



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND

AT MERU

ELC APPEAL NO. 1 OF 2019

THE COUNTY COUNCIL OF MERU.....1ST APPELLANT

THE CHAIRMAN BOARD OF GOVERNORS MARAA SECONDARY SCHOOL.....2ND APPELLANT

THE DIOCESE OF MERU REGISTERED TRUSTEE KANYAKINE PARISH.....3RD APPELLANT

VERSUS

P.C.E.A THRO' THE REGISTERED TRUSTEES.....RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. H. Ndungu (CM)

dated and delivered on 6/12/2018 in Meru CMCC No. 415 of 2009)

JUDGMENT

1. The appellants being the defendants in the trial court were sued by the respondent for a declaration that the transfer of the land parcel Nos. **ABOGETA/NKACHIE/1088, 1089 and 1090** to the appellants is null and void, cancellation of the said titles as well as costs and interest of the suit. The respondent had also sought for a permanent injunction restraining the 2nd and 3rd appellants from interfering in any way with the land parcels nos. **ABOGETA/NKACHIE/1088, 1089 and 1090**.

2. On 6/12/2018, the trial court entered judgment in favour of the respondent in the following terms.

- a) *“There be a declaration that the transfer of Land Parcel Nos. Abogeta/Nkachie/1088, 1089, 1090 to the defendant is null and void.*
- b) *There be an order of cancellation of titles held by the defendants and the land reverts back to the plaintiff.*
- c) *The Executive Officer of this court be and is hereby empowered to effect transfer to the plaintiff within 60 days of the defendants failing to do so.*
- d) *Cost and interest to the plaintiff.”*

3. The appellant being aggrieved by the decision filed this appeal based on fifteen grounds which may be summarized into three: **whether the learned trial magistrate erred in law and fact in proceeding to entertain a suit that was time barred; Whether the magistrate erred in failing to consider the submissions of the appellant and whether the trial magistrate erred in law and fact in the analysis and assessment of the evidence tabled before her to warrant the cancellation of the appellants' titles.**

4. This appeal was canvassed by way of written submissions. The appellants submitted that on **27/03/1979** the 1st appellant allotted **L.R No. ABOGETA/NKACHIE/368** (hereinafter **the Suit Land**) to the respondent through *Min. No. 9/79 (4) Ex Min. No. 10/79*. However, on **29/05/1979**, the 1st appellant allotted the Suit Land as well as land parcel Nos. Abogeta/Nkachie/366 and 367 to St. Lucy School for the Blind, Igoji, under the auspices of the Catholic Diocese of Meru, through *Min. No. 34/79 (a) (1) to 2nd and 3rd appellants*. This latter minute amended the earlier minute and it procedurally took away the allotment from the respondent. Therefore, the cause of action arose in 1979 hence making this suit time barred as per **Section 7 of the Limitations of Actions Act**.

5. The appellants further submitted that the Suit Land was later subdivided to parcels Nos. **1088, 1089 and 1090** and transferred to Diocese of

Meru Registered Trustee, Maara Secondary School and Maara Primary School respectively through Min.No.E. H.&S.S.3/2005 SCHEDULE "B".

6. Initially, the Suit Land was registered in the name of Meru County Council in 1975. Thus, the law applicable is **Section 117 of the repealed Constitution of Kenya** as the Suit Land was trust land. The Council reserved the right to allocate public land for the benefit of the community. It was not obligated to notify the respondent herein as long as the act of allocating the trust land was being done for the benefit of the larger community.

7. The appellants therefore submitted that the title deeds were not acquired fraudulently as alleged by the respondent who ought to have strictly proved this more than on a balance of probability.

8. The appellants further submitted that their titles were acquired lawfully and that no evidence was adduced to contradict this averment.

9. In support of their case, the appellants relied on the following authorities; **Kenya Agricultural and Livestock Research organization (KALRO) v County Government of Kitui [2019] eKLR, Dr. Joseph Arap Ngok vs. Justice Moiwo Ole Keiwa & 5 Others Nairobi CA 60 of 1997, Urmilla w/o Mahendra Shah v Barclays Bank International Ltd & another [1979] KLR and Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR.**

10. The respondent submitted that they were allocated the Suit Land by the 1st appellant in 1979. The 2nd and 3rd appellants were interested in it with the 3rd appellant claiming that they were allocated the same by the 1st appellant which was not the case. The 3rd appellant and the respondent started claiming the Suit Land in 2008, thus the suit is not time barred.

