



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 366 OF 2009

MAVOKO LAND DEVELOPMENT CO. LTD.....PLAINTIFF

VERSUS

KASINA HOUSING SCHEME SOCIETY.....1ST DEFENDANT

PETER MUINDE MBITI.....2ND DEFENDANT

ERICKSON KIMEU MULWA.....3RD DEFENDANT

FRANCIS KIRAGU NGOTHO.....4TH DEFENDANT

HON. ATTORNEY GENERAL5TH DEFENDANT

JUDGMENT

Introduction:

1. In the Plaintiff dated 30th November, 2009, and amended on 17th December, 2010, the Plaintiff averred that on 26th January, 2006, while operating under the name of Mavoko Municipal Land Trust Self Help Group, it purchased parcel of land known as L.R. No. 25062 from Velji Jadwa, Nanubhai Velji Varsani and Bhimji Velji Varsani.
2. It is the Plaintiff's averment that it sub-divided the suit land amongst its members who took possession of the same; that on 20th October, 2009, the Defendants unlawfully claimed ownership of L.R. No. 11895/27 and that the Defendants' acts are unlawful and illegal.
3. The Plaintiff is seeking for a declaration that the 1st Defendant's Leasehold title in respect of L.R. No. 11895/27 is fake, null and void; a permanent injunction restraining the Defendants from trespassing on L.R. No. 25062 Mavoko; and for the appointment of an independent Surveyor to show the beacons of L.R. No. 25062.
4. In their joint Defence, the 1st -4th Defendants averred that whereas M/S Mavoko Municipal Land Trust Self Help Group may have entered into an Agreement for the purchase of L.R. No. 25062, the said sale was never concluded; that the Plaintiff is not the successor of Mavoko Land Trust Self Help Group and that the 1st Defendant initially owned L.R. No. 11895/27 which it subsequently sub-divided among its members.
5. The 5th Defendant averred that if the Director of Surveys re-surveyed the suit land, then the same was done lawfully.

The Plaintiff's case:

6. The Plaintiff's Secretary, PW1, informed the court that the Plaintiff is the owner of land known as L.R. No. 25062 measuring approximately 43 acres; that the said land borders the land owned by the 1st Defendant and that the Director of Survey illegally re-surveyed L.R. No. 25062 and had the acreage of the Plaintiff's land reduced by more than 10 acres thus creating L.R. No. 11895/27.
7. It was the evidence of PW1 that L.R. No. 11895/27 was illegally created and a title issued to the 1st Defendant in 1992; that the 1st Defendant was not legally in existence in 1992 having been incorporated in the year 2005 and that the 1st Defendant has two titles with different acreage. It was the evidence of PW1 that the fact that the 1st Defendant has two titles with the acreage of 9.971 Ha and 17.971 Ha respectively shows that the said titles were fraudulently created.

