



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 307 OF 2017

FORMERLY MERU ELC. 58 OF 2008

NKWENGO CONSOLATA MISSION CHURCH (SUING THRO'

THE CATHOLIC DIOCESE OF MERU REGISTERED TRUSTEES).....PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF

THE PRESBYTERIAN FOUNDATION.....1ST DEFENDANT

P.C.E.A. GITARENE OUTREACH.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE NATIONAL LAND COMMISSION.....4TH DEFENDANT

THARAKA NITHI COUNTY.....5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

JUDGMENT

1. The plaintiff in its Further Amended plaint dated **4th December, 2017** prays for judgment against the 1st, 2nd, 3rd, 4th and 5th defendants jointly and severally for:-

- a) A declaration that a one acre portion of land part of L.R. NO. KARINGANI/GITARENI/929 is the property of and/or rightly belongs to the plaintiff herein and is not available for issuance of title deed to any other party other than the plaintiff.
- b) A declaration that the purported transfer and registration of land parcel NO. KARINGANI/GITARENI/929 into the names of the 1st defendant was fraudulent and unlawful thus null and void.
- c) An order directing for cancellation of the title deed issued to the 1st defendant on or about the 15th June, 2005 in respect to land parcel NO.KARINGANI/GITARENI/929.
- d) The rectification of the register for Land Parcel No. KARINGANI/GITARENI/929 in respect of entry No. 1 to read Tharaka Nithi County instead of Meru County Council.
- e) Rectification of the register for Land Parcel No. KARINGANI/GITARENI/929 in respect of entries Nos.2, 3, 4 and 5 dated 20.5.2002, 27.5.2005, 4.6.2005 and 15.6.2005 respectively.
- f) An order directing the 4th and 5th defendants for land parcel No. KARINGANI/GITARENI/929 to be resurveyed and one (1) Acre part thereof belonging to the plaintiff to be demarcated and a title deed thereto issued in the name of the plaintiff.
- g) The 1st, 2nd, 3rd, 4th and 5th defendants be ordered to sign all the relevant documents to effect the subdivision and the subsequent transfer of the said one (1) acre of Land Parcel No. KARINGANI/GITARENI/929 and in default the Deputy Registrar of this

honourable court be empowered to execute all the relevant documents to ensure that Land Parcel No. KARINGANI/GITARENI/929 is subdivided and one (1) acre therefore is transferred and registered in the name of the plaintiff.

h) Costs of the suit plus interest thereof.

i) Any other remedy and/or relief which the court may deem fit and just to grant.

2. The suit was fixed to be heard on 26th September, 2018. Only the representative of the plaintiff and the plaintiff's advocate were in court. The court directed Mr. Ndegwa, the Court Assistant, to call on the suit outside court. It was confirmed that the defendants were absent. The court satisfied itself that the defendants were aware of the hearing scheduled to take place on **26th September, 2018**. It then directed the suit to proceed *ex parte*.

3. PW1 Fedelis Murithi Nthaka told the court that he was chairman of the Lands Committee for the plaintiff Church. He testified that he was conversant with all the issues apposite to this matter. He asked the court to adopt his witness statement dated **25th September, 2013** as his evidence in this suit. He also asked the court to consider statements signed on the same day by John Murito Ndacho and Emilio Mbaka which corroborated his evidence.

4. PW1 asked the court to consider the plaintiff's case summary and the postulated issues for determination dated **19th May, 2015**. PW1 produced as a bundle of 25 documents which the court marked as Exhibit No 1 in support of the plaintiff's case.

5. PW1's witness statement is reproduced in full here below:-

STATEMENT BY FEDELIS KATHUNI ALIAS FEDELIS MURITHI M'NTHAKA

I am the above named person. An adult male of sound mind. I come from Gitareni Location, Gitareni sub location, Chuka Division, Meru South District, Tharaka Nithi County within the Republic of Kenya.

I am currently the Land Chairman of Chera Catholic Parish and Nkwengo Consolata Catholic Church is a Prayer House of Chera Parish and I know about this case.

I wholly adopt the statement of John Murito Ndachu and that of Emilio Mbaka.

I wish to add that after Meru HCA No. 65 of 2002, I applied to the County Council of Meru South to go and put beacons in respect of the Land Parcel No. Karingani/Gitareni/929. I also decided to buy copy of the register and also do search for the said land parcel No. Karingani/Gitareni/929.

