



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC SUIT NO. 460 OF 2017

(FORMERLY NAIROBI ELC NO.154 OF 2015)

SAMWEL MWAURA NDERI.....PLAINTIFF

VERSUS

NELSON MUCHIRI.....1ST DEFENDANT

THIKA DISTRICT LAND REGISTRAR.....2ND DEFENDANT

MARY MUTHONI KIMANI.....3RD DEFENDANT

GITHUNGURI CONSTITUENCY RANCHING LTD....4TH DEFENDANT

JOHN MAINA MBURU.....5TH DEFENDANT

KIMANI MWAURA.....6TH DEFENDANT

JUDGMENT

1. This matter was filed on 24.2.2015 as Nairobi ELC Suit No. 154 of 2015, but was transferred to Thika ELC on 6.4.17, where it was registered as Thika ELC no.460 of 2017. An amended plaint was filed on 19th April 2017, where by plaintiff added more defendants making a total of 6 defendants. The plaintiff was claiming entitlement to land parcel no. RUIRU/KIU/BLOCK 2/3762. He also sought for orders of injunction against the 3rd, 4th, 5th and 6th defendants as well as general damages for trespass as against the aforementioned defendants.

2. A memorandum of appearance was filed on 13.3.2015 for 1st defendant. Nothing else was filed thereafter and this defendant did not participate in the trial.

3. The 2nd defendant did not file a memorandum of appearance and /or defence.

4. The 3rd and 4th defendants filed a statement of defence and a counter claim dated 12.5.2016, amended on 25.10.2018 to include the 5th defendant. They aver that the land belongs to 3rd defendant, and they sought for an order declaring that 3rd defendant is the lawful owner of the land no. RUIRU/KIU/BLOCK 2/3762.

5. The 6th defendant is allegedly dead (this information came from 5th defendant).

6. The matter came up for notice to show cause why the suit should not be dismissed on 3.12.2018. There was no appearance for the plaintiff whose case was therefore dismissed. Counsel for 3rd- 5th defendant indicated that they would proceed with their counter claim, hence their case proceeded on 6.12.2018.

7. The 5th defendant, JOHN MAINA MBURU (DW 1) is the one who testified for these defendants (3rd - 5th). He adopted his statement recorded on 5.12. 2018 as his evidence. He also produced as exhibit documents in his list filed on 5.12.2018, running from page 1- 46, 32 items as defence exhibits 1-32 respectively.

8. DWI stated that he is the chairman of Githunguri ranching company and he is husband of 3rd defendant. He avers that the suit parcel no 3762 was sold to his wife by Kimani Mwaura who is apparently dead.

9. According to DW1, Kimani Mwaura was a member of 4th defendant and he had a ballot number 1686 and this is the one which gave rise to the parcel no .RUIRU/KIU BLOCK2/3762. The documents appertaining to this evidence are items 2 and 3 in defence bundle of documents. This land was then sold to DW1's wife MARY MUTHONI vide a land sale agreement dated 5.1.2010. The agreement is on page 4 of defence bundle.
10. DW1 further testified that plaintiff's mother was Priscilla Mwenja and her ballot numbers were 1683 and 1684. For 1683, the parcel of land was registered as RUIRU KIU/BLOCK 2/3761, whereas ballot 1684 became RUIRU KIU/BLOCK 2 /3766. He avers that both parcels were sold.
11. Regarding the claim by plaintiff that his land was fraudulently transferred to 1st defendant, Nelson Muchiri, DW1 stated that Muchiri's land was parcel no RUIRU KIU/BLOCK2/3764. Evidence to that effect is to be found on page 23 of the bundle where there is an affidavit sworn by the said Muchiri where he confirms that his land is no.3764, and he disowns a certain green card in Thika Land's registry which indicates that he is the registered owner of parcel 3762. There is also a copy of title deed on page 25 indicating that Nelson Muchiri owns parcel no 3764.
12. DW1 concluded his testimony by stating that him and his wife are the ones in occupation of the suit land.
13. In the submissions of the 3rd-5th defendants, it is averred that the documents presented at Thika Land registry which caused registration of the suit property in the name of the 1st defendant were not genuine. It is contended that this was a conspiracy to defraud the 3rd defendant. They relied on Section 26 (1) of the Land Registration Act.
14. It is submitted that the aforementioned registration was not sanctioned by the 4th defendant nor by the 3rd defendant. It was done without their knowledge. The 1st defendant was apparently not keen to defend this title as evidenced by his sworn affidavit (exhibit 15).
15. The 3rd, 4th, and 5th defendants contended that the court is vested with powers to cancel, revoke, alter and even order for the rectification of a title to reflect the name of the genuine and rightful owner. They relied on the case of Esther Ndegi & Anor Vs Leonard Gatei [2014] eKLR.
16. The question for determination is; **who is the legal owner of land parcel RUIRU/KIU BLOCK 2/GITHUNGURI/3762?**
17. From the evidence presented to this court, the suit land no 3762 appears to have been unlawfully registered in the name of 1st defendant (Nelson Muchiri). Plaintiff and 3rd-5th defendants claim as much. They however differ as to who is the rightful owner of the suit land.
18. It is not necessary to prove that the 1st defendant was involved in trying to defraud the legal owner of the suit property for section 26 (1) (b) of the Land Registration Act to take effect. See **Esther Ndegi Njiru & Another vs. Leonard Gatei (Supra)**
19. Even though plaintiff did not tender any evidence before me, I have perused his pleadings and documents to try and unravel the mystery behind registration of parcel 3762 in 1st defendant's name. None of the documents of the plaintiff reveal a nexus between the plaintiff and parcel 3762.
20. On the other hand, the records of the 4th and 5th defendants indicate that Plaintiffs mother, Priscilla owned RUIRU/KIU BLOCK 2/GITHUNGURI/3761 and 3766 resulting from ballot numbers 1683 and 1684 respectively.
21. The suit land on the other hand was allegedly owned by Kimani Mwaura, where the ballot number was 1686. This can be discerned from the documents on page 2 of 3rd-5th defendants bundle.
22. In Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR Justice Sila Munyao held that:
- 'It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme. Also see- Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012.**
23. Section 80 of the Land Registration Act provides as follows;
- “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.**
24. I have no doubts that the registration of the suit land parcel 3762 was unlawful. I also find that DW1 has given a plausible chronology of events of how each party mentioned herein acquired their rights and interests in the land. His evidence is unchallenged.
25. I am of the view that Dw1 could have made efforts to call his wife as a witness as well as Nelson Muchiri as these two could have shed more light on this matter. I say this because DW1 has stated that he is the chairman of 4th defendant, yet he is husband of 3rd defendant. He wears two hats. He has a fiduciary relationship with the persons who have been members of Githunguri Ranching, such that he is bound to protect their interest too. It is common ground too that this company has unending land disputes. Never the less, the evidence so far adduced is in favour of the 3rd-5th defendants.

26. I conclude that the 3rd-5th defendants counter claim has been proved on a balance of probability. I proceed to grant orders as follows;

- 1) **An order is hereby issued for the cancellation of title no. RUIRU/KIU BLOCK 2//3762 which is improperly registered under the name of NELSON MUCHIRI.**
- 2) **An order is hereby issued to the effect that title number RUIRU/KIU BLOCK 2/3762 is to be registered under the name of MARY MUTHONI KIMANI.**
- 3) **The Deputy Registrar of this court is hereby authorized to sign all requisite documents to give effect to this Judgment.**
- 4) **Any orders of inhibition, injunction, restriction or caution that may be subsisting in respect of parcel no RUIRU KIU/BLOCK2/3762 are hereby discharged in order to facilitate the implementation of the Judgment herein.**
- 5) **The consent of land control board is hereby dispensed with in the implementation of this judgment.**
- 6) **Each party to bear their own costs of the suit.**

Dated, signed and delivered at Thika this 2nd day of May, 2019.

MBUGUA LUCY

JUDGE

2/5/201

In the presence of

Court Assistant : Ms Diana

Tumu H/B for Mr. Kanyi for 3rd, 4th and 5th defendants

J. Kouna H/B for Njonjo for Plaintiff

All Parties Absent