11. It was further submitted that the issue of trust land and repealed Constitution of Kenya are new grounds which were not raised at the trial stage as they were not pleaded. Moreover, the appellants are trying to add additional evidence which is not acceptable. A party is not at liberty to raise a point of law or fact which he had not been pleaded and canvassed in the lower court.

12. The respondent avers that they were able to prove fraud before the trial court, as they had demonstrated that they were allocated the Suit Land as per Min. No. 9/79 Ex Min. No. 10/79 on 27.3.1979 after which the Suit Land became their property. They are the ones who retained power to alienate the suit land.

13. The respondent relied on the case of: **Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR.**

14. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and to make its own determination having in mind that it did not have the advantage of seeing and hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123, Mary Wambui Njuguna vs. William Ole Nabala & 9 Others (2018)eKLR.**

15. The suit before the trial court had proceeded to hearing where each party gave their version of their claim to the suit properties.

16. **PW1 Jibson Micheni Mbai**, introduced himself as a clergyman of the Presbyterian Church of E.A Kenya Kine Parish in charge of Imenti Central. He stated that they were allotted the Suit Land measuring 28 acres by the 1st appellant to build a primary and secondary school through minutes dated **27.3.1979** which he identified in court as "MFI 2". Once their application was successful, they started with Maraa Primary School and subsequently, two classes were donated to start the secondary school in year 2005. An issue arose on registration of the secondary school. The CM suggested it be registered at District Education Board but they wanted it to be registered under PCEA. This created a conflict resulting to the secondary school being moved to a different location nearby but not adjacent to the primary school.

17. In June 2008, the head master of the primary school reported that the Suit Land was being subdivided. They visited the 1st appellant's offices where they found out that the Suit Land had been subdivided into three parcels without the knowledge of the respondent. The minutes dated **29/05/1979** confirms that the Suit Land was allotted to St. Lucy School for the Blind, Igoji. They were aggrieved by this turn of events prompting them to file the suit before the magistrate's court.

18. **PW2 Julius Kimathi Ituru** testified that in 2002 he was a teacher at Maraa Primary School but left in 2012. He stated that it is the public who put up the primary school and the respondent sponsored it since the Suit Land was allotted to them, 8 acres for the primary school and 20 acres for the secondary school. They do not have a title where the school is located but sought for it in December 2002 from the 1st appellant. They obtained a map and green cards which showed that the land was registered under a demonstration farm. In 2005 they started the secondary school on the same land. The CM wrote to PCEA for allocation of 4 acres to build the school under secondary of DB but the church declined. They offered an alternative parcel No. 366 which belonged to EAPC and that is where the school started. In 2008 a team of surveyors demarcated it.

19. PW2 visited the 1st appellant's office to find out what was going on. That is when he found out that the Suit land had been demarcated to parcel nos. **1088, 1089 and 1090** allocated to experimental farm, primary and secondary schools respectively. This subdivision had not been allowed by the county council. The minutes which allocated the Suit Land to the experimental farm and school was attended by different persons as indicated in the earlier minutes. It thus appears to be a case of double allocation for the respondent was not consulted during the 2nd allocation. Thus the latter allocation was fraudulent for it was done without their knowledge.

20. **DW1 James Kimathi**, introduced himself as the chairman board of governors Maraa Secondary School, and he adopted his statement filed on 9/11/2012 as his evidence. He stated that when the congregation of Consolata Catholic Fathers came from Italy in the early 1960s, they came and settled in Maraa and started utilizing the Suit Land. Upon the death of the founding father Lead, the farm was named Maraa Lead farm which remained displayed on the permanent wall of the gate at the entrance of the farm. In 1977 the Catholic Diocese of Meru brought the congregation of St. Joseph's brothers to settle on the farm. To house the brothers, permanent structures were put up including

residential houses, health facilities, zero grazing, primary school and a church. The land the brothers occupied is the suit land which was registered as Maraa Experimental Farm under the trustees of Meru County Council.

21. On 14/11/2004 when the Member of Parliament then visited the area, he challenged the community to come up with a day secondary school and gave a cheque of Kshs. 316, 316/- to start the same. The community agreed to do so and proposed that the school be sponsored by the District Education Board rather than Christian denominations. He was elected as chairman of the management committee. The community agreed to give the secondary school four (4) acres of land from the Suit Land next to the primary school. Thereafter, the Catholic and PCEA churches claimed ownership of the Suit Land. It is only father in charge of Kanyakine Catholic Parish who adduced evidence of ownership by producing minutes from County Council of Meru that gave St. Lucy School for the Blind, Igoji under the Catholic Diocese of Meru the Suit Land (**Abogeta/Nkachie/368**).

22. Due to the confusion of ownership, he wrote letters dated 17/03/2005 to both churches requesting each for assistance with the four (4) acres of land for the secondary school as recommended by the community. In reply, the reverend of PCEA Kanyakine declined to give the four (4) acres to the secondary school unless the church sponsored it.

23. While waiting to know the permanent site of the school, the community decided that the secondary school should be temporarily housed on the vacant room of the primary school. Later, Kanyakine Catholic Parish approved their request and that the primary and secondary school would be considered for allocation of land when the Suit Land is subdivided. In the meantime the secondary school was moved to **Abogeta/Nkachie/366** reserved for Maraa Nursery School measuring two (2) acres.

24. Since the Catholic Diocese of Meru had proved ownership, vide a letter dated 5/01/2005, they applied to Meru County Council for subdivision of the Suit Land into three parcels twenty (20) acres, four (4) acres and balance for the Catholic Diocese of Meru, Maraa Secondary School and Maraa Primary School respectively. The application was approved, documents forwarded to the Ministry of Lands and payment of requisite fees resulting in issuance of titles for parcel nos. **1088, 1089 and 1090 to Catholic Diocese of Meru, Maraa Secondary School and Maraa Primary School respectively**. The 3rd appellant followed the right and legal procedures in subdividing the Suit Land. The respondent were allocated the Suit Land vide minute No. 9/79(4) but this was subsequently amended by minute No. 34/79(A) which cancelled its allocation.

25. **DW2 Father Basil Joseph Njagi**, a Vicar general with Catholic Diocese of Meru adopted his statement filed on 26/07/2018 as his evidence in chief. He stated that in the 1960s, the Consolata Catholic Fathers came from Italy and settled in Maraa and occupied the Suit Land. After adjudication the Suit Land was registered and reserved as Maraa Experimental Farm under the trusteeship of the County Council of Meru Central. The Catholic Diocese of Meru then brought the congregation of St. Joseph brothers who settled on the Suit Land.

26. In May 1979 Meru County Council officially allocated the Suit Land vide Minute 34/79 to St. Lucy's School for the Blind, Igoji of the Catholic Diocese of Meru. Since then the brothers and the school have continued to utilize the Suit Land of which the respondent has never raised any objection. In 2005, the Catholic Diocese of Meru received a letter from the Maraa Community representatives requesting for four (4) acres to be carved from the Suit land for the proposed new Maraa Secondary School.

27. The Catholic Diocese of Meru vide its letter dated 5/01/2005 applied to the Meru County Council for the subdivision of the Suit Land. The application was approved vide *minute No. E.H&S.S.3/2005 SCHEDULE 'B'* which was paid through receipt No. 091316 dated 17/05/2005. After approval, the documents were forwarded vide ref No. MCC/LND/16/8/5/Vol. XIV/181 of 19/09/2005 to the ministry of lands Meru to effect the changes in the record. The permanent secretary, ministry of local government vide letter ref no. 1142 – 84 TY/(3) dated 29/08/2006 recommended to the commissioner of lands the issuance of title deeds in respect of the subdivision of the Suit land to land parcel nos. **1088, 1089 and 1090 to Catholic Diocese of Meru, Maraa Secondary School and Maraa Primary School** respectively. After paying the requisite duties, the lands office was directed to issue title deeds to the Catholic Diocese of Meru and Maraa Secondary School. The appellants followed the right and legal procedure in acquiring and subdividing the Suit Land.

