



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 47 OF 2000**

**PETER KAKUI MUTISO.....PLAINTIFF**

**VERSUS**

**JOEL NZUKI NZIOKA (*suing as the personal representative of***

**ESTHER NTHENYA NZIOKA (*deceased*).....DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 9<sup>th</sup> March, 2000, the Plaintiff averred that he is the registered proprietor of a parcel of land known as Mitaboni/Kaiani/1312 (*the suit land*) which he bought from a third party; that he was awarded parcel number 1300 during the adjudication process which formed apart of parcel of land known as 1312 and that the Defendant and his agent invaded the suit land in the year 2000.
2. The Plaintiff has sought in the Plaintiff for a permanent injunction to issue restraining the Defendant whether by herself or servants from entering or using the suit land. The Plaintiff was amended on 8<sup>th</sup> November, 2017.
3. In her Defence, the Defendant averred that during the adjudication process in 1987, she filed Objection No. 267 of 1987; that she was dissatisfied with the outcome of the objection culminating into an Appeal that she filed with the Minister and that the dispute was still before the Minister pending hearing and determination. It is the Defendant's claim that the suit land belongs to her deceased husband since 1977.
4. When the initial Defendant died, she was substituted by her legal representative who also filed an amended Defence and Counter-claim dated 31<sup>st</sup> October, 2017.
5. The Plaintiff, PW1, informed the court that he is the registered proprietor of a parcel of land known as Mitaboni/Kaiani/1312; that he was born on the suit land in 1945 and that the Defendant has his own ancestral land which is Mitaboni/Kaiani/1300. It was the evidence of PW1 that the Defendant started laying claim on a portion of the suit land in 1987.
6. It was the evidence of PW1 that when the Defendant lodged an Appeal with the Minister, the Minister awarded her a portion of the suit land measuring 3 acres; that he successfully challenged the decision of the Minister in Appeal No. 181/1988 in Judicial Review Miscellaneous Application No. 304 of 2013 and that he filed this suit for injunctive orders.
7. It was the evidence of PW1 that he was issued with the Title Deed for the suit land on 10<sup>th</sup> February, 2015; that on 7<sup>th</sup> April, 2015, the Minister declined to reopen the dispute and that having been registered as the owner of the suit land in 1995, the cross-action for cancellation of the Title Deed is time barred.
8. In cross-examination, PW1 stated that the suit land was bought by his grandfather in 1939; that there was a dispute in respect of the suit land in Kangundo RMCC No. 194 of 1970 and that he was not a party to that dispute.
9. The administrator of the Defendant's Estate, DW1, informed the court that a portion of the suit land measuring 3 acres was bought by his late father 1977 from Musyimi Ndolo; that his family has been in occupation of the suit land for more than forty (40) years and that the Plaintiff entered the suit land in the year 2014.
10. It was the evidence of DW1 that the High Court nullified the decision of the Minister in Appeal No. 181 of 1988 and that the suit has been subject to past determinations in various avenues.
11. In cross-examination, DW1 stated that a portion of the suit land belonged to their late mother; that although the Minister's Appeal was decided in favour of her mother, the same was nullified by the court and that they are entitled to 3.7 acres of the suit land.

12. DW2 informed the court that DW1 was his brother; that their late father bought the disputed parcel of land from Mr. Musyimi and that the Kangundo Law Court ruled that the suit land belonged to Mr. Musyimi. It was the evidence of DW2 that Mr. Musyimi sold part of the land to the Plaintiff and a portion thereof to his father and that it is their family that has been using the land all along.

13. DW3 stated that the late Musyimi Ndolo was his brother; that Mr. Musyimi sold a portion of the suit land to the Plaintiff and another portion to the Defendant's father in 1977 and that it is the Defendant that has been residing on the disputed portion of land.

14. The Plaintiff's advocate submitted that the Plaintiff is the registered proprietor of parcel number Mitaboni/Kaiani/1312; that there is no evidence to show that the Plaintiff procured the Title Deed to the suit land fraudulently and that the Defendant's cross-action is time barred. Counsel relied on numerous authorities which I have considered.

15. The Defendant's counsel submitted that the Title Deed for Mitaboni/Kaiani/1312 was issued to the Plaintiff during the pendency of an Appeal before the Minister in Appeal Number 181/2/1988; that the said Appeal is yet to be determined and that the Title Deed that was issued to the Plaintiff was issued fraudulently.

16. Both the Plaintiff and the Defendant are claiming a portion of land measuring approximately 3 acres and which forms part of land known as Mitaboni/Kathiani/1332. According to the Defendant, the disputed portion was sold to their late father by a Mr. Musyimi (*deceased*) who also sold the remaining piece of land to the Plaintiff. Both parties are in agreement that the issue of the disputed portion of land was adjudicated upon during the adjudication process.

17. The evidence before me shows that the Plaintiff was registered as the proprietor of the suit land on 4<sup>th</sup> April, 1995. However, a Title Deed was not issued to him until 10<sup>th</sup> February, 2015.

18. The Defendant produced in evidence the proceedings in respect of the Objection that was filed by the Plaintiff before the Land Adjudication Officer of Kaiani Adjudication Section. The proceedings shows that the Land Adjudication Officer decided the matter in favour of the Plaintiff herein. It was the finding of the Land Adjudication Officer that the disputed land should be combined with parcel number 1312 which had already been registered in favour of the Plaintiff.

19. The evidence before me shows that the Defendant appealed against the decision of the Land Adjudication Officer in Appeal Case No. 181 of 1988. After hearing the Appeal, the Minister made the following finding:

***“The piece of land which was earlier combined as parcel no. 1312 should be reverted back to parcel number 1300 which was Esther Nthenya as per the demarcation Ruling. The sisal planted by court should therefore remain as per the boundary between the two parties.”***

20. The Plaintiff was not satisfied by the decision of the Minister and filed a Judicial Review Application being Miscellaneous Civil Application No. 304 of 2013. After hearing the Application, the High Court quashed the proceedings and Judgment of the Minister. The court also prohibited the Minister from enforcing the said Judgment.

21. The annulment of the decision of the Minister was premised on the ground that the same was tainted by procedural impropriety because the Applicant was not afforded an opportunity of being heard before the decision was made.

22. From the record, it would appear that the parties sought for directions from the court on the implication of the Ruling in Miscellaneous Application No. 304 of 2013, which directions were given on 19<sup>th</sup> June, 2015 as follows:

***“The effect of the decision of this court was that the Respondent's decision was quashed leaving the parties in the position they were before the decision was made. Accordingly, the Respondent ought to have taken the matter from that position. For avoidance of doubt the position was that the Appeal was still pending and remained undetermined. The determination of the Appeal is the mandate of the Respondent not this court and the same ought to be determined in accordance with the law.”***

23. It would appear that the Director of Land Adjudication and Settlement interpreted the decision of the High Court quashing the Minister's Award to mean that the Defendant's Appeal before the Minister had been dismissed by the High Court. I say so because in his letter dated 13<sup>th</sup> November, 2014, the Land Adjudication and Settlement Officer informed the Chief Land Registrar that the Appeal had been dismissed and “*Parcels Nos. 1300 and 1312 to remain as currently registered.*” The said officer further informed the Chief Land Registrar as follows:

***“Under Section 29(3) of Land Adjudication Act, I certify that the Duplicate Register for Kaiani Adjudication Section relating to parcel numbers 1300 and 1312 is final in all respects. Please take action on the matter and keep me informed.”***

24. It would appear that the 1<sup>st</sup> Respondent had also held the view that his decision having been quashed by the High Court, the only recourse for the Defendant was to move the Court of Appeal, and not otherwise. That opinion is found in his letter dated 7<sup>th</sup> April, 2015, two (2) months before the High Court clarified that the Appeal before the 1<sup>st</sup> Respondent was still pending.

25. That being the case, the directive by the Director of the Land Adjudication and Settlement Officer to the Chief Land Registrar to issue a Title Deed pursuant to the decision of the Land Adjudication Officer was erroneous. The decision to issue to the Plaintiff the Title Deed should have awaited the re-hearing of the Appeal which is still pending before the Minister.

26. In any event, it would appear that the register in respect of parcels number 1300 and 1312 was not complete as at 13<sup>th</sup> November, 2014.

If that is the position, then the issue of the Plaintiff having been registered as the proprietor of the suit land on 4<sup>th</sup> April, 1995 before a Title Deed was issued on 10<sup>th</sup> February, 2015 should not arise.

27. Even if the Plaintiff was registered as the proprietor of the suit land pursuant to the decision of the Land Adjudication Officer, the said registration can still be altered in accordance with the provisions of Section 27(1) of the Land Adjudication Act which provides as follows:

***“27(1) The adjudication officer shall from time to time alter the adjudication register to conform with any determinations of objections.”***

28. Considering that the dispute herein was pending before the Minister, the Plaintiff ought to have obtained the consent of the adjudication officer before filing this suit in the year 2000. None was exhibited by the Plaintiff. A suit can only be filed in respect of an adjudication section only with the consent of the Land Adjudication Officer or until the adjudication register has become final in all respects under Section 29(3) of the Act (*See Section 30(1) of the Act*).

29. Section 29(3) of the Act provides that an adjudication register becomes final when *“the Appeals have been determined.”* The Appeal in respect of the suit land has never been determined to date. Indeed, as directed by the High Court in Judicial Review Miscellaneous Application No. 304 of 2013, the dispute between the Plaintiff and the Defendant is still pending upto now, and was still pending as at the time the Plaintiff filed this suit in the year 2000.

30. For those reasons, I find that the suit by the Plaintiff was filed contra-statute, and the Title Deed that was issued to him on 10<sup>th</sup> February, 2015 was issued by misrepresentation. The same should be cancelled forthwith to allow the Minister determine Appeal Case No. 181 of 1988.

31. Consequently, the court makes the following orders:

***a. The Plaintiff's Plaint dated 9<sup>th</sup> March, 2000 and amended on 8<sup>th</sup> November, 2017 is hereby dismissed.***

***b. The Title Deed that was issued to the Plaintiff on 10<sup>th</sup> February, 2015 in respect of a parcel of land known as Mitaboni/Kaiani/1312 is hereby cancelled.***

***c. The Minister to re-hear Land Appeal No. 181 of 1988 as directed by the High Court in Judicial Review Miscellaneous Civil Application No. 304 of 2013.***

***d. The Plaintiff to pay the costs of the suit and the Defendant's cross-action***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2019.**

**O.A. ANGOTE**

**JUDGE**