



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ELC CASE NO. 61 OF 2012

DICKSON MURIMI KAMUYU

(Suing as the Legal representative of the Estate of the late

OBED KAMUYU NJAIRIA PLAINTIFF

VERSUS

CHARLES MAINA KAMOTHO DEFENDANT

JUDGMENT

By his plaint filed herein on 2nd March 2012, the plaintiff suing as the legal representative of the Estate of the late OBED KAMUYU NJAIRIA sought the following orders against the defendant:-

- a. ***A declaration that that portion of land adjacent to land parcel No. KIINE/KIBINGOTI/NGUGUINE/365 between the murram road heading to Kibirigwi Coffee Factory and the Nairobi – Karatina Highway measuring about 0.45 acres belonging (sic) to the Estate of Obed Kamuyu Njairia and for correction of the acreage of land parcel KIINE/KIBINGOTI/NGUGUINE/365 to read 3.25 acres***
- b. ***Mesne profits and general damages for un-lawful occupation thereof***
- c. ***Costs of the suit***
- d. ***Interest on (b) and (c) above***

The basis of the plaintiff's claim is that the deceased was all along the registered proprietor of all that parcel of land known as L.R No. KIINE/KIBINGOTI/NGUGUINE/365 measuring 2.80 acres together with an adjacent portion measuring about 0.45 acres which portion lies between the murram road heading to Kibirigwi Coffee Factory and the Nairobi-Karatina Highway which the defendant has forcefully and unlawfully taken and fenced claiming to be his own and thereby restraining the Estate of the deceased from claiming it. The Estate of deceased is therefore losing Ksh. 15,000/= per month as they are unable to utilize that portion.

In his defence, however, the defendant pleaded that he is the registered owner of parcel of land number KIINE/KIBINGOTI/NGUGUINE/2519 measuring 0.2 Hectares which lies between the murram road and the Nyeri-Nairobi Highway which he purchased from one KARIUKI NJINE a fact well known to the plaintiff. The defendant denied the claim that the parcel No. KIINE/KIBINGOTI/NGUGUINE/365 extends beyond the murram road and further added that the plaintiff's claim is time barred since the defendant has been in occupation of the land since 2002 when he fenced the portion in dispute.

The plaintiff DICKSON MURIMI KAMUYU testified as PW4 and called three other witnesses in support of his case being BEDAN WANGONDU KIRUBI (PW1), PHINHAS KARANI MWANGI

(PW2) and MICHAEL KURIA KINUTHIA (PW3). The defendant did not call any other witness apart from himself.

The plaintiff's case is that the late Obed Kamuyu was his father and owned the parcel of land known as KIINE/KIBINGOTI/NGUGUINE/365 measuring 2.8 acres situated along the Nyeri-Karatina Road near Ragati River and that there is a murrum road cutting through the said land dividing it into two portions each measuring 0.45 acres one of which is V shaped and which he has been utilizing from the time he was born until the defendant un-lawfully occupied it. He added that his late father even planted 105 coffee stems on it some fourty years ago as well as other crops and indigenous trees. However, in 2004, the defendant fenced off that portion and demolished a house occupied by plaintiff's sister and proceeded to register that portion in his names which is now KIINE/KIBINGOTI/NGUGUINE/2519. He added that during the life time of his father, they were using that portion of land and earning an average of Ksh. 15,000/= per year from it which income is now lost.

BEDAN KIRUBI (PW1) a brother of Obed Kamuyu testified that the defendant has taken a portion of the late Obed Kamuyu's land being KIINE/KIBINGOTI/NGUGUINE/365 and has used the police to evict the plaintiff and his family from that portion and destroyed their house. He added that although the defendant bought that portion from one Githiro, he (Githiro) was not part of their clan. He insisted that the portion in dispute belongs to plaintiff. Similar evidence was given by PHINHAS MWANGI (PW3) who also said the portion in dispute was always occupied by Obed Kamuyu.

MICHAEL KINUTHIA (PW3) the District Surveyor Kirinyaga produced the map for land parcels No. KIINE/NGUGUINE/365 and KIINE/NGUGUINE/2519 which shows that the two parcels are fronting the Nyeri-Karatina Road and between them, there is a feeder road. He added that the parcel No. 2519 is a new sub-division while 365 is the original number and the two parcels are adjacent to each other. He produced the map from the area as Plaintiff's Exhibit 1 and added that he had never been to the site.

On his part, the defendant told the Court that on 29th October 2001, he bought half an acre of land from Kariuki Njine out of parcel No. KIINE/KIBINGOTI/NGUGUINE/2154 and he was issued with a title deed for that portion being KIINE/KIBINGOTI/NGUGUINE/2519. He produced the sale agreement and search certificate with respect to that land – Defence Exhibits 1 and 2. He said he took possession of the parcel in 2002 which is V- shaped and lies between the Karatina-Nairobi Higway and a murrum road leading to the Kibirigwi Tea Factory. However, the plaintiff has denied him access to the land and reported to the police that he had demolished their house but the police found no case against him. He later learnt that there had been a land dispute between the late KARIUKI NJINE and the plaintiff at the Land Disputes Tribunal at Baricho over which property between KIINE/KIBINGOTI/NGUGUINE/333 and 365 was traversing the murrum road and there was evidence during those proceedings from the District Surveyor called HUMPHREY MWITARI that infact it was parcel No. 333 belonging to KARIUKI NJINE that traversed the road and not parcel No. 365 belonging to the plaintiff. He produced those proceedings (Defence Exhibit 3). He added that during the demarcation period, parcel No. 333 was given to KARIUKI NJINE on 4th August 1960 and that title was later closed upon sub-division and two titles issued being 2154 and 2156. He therefore urged this Court to dismiss this claim with costs.

Counsels for both parties filed their respective submissions at the end of the trial which I have considered together with the evidence on record.

The issues for determination in this dispute can be summarized as follows:-

- 1. Is the portion of land adjacent to land parcel No. KIINE/KIBINGOTI/NGUGUINE/365 between the murrum road heading to Kibirigwi Coffee Factory and the Nairobi-Karatina Highway measuring about 0.45 acres part of the Estate of Obed Kamuyu Njaira to justify the correction of that parcel of land's acreage to read 3.25 acres**
- 2. If so, has the defendant unlawfully occupied the said portion and liable to pay mesne profits and general damages for that unlawful occupation plus costs of this suit**
- 3. Or is that land infact the property of the defendant as comprised in his title KIINE/KIBINGOTI/NGUGUINE/2519 measuring 0.20 Hectares?**

It is not in dispute that parcel No. KIINE/KIBINGOTI/NGUGUINE/365 is part of the Estate of Obed Kamuyu Njaira while parcel No. KIINE/KIBINGOTI/NGUGUINE/2519 is the property of the defendant. It is also not in dispute that parcel of land No. KIINE/KIBINGOTI/NGUGUINE/2519 belonging to the defendant is a sub-division of parcel No. KIINE/KIBINGOTI/NGUGUINE/333 which belonged to the late KARIUKI NJINE before it was sub-divided to give rise to several other parcels including the defendant's parcel of land. It is also clear that during his life time, the late KARIUKI NJINE sold parcel No. KIINE/KIBINGOTI/NGUGUINE/2519 to the defendant as per the sale agreement (Defence Exhibit 2). According to the search certificate (Plaintiff's Exhibit 4), the parcel of land No. KIINE/KIBINGOTI/NGUGUINE/365 measures 2.80 acres. Indeed the plaintiff himself confirms as much. What he wants is that parcel's acreage to be increased to 3.25 acres. In cross-examination by counsel for the defendant Mr. Kagio he said:-

“I want my land increased from 2.8 acres to 3.25 acres. I confirm that the defendant has a title deed but it can be revoked”

Basically therefore, what the plaintiff seeks from this Court is to increase the size of parcel No. KIINE/KIBINGOTI/NGUGUINE/365 from 2.80 acres to 3.25 acres which would mean the cancellation of the defendant's title in respect of parcel No. KIINE/KIBINGOTI/NGUGUINE/2519. That title was issued under the now repealed ***Registered Land Act*** and ***Section 143 of that Act*** provides that cancellation or amendment of title can only be done if the same was obtained through fraud or mistake. A similar provision is found in Section 26(1) of the new ***Land Registration Act***. There is no evidence that the defendant obtained registration of parcel No. KIINE/KIBINGOTI/NGUGUINE/2519 either through fraud, mistake or other un-procedural or illegal means. There would therefore be no basis in law to justify the revocation of the defendant's title in respect of parcel No. KIINE/KIBINGOTI/NGUGUINE/2519 as suggested by the plaintiff in his oral evidence. Indeed, there is no claim in his pleadings for such an order. What he seeks is the correction of the acreage of parcel No. KIINE/KIBINGOTI/NGUGUINE/365 to read 3.25 acres rather than the 2.80 acres appearing on the title document. However, that would entail cancelling the defendant's title and as I have observed above, there would be no justification for doing so in the circumstances of this case.

It is clear from the evidence of the plaintiff and his witnesses that the basis of this claim is because the late Obed Kamuyu Njaira used to occupy and cultivate the portion in dispute. He says he has been utilizing it together with his parents from the time he was born and his father even planted coffee stems on it and this is confirmed by his witnesses. That may very well be so. However, it must now be made abundantly clear that such usage must have been under the mistaken belief that that portion formed part of parcel No. KIINE/KIBINGOTI/NGUGUINE/365, which, as has been established above, is not the case. Indeed the plaintiff's own witness MICHAEL KURIA KINUTHIA (PW3) who is a surveyor and therefore in the class of an expert witness whose evidence must be respected stated as follows in cross-examination:-

“The way the map is drawn, I cannot say there is any error. The dispute can be handled by the Land Registrar. It is beyond my mandate. I have never been to the ground but I can say that parcel No. 365 has not extended to 2519. The map is not authority of what is on the ground. At times, maps are altered by mutual agreement of the parties”

What this witness is saying therefore is that although maps may have errors, the parcel No. KIINE/KIBINGOTI/NGUGUINE/365 does not extend to KIINE/KIBINGOTI/NGUGUINE/2519.

It must be appreciated that this is not a boundary dispute at least going by the plaintiff's pleadings. He is simply saying that the acreage of the parcel No. KIINE/KIBINGOTI/NGUGUINE/365 is not correct and should be increased. In his evidence in chief he states as follows:-

“My late father owned the parcel of land No. KIINE/KIBINGOTI/NGUGUINE/365 measuring 2.80 acres”

He also conceded in cross-examination by Mr. Kagio that the defendant holds a clean title. He said:-

“Kariuki Njine is the one who transferred 2519 to the defendant. It is true that the title to 2519 was clean when it was transferred to the defendant. It is true that the map does not show that 365 extends beyond the murrum road but that is an error”

Having confirmed the validity of the defendant’s title to KIINE/KIBINGOTI/NGUGUINE/2519 is difficult to understand why the plaintiff would be seeking the revocation of the same.

I would therefore answer issue No. 1 above by making a finding that the portion of land adjacent to land parcel No. KIINE/KIBINGOTI/NGUGUINE/365 between the murrum road heading to Kibirigwi Coffee Factory and the Nairobi-Karatina Highway measuring about 0.45 acres is not part of the Estate of Obed Kamuyu Njaira to justify the correction of that parcel’s land acreage to read 3.25 acres. I would then answer issues No. 2 and 3 by declaring that infact that portion is the land comprised in defendant’s title No. KIINE/KIBINGOTI/NGUGUINE/2519 measuring 0.20 Hectares and therefore the defendant is not unlawfully occupying it and would not be liable to pay mesne profits and general damages to the plaintiff.

Ultimately therefore, the plaintiff’s suit is dismissed with costs to the defendant.

B.N. OLAO

JUDGE

12TH MAY, 2015

12/5/2015

Before

Hon. Justice R. Limo

CC – Willy

Mwangi holding brief for Kiama for Plaintiff

Maina Kagio for Defendant absent

COURT: Judgment signed, dated and delivered in open Court in the presence of Mwangi holding brief for Kiama for Plaintiff and in the absence of Maina Kagio for the Defendant.

R.K. LIMO

JUDGE

12TH MAY, 2015