8. In cross-examination, PW1 informed the court that it is the Defendants who gave them the copies of the two title documents with different acreage. It was the evidence of PW1 that the Defendants' title is fake; that the Plaintiff purchased the land before registering the same in the Plaintiff's name and that the people who sold the suit land to them were issued with the title document in the year 2000.
9. PW1 testified that the re-survey of the area was done when the Plaintiff was in possession of the title document for L.R. No. 25062 and that they were never consulted during the exercise.
10. A Surveyor from the Director of Surveys Office, PW2, informed the court that she was in possession of survey plan number FR 349/19 and 213/82. It was the evidence of PW2 that the initial survey in respect of the disputed land was done vide FR No. 213/8; that another survey was done vide FR No. 347/19 in the year 2006 which superceded the first survey and that the said survey caused L.R. No. 25062 to change to L.R. No. 11895/33 while L.R. No. 11895/27 changed to L.R. No. 11895/35.
11. During the re-survey, PW2 informed the court that the acreage in respect of the parcels of land changed. According to PW2, the acreage of L.R. No. 11895/33 changed from 17.58 Ha to 8.6 Ha while L.R. No. 11895/35 changed from 17.9 Ha to 14.2 Ha.
12. According to PW2, the re-survey of the two parcels of land caused the boundaries to change. PW2 informed the court that in between the two parcels of land, there is another parcel of land whose number is L.R. No. 1895/34; that all the parcels of land existed in the earlier survey plan (213/82) and that what changed was the acreage, the boundaries and the numbers.
13. The evidence of PW2 was that the land in between L.R No. 11895/33 and 11895/35 was initially known as L.R. No. 11895/R – meaning that it had never been allocated to anybody. PW2 informed the court that despite not sharing a boundary, both parties wanted to be allocated the remaining portion of land.
14. PW2 stated that she never came across a map for L.R No. 25062; that she was not sure if the Deed Plan for L.R. No. 25062 emanated from the Director of Survey's office and that the re-survey was done due to a mistake in the initial survey. It was the evidence of PW2 that the most current survey plan is L.R No. 347/19.
15. PW3 informed the court that he was the initial owner of L.R No. 25062 measuring 17.58 Ha; that the said land was previously known as L.R. No. 11895/8 and that the land changed the number when they changed the user of the land from quarry to industrial purposes. According to PW3, during the change of user, they surrendered the title for L.R No. 11895/8 and were issued with the Grant for L.R. No. 25062 for go-down and small industries. That is when they sold the land to the Plaintiff in the year 2014.
16. PW3 stated that he was not aware of any re-survey that was done in respect of L.R. No. 25062 in the year 2006; that he never received the letter dated 14th October, 1994 and that he was not aware of the other title documents.
17. PW3 denied having signed the Memorandum of Understanding dated 18th April, 2006; that they only signed the Sale Agreement after selling the land to the Plaintiff in 2014 and that the Agreement between them and Mavoko Municipal Land Self Help Group dated 26th January, 2006 was cancelled; that he sued the 1st Defendant in HCCC No. 121 of 2006 in which he sought to restrain them from interfering with L.R No. 25062 and that he has never received communication from the Director of Surveys concerning his land.
18. PW3 finally testified that he sold the land to the Plaintiff because the Plaintiff's members were already on the ground and that he had to cut his costs by selling the land in the year 2014.
19. The Registrar of Lands, PW4, stated that the search he conducted shows that the Plaintiff is the owner of L.R. No. 25062 measuring 17.58 Ha; that he could not trace the files for L.R. Nos. 11895/33, 34 and 35 for the purpose of conducting a search and that the file he retrieved for I.R. No. 53390 is in respect to land registered in the name of Ismael Hassan measuring 0.4417 Ha situated in Nairobi; that the land reference number (L.R) in respect of I.R. No. 53390 is L.R. No. 209/11445 and not L.R. No. 11895/33 and that the genuine title in this dispute is L.R. No. 25062. According to PW4, all the titles for L.R. No. 11895 are not genuine documents.

Defence case:

20. The Defence called the Land Registrar who had testified as PW4 as their witness. According to the said Registrar (DW1), the title for L.R No. 11895/27 (I.R. No. 53390) was surrendered for conversion vide a surrender document dated 17th December, 2007. However, in cross-examination, DW1 stated that he did not have evidence to show that the surrender document was ever registered as required.
21. The 1st Defendant's Chairman, DW2, informed the court that the 1st Defendant was registered in the year 1992 as a Self Help Group by the Ministry of Culture and Social Services; that the members of the 1st Defendant were mostly employees of Kenya Meat Commission who used to live on the land and that after the collapse of Kenya Meat Commission, they were allocated L.R. No. 11895/27 and that the land comprised of 17.97 Ha.
22. According to DW2, in the year 2006, a group calling itself Mavoko Municipal Trust Self Help Group and Mavoko Quarry Site Self Help Group invaded the suit land. DW2 stated that the land being claimed by the Plaintiff was surrendered by the original owners to the government who was then given an alternative land.
23. DW2 stated that they surrendered the title for L.R. No. 11895/27 to the Director of Physical Planning and duly executed a surrender deed dated 17th December, 2007 upon sub-division of land and that the title to their land measures 17.97 Ha. DW2 stated that the titles showing that their land measured 9.971 Ha was strange to them. According to DW2, the Survey Report of the Director of Surveys dated 6th August, 2010 gives a comprehensive status of the suit land.