28. **DW3 Kirimua Samuel** testified that he used to work at the County Council of Meru before devolution under the supervision of Stanley Mugambi. The council used to hold meetings and record minutes, and once signed, they would be brought to their office. When the County government wants land, it can revoke a previous allocation of land. That *Min. No. 34/1979 (a) (1)* amended *minute No. 4*. That once a minute amends another minute, the one that amends the previous one stands.

29. The issues of determination are:

- a) *Whether the suit is time barred.*
- b) *Whether the magistrate erred in failing to consider the submissions of the appellant.*
- c) *What is the nature and extent of the appellants and respondent's proprietary interest in the Suit Land.*

Limitation of Actions

30. The appellants allege that the Suit is time barred as per **Section 7 of the Limitation of Actions Act**, where it is stipulated that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

31. This issue was raised in the trial court vide the preliminary objection dated 23/09/2009. Through its ruling delivered on 6/11/2009, the trial court dismissed it. The appellants did not appeal. Therefore, they are barred from raising this issue all over again.

Submissions

32. The appellants contend that their submissions were not considered before the lower court, yet the same were personally delivered to the magistrates chambers. The records of 19.11.2018 before the trial court indicate that, none of the parties had filed submissions and a request was made by counsel for the appellants seeking more time to file submissions. The trial court stated as follows; **“Judgment on 6.12.2018-submissions to be filed before the end of the week”**. This means that parties were expected to file their submissions by 26.11.2018. The appellants filed their submissions on 4.12.2018, just two days before the date of delivery of the judgment. The trial magistrate being a court of record was not bound to consider those submissions filed outside the given time lines.

Proprietary interests

33. At the centre of the dispute is the question; what is the nature and extent of the parties proprietary interest in the Suit Land. The respondents in their amended plaint alleged that they were allotted the Suit Land through **Min. No. 9/79 (4) Ex Min. No. 10/79** dated **27/03/1979** for purposes of establishing a primary and secondary school. It established the primary school on or about 1980 with the assistance of the Maraa Community. The school has been operating under their sponsorship since then. In 2008, they discovered that the Suit Land had been subdivided to parcel Nos. **1088, 1089** and **1090** for **Diocese of Meru, Maraa Secondary School** and **Maraa Primary School** respectively.

34. The appellants on the other hand aver that vide **Min. No. 34/79 (a) (1)** dated **29/05/1979** the Suit Land was allotted to St. Lucy School for the Blind, Igoji, under the auspices of the Catholic Diocese of Meru. Later, through **Min.No.E. H.&S.S.3/2005 SCHEDULE “B”**, subdivision of the Suit Land was allowed which resulted in the 2nd and 3rd appellants getting title deeds.

35. It is not in dispute that the suit land was subdivided to give rise to parcel Nos. **1088, 1089** and **1090** for **Diocese of Meru, Maraa Secondary School** and **Maraa Primary School** respectively and registration to that effect was done (as per the green cards).

36. **Section 26 (1) of the Land Registration Act 2012** states as follows:

“(1) 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.”

37. Since the Suit Land which was subdivided is now in the names of the 2nd and 3rd appellants as well as Maraa Primary School, the respondent bore the burden of proving to the court that the titles were acquired on the ground of fraud, misrepresentation, illegally, unprocedurally or through corrupt scheme.

38. According to the respondent, the transfer of the land was done fraudulently. That being the case, the burden rests on the respondent to strictly prove fraud on a standard higher than a balance of probabilities but not beyond reasonable doubt. The Court of Appeal in the case of **Vinesh Emporium Gudka v Keshavji Jivraj Dodhia [1982] eKLR** stated that;

“The respondent was in effect being accused of fraudulent conduct, and allegations of fraud must be strictly proved, more than a mere balance of probabilities is required.”

39. The respondent’s claim is that the suit land belonged to it vide the allotment made by the 1st appellant via minutes no.**Min. No. 9/79 (4) Ex Min. No. 10/79** of 27.3.1979, hence the subsequent allocation to the appellants was fraudulent and a case of double allocation.

