



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 220 OF 2008

WARAB LIMITED.....PLAINTIFF

VERSUS

MACHAKOS COUNTY GOVERNMENT.....1ST DEFENDANT

JOSEPH KIOKO.....2ND DEFENDANT

HARRISON MUSYA MUSAU.....3RD DEFENDANT

FLORENCE KAMENE.....4TH DEFENDANT

NATIONAL LAND COMMISSION.....5TH DEFENDANT

ANTHONY MUTUA.....6TH DEFENDANT

DAVID KAVOO.....7TH DEFENDANT

PETER MUMO MAINGL.....8TH DEFENDANT

MUSEMBI NZIOKA.....9TH DEFENDANT

BENJAMIN SEVE.....10TH DEFENDANT

JUDGMENT

Introduction:

1. In the Further Amended Plaintiff dated 9th May, 2017, the Plaintiff averred that it is the registered proprietor of the land known as L.R. No. 337/996 situate in Mavoko Township within Machakos County (*the suit land*); that the Plaintiff applied for the approval to sub-divide the suit land into 40 plots and that sometimes in March, 2008, the Plaintiff's Director visited the suit land and discovered that the suit land had been illegally sub-divided.

2. The Plaintiff has averred that it later discovered that it is the 1st Defendant who had trespassed and sub-divided the suit land and sold the sub plots to the 2nd, 3rd, 4th, 6th and 7th Defendants and other persons and that the purported Letters of Allotment issued in favour of the 2nd-7th Defendants are illegal, null and void.

3. In its prayers, the Plaintiff has applied for the following orders:

a. A permanent injunction restraining 2nd, 3rd, 4th, 6th, 7th, 8th, 9th and the 10th Defendants and each of them whether by themselves, officers, agents, employees and/or servants from entering, trespassing, possessing, allotting, selling or offering for sale, constructing, developing or in any other manner whatsoever interfering with the Plaintiff's quiet possession, use and enjoyment of all that property known as L.R No. 337/996 Mavoko Township or any part thereof.

b. A mandatory order compelling the 2nd, 3rd, 4th, 6th, 7th, 8th, 9th and the 10th Defendants, their servants, officers, employees and agents to forthwith vacate and hand over to the Plaintiff's vacant possession of all that property known as L.R No. 337/996 Mavoko Township and to forthwith remove at their own cost the developments illegally constructed and/or erected thereon and

in default the Plaintiff be at liberty with the assistance of duly authorized auctioneers and the O.C.S Athi River Police Station to forcefully demolish any construction and/or developments erected and to evict the Defendants and their agents at their own cost.

c. A permanent injunction restraining the 5th Defendant whether by himself, officers, servants or agents from accepting, approving and/or registering any sub-division, survey plans, Deed Plans, Transfer, Lease, Charge, Title or any other document or transaction presented by the 2nd, 3rd, 4th, 6th, 7th, 8th, 9th and the 10th Defendant's or any other person other than the Plaintiff in respect to all that property known as L.R Number 337/996 Mavoko Township.

d. A declaration that the purported allocations and/or Letters of Allotment issued by the 1st Defendant in respect of all and/or any part of all that property known as L.R. Number 337/996 Mavoko Township in favour of the 2nd, 3rd, 4th, 6th, 7th, 8th, 9th, and the 10th Defendants are invalid, illegal, null and void in law and their continued occupation and/or possession of the suit property is illegal.

e. A declaration that the Plaintiff is the lawful and sole owner/proprietor of all that property known as L.R. Number 337/996 Mavoko Township measuring 1.713 Hectares.

mage under paragraph 10, 11 and 13 above.

g. Costs of this suit and interest thereon.

4. In its Defence, the 1st Defendant averred that it has no knowledge of the Plaintiff's ownership of the suit land; that it is not aware of any sub-divisional exercise in respect of the suit land and that the Plaintiff does not have a valid title in respect to the suit land.

5. According to the 1st Defendant, after the initial survey, the suit land was given registration number L.R. No. 337/996 with an acreage of 1.713 Ha; that the said survey was cancelled and a new L.R. Number 338/1077 given and that the said title was cancelled and the land was allocated a fresh number L.R. No. 337/2731 measuring 1.058 Ha.

6. The 1st Defendant averred that the title of L.R. No. 337/996 is defective; that inside L.R. No. 337/996 is L.R. No. 337/922 and L.R. No. 337/993 which had been surveyed much earlier and that the Plaintiff's suit is incompetent.