24. DW2 informed the court that a re-survey was done by the Director of Surveys due to the boundary dispute between the Plaintiff and the 1st Defendant; that after said re-survey, their land reduced by 3 Ha and that L.R. No. 11895/27 does not share a boundary with L.R. No. 25062.

Submissions:

25. The Plaintiff's advocate submitted that the purported title by the Defendants for L.R. No. 11895/27 did not exist; that the said title was never surrendered as alleged and that the 1st Defendant having been registered as a Society in the year 2005 could not have been issued with a title document in the year 1992.

26. The Plaintiff's counsel submitted that it is unlawful and illegal for the Director of Surveys to re-survey registered land without Notice to the affected persons; that the Surveyor did not give the reasons for the re-survey and that the change of the river's course cannot allow the Director of Surveys to misuse his office and sanction an illegal survey. The Plaintiff's counsel submitted that the 1st Defendant colluded with the Director of Survey to grab the Plaintiff's land.

27. The Defendants' advocate submitted that on 16th July, 2010, the parties filed a consent which formulated issues to be referred to the Director of Surveys; that the Director of Surveys prepared a report dated 6th August, 2010 which was filed in court and that the Plaintiff is bound by that Report.

28. The Defendants' counsel submitted that the Surrender produced by the 1st Defendant was duly received by the lands office; that the Application for conversion of the Defendants' title was approved and that the Registrar has since been issuing titles for the sub-divided parcel of land.

Analysis & findings:

29. The Plaintiff's case in this matter is that it is the registered proprietor of land known as L.R. No. 25062 Mavoko Municipality. According to the Plaintiff, it purchased the said land from the Velji's and was subsequently registered as the owner. However, it is the Plaintiff's contention that in the year 2006, the 1st Defendant's officials, in collusion with the Director of Surveys, caused L.R. No. 25062 to be sub-divided and created L.R. Nos. 11895/33 measuring 8.612 Ha; L.R. No. 11895/34 measuring 5.646 Ha and L.R. No. 11895/35 measuring 14.236 Ha.

30. The issues for determination therefore are as follows:

a. Whether the title for L.R. No. 11895/27 previously held by the 1st Defendant is null and void?

b. Whether the re-survey of the suit properties by the Director of Surveys was lawful.

c. Whether the 1st -4th Defendants have encroached on the Plaintiff's land.

d. Whether the Plaintiff's suit should be allowed.

31. The evidence produced in this court shows that the Plaintiff was incorporated as a limited liability company on 26th March, 2006. According to the evidence of PW1, the Plaintiff's members initially occupied the suit land as a Self Help Group before they converted the Group into a limited liability company.

32. Although PW1 informed the court that they first entered into a Memorandum of Understanding with the Vendors in respect of L.R. No. 25062 on 18th April, 2006, one of the Vendors, PW3, denied having signed the Memorandum of Understanding. However, PW3 admitted that the three registered proprietors of L.R. No. 25062 (*the Velji's*) agreed to sell the said land to the Plaintiff in the year 2014. This was after they realized that the Plaintiff's members had settled on their land and to cut down on their costs, they decided to sell it.

33. Indeed, the Plaintiff produced in evidence the Transfer document between the Velji's and their Directors. The said Transfer was duly registered on 18th August, 2014. The Transfer document shows that the land the Velji's sold to the Plaintiff measured 17.58 Ha. The Commissioner of Lands gave his consent for the Transfer of the land to the Plaintiff on 23rd May, 2014. The Grant No. I.R. 84437 for L.R. No. 25062 measuring 17.58 Ha was then transferred to the Plaintiff on 18th August, 2014.

