



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 30 OF 2018

HENRY KIMANI THAIRU..... PLAINTIFF

VS

JAMES KIMANI THAIRU 1ST DEFENDANT

FRANCIS KARIUKI KIMANI..... 2ND DEFENDANT

TERESIA WANJIRU NGARI.....3RD DEFENDANT

ELIZABETH WANJIRU MAINA.....4TH DEFENDANT

AGNES NYAMBURA KIHARA..... 5TH DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendants on the 30/6/16 and amended it on the 11/3/19 seeking the following orders;

- a. A declaration that land parcel Number GIKINDU/MIRIRA/816 belongs to the Plaintiff.
- b. An order directing the Registrar of Lands at Murang'a to cancel the title deed issued to the Defendants.
- c. A permanent injunction restraining the Defendants by themselves, their agents, assigns or persons claiming under them from entering into, fencing off, subdividing, selling, leasing and/or interfering with the Plaintiff's quiet possession or in any other way interfering with land Parcel Number GIKINDU/MIRIRA/816
- d. Costs of the suit
- e. Interest on item (d) at Court's rate; and
- f. Any other or further relief as this Honourable Court may deem fit and just to grant

2. The Plaintiff avers that he acquired the suit land in 1965 and upon successful completion of demarcation and registration was issued with a title on 5/1/1973 in his names Kimani Thairu (ID No 15411/KBU. That he cultivated the land until 1980 when he left it in the care of one of Hon Matiba's managers. That the said manager abandoned the land to be bushy and in 2008 he approached a Mr. Kimwere, a neighbor to care and cultivate the land in his absence.

3. That he later changed his old ID to ID No. 0282889 in 2003 bearing Henry Kimani Thairu.

4. In 2012 with the desire to dispose the land he carried out a search at the lands office that revealed that the land was registered in the names of the Defendants pursuant to a grant issued in the estate of Kimani Thairu – Succession Cause No 253 of 1998-Thika. He then reported the matter to the Police where the 1st -3rd Defendants were arraigned in Court for interalia obtaining the registration of the suit land by false pretenses but later acquitted for lack of evidence.

5. In their joint statement of defence filed on the 14/11/2016 the Defendants denied the claim of the Plaintiff and contended they are the rightful owners of the suit land having acquired the land through transmission in the estate of their father and father-in-law Kimani Thairu,

deceased.

6. It was stated that the 3rd Defendant died before the hearing of the case. Judgement in default was obtained against the 5th Defendant. The 1st – 3rd Defendants were represented by the firm of Mbiyu Kamau & Co Advocates.

7. At the hearing the Plaintiff singly led evidence in support of his case. He adopted in entirety his witness statement dated the 30/6/16 and list of documents filed on even date.

8. He stated that he is a retired civil servant having worked with the Ministry of Agriculture until 1999. That his old generation ID No 15411/KBU bore the name of Kimani Thairu which he later changed to Henry Kimani Thairu vide ID No 0282889.

9. He stated that he bought the land from one Muturi Ngatia in 1965 at the price of Kshs 3000/- and started farming. That there was no agreement in writing then. That the oral agreement was witnessed by 5 witnesses all of whom are deceased. That his names in the new ID are Henry Kimani Thairu. That in the original ID his 1st name Henry was left out. That between the years 1973- 2011 he has been in control of the suit land until he found out that the Defendants had caused themselves to be registered as owners following the issuance of a grant of administration in the estate of Kimani Thairu.

10. The Defendants case was led by 3 witnesses. DW1- James Kimani Thairu testified that the suit land was owned by Kimani Thairu, his grandfather. That they successfully obtained letters of administration in the estate of Kimani Thairu and vested the land in the Defendants in 2011. That they filed succession based on the letter dated the 18/9/1997 authored by the then area chief. That all along they did not have the title of the suit land which title Number was provided to them by Kennedy Matiba, the caretaker of the said suit land who lives on their land with their permission.

11. DW2 -Francis Kariuki Kimani stated that his father Kimani Kairu died in 1942 when he was 14 years old having been born in 1946. That he learned that the land belonged to his father from older siblings. That the land was being cultivated and cared for by Njindo Matiba who informed them there was a potential buyer interested in purchasing the land. They then sought and obtained a letter from the chief at Gikundi area which confirmed that the land belonged to their father. That none of the Defendants live on the land. That though the title was registered in their father's name, they only collected it later.

12. Teresia Wanjiru Ngari testified and adopted her witness statement dated the 9/11/16. That she is the daughter in law of the late Kimani Thairu and she got to know about the land from her husband and mother in law as they frequently visited the land which had been left in the hands of a relative. That she is 98 years old. That Kimani Thairu was alive when she got married into the family. That the farm was left in the hands of a relative called Matiba, the brother to Kimani Thairu. That none of the Defendants live on the land. That in 1996 Matiba's mother approached her to sell the land to her and this led to the filing of the succession cause in 1997. That they got the title after filing the succession cause and not before.

13. At the close of the hearing the parties elected to file written submissions. The Plaintiffs filed on the 10/11/2020 while the Defendants filed none.

14. As to whether the Plaintiffs is the registered owner of the land, the Plaintiff submitted that he purchased the land and was issued with title in 1973. That his ID no 15411/KBU is disclosed on the said title. That the Plaintiff was born on the 4/1/1957 as seen on the ID card. That the Defendants have not neither disclosed an ID no nor the death certificate in the name of their kin namely Kimani Thairu.

15. As to whether the title issued to the Defendants should be cancelled, the Plaintiff placed reliance on section 80(1) of the Land Registration Act and held that the Defendants may have honestly believed the land belongs to their kin who bore a similar name to the Plaintiff and it is on the strength of that that they commenced the suit proceedings. That on the ground of mistake the title issued to the Defendants should be cancelled.

16. Having read the Pleadings, heard evidence adduced at the hearing, considered the written submissions and all the materials placed before me the issues for determination are;

- a. Whether the Plaintiff is known as Kimani Thairu;
- b. Whether LOC2/MIRIRA/816 and GIKUNDI/MIRIRA/816 refer to the suit land;
- c. Whether the Plaintiff is the rightful owner of the suit land;
- d. Whether the title of the Defendants should be cancelled;
- e. Costs of the suit.

17. It is the Plaintiffs case that his old ID card was No 15411/KBU issued in the name of Kimani Thairu and that the name Henry was missing. That later he changed his ID and included the name Henry to read Henry Kimani Thairu.

18. On the 7/5/2012 a letter was produced by the Plaintiff addressed to the Registrar of Persons inquiring on the registration history of the identity card holder of No 15411 and 0282889 in the names of Kimani Thairu and Henry Kimani Thairu. The response to this letter was not produced in evidence by the Plaintiff. The Plaintiff did not produce the copy of ID 15411/KBU nor the 2nd and 3rd generation ID in particular ID No 0282889.

19. The Defendants produced the copy of the ID 15411 in the name of Henry Kimani s/o Thairu of postal address Kiambu T. Gakuo Kiamwangi. He is declared as a male student and issued on the 4/1/1957. Alongside this document is an undated letter authored by F Shiroya on behalf of the Managing Trustee of NSSF addressed to the DCI –Murang’a as follows;

“Divisional CID Headquarters

PO Box 21-10200

Muranga

Att; Wilfred O Odero(DCI)

IDENTITY CARD NO 15411/KBU

Your letter dated REF; CID/SEC/4/4//6/VOL11/88 dated the 22/7/2012 indicates as above. In that respect, we have made reference to the records held in this office and established that;

1. ID No 15411/KBU belongs to one Henry Kimani son of Thairu.
2. That date of registration of the ID Number 15411/KBU is indicated as 4/1/1957.
3. Details pertaining to the ID No 15411/KBU is as per the attached certified copy of the Certificate of Identity (B) dated the 10/1/1957.

20. This letter does little to link the Plaintiff’s ID No 15411/KBU in the name of Henry Kimani son of Thairu to the title registered in the name of Kimani Thairu. The letter does not create a nexus between ID No 15411/KBU and ID No 0282889. The latter ID was not produced in Court.

21. The issue of the Identity of the Plaintiff was raised in the Criminal Case No 190 of 2013 where the 1st -3rd Defendants were accused of obtaining land by false pretense. It is not in dispute that the Defendants were acquitted for lack of evidence. In this case the Court found that there was no evidence that the names Kimani Thairu belong to the Plaintiff.

22. Section 48 of the Evidence Act states as follows;

“A final judgment of a competent Court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged”.

23. Applying the import of the above provision, it rings true that where the Court finds absence of guilt the same shall be taken as conclusive evidence.

24. I have perused the title of the Plaintiff and it contains the names Kimani Kairu ID No 15411 KBU issued on the 5/1/1973. The green card shows the suit land was registered in 1971 and the title issued on 5/1/1973 in the name of Kimani Thairu. It is to be noted that no ID is indicated on the green card unlike the title deed.

25. The conclusion is that the Plaintiff did not lead any evidence to show that the names Kimani Thairu are his. In his pleadings he averred that his old ID bore the names Kimani Thairu in his ID. This is clearly untrue. The ID NO 15411/KBU discloses the names to be Henry Kimani s/o Thairu. That he changed his name later and added Henry in the new generation IDs, a position that the Court has found incorrect. He did not lead evidence to show change of name. He did not lead evidence to show that he has registered a deed poll to the effect that Kimani Thairu and Henry Kimani Thairu are his names.

26. As to whether the Plaintiff’s claimed title and that of the Defendants are the same. It is on record that the Plaintiff is claiming Parcel No GIKUNDU/MIRIRA/816. This title is registered in the name of Kimani Thairu. The Plaintiff has also annexed a green card in the name of LOC 20/MIRIRA/816. The title for the latter was not annexed nor the green card for the former. Nothing would have been easier for the Plaintiff to call the Land Registrar to confirm this fact. The Court therefore is in doubt as to whether the two titles referred to the same land. In the absence of evidence, it is the finding of the Court that the two parcels may be different.

29. Section 26 and 80 of the Land Registration Act provides two ways to impugn a title; on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title n has been acquired illegally, unprocedurally or through a corrupt scheme. Section 80 mandate this Court to cancel a title acquired by fraud, mistake or irregularity.

28. The Plaintiffs case is that the title of the Defendants is was irregularly acquired and therefore its validity is in doubt. The Plaintiff did not plead the particulars of irregularity; neither did he lead evidence on the same. It is the Defendant’s case that they acquired land through transmission in the succession cause which was initially filed by their mother in 1998 and later were substituted. Therefore, they obtained land through a Court process. There is no evidence that the said confirmed grant has been challenged revoked or set aside. There is no evidence led by the Plaintiff to proof irregularity of any sort.

29. Interestingly, the Plaintiff changed its plea in his submissions and argued that the Defendants may have honestly mistaken the title to belong to them. In the case of **Fibre Link Limited –Vs- Star Television Production Limited [2015] eKLR** the Court held that submissions from the bar have never been a means of the parties tendering their evidence in Court. Submissions are only meant to clarify issues and not for purposes of giving evidence.

30. Further, he who asserts must prove. The Plaintiff has raised issues with the process in which the Defendants obtained title and attempted to find fault in the succession process. This is perhaps the incorrect forum to do that. Secondly the burden of proof rests in the Plaintiff to discharge. A party cannot succeed in his case because the Defendants defence is weak.

31. Having made the findings in a and b above it follows that c and d are answered in the negative.

32. The Plaintiff informed the Court that he left the land under the case of one of Hon Matiba's managers in the 1980s and when he returned in 1980 found the land abandoned and sought the help of one Kimwere to care for the land. The Defendants on the other hand states that the land was left in the hands of one Matiba who is a distant relative of Kimani Thairu. The Plaintiff did not call the said manager or Kimwere to attest to the fact that the Plaintiff maintained possession of the suit land. The Plaintiff failed to establish possession of the suit land.

33. On a balance of probabilities, the Court finds that the Plaintiff has not proved his case. It is dismissed.

34. The Defendants shall have the costs of the suit.

35. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANGA THIS 17TH DAY OF DECEMBER 2020

J G KEMEI

JUDGE

Delivered online in the presence of:

Ndung'u for the Plaintiff

Mbiyu Kamau absent for the 1st – 3rd Defendants

4th & 5th Defendants: Absent

Njeri and Kuiyaki, Court Assistants