



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 20 OF 2012

STEPHEN R.G.G. MUNYI.....PLAINTIFF

VERSUS

THE BOARD OF GOVERNORS

KUTUS SECONDARY SCHOOL.....DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff vide a plaint dated 12th November 2012 sought the following orders:

- (1) A declaration that the plaintiff is the registered absolute proprietor of land parcels registration numbers KABARE/NYANGATI/2597, KABARE/NYANGATI/2895, KABARE/NYANGATI/2892, KABARE/NYANGATI/2901, KABARE/NYANGATI/2903, KABARE/NYANGATI/2898, KABARE/NYANGATI/2905, KABARE/NYANGATI/2904, and KABARE/NYANGATI/2889.***
- (2) A permanent injunction against the defendant by itself, its servants and/or agents from trespassing on, fencing around or otherwise adversely interfering with the plaintiff's quiet possession of land parcels KABARE/NYANGATI/2597, KABARE/NYANGATI/2895, KABARE/NYANGATI/2892, KABARE/NYANGATI/2901, KABARE/NYANGATI/2903, KABARE/NYANGATI/2898, KABARE/NYANGATI/2905, KABARE/NYANGATI/2904, and KABARE/NYANGATI/2889.***
- (3) Any further or better relief that the Court may deem fit and just to grant.***
- (4) Costs of the suit.***

In a statement of defence dated 13th December 2012, the defendant denied the plaintiff's claim and sought judgment against the plaintiff by way of a counter-claim as follows:

- (a) A declaration that the defendant is the owner of the title No. KABARE/NYANGATI/703 and/or the sub-divisions thereof KABARE/NYANGATI/2897, 2895, 2892, 2896, 2902, 2901, 2903, 2898, 2905, 2904 and 2889.***
- (b) A permanent injunction restraining the plaintiff by himself, his servants and/or agents from trespassing on, selling, offering for sale, disposing of, charging or otherwise howsoever alienating, parting with possession, or interfering with the plaintiff's ownership of the property comprised in title Nos. KABARE/NYANGATI/2897, 2895, 2892, 2896, 2902, 2901, 2903, 2898, 2905, 2904 and 2889.***
- (c) An order directing the plaintiff to execute and effect a transfer in favour of the defendant and in default, the Deputy Registrar to execute the transfer.***
- (d) Costs of this suit.***
- (e) Such other or further orders as this Honourable Court shall deem fit and just.***

PLAINTIFF'S CASE

Before this case was confirmed for hearing, the plaintiff filed his witness statement and a list of documents dated 12th November 2012 and

22nd February 2016 respectively. In his sworn evidence, the plaintiff stated that he is the registered absolute proprietor of land parcels No. KABARE/NYANGATI/2897, 2895, 2892, 2896, 2902, 2901, 2903, 2898, 2905, 2904 and 2889 respectively. He further stated that the suit land parcels described above are the sub-divisions of land parcel No. KABARE/NYANGATI/703 which was at one time registered in the name of one PETER GACHOKI MBURIA and subsequently sub-divided to give rise to the suit land parcels which he got registered on 6th June 1996. The plaintiff also testified and stated that he had possession of the suit land parcels until on or about 4th October 2012 when the defendant's principal confronted him and alleged that the defendant owned the land parcels. He stated that the defendant manages Kutus Secondary School whose land is adjacent to his parcels of land. The plaintiff referred to a sale agreement item No. 4 in his list of documents dated 22/2/2016 which he produced in evidence. He also produced proceedings and an order in HCCC No. 193/2002 (Nyeri) as Plaintiff's Exhibits in this case. The plaintiff did not call any witness.