7. In their Defence, the 8th, 9th and 10th Defendants averred that the Plaintiff's title in respect of L.R. No. 337/996 was cancelled by the 5th Defendant because there was an earlier allocation being L.R. No. 337/992 and 993; that the Shida Moja Property being Mavoko/Block 7/53 measuring 1.468 Ha does not fall under the Plaintiff's alleged L.R. No. 337/996 and that the Plaintiff's title was issued using a forged Deed Plan.

8. The 8th, 9th and 10th Defendants finally averred that there is no proof of the existence of Survey Plan Number F/R 210/14 which gave rise to L.R. No. 337/996; that the members of Shida Moja hold the valid title for L.R. No. 337/1077 measuring 1.468 Ha and that the said land was later converted to Mavoko Block 7/53.

The Plaintiff's case:

9. The Plaintiff's Director, PW1, informed the court that the Plaintiff was allocated a parcel of land known as L.R. No. 337/996 vide a Letter of Allotment dated 5th October, 1990; that she paid the requisite stand premium of Kshs. 285,040 on 17th November, 1990 and that the Plaintiff was issued with the title document for L.R. No. 337/996 on 10th June, 1992.

10. It was the evidence of PW1 that when she visited the suit land, she found structures had been constructed on the suit land; that she reported the issue of the encroachment whereafter the Titles of the trespassers were cancelled and that she filed the current suit for the eviction of the trespassers who were residing on the suit land.

11. It was the evidence of PW1 that it is the 1st Defendant which had allocated the other Defendants the suit land and was collecting rates from them; that after the court ordered for the demolition of the structures that were standing on the suit land, the Defendants filed numerous suits in court and that the Plaintiff is holding a genuine title.

12. PW1 informed the court that she has never been informed that the Plaintiff's title was cancelled and that she has the original title document of L.R. No. 337/996.

13. In cross-examination, PW1 stated that she did not have a copy of the Articles and Memorandum of Association of the Plaintiff or the authority of the Plaintiff to plead on its behalf; that by the time the Plaintiff was allocated the suit land, the land had already been surveyed and that she did not know when the survey of the suit land was conducted.

14. PW1 informed the court that the Letter of Allotment shows that she was allocated land measuring 2.14 Ha; that her title document shows the acreage of the land to be 1.713 Ha and that she discovered that she was allocated land which was less than that indicated in the Letter of Allotment.

15. PW1 stated that the people who had been allocated the suit land were later on allocated alternative parcels of land and that the survey plans shows that the Plaintiff's title had been cancelled.

16. The 10th Defendant, DW1, informed the court that he is the Chair of Shida Moja Self Help Group and owners of land known as L.R. No. 337/1077 measuring 1.468 Ha; that he was issued with a Letter of Allotment by the 1st Defendant on 19th October, 2007 and that he has been paying the requisite rates.

17. DW1 stated that the Plaintiff's title was cancelled by the 5th Defendant on 15th May, 1991 because it had overlapped on earlier parcels of land being L.R. No. 337/992 and 993 which was done on 2nd April, 1991 and that Survey Plan Number F/R 220/173 was cancelled by F/R No. 210/124.

18. DW1 informed the court that the acreage of the land indicated in the Plaintiff's Letter of Allotment is different from the acreage in the title document; that the Deed Plan annexed on the Plaintiff's title cannot be traced at the Director of Survey's office and that the members of Shida Moja hold a legitimate title.

19. It was the evidence of DW1 that L.R. Nos. 337/992, 993, 1078 and 1079 are all within L.R. No. 337/1077 and that the Defendants' land was converted to read Mavoko Block 7/53. According to DW1, he was allocated a plot as a member of Shida Moja measuring 60feet by 40feet in the year 2009; that he had constructed 18 permanent rental houses which were illegally pulled down by the Plaintiff and that he is entitled to the suit land and damages.

20. The evidence of the Vice Chair of Shida Moja Self Help Group, who is also the 9th Defendant, was that she is the holder of land known as L.R. No. 337/2694 which she bought on 16th January, 2007 from N. Tumbo. It was the evidence of DW2 that his plot arose from the original plot number 337/1077 which was issued after L.R. No. 337/996 was cancelled.

