



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 383 OF 2017

SAMUEL KARIRU MWANGI.....PLAINTIFF

VS

JAMES NJUGUNA KIMUL.....1ST DEFENDANT

THE DISTRICT LAND REGISTRAR MURANGA.....2ND DEFENDANT

HON ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1. The Plaintiff sued the Defendants seeking the following orders;

- a. An Order of permanent injunction restraining the Defendants, particularly the 1st Defendant, his agents, servants, employees and/or through whomsoever against Trespassing and/or in any other way of interfering with the Plaintiff's quiet enjoyment, utilization and/or occupation of his LR. TITLE NO. LOC.4/GAKARARA/1249.
- b. A declaration that the Plaintiff bought a portion of 1.3 Acres from L.R. TITLE NO LOC.4/GAKARARA/722 on 3/7/1979 & was issued with its title on 30/9/1980 by the 2nd Defendant.
- c. An order directing the 2nd Defendant to repossess, cancel the title issued to the Plaintiff on 30/9/1980 and issue the Plaintiff with another title indicating the measurement of the Plaintiffs land to be 1.3 Acres.
- d. The costs of and incidentals to this suit.
- e. Any other/such other/further relief/order as this Hon. Court might deem fit/just to order in the circumstances as it deems fit/just.

2. It is the Plaintiff's case that at all material times he is the registered owner of parcel LOC.4/GAKARARA /1249 measuring 1.3 acres which he purchased from Njekehu Gakuu alias Kariru Gakuu. Gakuu owned all that parcel of land known as LOC.4/GAKARARA /772 which he subdivided into two portions to wit parcel LOC.4/GAKARARA /1249 and 1250 in 1979. The Plaintiff avers that he purchased parcel 1249 measuring 1.3 acres. Gakuu retained parcel LOC.4/GAKARARA /1250 measuring 0.7 acres.

3. That in 1980 the Plaintiff was issued with a title for LOC.4/GAKARARA /1249 but without disclosing acreage on the title. He avers that notwithstanding the absence of the acreage on the title he has occupied the suit land measuring 1.3 acres on the ground since 1980 to date.

4. That trouble started in 2015 when the 1st Defendant acquired parcel No LOC.4/GAKARARA /1250 from the administrators of the estate of Gakuu namely Francis Waweru Kariru. That the 1st Defendants is claiming that parcel LOC.4/GAKARARA /1250 is 1.3 acres and not the parcel LOC.4/GAKARARA /1249 thus claiming some portion of land from LOC.4/GAKARARA /1249.

5. At the hearing of the case the Plaintiff adopted the contents of his witness statement dated the 24/8/15 and reiterated the pleadings in the plaint. He stated that he discovered in 2014 that his title had no indication of the acreage and yet the land control board consent issued in 1979 showed that the portion that he purchased was 1.3 acres which is LOC.4/GAKARARA /1249. That the matter was brought to his attention when the 1st Defendant brought the area chief and a surveyor to the land to explain to him that his land is 0.7 acres and not 1.3 acres as he had always believed. On checking the title and carrying out a search he made the discovery that the title he held had no measurement. That he knows the boundaries of his 1.3 acres which is delineated with a life hedge between parcel Nos. LOC.4/GAKARARA /1249 and 1250. He informed the Court that even in the face of the parcel of land being showed as 0.28 Has on both the green card and the certificate of official search indicating that the suit land is 0.28 ha, he still holds the position that his land on the ground is 1.3 acres as shown in the Land Control Board proceedings. That parcel LOC.4/GAKARARA /1249 is bigger than LOC.4/GAKARARA /1250 on the ground.

6. The 1st Defendant denied the Plaintiffs claim. He refuted the claim that parcel LOC.4/GAKARARA/1249 measures 1.3 acres. In his counterclaim the 1st Defendant avers that he is the registered owner of parcel LOC.4/GAKARARA /1250 measuring 0.52 ha. He claimed that the Plaintiff has unlawfully fenced off parcels LOC.4/GAKARARA/764, 766 and 1250 which he claims to own. He stated that further the Plaintiff has built his house on parcel LOC.4/GAKARARA/ 764 which is registered in the name of Kamochu Gakuru, deceased which parcel borders LOC.4/GAKARARA /766 registered in the name of the Plaintiff. That parcels LOC.4/GAKARARA /1249, 1250 and 766 are vacant. He sought the following orders;

a. That a permanent injunction do issue restraining the Plaintiff by him, his agents servants and or in any person whose ever from trespassing, entering into encroaching and or in any manner interfering with the dimensions of all that parcel of land known as LOC.4/GAKARARA/1250 or in any manner interfering with the 1st Defendant's quiet possession and user thereof.

b. That order do issue directing the District Land Surveyor, Murang'a to go on the ground, establish and mark the beacons of the lands in dispute being LOC.4/GAKARARA/1250, LOC.4/GAKARARA/1259, LOC.4/GAKARARA/766 and LOC.4/GAKARARA/764.

c. Cost of the Plaintiff's suit and Counterclaim.

d. Any other order or relief that the Hon. Court deems fit to grant.

7. DW1- James Njuguna Kimui testified and adopted his witness statement dated the 30/9/15. He stated that he is the registered owner of parcel LOC.4/GAKARARA /1250 measuring 0.52 ha. He stated that the Plaintiff lives on parcel LOC.4/GAKARARA /766 and not LOC.4/GAKARARA /1249 though he owns both parcels. That attempts to invite a surveyor to resolve the dispute have failed because the Plaintiff is not cooperating. That according to the available survey records his parcel is bigger than that of the Plaintiff.

8. At the hearing he stated that he is claiming 0.7 acres from LOC.4/GAKARARA /764 and not LOC.4/GAKARARA /1249. He referred the Court to the attempts by the Deputy County Commissioner who had directed them to resolve the matter by identifying and marking out the beacons but the Plaintiff rushed to Court to forestall the resolution of the dispute. He impressed upon the Court that the dispute can be resolved by the surveyor remeasuring the parcels and fixing the beacons.

9. In his further testimony he informed the Court that he does not reside on parcel LOC.4/GAKARARA /1250 but carries out cultivation.

10. He informed the Court that when he bought the land from the previous owner he was informed that part of the land is to be found in parcel LOC.4/GAKARARA /764 and it is on that basis that he agreed to purchase the land. That he has no interest in encroaching on the land of the Plaintiff and infact has no claim on parcel LOC.4/GAKARARA /1249 and that his claim is on parcel LOC.4/GAKARARA /764 which parcel is registered in the name of Kamochu Gakuu. That there are no beacons on the ground to demarcate the parcels of the land.

11. The 2nd and 3rd Defendants filed a statement of defence in which it contains general denials of the Plaintiffs claim.

12. On the application of the parties the Court orders the Land Registrar and the surveyor to visit the locus in quo and file a report.

13. DW2- David Maina Ndirangu presented two site reports to the Court. His findings were; the positions of parcels LOC.4/GAKARARA /1249, 1250 and 766 and 764 are shown on the RIM; there is an interchange of the ground between parcel LOC.4/GAKARARA /1249 and 764; the measurements of LOC.4/GAKARARA /1250, 1249 are at variance between those indicated in the title and the ground; LOC.4/GAKARARA/1249 is developed with permanent structures. He recommended that the Registry Index Map should be amended to reflect the ground.

14. The Plaintiff did not file any written submissions despite having undertaken to do so.

15. The 1st Defendant submitted that the Land Registrar and the District Surveyor should be authorized to affix the beacons on parcels LOC.4/GAKARARA /1249 and 1250.

16. It is not in dispute that the Plaintiff is the registered owner of the parcel LOC.4/GAKARARA /1249 and 1250 belongs to the 1st Defendant.

17. It is the Plaintiffs case that parcel LOC.4/GAKARARA /1249 measures 1.3 acres and not 0.7 acres. According to the certificate of search and the green card on record the parcel LOC.4/GAKARARA /1249 measures 0.28 ha while parcel LOC.4/GAKARARA /1250 measures 0.52 ha. The Land Control Board proceedings have indicated parcel LOC.4/GAKARARA /1249 to measure 1.3 acres however the mutation forms adduced in evidence shows that the acreage is 0.28 ha. It is to be noted that the acreage in the Land Control Board approvals were altered and no explanation has been given for the alteration. The Plaintiff failed to present the agreement of sale nor the transfer instrument that would have showed the acreage of the land that he purchased.

18. It is true that the title issued to the Plaintiff on the 13/9/1980 to wit LOC.4/GAKARARA /1249 does not disclose the acreage at all. However the green card is very explicit on the measurement of the land so much so that taken together with the mutation forms give the actual acreage of the land as 0.28 ha. and not 1.3 acres as alleged by the Plaintiff.

19. The Plaintiffs assertion that he has settled on 1.3 acres is therefore not supported by any tangible evidence. The burden to proof that he purchased 1.3 acres of land from the original owner was on the Plaintiff, which he has clearly failed to establish on a balance of probabilities. Title LOC.4/GAKARARA /1249 should therefore be rectified to read an acreage of 0.28 ha.

20. In respect to the claim of the 1st Defendant's concern is that the beacons of the plots LOC.4/GAKARARA /1249 and 1250 be established and affixed to determine the boundaries and the acreage of the two parcels. Following the application for a site visit, the report of the Land Registrar and the District Surveyor both agree that the position of the plots LOC.4/GAKARARA /1249 and 764 are interchanged on the ground so much so that parcel LOC.4/GAKARARA /1249 occupies the position for LOC.4/GAKARARA /764 while LOC.4/GAKARARA /764 occupies the position of 1249. Parcel LOC.4/GAKARARA /764 belongs to a third party and the Court will restrain itself from making any decision that is likely to affect the title of a party that was not enjoined to the suit. The owners of Plots LOC.4/GAKARARA /1249 and 764 are best left to resolve the matter.

21. The other finding made by the Land Registrar is that the acreage on the ground and the Registry Index Map vary. For example, LOC.4/GAKARARA /1249 measures 0.390 ha on the ground while LOC.4/GAKARARA /1250 measures 0.171 ha. It is not clear where the balance of the acreage is. The Land Registrar and the surveyor recommended that the acreage on Registry Index Map be rectified to reflect the acreage on the ground.

22. The Plaintiffs case fails and the 1st Defendants' Counterclaim partially succeeds.

23. In the interest of justice and given the Report of the Land Registrar, it is noteworthy that none of the parties raised any objection on the report and it is the view of the Court that the Land Registrar is hereby ordered to re-measure the parcels and rectify the measurements in the Registry Index Map to reflect the ground and proceed to affix the beacons in accordance with the report dated the 17/9/2019 and 7/7/2019 in as far as it relates to parcels LOC.4/GAKARARA 1249 and 1250.

24. Each party to meet their cost of the suit.

25. The parties have liberty to apply.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF FEBRUARY 2020.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Wangari HB for Wambugu Kariuki for the Plaintiff

Defendant: Present in person

2nd & 3rd Defendant: Attorney General is absent.

Irene and Njeri, Court Assistants