DEFENDANT'S CASE

The defendant filed a list of documents dated 13th December 2012, and a supplementary list of documents dated 18th August 2015. She called two witnesses. PW1 was Cyrus Muchiri Wambogo who is the Vice Chairman, Board of Management Kutus Secondary School. He stated that he has held that position from 2005. The witness testified that he was surprised to see title deed in respect of land parcel No. KABARE/NYANGATI/703 which is their school land. He said that the purported sub-division was done behind their back as the school was not involved. He stated that no surveyor came to the ground. The witness further stated that since part of the school land is water logged, they requested the then County Council of Kirinyaga for more land elsewhere for expansion in 1970s. Their request was accepted by the County Council of Kirinyaga who gave them five (5) acres. He said that the decision was made through a Council meeting and communicated to them through a letter dated 2/2/1983 signed by the Clerk to the Council one S.R. Munyi who is also the plaintiff in this case. The letter was accompanied by the minutes of the Council approving the allocation of the five acres which was signed by the plaintiff herein who was the Clerk to the Council which were produced as **Defence Exhibits 4 & 5** respectively. They were shown the plot which was adjacent to the school and they took possession and occupation immediately and they have been using the land ever since then. The witness said that the plaintiff has never used a portion of the said land a single day. He stated that the suit land belonged to one Mburia Ngaragari (deceased) who was the original registered owner. He identified the green card from the Defendants list of documents **Item 1** which he produced as **Defence Exhibit No. 1**. The witness further recalled that sometime in the year 1970 or thereabouts, the County Council of Kirinyaga was attempting to expand the town and all the pieces of land around Kutus area were acquired by compulsory acquisition and the owners were re-allocated land at Mwea area. The original registered owner of the suit land parcel No. KABARE/NYANGATI/703 was among the people who were compensated with another land at Marugumo in Mwea being L.R. No. 165 measuring approximately 9.1 Ha. When the acquisition was being done, the owner was represented by his son one Peter Gachoki whom the witness said was his classmate. He produced a list of the parcels of land acquired including the suit land as **Defence Exhibit No. 7**. He stated that it cannot be true that the plaintiff could have bought the suit land from Peter Gachoki as there was no land available for sale at the time. The witness also produced a list of correspondences from Kirinyaga County Council to the defendant and the Commissioner of Land confirming the acquisition of the suit land by the defendant herein as **Defence Exhibit No. 3**. The witness also identified other minutes by the Kirinyaga County Council in their supplementary list of documents showing that the suit land belongs to them which was also produced as **Defence Exhibits 8 & 9** respectively. The witness referred to his witness statement dated 10/11/2016 which he asked the Court to adopt in his evidence.

DW2 was Ngari James Gachiwi. He gave sworn testimony and stated that he worked as a Civil Kader with Kerugoya Kutus Municipal Council between 1992 and 2007. He said that he was once appointed a Board member of Kutus Secondary School. He stated that the original registered owner of the suit land parcel No. KABARE/NYANGATI/703 was one Mburia Ngaragari. He said that he lives less than a kilometer from where the disputed land is located. He said that he knows the family of the said Mburia Ngaragari including his children. He said one of the sons of the said Mburia Ngaragari was known as Gachoki Mburia. He stated that both Mburia Ngaragari and his son Gachoki passed on later. He said that he was schooling with the said Gachoki Mburia in Kutus Primary but left to Mururumo area after their land was acquired by Kirinyaga County Council and given to Kutus Secondary School. The witness further stated that the suit land was allocated to the defendant by Kirinyaga County Council and a letter of allotment given. He stated that Kutus has been in possession of the suit land since they were allocated and that the land is a public utility.

ISSUES FOR DETERMINATION

The following are issues for determination in this case:

- (1) *Whether the plaintiff acquired the suit property land parcel No. KABARE/NYANGATI/703 lawfully and procedurally?*
- (2) *Whether the sub-division, transfer and issuance of titles to the plaintiff was above board?*
- (3) *Whether the titles issued to the plaintiff in respect of land parcels No. KABARE/NYANGATI/2897, 2895, 2892, 2896, 2902, 2901, 2903, 2898, 2905, 2904 and 2889 are indefeasible capable of being protected in law?*
- (4) *What orders should the Court issue?*
- (5) *Who shall bear the costs of this suit?*

1. Whether the plaintiff acquired the suit property land parcel No. KABARE/NYANGATI/703 lawfully and procedurally?

The plaintiff in his evidence stated that he bought the suit land from one Peter Gachoki Mburia and produced a sale agreement dated 25th February 1992 as Plaintiff's Exhibit No. 4. From a copy of the said agreement, the said Peter Gachoki Mburia was stated to be the personal representative of Mburia Ngaragari who was deceased. There are no letters of administration showing that the said Peter Gachoki Mburia was authorized in law to deal with the property of the deceased Mburia Ngaragari at the time the purported sale took place. Once a title to land has been put to challenge, it behoves upon the proprietor of such a title to show that the process of acquisition of title was beyond reproach. The defendant has stated that she acquired the suit property in 1970s from the Kirinyaga County Council who allocated them the

land. They produced minutes of Council meeting which approved the allocation which was signed by the plaintiff who by then was the Clerk to the Council. The plaintiff did not controvert or challenge those minutes or deny that the signature appearing therein do not belong to him. The defendant also produced several correspondence letters between her and Kirinyaga County Council and even the Commissioner of Lands confirming that she was indeed allocated the suit land lawfully and procedurally. Those correspondences were not controverted and/or challenged in cross-examination. The evidence adduced puts to doubt the manner and procedure in which the plaintiff acquired the suit land.

2. Whether the sub-division, transfer and issuance of titles to the plaintiff was above board?

The defendant through their first witness Cyrus Muchiri Wambugu stated that they were not involved in the sub-division of the suit land parcel No. KABARE/NYANGATI/703 into the numerous parcels No. KABARE/NYANGATI/2897, 2895, 2892, 2896, 2902, 2901, 2903, 2898, 2905, 2904 and 2889. He stated that there was no sub-divisions done on the ground. The plaintiff did not produce the beacon certificates showing that the eleven land parcels have their individual boundary features. There is also no surveyor and no mutation forms were availed by the plaintiff in his evidence that the alleged sub-division, transfer and issuance of the eleven land titles were issued above board.

3. Whether the titles issued to the plaintiff in respect of land parcels No. KABARE/NYANGATI/2897, 2895, 2892, 2896, 2902, 2901, 2903, 2898, 2905, 2904 and 2889 are indefeasible and capable of being protected by law?

Section 26 (1) of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

- (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or***
- (b) Where the certificate of title has been acquired illegally, un-procedural or through a corrupt scheme”.***

The plaintiff has produced copies of titles in respect of the numerous parcels which are sub-divisions of the original land parcel No. KABARE/NYANGATI/703. I have already found and held that those titles were not acquired lawfully and procedurally. The plaintiff was the Clerk to Kirinyaga County Council. When the suit land was allocated to the defendant, he participated in the Council meeting which approved the said allocation. He even wrote several letters to the defendant confirming the said allocation. The defendant in her defence and counter-claim sought to have those titles issued to the plaintiff cancelled on grounds of being issued illegally, un-procedurally and unlawfully. I am satisfied that the eleven (11) titles issued to the plaintiff being sub-divisions of the original land parcel No. KABARE/NYANGATI/703 are not indefeasible ownership of title capable of being protected by law. The same are out for cancellation.

4. What orders should the Court issue?

Having found and held that the plaintiff did not acquire the titles to the suit properties legally, lawfully and procedurally, the appropriate order that comment to this Court are that this suit fails and the same must therefore be dismissed.

In the final analysis, I enter judgment in the following terms?

- (1) The plaintiff’s suit is hereby dismissed with costs to the defendant.***
- (2) The defendant’s counter-claim succeeds and the plaintiff’s titles in respect of land parcels No. KABARE/NYANGATI/2897, 2895, 2892, 2896, 2902, 2901, 2903, 2898, 2905, 2904 and 2889 are hereby cancelled.***
- (3) The Land Registrar Kirinyaga do rectify the Register in respect of those parcels of land No. KABARE/NYANGATI/2897, 2895, 2892, 2896, 2902, 2901, 2903, 2898, 2905, 2904 and 2889 by transferring the same to the defendant herein.***
- (4) An order be and is hereby issued directing the plaintiff to execute and effect a transfer in favour of the defendant and in default, the Deputy Registrar to execute the transfer.***
- (5) A permanent injunction be and is hereby issued restraining the plaintiff by himself, his servants and/or agents from trespassing on, selling, offering for sale, disposing of, charging or otherwise howsoever alienating, parting with possession or interfering with the defendant’s ownership of the property comprised in title Nos. KABARE/NYANGATI/2897, 2895, 2892, 2896, 2902, 2901, 2903, 2898, 2905, 2904 and 2889.***
- (6) The costs of the counter-claim also to be borne by the plaintiff.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 13th day of March, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Asimwe holding brief for Magee for Plaintiff
2. Defendant/Advocate – absent
3. Mbogo, Court clerk – present