government Proceedings Act](#) and that no order of Injunction can issue against the 3rd and 4th defendants by virtue of section 16 of the [Government proceedings Act](#). They denied the particulars of illegality attributed to them and averred that if at all they dealt with the suit land, the same was lawful and in exercise of their statutorily prescribed powers. The 3rd and 4th defendants did not call any witness.

Written Submissions

16. At the close of both cases, the parties through their advocates on record filed written submissions which I have read and I need not reproduce the same herein.



Analysis And Determination

17. The court has considered the pleadings, the evidence adduced and the submissions. The issues for determination are-;
 - i. Whether the plaintiff proved that there was alteration of the map of the suit land.
 - ii. whether the plaintiff is entitled to the reliefs sought.
 - iii. who bears the costs.

Whether the plaintiff has proved that there was an alteration of the map of the suit land

18. From the material on record, the gist of the plaintiff's case is that she is the registered owner of the land parcel known as Kianjai/Kianjai/7768 which was previously registered in the name of her late husband Ntongai Ambau who had inherited it from his father one Ambau Ithela who initially owned the parent land parcel No. Kianjai/Kianjai/51. The plaintiff states that her deceased father in law shared his land to his children and further identified to all his children the ground positions of their respective parcels/ portions. The plaintiff contends that her land parcel No. Kianjai/Kianjai/7768 which was 70 points was demarcated with the frontage touching the Meru Maua road and the rear part extending to the feeder road.
19. It is the plaintiff's case that her late husband and his brother Richard occupied their respective parcels without any complaints. That the plaintiff and her family have occupied and used the suit land Kianjai/ Kianjai/7768 since 1983 when she got married and the 1st defendant and her family have also been using the portion Kianjai/Kianjai/7769 peacefully,
20. The plaintiff's contention is that recently, the 1st defendant curved out 10 points out of her parcel No. Kianjai/Kianjai/7769 which created parcel No. Kianjai/Kianjai/7772 which is 10 points which she sold to the 2nd defendant and another person. That subsequently, the 2nd defendant entered the plaintiff's land parcel No. Kianjai/Kianjai/7769 claiming that was the ground position of the parcel No. Kianjai/Kianjai/7772 and threatened to demolish the plaintiff's houses and development thereon.
21. The 1st defendant who is the administratrix of the estate of Kirema M'Ambau (deceased) maintained that she only sold a portion that was given to her later husband by her late father in law and that the process was undertaken through a succession process.
22. There is no dispute that the plaintiff and the 1st defendant are related by virtue of being the widows of the sons of the late M'Ambau M'Ethera, namely Ntongai Ambau and Kirema Ambau. It is also not in dispute that the family patriarch, the late M'Ambau M'Ethera owned the parent land parcel No. Kianjai/Kianjai/51 which he later subdivided and gave the resultant portions to his sons, Ntongai Ambau (deceased) who was given LR no. Kianjai/Kianjai 7768 while LR NO. Kianjai/Kianjai/7772 was given to Kirema Ambau (deceased).
23. The evidence on record confirmed that the 1st defendant filed Tigania Principal Magistrate succession cause No. 20 of 2015 in respect of the estate of her deceased husband Kirema Ambau and obtained a certificate of confirmation of grant. It is therefore apparent that the 1st defendant acquired the land which was given to her late husband by the 1st defendant and plaintiff's father in law, through transmission. There is also no dispute that the 2nd defendant and another party purchased a portion of land measuring 0.10 acres from the 1st defendant. The 1st and 2nd defendants have clearly stated that they have no interest in LR. NO. Kianjai/Kianjai 7768 belonging to the plaintiff.



24. From the evidence on record, I am not convinced that the plaintiff has proved her allegations that land parcel No. Kianjai Kianjai 7772 has been superimposed on the suit land. In any case, if there was a boundary dispute, the plaintiff ought to have invoked the rightful provisions of the law and seek the services of the land registrar and the District surveyor as suggested by the Executive Officer in his report dated 17th July, 2019 to resolve the said dispute by marking out the boundaries of the suit lands. It is trite law that he who alleges must prove. The burden of proving the claim was the plaintiff's.
25. From the material on record, and in particular the proceedings and judgment in Tigania Principal magistrate's court criminal case No. 1172 of 2018, it is clear that the plaintiff and others were charged with inter alia the offence of obstructing a surveyor from surveying the 1st defendant's land parcel No. Kianjai/Kianjai/7772. The plaintiff and the other accused persons were found guilty of the said offences and were convicted. It therefore beats logic that the plaintiff who prevented a surveyor from surveying the suit parcels with a view to establishing their boundaries would turn around and ask this court to direct the 3rd defendant to amend the map involving the position of the suit parcels of land without having laid a clear basis for doing so. The surveyor's report filed herein indicates that each of the parcels of land is registered in the names of the plaintiff and the 1st and 2nd defendants. The county Land Registrar was clear that all the parcels are in the map and the ground and that all the parties can be accommodated on the ground. This in my view dispels the superimposition alleged by the plaintiff herein.
26. It is therefore my finding that the plaintiff has not proved her case on a balance of probabilities and is not entitled to the orders sought.
27. Consequently, the plaintiff's suit is hereby dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF APRIL 2024

In the presence of

Court assistant – Tuppet

Kiogora Nganga for plaintiff

Ms Mugo holding brief for Omari for 2nd defendant

No appearance for 1st defendant

No appearance for A.G for 3rd and 4th defendants

C.K YANO

JUDGE