40. In the Pre-2010 regime, County Council land could be acquired through allotment, whereby Minutes of the relevant Council had to sanction the process. In addition, the allotment process had terms of engagement like offer and acceptance which had to be followed. See **Paul Mworja Bagine & 2 others v Pauline Kagendo Mwari [2019] eKLR**. The title of the land being allocated would only come into existence after issuance of letter of allotment, meeting the conditions stated in it and actual issuance of the title. This was so expressed by the Court of Appeal in the case of **Joseph N.K. Arap Ng’ok v Moijo Ole Keiwua & 4 others [1997] eKLR** where it was held that:

“It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”

41. Majanja J in the case of **Philma Farm Produce & Supplies & 4 Others V Attorney General & 6 Others [2012]eKLR** expressed the issue as follows:

“These letters do not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. It is in this respect that the petitioner claim must fail.

...

There were no allocation letters issued to the company and therefore any payment by the company was purely gratuitous. It could not create a legal obligation on the part of the Commissioner of Lands to process titles in the petitioners' favour in accordance with the offer nor confer a proprietary interest in the suit properties."

42. PW1 had told the court that they have no other documents apart from the **minutes of 1979** to stake their claim over the land. What then is the nature of interest in land that is acquired by a party through minutes from a county council similar to those issued to the respondent in March 1979 and to 3rd appellant in May 1979?

43. Minutes alone do not confer any proprietary interest in land. This is because minutes are an expression of an intention to allocate land. The commitment to actualize the intent to allocate is manifested in the issuance of the letter of allotment from the allotting authority. Demarcation of the parcel of land in question is then carried out through the process of survey. Thus the resolution of the council as captured in the minutes must be put into effect in order to give rise to a bundle of rights in land capable of being protected.

44. From the foregoing analysis, it is clear that none of the parties acquired rights over the suit land through the aforementioned minutes of **27.3.1979** and **29.5.1979**. The county council simply expressed an intention to give the respondent the suit land vide their minutes of 27.3.1979. The intention to give the respondent the land was however withdrawn few months later on 29.5.1979 when the intention was directed upon the 2nd 3rd appellants, whereby the council divested itself of any interests in the suit land by completing the process of allocation and allotment of the land. This is what led to the crystallization of the rights of the 2nd and 3rd appellants in the form of registration.

45. Accordingly, I am of the view that the trial magistrate erred for she placed a burden of proof upon the appellants even before the respondent had discharged its burden and standard of proof as required by the law. The judgment was tackled based on the evidence adduced by the appellant's as opposed to the respondent. The respondent failed to fulfil his obligation of proving the particulars of fraud.

46. It is also not lost to this court that even as the county council was expressing the intention to allocate the suit land to the respondent on 27.3.1979, the said intent had an encumbrance as the land was already reserved for Maraa Experimental Farm. This can be discerned from the registration records of parcel **Abogeta/Nkachie/368** captured on page 64 of the Record of Appeal. Those records indicate that the suit land was registered on 24.9.1975 in the name of the 1st appellant but reserved for the **Maraa Experimental Farm**.

47. The reservation of the land is consistent with the history of the land as given by DW 1 and 2 whereby one Father Lead is the one who set up the farm in the 1960 and 3rd appellant took up the farm as **Maraa Experimental Farm**. Even though the 3rd appellant did not acquire any proprietary rights in the suit land through the reservation of 1975, the registration records indicate that the suit land was obtained by 1st appellant for use by 3rd appellant, going by the definition of the term "RESERVATION".

48. In point "B" in the final orders of the trial court's judgment, it is stated that **"there be an order of cancellation of the titles held by the defendant and the land revert back to the plaintiff"**. In essence, the trial court was conferring rights of proprietorship upon the respondent where none ever existed.

49. In the circumstances, I am of the view that the appeal is meritorious and the following orders are hereby given:

a) An order is hereby issued setting aside the judgment/decree of the trial court delivered on 6/12/2018 and the suit before the trial court is dismissed.

b) The Costs of the suit before the trial court and in this appeal are awarded to the appellants.

DATED, SIGNED AND DELIVERED AT MERU THIS 14th DAY OF JULY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the parties/advocates on 23.6.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE