



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 157 OF 2015

MUTIGE KIBOTI & COMPANY LTD.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KIRINYAGA.....DEFENDANT

JUDGMENT

BACKGROUND

In a plaint dated 7th December 2006 and filed on 7th December 2006, the plaintiff sought against the defendant the following orders:

- (i) Eviction order from suit L.R. KABARE/MIKARARA/136/128.*
- (ii) Mesne profits from 1st January 1988 until date of eviction.*
- (iii) General damages for trespass.*
- (iv) Any other relief this Court may deem fit and just to grant.*

On 18th January 2007, the defendant filed defence and counter-claim in which it sought an order that the plaintiff's title to L.R. KABARE/MIKARARA/136/128 be revoked and the register rectified to reflect the defendant as the owner thereof. The defendant also sought costs of the counter-claim. Both the plaintiff and the defendant filed their respective compliance documents pursuant to **Order 3, 7, and 11 CPR** which they relied during the hearing of the suit.

PLAINTIFF'S CASE

PW1 was Samuel Gichovi Ndambiri who was the Vice Chairman of the plaintiff Company who testified on oath and stated that the suit land parcel No. KABARE/MIKARARA/136/126 and KABARE/MIKARARA/136/128 belongs to the plaintiff. He said that they bought several of them and were issued with transfers. He produced transfers for Plots No. 36, 37 and 38 as Plaintiff's Exhibits 1 (a) (b) & (c) respectively. He stated that they paid a total of Ksh. 150,000/= in 1989. He produced the receipt as Plaintiff's Exhibit No. 2. He stated that the then County Council approved the transfers and issued receipts which he also produced in evidence as Plaintiff's Exhibits 3 (a) (b) & (c) respectively. He said that the County Council gave them approvals dated 18th October 1989 which he also produced as Plaintiff's Exhibits 4 (a) (b) (c) & (d). He stated that they then consolidated the plots because they wanted to develop them and became parcel No. KABARE/MIKARARA/136/88. He said that they wanted to sub-divide the land into two (2) portions, one for fresh house and the other for a petrol station. They applied for change of user on 8th March 1997. He said that they were asked to surrender the first title deed No. 88 so that they could be issued with the two separate plots. He produced the letter dated 8th March 1997 from the Ministry of Land showing that they had approved the change as Plaintiff's Exhibit No. 5 (a). The witness also produced another letter from the Ministry of Lands dated 10th July 1996 as Plaintiff's Exhibit No. 7. He stated that after the sub-division, the land became plot No. 126 and 128. He produced the certificate of title for plot No. KABARE/MIKARARA/126/128 as Plaintiff's Exhibit No. 6 (a). He also produced the certificate of lease as Plaintiff's Exhibit No. 6 (b). He stated that they had entered into an agreement with Total Kenya for 20 years. He showed the sub-lease between the plaintiff and Total dated 21/7/97 and marked **P-MFI 7**. They could not give Total their portion because the County Council refused to approve the plan. He stated that the Physical Planner and Land office and Road Engineer had all approved. Only the Council refused. He produced the Map and Comments Sheet as Plaintiff's Exhibit 8 (a) & (b). He stated that the Council did not give reasons for their refusal to approve. He said that the Council uses the plots to sell sheep and cows. The witness also stated that they even wrote to the District Commissioner on 13/5/2004 complaining which he produced as Plaintiff's Exhibit No. 9. He said that the Council had even called them to their office for a discussion over the matter vide a letter dated 13/3/2004 which he also produced as Plaintiff's Exhibit No. 10. He said that the Council admitted that the plot belonged to them and even allowed them to fence it. The witness further stated that the defendant

told them that they would waive the rent and rates on the plot and gave them minutes of those resolutions which he produced as Plaintiff's Exhibit No. 11 (a) & (b). The County Council later reneged and wrote a demand through the firm of Munene Wambugu & Co. Advocates. He produced a bundle of receipts marked Plaintiff's Exhibit No. 12. The defendant even at one time put an advertisement in the Newspaper for defaulters and they decided to pay for the year 2008. He also produced the receipts as Plaintiff's Exhibit No. 13. He said that they are supposed to be paying Ksh. 15,000/= every month renewable every 5 years and that they have lost that money since 1997 since the Council occupies the plot. He said that the Council wrote them a letter asking them to fence the plots. He produced the letter dated 30/3/2009 as Plaintiff's Exhibit No. 14.

DEFENCE CASE

The defendant called one witness namely Josphat Mwai Ngonyi who works with the County Government of Kirinyaga as Director of Lands, Survey and Geospatial Information Systems (G.I.S). He stated that his duties include overseeing the inventory of public land and the transfer of plots that have been alienated to individuals by the defunct Kirinyaga County Council/Kerugoya Kutus Municipality, Kagio-Sagana Township and the Kirinyaga County Council. He stated that he was familiar with the suit property L.R. KABARE/MIKARARA/136/126 and KABARE/MIKARARA/136/128. He referred to his statement dated 14/9/2018 which he sought to be adopted in his evidence. In addition, the witness stated that the suit plots have historically been used as a cattle buying and selling zone. He said that the area was left as a public open space which have never been alienated. He produced an approved development of Kutus Market which he produced as Defence Exhibit No. 2. From that map, he stated that the plots in dispute are shown as 31 and indicated as an existing public open space. The witness further stated that he has done a search and found that the titles in respect of the two parcels have not been signed by the officials of the defunct local authority but were only signed by the Commissioner of Lands and that he has not seen any authority asking him to sign on behalf of the Authority. The witness produced a Report by the Commission of Inquiry into illegal/irregular allocation of public land otherwise known as Ndungu Report. He said that the said report had recommended that the plots be revoked. He stated that the private developers have not taken possession and that the plots are used for selling and buying livestock. The witness also referred to a letter dated 16/8/2006 written by Kerugoya/Kutus Municipal Council to the plaintiff referring to the Ndungu Report where the suit plots have been quoted. The letter is also produced in evidence as Defence Exhibit No. 4. The witness also referred to a certificate of official search for plot No. 136 which is registered in the name of Kirinyaga County Government. The same is also produced as Defence Exhibit No. 5.

ISSUES FOR DETERMINATION

From the pleadings and the documents produced by the parties in evidence, the following are the appropriate issues for determination:

- (1) Whether the plaintiff's title to land parcels No. KABARE/MIKARARA/136/126 and 128 were lawfully and regularly allocated?***
- (2) Whether the plaintiff has proved her claim to the required standard and that the defendant should be evicted from land parcels No. KABARE/MIKARARA/136/128.***
- (3) Whether the claim for mesne profits and damages has been proved and payable to the plaintiff?***
- (4) Whether the plaintiff's title to land parcel No. KABARE/MIKARARA/136/126 and 128 should be revoked and the register rectified?***
- (5) Who should pay the costs of the suit?***

ISSUE NO. 1

The plaintiff called one witness namely Samuel Gichovi Ndambiri who explained that they bought several plots from individuals who had been allocated the plots and thereafter the plots were transferred to them. The plaintiff did not call the individuals from whom they bought the individual plots. Where the root of a title has been challenged, it behoves upon the holder of such title to call the individuals to give account of how they acquired the same. It was incumbent upon the title holder to prove that the title he is holding is not tainted with any irregularity. It is not sufficient for him to dangle the certificate of title as proof of ownership when the same is being challenged. The plaintiff produced numerous transfers as Plaintiff's Exhibit No. 1 (a) (b) & (c) in respect of plots No. 37, 38 and 83 Kutus Township/Market/Shopping Centre in the names of Danson Munene Kibetu, Jane Wanjiru and Pauline Wanjiru. The plaintiff also produced receipts for the purported transfer from the three individual allottees to the plaintiff and marked Plaintiff's Exhibit 3 (a) (b) & (c). The allotment in respect of the three plots were not produced. The plaintiff did not call the three allottees as witnesses to explain how they acquired the plots. The defendant in their defence and counter-claim had put the plaintiff on notice through their particulars of irregularities and/or illegalities of the said allocation as follows:

- “(a) The allocation was not initiated by the defendant who were the owners of the land in issue.***
- (b) The allocation was done without the consent or consultation of the defendant.***
- (c) The defendant had not authorized the alienation of any part of the cattle livestock ring market to the plaintiff or any other allottee.***
- (d) The plots in issue are contained in the report on the Commission of Inquiry into illegal/irregular allocation of public land commonly known as the Ndungu Report Annexes Volume 1, Page 390”.***

The plaintiff did not explain whether it had any difficulties in securing the attendance of the original allottees of the disputed parcels of land whose names are clearly indicated in the transfer forms. It was important for the plaintiff to call those allottees to shed light on how they acquired the plots and whether the acquisition of the plots was irregular and/or illegal. It is not in dispute that the law jealously protects title to land as indicated under **Section 26 (1) of the Land Registration Act (Cap. 300)** which provides as follows:

“The certificate of title issued by the Registrar upon Registration, or to a purchaser of land upon a 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, unprocedurally or through a corrupt scheme”

The defendant on her part also called one witness who testified and stated that after conducting a search of the records in the County Land Registry, he could not see how the two plots were alienated or the person who authorized the alienation. He stated that the suit plots which are the subject of this dispute were never alienated and that the same were irregularly and/or illegally allocated to the plaintiff and that the defendant reported the irregularity and/or illegality of the alienation of the two plots and the same were indeed contained in the Ndungu Report which had recommended for revocation. The witness also pointed out yet another irregularity in the lease document to the effect that the lease had been signed by WILSON GACHANJA, Commissioner for Lands but there was no document authorizing him to alienate the land or to sign the lease on behalf of the defunct Local Authority. According to the witness, the disputed plots are in riparian area of Thiba River and that the same have always been used as livestock ring market and that the plaintiff despite having a paper title has never taken occupation of the land for the last 21 years. The witness also produced an Approved Development Plan of Kutus Market as Defence Exhibit No. 2. The area identified as 3:1 in the said plan is indicated as a public open space adjacent to Thiba River which is being used as cattle/livestock ring market and also serves as a riparian area due to its proximity to Thiba River. The testimony given by the defence on oath has not been challenged in cross-examination. I am satisfied that the plaintiff's titles to land parcels No. KABARE/MIKARARA/136/126 and 136/128 were not acquired lawfully and regularly.

ISSUE NO. 2

Other than producing the certificate of title to the suit lands, the plaintiff has not called the original allottees of the suit parcels of land to show that their acquisition was done in accordance with the law. The standard procedure in acquiring land by private owners was by writing/making an application to the local authority concerned who appoints a committee. The allocation Committee would consider the application alongside any other applicants and come up with recommendations which are forwarded to the full Council meeting for approval or otherwise. Upon approval of an application for allocation of a plot, the local authority concerned writes to the Commissioner of Lands together with the recommendations of the Council. The Commissioner of Land thereafter writes a letter of allotment giving conditions to the successful allottee. The letter of allotment is accompanied by the Part Development Plan showing the location and size of the allotted plot. The documents produced by the plaintiff are not prima facie evidence of allocation of a plot. I find that the plaintiff has failed to proof his claim to the required standard.

ISSUE NO. 3

In the same vein, I find that the claim for mesne profits and damages for trespass has not been proved on a balance of probabilities.

ISSUE NO. 4

Having found that the plaintiff's titles to land parcel No. KABARE/MIKARARA/136/126 and 128 were obtained irregularly and/or illegally, the only available remedy is to have the same revoked and the register rectified. I also take judicial notice that the said illegality and irregularity was observed by the Commission of Inquiry into irregular/illegal acquisition of public land otherwise known as Ndungu Report. Dealing with a similar matter such as before me in ***Milimani High Court ELC No. 238 of 2020 between Margaret Wairimu Mucheru & Another Vs Manyalla Paradise Limited & Another, Lady Justice P.M. Mwilu*** (as she then was) held as follows:

“Every literate and knowledgeable Kenyan ought to be aware of the widely publized Ndungu Report on illegally acquired land. The plaintiff admits that their parcel of land in dispute is included in that Report. They did not show to this Court what legal action they have taken to resolve that inclusion of the suit land in the Ndungu Report. And whereas the Ndungu Report is not conclusive convicting authority one who is adversely mentioned therein would at the very least be expected to contest the same”.

The plaintiff through the witness who was the secretary to the plaintiff Company stated that he was not conversant with the Ndungu Report. However, he did not do anything to challenge the same which made adverse recommendation against the suit plots. I believe that failure by the plaintiff to challenge the said report as soon as it came to their knowledge of the adverse recommendation in respect of the suit plots is clear admission that the land was indeed acquired irregularly and illegally.

I have considered the submissions by counsels and the authorities particularly those cited by counsel for the plaintiff and find that they are distinguishable.

DISPOSITION

In view of my findings as aforesaid, I now enter judgment as follows:

(1) The plaintiff's suit is dismissed.

(2) The defendant's counter-claim is allowed.

(3) The plaintiff's title to L.R. No. KABARE/MIKARARA/136/128 be and is hereby revoked and the register rectified to reflect the defendant as the owner thereof.

(4) The costs of the dismissal and the counter-claim to be borne by the plaintiff.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 22nd day of May, 2020.

E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. P.M. Muchira for Defendant - present

2. Mr. Asimwe for Plaintiff – present

3. Okatch – Court clerk – present