



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 587 OF 2017**

**ELIUD KUNGU MUNYINYI.....PLAINTIFF**

**VERSUS**

**THE CHIEF LAND REGISTRAR.....1<sup>ST</sup> DEFENDANT**

**DIRECTOR OF SURVEY KENYA.....2<sup>ND</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**NDURAHU MUNYINYI.....1<sup>ST</sup> INTERESTED PARTY**

**JUDGEMENT**

By a Plaintiff dated 6<sup>th</sup> June 2017, and filed on 7<sup>th</sup> June 2017, the Plaintiff sought for the following orders;

- 1. That the transactions leading to subdivision of KIAMBAA/ RUAKA/233, and the merging of KIAMBAA/ RUAKA/449, with KIAMBAA/RUAKA 425, to make KIAMBAA/RUAKA/450, are null and void and be cancelled.*
- 2. The Director of Survey Kenya do show whether the issues he raised with the Land Registrar, Kiambu as to the propriety of the actions of the Registrar concerning the transactions above were ever clarified satisfactorily.*
- 3. The purported sale of part of KIAMBAA/RUAKA 233, be cancelled as null and void.*
- 4. The Land Registrar to register the beneficiaries as set out in the rectified Certificate of Confirmation of Grant dated 12<sup>th</sup> July 2016.*
- 5. Any other relief the court deems proper fair and just.*
- 6. Cost of the suit.*

In his statement of claim, the Plaintiff stated that he is one of three Administrators appointed in **High Court Succession Cause No 671 of 1990**, for the Estate of **Ndurano Igogo(Deceased)** which he replaced his deceased father and is now a co-administrator with one **Ndurano Munyinyi** alias **Edward Ndurano Munyinyi** and **Robert Chege Ndurano**. **LR Kiambaa/Ruaka 233**, was the only parcel remaining for the deceased **Igogo Ndurano**, who died on **8<sup>th</sup> October 1975**. That **Ndurano Igogo** was issued with title No. **Kiambaa/Ruaka/233**, in **1958** and the land later subdivided into **Kiambaa/Ruaka/448** and **449** and then combined **448** with **425** and named **Kiambaa/Ruaka/450**, in circumstances which are a mystery to the family of **Ndurano Igogo** and which the Land Registrar and Director of Survey have been unable to explain.

That the Plaintiff would like to cause subdivision and be issued with titles, but it is impossible to know the registration of the land they live in. That there are alleged buyers of the land to wit **Peter D Silva** who claims to have bought part of it from the second administrator **Ndurano Munyinyi** and **Francis Njaga Murima**, who claim to have bought part of combined **KIAMBAA/RUAKA 233** and **425**. Further that they have tried to get information on sub-division of **KIAMBAA/RUAKA 233**, from **1<sup>st</sup>** and **2<sup>nd</sup>** Defendant since the death of **IGOGO NDURANO**, but he could not take action until he was appointed one of the Administrator on **12<sup>th</sup> July 2016**.

That the beneficiaries cannot take their rightful shares of the estate as indicated in the Rectified Certificate of Confirmation of Grant dated **12<sup>th</sup> July 2016**.

The suit is contested and the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a defence on **12<sup>th</sup> July 2017**, and denied all the allegations made in the **Plaint**. That the deceased was never the registered proprietor of **LR NO KIAMBAA/RUAKA 233 as alleged**. It was their contention that the Plaintiff is not entitled to the prayers sought.

The matter proceeded by way *viva voce* evidence on the **20<sup>th</sup> May 2019**, wherein the Plaintiff testified for himself and did not call any witness. The Defendants called 2 witnesses and the Interested Party also testified for himself.

#### **PLAINTIFF'S CASE**

**PW1 - Eliud Kungu Munyinyi**, the Plaintiff herein adopted his witness statement dated **6<sup>th</sup> June 2017**. He testified that he was an administrator of the estate **Ndurano Igogo**, who was his grandfather. That one of the parcel of land is **L.R KIAMBAA/RUAKA 233**. **That upon confirmation of the grant, they went to the lands office in Kiambu where they were told that the said Land Reference did not exist as it had been subdivided and they were issued with a Certificate of search. . That the land was subdivided into Kiambaa/Ruaka /448 & 449. That they did not know how subdivision was done and he was also not aware how the title Kiambaa/Ruaka 233, was subdivided. That the Director of Survey had refused to survey the land as the subdivision was irregular. Further that they had written a letter to the District Surveyor which was not responded to and no explanation was provided. He produced his documents in his list of documents as exhibits. That the title was never changed or closed.**

That before his grandfather died, they did not have squabbles. It was his testimony that the entry number to **NDURANI IGOGO'S KIAMBAA/RUAKA 233**, was closed on **28<sup>th</sup> November 1956**, and it was before his grandfather's death. That **FRANCIS NJAGA** subdivided the land without their knowledge. Further that **NDURANO MUNYINYI**, was a brother to his father and he lived on the suit property too. He testified that he did not know the acreage that he occupies. He further testified that he followed the matter at the Land Registry and that the letters were addressed to his father who followed the matter with the Interested Party at the Chief Registrar. That document 2A is addressed to **NDURANO MUNYINYI** and Document 2D is also addressed to **NDURANO MUNYINYI**, the Interested Party. That the Surveyor had never come to the ground, but there was a time a Judicial Officer visited the land.

#### **DEFENDANT'S CASE**

**DW1 - John Matheka**, the Land Registrar Kiambu testified that he has not managed to trace any documents in relation to **KIAMBAA/RUAKA 233 and KIAMBAA/RUAKA 448 and 449. That the parcels of land exist but do not have any documentations.**

**That their office is the custodian of the lands documents and that they did not obtain the original documents. That there is Green Card for parcel no 233 where land parcel no KIAMBAA/RUAKA 233, was subdivided and gave rise to 448 and 449, but that there were no Green Cards for 448 and 449. That he has never received any correspondences in relation to parcel of land KIAMBAA/RUAKA 233.**

Further that at the lands office, there are documents in relation to the parcel of land which are mutations, consent from Land Control Board, copy of ID for the proprietor and original title if it had been issued and in the absence of such documents, he would doubt if they were submitted. **That they did not trace the parcel file and the application ought to have been declined until he sees the parcel file. That unless he sees the parcel file, he could not say that the sub-division was non-existent.**

**DW2 Joseph Muchungu** stated that he works as the County Surveyor Kiambu. That the documents required were mutation forms and subdivision of **KIAMBAA/RUAKA 233**, which was done in 1960, but he could not trace the mutation forms that drew the subdivisions.

It was his testimony that if subdivision was done in **KIAMBAA/RUAKA 233**, then a mutation was to be submitted together with consent from Land Control Board and the Land Registrar could not issue title deed without mutation forms and once issued they send them to the Director of Survey which is now a recent development. **That he does not know whether KIAMBAA/RUAKA 233, had been subdivided. If it were, then the documents might be found at Ruaraka. He further testified that after subdivision, there are two numbers that come out. A map can be found, but the documentation are unavailable. That a mutation form is necessary and Land Control Board Consent and a search are needed before subdivision. He further testified that the parcel file cannot be found and he is not aware of any correspondences from the Director of Survey and without the above documents the map cannot be registered.**

#### **1<sup>st</sup> INTERESTED PARTY'S CASE**

**I.P 1- Edward Ndurano Munyinyi** adopted his witness statement. **He stated that he knew KIAMBAA/RUAKA 233, as it belonged to his late grandfather NDURANO IGOGO.** He stated that he did not know the outcome of the High Court Nairobi Succession Case. He testified that **MUNYINYI NDURANO** is his paternal uncle and that they have subdivided the land. That they took the Court Orders to the Lands Office and found that the land had been subdivided and sold. That they did not go to the Land Control Board and he did not sign the mutation forms for subdivision of the land. He further stated that the late **IGOGO** did not sign the mutation forms. He concluded that he lives in the suit land and that he did not know the portion number of the parcel where he lives and was not aware if the land was subdivided further. He was not given explanation of how the subdivision was done. Further that he got the confirmed grant and when he went to the lands office, he found the land had been subdivided and the recipient was **Francis Njaga Murima**.

The Court directed the parties to file written submissions and in line with the said directions, the Plaintiff through the **Law Firm of E.N MUGU & Co. Advocates**, filed their written submissions on the **27<sup>th</sup> October 2020**. While the **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants** through the **Office of The Attorney General** filed their Written Submissions on **23<sup>rd</sup> October 2020**. The Court notes that on **3<sup>rd</sup> December 2017**, the

plaintiff withdrew the suit filed against the 2<sup>nd</sup> Interested Party. Notably, the 1<sup>st</sup> interested did not file any submissions.

Having carefully read and considered, the pleadings by the parties, the evidence adduced and the written submissions, it is the Court considered view that the issue for determination is ***whether the Plaintiff is entitled to the orders sought.***

It is not in doubt that the **L.R. Kiambaa/Ruaka/233** initially belonged to the Plaintiff's grandfather. That from the documents produced in evidence by the Plaintiff, it is clear that there were attempts to have the suit property subdivided and though the Green Card shows that subdivision occurred and title was closed, there is no evidence of the process that was undertaken to finalize the said subdivision. In the various letters produced in evidence by the Plaintiff, it is further clear that the process of subdivision was questioned and that there were documentations that were missing the process that had been followed to enable the subdivision fall through. It is unfortunate that the offices that are responsible for the safe keeping of various documentations that are meant to help the Court and the public at large to arrive at a proper decision do not seem to trace any documents or have any clear path to whatever happened to the alleged subdivision.

If the Court was only to rely on the documents produced in evidence and the evidence of the Defence witness, there would be no doubt in the Court's mind that the transactions leading to the subdivision of **Kiambaa/Ruaka/233**, were to be cancelled and any purported sale declared null and void as there has been no documentation that has been produced to show that the questions raised in the letters produced in evidence were ever clarified and/or due process was followed that resulted in the subdivision. However, there is a registered owner of the said suit property to wit **Francis Njaga Murima**. Though there was an allegations that there is a buyer to wit **Peter Silva**, there are no documents produced in evidence to show that he has any Interest over the suit property.

**Francis Njaga Murima** was initially joined in the suit as an Interested Party. However the case against him was withdrawn upon his demise and therefore it means that he was not allowed to participate in the proceedings. It is the Court's considered view that it cannot make a determination that would interfere with a person's interest over the suit property without affording them an opportunity to be heard as this would go against the Rules of natural justice.

The Kiambu Land Registrar in his evidence stated that he would not make a conclusion that the subdivision did not exist without having the file. It would only have been proper for the Plaintiff to enjoin the Estate of the Late **Francis Njaga Murima** to protect his interest if any over the suit property.

This Court cannot give an order for cancellation of his title without affording him or his estate an opportunity to present his evidence if any and maybe shed some light into the transaction.

In the case of **Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR** the Court cited the case of **Russel vs. Duke of Norfolk [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

*“There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case.” [Emphasis mine].*

Further in the case of **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553** the Court held that:

*“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialization of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.*

It is thus not in doubt that failing to enjoin the estate of the late **Francis Njaga Muria** who was the 2<sup>nd</sup> Interested Party, the Plaintiff created a position where the Court was not able to take his evidence. It therefore follows that the orders sought which are to directly affect the said Estate cannot be issued without affording the said estate an opportunity to be heard. Consequently, the Court finds and holds that the Plaintiff is not entitled to the orders sought.

The Upshot of the foregoing is that the Plaintiff has failed to prove his case on the required standard of balance of probabilities and therefore is not entitled to the orders sought. The Court finds and holds that the Plaintiff's claim as contained in the Plaint dated **6<sup>th</sup> June 2017** is **not merited**, and the same is dismissed with no orders as to costs.

It is so ordered.

**Dated, signed and Delivered at Thika this 15<sup>th</sup> day of April 2021.**

**L. GACHERU**

**JUDGE**

**15/4/2021**

**Court Assistant - Phyllis**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgement** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Mugu for the Plaintiff**

**No appearance for the 1<sup>st</sup> Defendant**

**No appearance for the 2<sup>nd</sup> Defendant**

**No appearance for the 3<sup>rd</sup> Defendant**

**No appearance for the Interested Party**

**L. GACHERU**

**JUDGE**

**15/4/2021**