Upon buying the copy of the register and the search, I learnt that the said land parcel No. Karingani/Gitareni/929 had fraudulently been transferred to the 1st defendant while Meru HCA No. 65 of 2002 was pending and that is when myself, Emilio Mbaka and Alexander Nyaga were given authority by the Catholic Diocese of Meru registered Trustees to file this suit. The said authority was filed together with the plaint when this case was being filed.

I pray that the prayers being sought for by the plaintiff in this case be allowed and the plaintiff be awarded costs.

That is all that I have to say.

Dated and prepared at Meru this 25th day of September, 2013.

Signed.....

FEDELIS KATHUNI ALIAS

FEDELIS MURITHI M'NTHAKA.

6. The following exhibits (op.cit) were produced as a bundle by PW1:

i) Copy of the green card for Land Parcel No. Karingani/Gitareni/929

ii) Copy of minutes No. TP & M of 23/1/1997 in which land parcel No. KARINGANI/GITARENI/929 was allocated to the plaintiff by the County Council of Tharaka Nithi.

iii) Copy of the Plaint in Meru CMCC No. 753 of 1999.

iv) Copy of the defence and counter-claim in Meru CMCC No. 753 of 1999.

v) Copy of the proceedings in Meru CMCC No. 753 of 1999.

- vi) Copy of the judgment in Meru CMCC No. 753 of 1999.
- vii) Copy of plaint in Chuka PMCC No. 5 of 2002.
- viii) Copy of the statement of defence in Chuka PMCC No. 5 of 2002
- ix) Copy of the notice of Preliminary Objection in Chuka PMCC No. 5 of 2002.
- x) Copy of the proceedings when the preliminary objection was argued in Chuka PMCC No. 5 of 2002.
- xi) Copy of the Ruling on the Preliminary Objection in Chuka PMCC No. 5 of 2002
- xii) Copy of the memorandum of appeal in Meru HCC Appeal No. 65 of 2002.
- xiii) Copy of the judgment in Meru HCC Appeal No. 65 of 2002.
- xiv) Copy of search certificate over land parcel No. Karingani/Gitareni/929 conducted on 13.8.2007.
- xv) Copy of the letter from the clerk, county council of Meru South (now defunct) dated 06.08.2007.
- xvi) Copy of the letter from the clerk, County Council of Meru South (now defunct) dated 17.08.2007 attached with a minute extract.
- xvii) Copy of the plaint in Chuka PMCC No. 39 of 2007.
- xviii) Copy of the defence in Chuka PMCC No. 39 of 2007
- xix) Copy of the proceedings on a preliminary objection in Chuka PMCC No. 39 of 2007.
- xx) Copy of the Ruling on the preliminary objection in Chuka PMCC No. 39 of 2007.
- xxi) Copy of the court order in Meru HCC Misc. Application No. 21 of 2008 issued on 07.05.2008 granting the plaintiff leave to file suit out of time against the Attorney General.
- xxii) Copy of the Statutory Notice issued to the Attorney General before filing suit.
- xxiii) Copy of the covering letter forwarding the said statutory notice to the Attorney General.
- xxiv) Postage certificate for the said statutory notice to the Attorney General.
- xxv) Copy of the Attorney General's letter acknowledging receipt of the said statutory notice.

7. Mr. Mutege, counsel for the 1st and 2nd defendants, who came to court late cross examined PW1. He sought to prove that this suit was filed in 2008, over 3 years after the time suits alleging fraud should be filed. However, during re-examination by advocate Nyamu Nyaga, PW1 rebutted this assertion by showing that leave to file suit out of time was properly granted by the Hon. J. A. Emukule, J, on 7th May, 2005. The apposite order states:

IT IS HEREBY ORDERED

1. THAT an order for leave is hereby granted to the applicant to file suit out of time against the Honourable Attorney General in his Capacity as the Government's Chief Legal Officer, the Commissioner of Lands and the Chief Land Registrar seeking for:

- a) A declaration that the purported transfer and registration of Land Parcel No. KARINGANI/GITARENI/929 into the names of the Presbyterian Foundation was fraudulent and illegal thus null and void.
- b) Cancellation of the title deed for Land Parcel No. KARINGANI/GITARENI/929 issued to the Presbyterian Foundation on 15th June, 2005.
- c) An order that Land Parcel No. KARINGANI/GITARENI/929 be resurveyed and one (1) Acre part thereof belonging to the claimant as allocated by the Meru South County Council be demarcated or marked out and a title deed thereto issued to the applicant.
- d) Costs of the suit plus interest thereof.
- e) Any other remedy and/or relief which the court may find just to grant.

2. THAT costs of the application and incidental thereto be costs in the main cause.

8. The plaintiff has filed the following issues as constituting what he thinks ought to be determined:

PLAINTIFF'S ISSUES FOR DETERMINATION

1. Who was the original registered owner of Land Parcel No. KARINGANI/GITARENE/929.

2. To whom was the said land parcel No. KARINGANI/GITARENE/929 reserved for.

3. Did the plaintiff apply to be allocated part of Land Parcel No. KARINGANI/GITARENE/929 by the then Tharaka Nithi County Council (later County Council of Meru South)?

4. Was the plaintiff ever allocated any part of land parcel No. KARINGANI/GITARENE/929?

5. If the answer to Nos. 3 and 4 hereinabove is in affirmative, how much land was allocated to the plaintiff.

6. Did Nkwengo Nursery School and Nkwengo Primary School file Meru CMCC No. 753 of 1999 against the plaintiff herein and County Council of Meru South objecting to allocation of one (1) acre of Land Parcel No. KARINGANI/GITARENE/929 to the plaintiff. If the answer is in affirmative, did the plaintiff file a defence and counter-claim to the said suit.

7. What was the outcome of the said Meru CMCC No. 753 of 1999?

8. DID Nkwengo School Chairman and Nkwengo Nursery School again file Chuka PMCC No. 5 of 2002 against the plaintiff herein?

9. Did the plaintiff herein file defence and a Notice of Preliminary Objection raising points of law to the filing of the said Chuka PMCC No. 5 of 2002 to the effect that he said suit was res judicata the same have been heard and determined in Meru CMCC No.753 of 1999.

10. What was the outcome of the said Preliminary Objection filed by the plaintiff in Chuka PMCC No. 5 of 2002?

11. Did the plaintiff herein file Meru HCCA No. 65 of 2005 challenging the ruling on the Preliminary Objection in Chuka PMCC No. 5 of 2002?

12. What was the outcome of the said Meru HCCA No. 65 of 2002?

13. During the pendency and proceeding of the said Meru HCCA No. 65 of 2002, did the defendants herein commit acts of fraud, deceit and collusion to defeat the cause of justice by transferring land parcel No. KARINGANI/GITARENE/929 to the 1st defendant to ensure that the plaintiff did not get its one (1) acre of land parcel No. KARINGANI/GITARENE/929 as pleaded and itemized in paragraph 17 of the amended plaint?

14. IF No. 13 hereinabove is in affirmative, does he 1st defendant have a good title for the said land parcel No. KARINGANI/GITARENE/929?

15. Did the defendants obtain any consent or permission from the plaintiff and/or from Tharaka Nithi County Council (Later County Council of Meru South) before fraudulently causing Land Parcel No. KARINGANI/GITARENE/929 to be registered in the names on the 1st defendant?

16. Did the plaintiff obtain the necessary leave to file this suit against the 3rd, 4th and 5th defendants?

17. Did the defendants have any good defence against the plaintiff's claim whatsoever?

18. Is the plaintiff entitled to eh prayers being sought for against the defendant in the amended plaint?

19. Who is liable to pay the costs of this suit?

DATED AT MERU THIS 19TH DAY OF MAY 2015

NYAMU NYAGA & CO. ADVOCATES

ADVOCATES FOR THE PLAINTIFF

9. The 1st and 2nd defendants have filed the following issues as constituting what they think ought to be determined.

1. Whether the plaintiff applied for and was allocated 1 acre in Land parcel No. Karingani/Gitareni/929 by the then Tharaka Nithi County Council.
2. Whether 1 acre was and is still available for allocation to the plaintiff in land parcel No. Karingani/Gitareni/929.
3. Whether the 1st and 2nd defendants were rightfully allocated land parcel No. Karingani/Gitareni/929 by the then Tharaka Nithi County Council.
4. Whether the 1st defendant acquired the title No. Karingani/Gitareni/929 lawfully.
5. Whether the 1st and 2nd defendants fraudulently colluded with the 3rd and 4th defendants to have the suit property transferred and registered in the name of the 1st and 2nd defendants.
6. Whether 1 acre was reserved for purposes of registration in favour of either the plaintiff or the 1st and 2nd defendants.
7. Whether the plaintiff is entitled to the prayers sought in the amended plaint.
8. Whether the 1st defendant's title deed should be cancelled and the suit property be resurveyed.

10. I find that the main issue for determination is if or if not upon consideration of all the pleadings and evidence tendered in this matter, the plaintiff is entitled to the orders sought in the plaint. Issues numbers (i) to (xxv) as framed by the plaintiff and issues numbers 1 to 8 as framed by the 1st and 2nd defendants are subsumed by this main issue.

11. I have considered the pleadings proffered by the parties to buttress their diametrically incongruent assertions.

12. It is not controverted by the defendants that the plaintiff obtained a judgment in his favour delivered on 28th June, 2007 in Meru HCCA No. 65 of 2007. When the plaintiff was in the process of formalization of the documentation for the registration in its name of the one acre awarded to it, it discovered that in or about 15th June, 2005, the defendants had caused the entire Land Parcel No. KARINGANI/GITARENE/929 to be registered in the names of the 1st defendant and a title deed had been issued. Meru HCCA No. 65 of 2007 had been filed in 2002. The registration of the land in the names of the Registered Trustee Of The Presbyterian Foundation, to the benefit of the 1st and 2nd defendants, was done during the pendency of Meru HCCA No. 65 of 2007. I find this conduct fraudulent. As a result of that conduct the plaintiff was unable to enjoy the fruits of its judgment given in its favour in Meru HCCA No. 65 of 2002. I further find that the 1st, 2nd, 3rd and 5th defendants participated in the execution of the apposite fraud. In the circumstances, I find that the plaintiff has, on a balance of probabilities, proved its case against the defendants. Judgment is therefore, entered for the plaintiff against the 1st, 2nd, 3rd, 4th, 5th and 6th defendants in the following terms:

1. It is hereby declared that a one acre portion of land part of L.R. NO. KARINGANI/GITARENI/729 is rightly the property of the plaintiff and is not available for issuance of title deed to any other party.
2. It is hereby declared that the purported transfer and registration of Land Parcel No. KARINGANI/GITARENI/929 into the names of the 1st defendant was fraudulent and unlawful and thus null and void.
3. An order is hereby issued directing the cancellation of the title deed issued to the 1st defendant on or about the 15th of June, 2005 in respect of Land Parcel No. KARINGANI/GITARENI/929.
4. An order is hereby issued for rectification of the register for Land Parcel No. KARINGANI/GITARENI/929 in respect of entry No. 1 to read Tharaka County Council or The County Government of Tharaka Nithi instead of Meru County Council.
5. An order is issued for rectification of the Register for Land Parcel No. KARINGANI/GITARENI/929 in respect of entries Nos. 2, 3, 4 and 5 dated 20.5.2002, 27.5.2005, 4.6.2005 and 15.6.2005 respectively.
6. An order is hereby issued directing the 4th and 5th defendants to resurvey land parcel No. KARINGANI/GITARENI/929 and one acre part thereof belonging to the plaintiff be demarcated and a title thereto be issued to the plaintiff forthwith.
7. The 1st, 2nd, 4th and 5th defendants are hereby ordered to sign all the relevant documents to effect the subdivision and subsequent transfer of the said one (1) acre of Land Parcel No. KARINGANI/GITARENI/929 and in default the Deputy Registrar of this Court is hereby empowered to execute all the apposite documents to ensure that the plaintiff is duly registered as proprietor of the said one (1) Acre of land.
8. Costs are awarded to the plaintiff against the 1st, 2nd, 3rd, 5th and 6th defendants and interest at court rates is payable to the plaintiff from the date of delivery of this judgment.

13. It is so ordered.

Delivered in open Court at Chuka this **3rd day of October, 2018** in the presence of:

CA: Ndegwa

Murango Mwenda h/b Nyamu Nyaga for the plaintiff

Other parties absent

P. M. NJORGE,

JUDGE.