



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 212 OF 2012

MUSYOKI KALOKI MBUI..... PLAINTIFF

VERSUS

EXPORT PROCESSING ZONES AUTHORITY

(EPZ) ATHI RIVER (K)1ST DEFENDANT

LUKENYA RANCHING AND FARMERS

CO-OPERATIVE SOCIETY LIMITED.....2ND DEFENDANT

JUDGMENT

1. In the Plaint dated 18th June, 2012, the Plaintiff averred that at all material time, he was the registered owner of a parcel of land known as Mavoko Town Block 3/6275 measuring approximately 3.92 Ha (the suit property).
2. The Plaintiff averred that on or about 1st September, 2011, the Defendants, without any colour of right or authority, trespassed on the suit property and fenced the whole parcel of land thus depriving him of the suit property.
3. The Plaintiff has prayed for a declaratory order that the suit property belongs to him and for a permanent injunction restraining the Defendant or his agents from interfering with the suit property. In the alternative, the Plaintiff has prayed for an order that the Defendant purchases the suit property at the current market price of Kshs. 2 million per acre.
4. In the further Amended Defence and counter-claim, the Plaintiff averred that he is the lawful owner of land known as L. R. No. 23967 measuring 301.1 Ha which it acquired from Lukenya Ranching & Farming co-operative Society over twelve (12) years ago and that it has held a title to the land since then and has secured the land by fencing it.
5. In the counter-claim, the Defendants averred that the Plaintiff should be restrained by this court from trespassing on L. R. No. 23961 and dismiss the suit with costs. The Defendant has also prayed for the cancellation of the Plaintiff's title.
6. The Plaintiff filed an Amended Plaint dated 10th March, 2015 in which he joined the 2nd Defendant in the suit. In the Amended Plaint, the Plaintiff pleaded that on 28th March, 1975, he was registered as a member of the 2nd Defendant being member number 499 and that as such, he was allocated plot number 95 which upon survey became parcel of land known as Mavoko Town Block 3/6275 measuring 3.25 Ha.
7. The Plaintiff pleaded that the property known as L.R. No. 23961 purportedly owned by the 1st Defendant consists of his land, Movoko Township Block 3/6275. The Plaintiff reiterated the prayers in the original Plaint.

The Plaintiff's case

8. In his evidence, the Plaintiff, Pw1, informed the court that the suit property originally belonged to Lukenya Ranching and Farming Co-operative Society Limited (the society); that his late father, Joseph Kaloki Mbui, was allocated the suit land by virtue of his membership in the society on 28th March, 1975 and that his father died in 1985.
9. It was the evidence of Pw1 that upon the death of his father, the suit property was transferred to his mother, Tabitha Ngina Kaluki; that his mother was given a membership card and a letter of allocation for the land by the 2nd Defendant and that the letter of allotment is dated 28th February, 1991.

10. Pw1 informed the court that upon the demise of their mother, they sub-divided the land which initially measured 40 acres amongst themselves; that each of his siblings was allocated 10 acres; that his portion of land became to be known as Mavoko Block 3/ 6275 (the suit property) and that the said land measuring approximately 10 acres is in his name.

11. Pw1 stated that the 1st Defendant took possession of his land by fencing it and that he should be compensated for the land. It was the evidence of Pw1 that he is still the registered proprietor of the land to date.

12. In cross-examination, Pw1 stated that the suit property was surveyed in the year 1991; that he could not remember the number that was allocated to the initial 40 acres of land upon survey; that he was not aware that the suit property was part of the land that was allocated to the 1st Defendant and that he was not aware that the 2nd Defendant was paid Kshs. 12,420,000 by the government for the land.

13. It was the evidence of Pw1 that neither him nor his siblings live on the suit property and that he made a complaint to the 1st Defendant in the year 2011.

14. The Machakos County Land Registrar, Pw2, informed the court that the Plaintiff is the registered proprietor of parcel of land known as Mavoko Town Block 3/6375; that the Plaintiff was registered as the owner of the land on 6th December, 2019 and that he was issued with a title deed for the land in the year 2011.

15. In cross-examination, Pw2 stated that the suit property is a sub-division of parcel number 2213 and that she did not check the history of parcel number 2213. Pw2 informed the court that she could not tell if parcel number 6375 was created illegally.

16. The evidence of Pw3 was expunged from the record. Pw4 informed the court that he is a surveyor working with the Ministry of Lands, survey Department, Machakos and that his office prepared a report dated 27th June, 2011 relating to the suit property.

17. It was the evidence of Pw4 that the 1st Defendant's sewerage ponds have encroached on the suit land; that his report shows the extent of the encroachment by the 1st Defendant; that Machakos Town Block 3/6275 (the suit property) is registered under the repealed Registered Land Act and that he does not know when the land was surveyed and registered.

18. It was the evidence of Pw4 that L. R. No. 23961 is registered under the repealed Registration of Titles Act and measures 301.1 Ha; that the said land is registered in favour of the 1st Defendant and that the land borders parcel of land known as Mavoko Town Block 3/6275 (the suit property).

19. Pw 4 informed the court that he did not have documents in respect of L.R. No. 23961; that he notified all the concerned parties about his visit to the disputed land and that the treatment ponds for the 1st Defendant are within L. R. No. 23961, which has been fenced. It was the evidence of Pw4 that he relied on the settlement scheme map from lands office to come up with his report and that he did not know when the 1st Defendant obtained its Deed Plan for L.R. No. 23961.

The Defence Case

20. The Land Registrar, Dw1, informed the court that he was in possession of documents relating to L.R. No. 23961, I.R 89591; that the title for L.R. No. 23961 is in the name of the 1st Defendant and that the Deed Plan for L.R. No.23961 is dated 25th September, 1998 while the grant was registered on 22nd August, 2002.

21. It was the evidence of Dw1 that a Deed Plan is always issued first before the grant; that it is the survey office that gives the L.R. Numbers while issuing Deed Plans and that before the issuance of a Deed plan, a survey plan is usually prepared.

22. The 1st Defendant's senior property officer, Dw2, informed the court that the 1st Defendant is a state parastatal; that the 1st Defendant is the registered proprietor of L. R. No 23962 and that the government acquired the land on behalf of the 1st Defendant vide gazette notice number 2801 and 2803.

23. It was the evidence of Dw2 that the government acquired L.R. No. 23961 on behalf of the 1st Defendant from Lukenya Farmers and Ranching Co-operative Society Limited was paid Kshs 14 million for the land.

24. According to Dw 2, there has never been a dispute between the 1st Defendant and the society over the suit property; that L.R. No. 23961 was as a result of amalgamation of two properties and that the 1st Defendant has never encroached on the Plaintiff's land known as Mavoko Town Block 3/6375 as alleged. According to Dw2, they fenced the entire land in the year 2010.

Submissions

25. The Plaintiff's advocate submitted that the suit property was part of the 40 acres that was allocated to the Plaintiff's late father; that the said land was allocated and beaconed before the government purchased any land from the society and that after the sub-division of the 40 acres, the Plaintiff retained Mavoko Town Block 2/6275 measuring 10 acres.

26. Counsel submitted that the report produced by the surveyor shows that the 1st Defendant had encroached on the Plaintiff's land and that by the 1st Defendant failing to call its surveyors, it had not proved its case.

27. The Defendant's advocate submitted that no documents pertaining to the registration of the property in the name of his late mother have been produced in evidence and that the Plaintiff failed to provide a conclusive account backed by evidence on how Mavoko Town Block 3/6275 came to be and how the 1st Defendant encroached on the land.

28. Counsel for the 1st Defendant submitted that the 1st Defendant proved that the government purchased land for the 1st Defendant in 1991 from Lukenya Ranching and Farming Co-operative Society and that the 1st Defendant gave an account of how L. R. No. 23961 came into existence.

Analysis and Findings

29. The Plaintiff's claim in this matter is that his father (deceased) was a member of Lukenya Ranching and Farming Co-operative Society Limited (the Society); that his late father was allocated land by the society measuring 40 acres and that when his father died, he was succeeded by his wife in the early 1980's.

30. It is the Plaintiff's case that his father's land measuring 40 acres was surveyed as Mavoko Town Block 3/2213 and that the said land was sub-divided and bequeathed to four siblings. According to the Plaintiff, one of the sub-divisions that arose out of the said sub-division is Mavoko Town Block 3/6375 (the suit property)

31. The issue that this court has been called upon to determine is whether the 1st Defendant's land known as L.R. No. 23961 and registered under the repealed **Registration of Titles Act** (RTA) has encroached on parcel number Mavoko Town Block 3/6375 registered under the repealed **Registered Land Act** (RLA)

32. The evidence produced by the Plaintiff shows that the Plaintiff was registered as the owner of parcel of land known as Mavoko Town Block 3/6275 on 21st March, 2011. The evidence produced by the Plaintiff shows that vide a letter of allotment dated 28th February, the society allocated land known as plot "565" to the Plaintiff's mother. The letter of allotment does not have the plan showing the location and extend of the said land.

33. Other than the official search showing that parcel of land number Mavoko Town Block 3/6375 was registered in favour of the Plaintiff in the year 2009, there is no evidence on record to show when the bigger parcel measuring 40 acres was surveyed and sub divided to create the suit property. Indeed, it is not clear to this court the year that parcel number Mavoko Town Block 3/2213 was sub-divided to create parcel number 6375, amongst others.

34. Although the surveyor, Pw4, informed the court that the 1st Defendant's land, L.R. No. 23961 measuring 301 ha, has encroached on the Plaintiff's land parcel number Mavoko Town Block 3/6375, he did not provide any documents to show which survey between L.R. No. 23961 and Mavoko Town Block 3/2213 or 6375 came first.

35. The evidence produced by the Defence shows that the government acquired L. R. No. 23961 for the 1st Defendant from the society vide gazette notices number 2802 and 2803 dated 13th June, 1991. Evidence was produced by the defence showing that the society was paid Kshs. 14,904,000 on 20th September, 1991.

36. The two parcels of land that were acquired by the government on behalf of the 1st Defendants were amalgamated and surveyed as L.R. No. 23961. A Deed Plan was issued for the said land measuring 301 Ha on 25th September, 1998.

37. The evidence before this court shows that before the Plaintiffs land known as Mavoko Town Block 3/6375 was created in the year 2009, the 1st Defendant had already acquired and surveyed L.R. No. 23961. Indeed, to the extent that the 1st Defendant's title has "fixed boundaries", the person who surveyed and created parcel number Mavoko Town Block 3/6375, which has "general boundaries" in the year 2009 should have realized that the said land had already been acquired and surveyed by the 1st Defendant.

38. The 1st Defendant having been allocated L.R. No. 23961 whose history is traceable, and the Plaintiff having failed to show how and when Mavoko Town Block 3/2213 (which was subsequently sub-divided to create Mavoko Town Block 3/6375) was sub divided, it is the finding of this Court that the Plaintiff has not proved his case on a balance of probabilities.

39. For these reasons, the Plaintiff's suit is dismissed with costs. The 1st Defendant's counterclaim is allowed as follows;

a) A permanent injunction be and is hereby issued restraining the Plaintiff, his agents, and /or servants from trespassing on the 1st Defendant's Land Reference number 23961 measuring 301.1 Hectares and from interfering with the said land in any manner whatsoever.

b) The title deed issued to the Plaintiff in respect of parcel of land known as Mavoko Town Block 3/6275 be and is hereby cancelled to the extent of its encroachment on L.R No. 23961.

c) The Plaintiff to pay the costs of the suit and the counter-claim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 3RD DAY OF FEBRUARY, 2022.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Amunga for the Plaintiff

Mr. B. M. Nzei for the Defendants

Court Assistant: Okumu