



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO 437 OF 2017

BAKARI SHABAN GAKERE.....1ST RESPONDENT/PLAINTIFF

VS

MWANA IDD GUCHU.....APPLICANT/1ST DEFENDANT

THE COUNTY GOVERNMENT OF MURANGA.....2ND RESPONDENT/ DEFENDANT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT/DEFENDANT

THE HON ATTORNEY GENERAL.....4TH RESPONDENT/DEFENDANT

JUDGEMENT

1. The Plaintiff filed his Complaint dated 24/08/2017 seeking Judgment against the Defendants for; -

a) A declaration that the Plaintiff is the rightful owner of Plot No. Mjini/69 located within Mjini area at Murang'a County measuring 200ft by 100ft.

b) A revocation of the purported sub-division of Plot No. Mjini/69 and subsequently cancellation of the allocation of Plot No. Mjini/69 to the 1st Defendant.

c) A permanent injunction restraining the Defendant, their agents, servants, employees and/or any other person claiming to act with the authority of any of the Defendants from entering, demarcating, sub dividing, destroying or in any other way interfering with Plot No Mjini/69.

d) Costs of the suit with interest.

2. The Plaintiff's claim is that he is the legal allottee of Plot No. Mjini/69 located within Mjini area in Murang'a County having purchased it from Ibrahim Mohammed in 1982. That he pays rates to the 2nd Defendant though erroneously through Plot No. Mjini/68, an anomaly he alleges occurred during survey. He accused the 2nd Defendant of arbitrarily sub-dividing his Plot No. Mjini/69 resulting in a new Plot No. 69 that has been allocated to the 1st Defendant.

3. The Plaintiff enumerated particulars of fraud against the Defendants for encroaching onto his land and allocating it to the 1st Defendant. He blames the 4th Defendant for failing to protect his interests as a land owner and Kenyan citizen.

4. The claim is strenuously opposed.

5. The 1st Defendant averred that Plot No. 69 never belonged to the late Ibrahim Mohammed in the first place. That the Plaintiff never occupied the suit land but trespassed on it and forcefully erected a fence around it. She accused the Plaintiff of misrepresenting facts with intent to mislead the Court. She maintained that the Plaintiff used his position as the secretary of the Mjini Plots Owners committee to unfairly enrich himself.

6. The 1st Defendant raised particulars of fraud against the 1st Plaintiff. That Mohammed's Plot No. 68 was illegally acquired; that the Plaintiff fraudulently and illegally transferred Plot No. 68 to himself. Further, the 1st Defendant counter-claimed against the Plaintiff and

sought the Plaintiff's eviction from the suit land. She urged the Court to dismiss the Plaintiff's case and prayed for judgment that the Plaintiff's transfer of Plot No. 68 was fraudulent and illegal; and finally sought an order that the 1st Defendant is the rightful owner of Plot No. 69 together with costs of her suit.

7. The 2nd Defendant filed its defence dated 22/01/2018 and denied that the Plaintiff was the allottee of Plot No.69 as claimed. It also denied that alleged ownership of Plot No. 69 by one Ibrahim Mohammed. On the issue of anomaly of plot numbering, the 2nd Defendant averred that the wrongful allocation for Plot Nos. Mjini 69 and 70 was between the 1st Defendant and Marcella Nyambura Macharia as opposed to the Plaintiff and 1st Defendant. The 2nd Defendant refuted the particulars of fraud and urged the Court to dismiss the suit with costs.

8. The 3rd and 4th Defendants neither entered appearance nor filed their defenses.

9. The Plaintiff's witness was Shaban Gakere Bakari, the Plaintiff's father. He was stood down as the Plaintiff's Counsel was under the impression that the witness was the Plaintiff himself. She informed the Court that all along she believed the witness in Court was the Plaintiff. That she has been informed that the real Plaintiff is the son of the witness. That Bakari Shaban Gakere, the Plaintiff in this case is the son of the witness. Learned Counsel Ms. Kanja sought an adjournment to file a power of attorney to enable the Plaintiff's father to proceed with case in place of the Plaintiff who resides in America. The application was found unmerited.

10. The case having been certified ready for hearing and no cogent reasons advanced for the adjournment, the Court dismissed Plaintiff's the case for want of prosecution on 22/2/2021.

11. The 1st Defendant proceeded with the hearing of her counter claim.

12. The first witness was PW1, Mwanaidi Guchu. She relied on her witness statement dated 15/10/2019. She testified that she is the owner of Plot No. 69 having been allocated the plot by the County Council of Murang'a. That Plot No. 69 was hers whereas Plot No. 70 belonged to Marcela Nyambura. PW1 admitted knowing Mzee Mohammed Ibrahim, the father of Ibrahim Mohammed. She produced a grant of letters of administration dated 17/4/2009, certificate of confirmation of grant, letter from Thika Chief Magistrate's Court dated 27/9/17 and Plaintiff's letter to the Town clerk dated 26/8/96 as Plaintiff's exhibits nos. 1-4.

13. In Cross-examination, PW1 maintained that Plot No. 69 is hers and had no claim over Plot No. 68. That she was allocated Plot No.69 by the council after she was moved to pave way for the expansion of Mumbi Girls Secondary School. That she had an allotment letter for Plot No.69 though she did not produce it in Court. That she neither had an application for the said plot nor knew its size. She also admitted that she did not have any minutes of the county allocating the said plots. In reference to the sale agreement dated 16/9/96, she confirmed that the subject land that was sold did not disclose Plot No.69.

14. PW2, Mohammed Idd Rajab Maingi acknowledged knowing the suit parties and explained that they used to live next to Mumbi Girls. That they were later moved to Makadara to pave way for the school expansion. He said that the 1st Defendant was allocated Plot No 69. In cross-examination, he was emphatic that he was PW1's neighbor and he knew that Plot No. 69 was allocated to PW1.

15. The last witness, PW3 Kimani Adam's evidence was similar to PW2 that Plot No.69 belonged to the 1st Defendant having been moved from Mumbi Girls to Makadara.

16. The 2nd Defendant supported the 1st Defendant's counterclaim but did not call any witness.

17. The 1st and 2nd Defendants filed their submissions but the Plaintiff did not.

18. The 1st Defendant submitted that the Plaintiff's ownership of the late Ibrahim's plot was illegal hence his title should be cancelled. That the Plaintiff never purchased any plot from the late Ibrahim Mohammed but such transaction was between the Plaintiff's father Shaban Gakere and late Mohammed Ibrahim alias Gatembo son of the late Ibrahim Mohammed. That the Plaintiff could not have purchased the plot in 1982 as he was 3 years thus lacked capacity to transact.

19. The 1st Defendant went into great details to discredit the Plaintiff's sale agreement dated 16/9/1996. In particular, it was argued that clause 4 of the agreement required succession proceedings to be conducted before the land could be transferred to the Plaintiff's father. That the said succession proceedings never took place. That the vendor's identity card number in the impugned sale agreement proves that it was the son of Mzee Ibrahim who was transacting.

20. Additionally, the 1st Defendant argued that the purported sale agreement was a nullity as the actions in respect of Mohammed's plot amounted to intermeddling as provided under Section 45 of the Law of Succession Act. The case of estate of **Veronica Njoki Wakegito [2013] eKLR** was cited in support.

21. Also, that the death certificate annexed by the Plaintiff belongs to Ibrahim Mohammed's son, Mohammed Gatembo. That having failed to take out letters of administration, Ibrahim Katembo did not have any valid title to pass to either the Plaintiff or his father. In reference to the Plaintiff's receipts for payment dated 25/7/2016, the 1st Defendant was categorical that they were for clearance and transfer fees and not land rates as claimed. In any event she contended that the payments were for Plot no. 68 and not 69. That the purported letters of administration issued in Thika CMCC Succession cause no. 148 of 2009 are forgeries as they relate to a complete stranger that is to say the estate of Kiarie Karu. That the transfer based on the said Grant is therefore fraudulent and illegal. In light of the foregoing, the 1st Defendant submitted that the Plaintiff's title was impeachable on fraud in line with section 26(1) Land Registration Act 2012 and relied on the decision in the case of **Alice Chemutai vs Nickson Kipkurui & 2 others Kericho ELC Case No. 51 of 2014 [2015] eKLR**.

22. The Plaintiffs case having been dismissed what is before me now is the 1st Defendants counterclaim. It is expressed as follows;

- a. The Court to declare the transfer of Plot No 68 to the Plaintiff fraudulent and illegal and order the plot to revert to Ibrahim Mohammed name at the same time ordering the eviction of the Plaintiff from Plot Nos 68 and 69.
- b. An order that the 1st Defendant is the rightful owner of Plot No. 69.
- c. Costs.

23. The starting point is whether the 1st Defendant is the bonafide allottee of Plot No 69. The 1st Defendant has gone to great lengths to explain how she acquired the plot. In her testimony she led unchallenged evidence that she owned Plot No 180 next to Mumbi High School. However, in 1982 during the expansion of the school she and about 7 other families were relocated to Makadara area of Mjini Estate and given alternative plots. That she was allotted Plot No 69 whereupon she took possession and constructed a water canteen. This evidence was supported by PW3.

24. That following this reallocation there occurred an anomaly in the survey and ground positioning of plots Nos. 69 and 70 between Marcella Nyambura and the 1st Defendant, which dispute was resolved. The 2nd Defendant concurred with the evidence of the 1st Defendant entirely.

25. It was her undisputed evidence that the Plaintiff Ibrahim Mohammed whom the Plaintiff purport to have purchased the plot from owned Plot No 68 and not 69. She was succinct that the two plots are distinct and separate. This evidence was supported by the 2nd Defendant who stated that Plot No 68 and 69 have always been two distinct plots which changed numbers after the resurvey. That they are now Plots Nos 173 and 174 respectively and that plot No 69 (now 174) belongs to the 1st Defendant.

26. I have gone through the minutes of the committee of Mjini Plot Owners, the County Land Housing Physical Planning and settlement Committee and the various correspondences on attempts to register the plots of the residents of Mjini area who despite having acquired the plots since 1890 do not have titles upto today. It is clear that there is an ongoing exercise to address the issue both by the residents and the County Government which will culminate in the issuance of leases to the residents. This evidence supports the case of the 1st Defendant.

27. It is also noteworthy to state that the 2nd Defendant has confirmed that that the Plaintiff is the owner of plot No 68 now re-named Plot No 173. This is supported by the letter of allotment dated the 9/6/2017 issued in the name of Bakari Shaban Gakere. In this allotment letter the Plaintiff was allotted plot No 173. It is therefore the finding of the Court that the 1st Defendant is correct in faulting the Plaintiff for claiming plot No 69 (now 174) instead of plot 173(68).

28. Going by my finding in para 27, I hereby order the Plaintiff to vacate Plot No. 69 (now 174).

29. I am constrained to determine the legality or otherwise of the Plot No 68 because the 1st Defendant cannot advert any claim on it as she has not satisfied this Court that she is the legal representative of the estate of Ibrahim Mohammed the previous owner of the Plot. I leave it at that.

30. In the upshot I make orders as follows;

- a. The Plaintiffs suit is dismissed.
- b. The 1st Defendants counterclaim partially succeeds and I enter judgment in favour of the 1st Defendant as follows; the 1st Defendant is the rightful owner of Plot No 69 Mjini area.
- c. The Plaintiff is ordered to vacate the said plot and in default be evicted accordingly.
- d. Each party to bear their costs of the suit.

31. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 5TH DAY OF JULY, 2021

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Absent

1st Defendant: Present in person. PA is present.

Omwenga HB for Kimwere for the 2nd Defendant

3rd Defendant: Absent

4th Defendant: AG is absent

Court Assistant: Kuyiki