



1. **GITHUNGURI JUA KALI ARTSAN ASSOCIATION**
2. **JAMES MBURU MUKUNDI**
3. **VERONICA WANJIRUWARUHIU**
4. **EVANSON MBURU WANJOHI.....APPELLANTS**

versus

1. **KARANJA MUKIRI**
2. **RACHAEL WANJIRUWAWERU**
3. **PETER KARANJA THINDI**
4. **JOSEPH MATHENGE MUTITU..... RESPONDENT**

JUDGMENT

This is an appeal filed by Githunguri Jua Kali Artisan Association, James Mburu Mukundi, Veronica Wanjiru Waruhiu and Evanson Mburu Wanjohi who are not satisfied with the judgment delivered in this matter by M/s Margaret Rungare, then Senior Resident Magistrate, on 18th February 1998, in Civil Case No. 506 of 1996 in the Senior Resident Magistrate's Court at Githunguri.

The 1st Appellant is a registered body at the Registrar of Societies Office. The 2nd and 3rd Appellants are the registered trustees of the 1st Appellant while the 4th Appellant was the 1st Appellant's Secretary at the material time.

There is the name of one Patrick Nganga Kamau appearing on the certificate of lease as another trustee of the 1st Appellant, but that name has been left out in these proceedings.

The lease I have just mentioned is in relation to the suit property registered under the provisions of the Registered Land Act as Title No. GITHUNGURI/TOWN PARCEL NO./1 pursuant to a letter of allotment issued by the Commissioner of Lands to the 1st Appellant on 16th May 1991.

The certificate of lease, issued in the names of the three trustees of the 1st Appellant shows that the Lesser is the County Council of Kiambu for a term of 99 years from 1st July 1992 at a rent of Kshs. 3,600/= and that the Lessee is the 1st Appellant and it contains a mandatory restriction in terms of Section 48 of the Registered Land Act that

"NO DISPOSITION BY THE PROPRIETOR SHALL BE REGISTERED WITHOUT THE WRITTEN CONSENT OF THE LESSOR."

The term proprietor refers to the Lessee.

The approximate area of the leased plot is given as 0.2925 hectare although the letter of allotment had given the area as 0.56 hectare.

Other things to note are that the Letter of Allotment had stated that the term of 99 years was to run from 1st May 1991 and that the Annual rent was to be Kshs.5600/=. By then, 16th May 1991, the plot was unsurveyed as can be seen from the heading of the letter. A number 42 has been mentioned by the parties in relation to that land but it is not clear how the number came about.

However, it would appear that upon the survey which resulted into the issuing of the lease, the area given to the 1st Appellant was almost half the original area and that may explain why the Annual rent had to come down to Kshs.3600/= and the running of the term of the lease made to be from 1st July 1992 with the new number being Githunguri Town Parcel No./ 11. The certificate of lease I am looking at was produced as Plaintiff exhibit No. 8 and was issued to the Trustees of the 1st Appellant on 23rd February 1996.

Thereafter the suit giving rise to this appeal was filed in the Magistrate's Court at Githunguri on 14th October 1996, the Appellants, then Plaintiffs, seeking orders that the Respondents do vacate the suit property, namely Title No. Githunguri/Town Parcel No. 11 measuring 0.2925 hectare and that in the alternative, the Court do issue an eviction order against the Respondents and further that a permanent injunction be issued restraining the Respondents, their servants, their agents and/or any other person acting under their authority from entering, trespassing and/or having any other dealings whatsoever with the suit premises.

The Appellants wanted those orders on the basis that the Respondents had, each, illegally and without the Appellant's authority put up semi-permanent structures on the suit property Title No. Githunguri/Town Parcel No./11 although the Respondent knew the land belonged to the 1st Appellant.

The Respondents, then Defendants, did not accept the claim of the Appellants. They admitted that the Appellants were currently registered as the proprietors of the suit parcel of land but contended that the 1st and 2nd Respondents were entitled to a portion of 50 feet by 80 feet while the 3rd and 4th Respondents were entitled to another 50 feet by 80 feet portion out of the suit parcel on the ground that before the Appellants were allocated the suit parcel of land the Respondents had, by letters of allotment dated 24th September 1992 been allocated by the Kiambu County Council, their respective plots, the one given to the 1st and 2nd Respondents having been numbered Githunguri/Githunguri/16/L and the one given to the 3rd and 4th Respondents having been numbered Githunguri/Githunguri/16/G. The Respondents claimed the two portions were within the suit parcel of land and that that happened through the mistake of the County Council of Kiambu and that therefore the Respondents had continued paying their respective rates to the County Council.

The Respondents therefore denied the illegality the Appellants were attributing to them and went on to say that the structures the Respondents had put on the suit parcel of land had been put there long before the Appellants were allotted the suit parcel of land and could not therefore have been put there with the Respondent's full knowledge that the 1st Appellant owned the land. They prayed for dismissal of the Appellants case.

The Respondents went on to make a counter claim against the Appellants praying for rectification of the Appellants' registration as owners of the suit parcel of land under section 143 of the Registered Land Act so that the suit parcel of land could be divided into three portions to enable the 1st and 2nd Respondent have their separate portion, the 3rd and 4th Respondent their separate portion and the remainder to be with the Appellants.

The learned trial magistrate dismissed the Appellants' suit as prayed by the Respondents and went ahead to grant the Respondents' counter claim.

The Appellants feel aggrieved, hence this appeal.

But let me go a little backward. Before this suit was filed, there was a criminal case in which the 1st

Appellant was the Complainant and the 1st Respondent was the accused. I should have pointed out that the Respondents in this appeal are Karanja Mukiri, Rachael Wanjiru Waweru, Peter Karanja Thindi and Joseph Mathenge Mutitu. In the Criminal Case, No. 589 of 1994 in the same court at Githunguri, Karanja Mukiri, as the accused, was charged with the offence of willfully and unlawfully destroying a fence valued at KShs. 16,000/= the property of the 1st Appellant herein.

The fence was on the suit parcel of land and the end result was that the case was dismissed and the accused acquitted as the trial magistrate said that he did not find malice, ownership of the piece of land on which the fence was not having been established. The magistrate added that since the accused had been allocated a portion of the land by the County Council of Kiambu, the accused was also rightly in occupation as no quit notice had been given.

By that time the lease in favour of the Appellants may not have been registered. That was on 21st December 1994 and I have no evidence when the lease was registered. But by the time Civil Case No. 506 of 1996 was decided on 18th February 1998, the lease had, no doubt, been registered and the relevant certificate of lease had also been issued on 23rd February 1996.

But whether the lease had been registered or not, I think the main problem which stood in the way of the trial magistrates, both in the criminal case and in this civil case was, the fact that each one of the learned magistrates looked at the Commissioner of Lands and the County Council of Kiambu as two separate and independent land allocating authorities. No evidence of the land allocating procedure was adduced. All that was there was that the whole piece of land belonged to the County Council of Kiambu. The Council allocated a portion of 50 feet by 80 feet to the 1st and 2nd Respondents and another portion of 50 feet and 80 feet to the 3rd and 4th Respondents. Commissioner of Lands allotted the whole piece of 0.2925 hectare to the 1st Appellant. There was no evidence to answer the question how the Commissioner could do that if the piece of land belonged to the County Council of Kiambu.

But strangely, while the Respondents in their written statement of defence and even in their evidence, were blaming the County Council for what happened, each one of the two learned magistrates blamed the Appellants for what happened saying the Appellants did not go to court with clean hands. They talked of surveyors loosely without having gone into the evidence as to how such a surveyor comes to do his work after an allottee by the Commissioner of Lands or an allocatee by the County Council of Kiambu has received the letter of allotment or allocation. The trial magistrate in this civil case therefore stated at page 6 of his judgment:

"As earlier testified to by the clerk to the Council in the Criminal trial the Commissioner of Lands acquired land which had already been allocated to the Defendants. These Defendants were never consulted when the survey was done and the result was that their plots measuring 50x80 and 50x80 respectively were included in the plot of the Plaintiffs:"

The learned magistrate went on to quote section 143 (2) of the Registered Land Act and continued:

"In the instant case the plaintiffs caused the survey of the plot that included the plots of the Defendants and caused the same registered in the name of the Plaintiff and Title Deed issued. The circumstances of the dispute were well known to them as their allotment letter had the acreage of the plot allocated to them by the Commissioner of Lands and yet they went ahead and caused the inclusion of the plots of the Defendants in plot No. 11 ending up with a different acreage from the one already allocated to them by the Commissioner of Lands. In this case I find the Plaintiffs have not come to court with clean hands or in good faith....." allotting or allocating authorities should be joined as parties to be in court to tell the court what they did and to identify the owner of the suit piece of land. The County Council of Kiambu should have been a party and present in court to tell the court how the Commissioner of Lands could allot the council's piece of land without the council's knowledge and consent and without regard to the presence and ownership of the council's allocates as its clerk implied in his evidence in the Criminal Case which the Senior Resident Magistrate in the instant case followed as if that evidence was a Bible.

The learned Senior Resident Magistrate should have looked at the lease to see that the Lessor is not the

Commissioner of Lands. The Lessor is the County Council of Kiambu and there is rent payable by the lessee, who is the 1st Appellant, to the Lessor. If the same Council is receiving other dues in respect of the suit piece of land from the Respondents, then it must be the council which is playing a dirty game between the litigants in this suit. The Council ought to have been made a party in this suit and I have said it and may repeat it. The County Council of Kiambu is a public body, elected by "Wananchi" and must serve them properly and in accordance with the law. The fact that the Council is the Lessor in this matter shows that on my part, there is no evidence from which I can attribute omission or fraud or mistake to the knowledge of the Appellants or to actions taken by the Appellants.

As to surveying the 1st Appellants as an allottee had the duty to pay survey fees as stipulated in the letter of allotment which fee was to be paid together with the rest of the fees. Thereafter it was up to the Commissioner of Lands to instruct a surveyor, presumably from the Director of Survey's Department, in the same Ministry as the Commissioner himself, to go and carry out the survey. There was no evidence that all the people to whom the County Council of Kiambu had previously allocated plots in the suit parcel of land were to be present. There was even no evidence that the surveyor knew any one of them. The person responsible for summoning them was not revealed in the evidence. In the circumstances I find no reasonable cause for blaming the Appellants for the absence of the Respondents at the survey of the suit parcel of land whose date is also not known.

Finally, from what I have been saying, and especially in the circumstances of this case, the date on which a local authority, or the County Council of Kiambu for that matter, made the allocation in question is of no legal consequence. What is of importance is the forwarding of the allocation to the Commissioner of Lands and thereafter the processing of the lease culminating into its registration. The person so registered is the legal owner of the lease even if he was the last person to be allocated the relevant plot by the local authority. All the rest whose allocations of the same plot were not forwarded by the local authority to the Commissioner of Lands qualify for no valid claim in the lease or the plot and perhaps their remedy lies in following the same local authority to allocate them some other plots elsewhere.

To conclude this judgment therefore, I do hereby allow this appeal. Set aside the trial Magistrate's dismissal, with costs, of the Appellants suit and also set aside the Magistrate's order granting, with costs, the counterclaim of the Respondents.

The same counter-claim be and is hereby dismissed.

Respondents, their servants, their agents and/or any other persons acting under their authority be and are hereby ordered to vacate the suit parcel of land within three months from the date of this judgment. In default, they be evicted from the said parcel of land and a permanent injunction to issue restraining them from entering, trespassing and/or having any dealings whatsoever with the suit parcel of land.

Respondents to pay costs of this suit.

Dated this 15th day of October 1999.

J.M KHAMONI

JUDGE