21. It was the evidence of DW2 that Shida Moja Self Help Group was allocated L.R. No. 337/1077; that the Plaintiff has a non-existent Deed Plan and that the Plaintiff's title is as a result of double allocation and that is why its title was cancelled on 15th May, 1991. The evidence of the 8th Defendant, DW3, is similar to evidence of DW1 and DW2.

22. A Surveyor from the Director of Survey's office, DW4, informed the court that the office of the Director of Surveys received survey maps for L.R. No. 337/996, 992 and 1077 from private licensed surveyors. According to DW4, the first survey plan that was received by the Director of Surveys on 2nd April, 1991 is for L.R. No. 337/992 and 993 whose plan number was F/R No. 205/88.

23. DW4 stated that on 13th May, 1991, the office received another survey plan number F/R 210/124 for L.R. No. 337/996 and that this survey plan was never approved because of the earlier survey plan for L.R. Nos. 337/992 and 993. According to DW4, the Commissioner of Lands was informed about the issue of the two survey plans.

24. DW4 informed the court that survey plan number F/R 220/173 for L.R. No. 337/1077-1079 was received by the Director of Survey's office on 23rd March, 1992 and was approved on 23rd May, 1992 and that F/R No. 220/173 showed the cancellation of the earlier survey plan F/R No. 220/173 for L.R. No. 337/996.

25. DW4 stated that most of the land within the then Mavoko Municipality was converted from the Registration of Titles Act (RTA) to the Registered Land Act (RLA) regime; that the Deed Plan for L.R. No. 337/996 has never been approved by the Director of Surveys and that the survey plan for L.R. No. 337/1996 was cancelled.

26. After the testimony of DW4, the Plaintiff's and the Defendants' advocate entered into a consent which read as follows:

“By consent, a report by the Director of Surveys or his nominee to be made in respect of Deed Plan No. 163310 for L.R. No. 337/996 within thirty (30) days. DW4 to produce the report on 20th February, 2018”.

27. It is on the basis of the above consent that DW4 testified for a second time and produced his report in respect of Deed Plan number 163310 for L.R. No. 337/996. It was the evidence of DW4 that after investigations by the office of the Director of Surveys, they found that there are no records showing the reinstatement of the cancelled survey plan number F/R No. 210/124.

28. It was the evidence of DW4 that a Deed Plan is usually prepared on the basis of a survey plan; that as long as survey plan F/R 210/124 remains cancelled, Deed Plan number 163310 for L.R. No. 337/996 stands cancelled too and that Deed Plan number 163310 is not authentic.

29. In cross-examination, DW4 stated that the reasons why survey plan number F/R No. 210/124 was cancelled are captured in the letter dated 15th May, 1991 by the Director of Surveys which was addressed to the Commissioner of Lands and copied to the Surveyor who prepared the survey plan and that the cancelled survey plan overlapped the surveys that were already existing.

Submissions:

30. The Plaintiff's advocate submitted that the Plaintiff's claim is merited because she produced the Letter of Allotment and the payment receipt for Kshs. 285,040; that the Plaintiff produced an official search for L.R. No. 337/996 dated 12th November, 2008 and that the Ministry of Lands vide a letter dated 16th July, 2008 confirmed that it is the Plaintiff who is the registered proprietor of the suit land.

31. The Plaintiff's counsel submitted that the purported allocations to the Defendants were done just recently; that the Defendants' witness did not produce a letter cancelling the Plaintiff's title and that the Defendants admitted that their land does not fall in the Plaintiff's land being L.R. No. 337/996.

32. The Plaintiff's advocate submitted that no person has sued in respect of L.R No. 337/992-993; that there is no claim that the Defendants were allocated L.R No. 337/992 and 993 and that DW4 did not produce any evidence to show that the Plaintiff's survey plan, Title Deed and Deed Plan were ever cancelled. In conclusion, counsel submitted that the Plaintiff having been allocated the suit land, and title to the land issued, the suit land could not have been allocated to the Defendants as alleged. Counsel relied on numerous authorities which I have considered.

33. The Defendants' counsel submitted that L.R. No. 337/996 arose out of double allocation of land; that the Plaintiff's survey plan was never processed due to the said double allocation and that in any event, the measurements of the land indicated in the Letter of Allotment that was issued to the Plaintiff is different from the measurements in his Title document.

Analysis and findings:

34. This suit was commenced by way of a Plaint dated 21st November, 2008 against the 1st to 5th Defendants. The Plaint was amended on three occasions, with the last amendment being done on 9th May, 2017.

35. The Plaintiff's case is that it is the registered proprietor of land known as L.R No. 337/996 situate within Mavoko Township (*the suit land*). It is the Plaintiff's case that it was allocated the suit land vide a Letter of Allotment dated 5th October, 1990 and that after paying the requisite charges to the government of Kshs. 285,040, the title document was issued in its favour.

36. The Letter of Allotment dated 5th October, 1990 which was produced by the Plaintiff shows that the Plaintiff was allocated an unsurveyed residential plot in Athi River Town. The Plaintiff also produced in evidence a copy of the receipt dated 7th October, 1990 showing that it paid Kshs. 285,040 as stand premium for the said land.

37. The title document exhibited by the Plaintiff shows that the Plaintiff was issued with the Grant for L.R No. 337/996 measuring 1.713 Ha and delineated in Deed Plan number 163310 dated 4th June, 1992. The Grant was signed by the Commissioner of Lands on 10th June, 1992 and was registered as I.R Number 55866/1 on 17th June, 1992.

38. The dispute herein arose when the Plaintiff's Director, PW1, found people on the suit land. According to a Surveyor who had been retained by the Plaintiff, in his undated report that was produced by the Plaintiff, he stated as follows:

“Findings: A visit was made to the ground on 10th October, 2018 using a copy of the Deed Plan and title as the survey plan was missing from survey of Kenya... A copy of the survey plan was later obtained privately and this revealed that there were further sub-divisions on the property in question as evidence on the plan (F/R No. 220/173). These other plans were searched and two were eventually found. These are F/RS No. 284/197 and 292/77...”

39. The 1st, 8th, 9th and 10th Defendants have averred in their Defences that the survey plan which gave rise to L.R. No. 337/996 (*the Plaintiff's title*) was cancelled after it was realized that the same had overlapped two existing parcels of land, that is L.R No. 337/992 and 993.

40. According to the Defendants, after the cancellation of survey plan number F/R No. 220/173 which gave rise to L.R. No. 337/996, a new survey plan number plan was prepared which gave rise to L.R. No. 337/1077. It is the Defendants' case that L.R. No. 337/1077 was allocated to a Self Help Group known as Shida Moja who are represented by the 8th, 9th and 10th Defendants.

41. The Defendants produced in evidence the Letter of Allotment dated 2nd January, 1994 that was issued to Shida Moja Investment for unsurveyed land in Athi River measuring 1.408 Ha. The evidence produced by the Defendants shows that parcel of land known as L.R. No. 337/992 and 993 was surveyed on 2nd April, 1991. The survey plan F/R No. 208/88 was approved and authenticated by the Director of Surveys on 5th April, 1991.

42. Mr. Anyumba G.A is shown to have carried out a survey vide survey plan number F/R 210/124 on 5th February, 1991. This is the survey plan that gave rise to L.R. No. 337/996 measuring 1.713 Ha. The survey plan that gave rise to L.R. No. 33/996 was produced by the Defendants, and not the Plaintiff. On the face of the said survey plan, a note was done by hand in the following words.

“This plan cannot be processed as there is double allocation. See my letter in CT 221/Vol. 42/3730 of 15th May, 1991”.

43. The Defendants further produced in evidence the survey plan F/R No. 220/173 dated 23rd March, 1992 for L.R. No. 337/1077-1079. The said survey map shows that L.R. No. 337/996 had been cancelled. The plan further shows the positioning of the following parcels of land: 337/992; 337/993; 337/1078 and 337/1079.

44. The Defendants also produced in evidence the letter dated 20th June, 2016 authored by DW4 and addressed to Shida Moja Self Help Group. In the said letter, the Director of Survey's nominee stated as follows:

“RE: L.R. No. 337/996, F/R 210/124

Please note that the survey for the said property was conducted by a private/licenced Surveyor, one Mr. Anyumba, the approved plan F/R 210/124 was later cancelled on 15th May, 1991. Therefore, the purported DP No. 163310 issued on 4th June, 1992

cannot be a valid extract from records on the cancellation of the F/R 210/124 has never been reinstated”.

45. When DW4 testified, he repeated the above sentiments, and produced the survey maps in respect of the contested land. In his Report dated 13th December, 2017, DW4 stated as follows:

“RE: ELC. CASE NO. 220 OF 2008 – REPORT ON DEED PLAN NO. 163310 FOR L.R. NO. 337/996

Reference is made to your court order dated 14th November, 2017 on the above subject matter.

Deed Plan is produced to be attached to the Title Deed. Deed Plan is produced at the same scale as the survey plan. It is a replica of the survey plan. It depicts linear and angular dimensions and acreage as they appear on the survey plan.

Deed Plans are produced in duplicate. One copy is for registration purpose and the other one is office copy which is retained by Director of Surveys. In case of client copy is lost the office copy is used to produce and certify another copy for registration purpose.

The difference between the two Deed Plans is that office copy bears signature of the Deed Plan officer whereas the client bears the name of the Deed Plan officer.

Deed Plan No. 163310 for L.R No. 337/996 was signed on 4th June, 1992.

Survey for L.R No. 337/996

- a. Survey for L.R 337/996 was done by Anyumba G.A.*
- b. Survey work was received and registered in survey records office (SRO) on 13th May, 1991.*
- c. Survey plan and Computation were registered respectively as F/R 210/124 and 25751.*
- d. Survey plan F/R 210/124 was cancelled through a letter CT 221/VOL. 42/3730 dated 15th May, 1991.*
- e. Cancellation was due to an overlap which was found to have been caused by multiple allocations on the same piece of land.*

Survey for L.R. No. 337//992-993

- a. This survey falls in the same land as L.R. No. 337/996*
- b. It was done earlier than survey for L.R. No. 337/996*
- c. Survey was received in Survey Records office in 2nd April, 1991*
- d. Survey was registered as F/R No. 208/98*
- e. It was authenticated on 5th April, 1991*
- f. It is one of the allocations found to overlap with L.R. No. 337/996*
- g. Survey for L.R No. 337/996 was found to encroach on to this survey hence its cancellation on 15th May, 1991.*

Conclusion

There are no records in this office to show reinstatement of cancellation of Survey Plan F/R 210/124. A Deed Plan is normally based on a survey plan and cannot stand on its own. As long as the Survey Plan F/R 210/124 remains cancelled, Deed Plan No. 163310 for L.R No. 337/996 stands cancelled too.

Deed Plan No. 163310 appear to have been produced far much later after cancellation of Survey Plan F/R 210/124. This Deed Plan resembles the office copy and lacks the Deed Plan officer’s name.

From the above findings, Deed Plan No. 163310 is not authentic.”

46. DW4 gave evidence to the effect that the Deed Plan number 163310 annexed on the Plaintiff’s title is not authentic. DW4 further informed the court that the said Deed Plan could not have been issued by the Director of Surveys because the survey plan in support of the Deed Plan had been cancelled by the Director of Surveys in 1991.

47. The Plaintiff did not call evidence from the private surveyor who purportedly prepared the survey plan that gave rise to L.R. No. 337/996 and Deed Plan number 163310 dated 4th June, 1992 to controvert the evidence of DW4.

48. Indeed, other than the evidence of the Plaintiff's Director, the Plaintiff did not adduce evidence from a witness who has the expertise in matters of survey to controvert the assertions by the Defendants that survey plan number F/R No. 210/124 had been cancelled because it overlapped other existing parcels of land, and therefore a Deed Plan could not have been issued on the same land.

49. Although the Plaintiff produced in evidence a Letter of Allotment showing that it had been allocated unsurveyed land measuring 2.14 Ha, there was no explanation why the Grant that was issued to the Plaintiff showed the acreage as 1.713 Ha. This big difference in terms of acreage shows that the Letter of Allotment produced by the Plaintiff was not referring to the same parcel of land that is depicted in the Grant for L.R. No. 339/996.

50. The evidence before me shows that the title in respect of L.R. No. 339/996 was issued to the Plaintiff unlawfully. Indeed, the Defendants proved that after the cancellation of the Survey Plan for L.R. No. 339/996, another Survey Plan for L.R. No. 1077-1079 was prepared and approved by the Director of Surveys. This Survey Plan took into consideration the existence of the earlier survey for L.R Nos. 337/992 and 993.

51. In the circumstances, I find and hold that the Plaintiff has not proved its case on a balance of probabilities. On the other hand, the 1st, 8th, 9th and 10th Defendants herein (*who are Plaintiffs*) in ELC. Nos. 180 of 2009, 183 of 2009 and 185 of 2009 (*which were consolidated*) have proved their respective cases.

52. For those reasons, the Plaintiff's suit, that is, ELC Case No. 220 of 2008 is dismissed. Each party will cater for its/his own costs in all the consolidated suits.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE