



**Gatumu v The County Surveyor, Kirinyaga County & 2 others (Environment & Land Case 195 of 2016) [2022] KEELC 3976 (KLR) (6 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3976 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 195 OF 2016**

**EC CHERONO, J**

**MAY 6, 2022**

**BETWEEN**

**SYMON KAMAKU GATUMU ..... PLAINTIFF**

**AND**

**THE COUNTY SURVEYOR, KIRINYAGA COUNTY ..... 1<sup>ST</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR, KIRINYAGA COUNTY 2<sup>ND</sup> DEFENDANT**

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

**JUDGMENT**

1. The Plaintiff instituted the suit herein by way of a Plaint dated November 16, 2016 whereby he seeks that judgment be entered against the Defendants for: -
  - a. A declaration by the Court that the said alterations to the Mutation form of land Reference number Kabare/Mutige/173 and the Surveyor Map Sheet No 5 (121/IV/22/6) for Mutige Sub-location, Kabare Location, Kirinyaga District, Nyeri Province are unlawful fraudulent and irregular.
  - b. A declaration by the Court that the registration of the said altered Mutation Form of land reference number Kabare/Mutige/173 and the Survey Map Sheet No 5 (121/IV/22/6) for Mutige Sub-location, Kabare Location, Kirinyaga District, Nyeri Province by the Land Registrar at Kirinyaga was illegal and as such void for all legal purposes.
  - c. A declaration by the Court that the purported excise of ¼ acre portion of land from land reference number Kabare/Mutige/173 to land reference number Kabare/Mutige/156 is a nullity ab initio and of no legal effect.
  - d. A declaration by court that any survey plans produced by the Director of Surveys subsequent to the said illegal and fraudulent alterations of the Mutation Form and Survey Map Sheet No 5



(121/IV/22/6) for Mutige Sub-location, Kabare Location, Kirinyaga District, Nyeri Province are void and of no legal effect.

- e. An order of annulment and cancellation of the illegal registration of change of common boundary registered as ACS/51/CEN/V/10 on Survey Map Sheet No 5 (121/IV/22/6) for Mutige Sub-location, Kabare Location, Kirinyaga District, Nyeri Province.
  - f. An order of annulment of any and all other unlawful entries in the register of the parcel of land Kabare/Mutige/173 entered by the Land Registrar at Kirinyaga.
  - g. Damages for loss suffered due to the Defendants' negligence and/or fraud.
  - h. Cost of this suit.
  - i. Interests on (f) and (g) above at Court rates from date of judgment until payment in full.
2. The Defendants entered appearance and filed their statement of defence dated March 21, 2017 on March 31, 2017.
  3. The matter was heard by way of *viva voce* evidence and upon close of their cases on March 13, 2020, the parties through their advocates on record agreed to file their respective submissions. The Plaintiff filed his submissions on January 2, 2021, while the defendants filed theirs on November 4, 2021.

**Plaintiff's Case: -**

4. The Plaintiff adopted his statement as his testimony dated November 16, 2016. He also produced the documents contained in his List of Documents and further List of Documents as exhibits in his case.
5. The Plaintiff's case is that he is the registered proprietor of land Reference Number Kabare/Mutige/173 which measures 1.57 Hactares or thereabout which he became registered on July 24, 1958 after demarcation and Certificate of Title was issued to him on August 29, 1996.
6. He stated that pursuant to the Survey Map Sheet No 5 (121/IV/22/6) for Mutige Sub-location, Kabare Location, Kirinyaga District, Nyeri Province his land which measures 1.57 Hectares bordered parcels of land No Kabare/Mutige/16 Mukarara Market, Kabare/Mutige/364, Kabare/Mutige/142, crossed the road and bordered Kabare/Mutige/156, Kabare/Mutige/157, Kabare/Mutige/397 and Kabare/Mutige/187.
7. He stated that this remained as the position until May 18, 2010, when the Defendants without notice to him unilaterally decided to change the initial demarcation of the land and excise a portion therefrom bordering Kabare/Mutige/142 and annex it to Kabare/Mutige/156.
8. He stated that when he became aware of this, he followed up with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. However, his efforts were frustrated and the current registrar informed him that they cannot do anything unless they have a court order.
9. He stated that the decision by the defendants is illegal and that acquisition of part of his land was fraudulently done by way of corrupt means as efforts to try and find out how ¼ acre of his land was excised and given to his neighbor without a sale or court order have not borne fruits.
10. He stated that the Registrar of Lands at Kirinyaga fraudulently and/or negligently signed the mutation form and in effect authenticating the amendment of the original mutation form and survey map.
11. He stated that as a result of the actions by the Defendants, he is unable to access a portion of ¼ acre Kabare/Mutige/173, develop it and use it and thus prayed that the same be reversed.



12. In his submissions, the Plaintiff argued that the recommendation relied upon by the Defendants was in essence not resolving any boundary dispute, trespass or occupation or working of the Plaintiff's land contrary to Section 3 of the Land Disputes Act CAP 303A.
13. He submitted that the tribunal acted in excess of its powers when it took a chunk of his land and transferred it to Kabare/Mutige/156 and that the only remedy available was to have the whole proceedings emanating therefrom be declared null and void. He relied on the cases of Moses Makokha Osanya v Elekia Mabosio Marenga (2018) e KLR and Joseph Karobia Gicheru v Michael Gachoki Gicheru (2013) e KLR.
14. He further submitted that reducing the acreage of his Land pursuant to an order of the Land Disputes Tribunal is null and void as the tribunal did not have jurisdiction to take away a portion of the Plaintiff's land.
15. He submitted that his suit is merited and prayed that the same be allowed as prayed.

**Defendants' Case And Submissions: -**

16. The defendants' witness adopted his written statement dated February 27, 2020 as his testimony and the documents listed of their list of documents as his exhibits.
17. He stated that the amendment to the Registry Index Map for Kabare/Mutige/173 and Kabare/Mutige/156 was pursuant to a court order in SRMC Land Tribunal Case No 5 of 1998 at Kerugoya issued on June 22, 2009 directing the Executive Officer to sign the necessary documents to facilitate the amendment of the index maps for Kabare/Mutige/156 and Kabare/Mutige/173.
18. He stated that pursuant to the said court order, the Executive Officer, Kerugoya Law Courts executed Mutation Form Serial Number 29558 on July 23, 2009 which gave rise to land parcel numbers Kabare/Mutige/156 and Kabare/Mutige/173 measures 2.36ha and 1.48ha respectively which mutation was then lodged for registration by the 2<sup>nd</sup> Defendant.
19. He stated that the order was a culmination of the Provincial Land Disputes Appeals Committee Central Province Appeal Case No Kirinyaga 170/2000 where the plaintiff was the Appellant.
20. He stated that the Appeals Committee in upholding the Gichugu Land Disputes Tribunal's decision held that the portion in dispute belonged to Kabare/Mutige/156 and directed the District Land Registrar and the District Surveyor to make arrangements to survey the portion in dispute and effect the necessary amendment to the index maps.
21. He stated that any aggrieved party was given leave to appeal to the High Court within 60 days on points of law. However, the plaintiff did not appeal but instead filed this suit many years later raising the same issues that were determined by the Appeals committee.
22. In their submissions, the Defendants submitted that they were implementing the decision of the Appeals Committee which decision was not challenged by the Plaintiff herein.
23. They submitted that they did not fraudulently alter or substitute the Mutation form and survey map sheet as alleged as the same was pursuant to the award of the Appeals Committee.
24. They submitted that it is not true that the alterations were done without the Plaintiff's consent as the plaintiff was all along aware and participated in the entire process including at the Appeal stage where he was the Appellant and was present when the award was read. Further, the Plaintiff had the notice that the survey on the ground was going to be done and amendment done pursuant to the award.



25. They submitted that it is not true that their actions amounted to compulsory acquisition as that process entails acquisition of land by the Government for public use whereas the disputed portion was annexed to a privately owned land in accordance with and pursuant to the implementation of an Award by the Appeals Committee.
26. They submitted that it is not true that the beacons were altered as the alterations done on the Index Map was to ensure that the measurements on the ground were the same as those on the Map and thus the beacons remained intact.
27. They submitted that the Plaintiff failed to prove the particulars of fraud to the required standard as the same ought to have been proved on a standard above a balance of probabilities but not beyond reasonable doubt. They relied on the case of *Gichinga Kibutha vs Caroline Nduku* (2018) e KLR.
28. They further submitted that the plaintiff did not provide any proof of the alleged loss and damage as he did not tender any evidence to demonstrate what use he wanted to put the disputed portion into and the earnings he got from the said portion. They also relied on the case of *Edward Kamau Muchoki & another v County Executive Officer, Ministry of Roads Housing & Public Works & another* (2018) e KLR.
29. They submitted that the Plaintiff is not entitled to any of the prayers sought and prayed for dismissal of this suit with costs to the Defendant.

**Analysis: -**

30. I have looked at the Parties' pleadings, evidence, exhibits, rival submissions and supporting authorities as well as the relevant law. The issues for determination are as follows: -
  - a. Whether the Plaintiff has proved his allegations of fraud against the defendants to the required standard?
  - b. Whether the Plaintiff is entitled to the orders sought?
  - c. Who should bear the costs?

**Whether The Plaintiff Has Proved His Allegations Of Fraud Against The Defendants To The Required Standard?**

31. The claim of fraud is one of a serious nature whereby a litigant is required to specifically plead the same and also prove it to the required standard. This position was held in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] e KLR where the Court held that:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

32. The burden of prove lies on the party claiming a particular fact. This is provided under Section 109 of the *Evidence Act* which provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



33. In regard to allegations of fraud, the standard of proof is above the required standard in civil cases. In the case of *Kinyanjui Kamau vs George Kamau* [2015] e KLR, the Court of Appeal held that:-
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved. *See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742* wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
34. In this matter, the Plaintiff has made a claim of fraud against the Defendants herein. From the foregoing it thus follows that the plaintiff herein was required to, not only plead fraud and the fraudulent acts of the Defendants herein but specifically and strictly prove the same on the required standard.
35. The Plaintiff has claimed that the Registry Index Map was fraudulently altered by the Defendants herein without his consent, thereby changing the initial demarcation of his land and excise a portion therefrom and annexed it to Kabare/Mutige/156.
36. In light of the evidence tendered, it is evident that the amendment made on the Registry Index Map were done pursuant to an Order for implementation of an award issued by the Provincial Land Disputes Appeals Committee, Central Province issued on June 15, 2000 in Appeal Case No 170/2000 (Kerugoya).
37. In the said proceedings, an order was issued directing the Executive Officer, Kerugoya SRM’s Law Courts to sign the necessary documents in order to facilitate the award issued. The Plaintiff was also notified of his right to appeal to the High Court within 60 days on a point of law.
38. The Defendants presented the Court Order given in Kerugoya Land Dispute Tribunal Case No 58 of 1998 on June 22, 2009.
39. During cross examination, the Plaintiff admitted that indeed he was a party to the proceedings which gave rise to the said award. He did not provide any material to show that he was aggrieved with the said decision by moving to the High Court as required by law.
40. It is my view that the Plaintiff is guilty of material non-disclosure in his pleadings by not stating that there was a previous dispute involving the suit land which commenced from the District land disputes tribunal and went all the way to the Central Provincial Disputes Appeals Committee where the plaintiff who was the Appellant lost but failed to appeal within sixty days as prescribed by law. It is therefore hypocritical of the Plaintiff to claim that the Registry Index Map was amended without his consent and without notice yet he was party to the proceedings before the Appeals Committee which gave an award reflecting the current position.
41. The Plaintiff now claims in his submissions that the said award was null and void as the tribunal did not have jurisdiction to determine the same. It is absurd that the plaintiff is making this claim 21 years later yet it is evident that the Plaintiff is an indolent litigant who failed to exercise his right of appeal as prescribed by law.
42. It is also evident that the Plaintiff is forum shopping. The said claim is not only stale but also defective and an abuse of the court process. The Plaintiff deliberately failed to join the registered proprietor/ owner of land parcel No Kabare/mutige/156 whom he knows is likely to be aggrieved by the orders sought herein.



43. It is therefore my view that the Plaintiff has failed to prove that the amendments made on the Registry Index Map were done fraudulently. The Defendants' witness explained clearly the process followed in effecting the amendments in the Registry Index Map which in view was done legally and procedurally.

**Whether The Plaintiff Is Entitled To The Orders Sought?**

44. In view of the foregoing matters, I find that the Plaintiff has not established a basis to warrant the grant of the orders sought. His claim on fraud fails for want of prove which requires a standard higher than that of a balance of probabilities but lower than beyond reasonable doubt.

**Who Should Bear The Costs?**

45. It is trite law that costs follow the event. Section 26 (1) of the Civil Procedure Act provides as follows: -

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”.

46. It is my view that there is no good reason to deny the Defendants costs especially owing to the fact that the Plaintiff is guilty of approaching this Honourable Court with unclean hands for failure to fully disclose all material facts to the case.

**Conclusion: -**

47. For all the reasons given herein above, it is my finding that the Plaintiff's suit lacks merit and the same is hereby dismissed with costs.

**6/5/2022**

Before

Hon. Justice E.C. Cherono

Kabuta – C/A

COURT

**Judgment is READ/ENDORSED in the open Court at Kerugoya this 6<sup>th</sup> May 2022 in the absence of the parties and/or their advocates.**

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**HON. E.C. CHERONO**

**ELC JUDGE**