34. The Grant for L.R. No. 25062 shows the same was allocated to the Velji's (*three of them*) "*in pursuance of a surrender registered as I.R. 51761/2.*" PW3 informed the court that they had surrendered the initial title document for L.R. No. 11895/8 for the change of user from quarrying to light industrial purposes. Upon the said surrender, the title number changed from L.R. No.11895/8 to L.R. No. 25062.

35. The registration of L.R. No. 25062 in the names of the Velji's on 30th August, 2000 is not in dispute. Indeed, the subsequent transfer of the said land to the Plaintiff is not contested. What is contested is what happened after the Director of Survey purported to re-survey several parcels of land in the area in the year 2006.

36. The Surveyor, PW2, admitted that there was a re-survey that was done in the year 2006. According to PW2, the said re-survey was authorized by the Director of Surveys.

37. PW2 produced a Report which shows that before the re-survey that was done in the year 2006, there existed survey plan number FR 213/82 which created L.R. No. 25062 (*the Plaintiff's land*). After the re-survey vide survey plan number FR No. 347/19, L.R. No. 25062 changed to L.R. No. 11895/33.

38. According to PW2, L.R. No. 11895/27 had been previously surveyed vide F/R No. 226/121. After the re-survey, the said land changed to L.R. No. 11895/35 vide FR No. 347/19.

39. The re-survey of the parcels of land by the Director of Surveys, according to PW2, also established that L.R. No. 25062 did not share a boundary with L.R. No. 11895/27; that the two plots were initially separated by L.R. No. 11895/R and that after the 2006 re-survey, L.R. No. 11895/R became L.R. No. 11895/34.

40. The evidence before this court shows that after the re-survey that was done by the Director of Surveys in the year 2006, three new parcels with different acreage emerged as follows:

a. L.R. No. 25062 measuring 17.58 Ha changed to L.R. No. 11895/33 measuring 8.6 Ha.

b. L.R. No. 11895/27 measuring 17.9 Ha changed to L.R. No. 11895/35 measuring 14.2 Ha.

c. L.R. No. 11895/R changed to L.R. No. 11895/34.

41. The explanation that PW2 gave for the change of the size of the plots was that the "*river changed the course*". According to PW2, all the three parcels of land existed in the earlier survey plan which is F/R No. 213/82 and that what changed is the area.

42. On being asked why the acreage of L.R. No. 25062 had changed substantially (*by more than 9 Ha -approximately 22.5 acres*), PW2 stated that the same could have been caused by the change of the river course. However, he admitted that he had not visited the ground.

43. Having not visited the ground, PW2 could not authoritatively state that L.R. No. 25062 changed in acreage because of the change of the river course. Indeed, there was no evidence that was placed before the court to show that there is a river course, leave alone a river, that goes through or abutts L.R. No. 25062. In any event, the evidence of PW2 that the re-survey that was done in the year 2006 was due to the change in the river course contradicted the evidence of DW2 who stated the re-survey was done due to a boundary dispute between the Plaintiff and the 1st Defendant.

44. The evidence of PW2 and DW2 was that L.R. No. 11895/27 (*the Defendants' land*) was created vide survey plan number F/R 226/121, which was re-surveyed vide survey plan FR. No. 347/19. However, PW2 stated that he did not have the survey plan (*FR 226/121*) that created L.R. No. 11895/27. Indeed, the Land Registrar, PW4, informed the court that he did not manage to trace the file for L.R. No. 11895/27 whose title was purportedly issued to the 1st Defendant in 1992.

45. To show that L.R. No. 11895/27 (*I.R 53390*) was a forgery, the Land Registrar, PW4, produced a certified copy of a title in respect of title number L.R. No. 209/11445 (*I.R 53390*). That title is for a piece of land in Nairobi. It is trite that parcels of land registered under the Registration of Titles Act are identified, for the purpose of an official search, by their inland reference (IR) number. It is not possible therefore for two different parcels of land to share an IR Number. That is the reason why PW4 produced an official search for L.R. No. 209/11445 whose IR Number is 53390.

46. To the extent that the title that 1st Defendant purports to have had (*L.R. No. 11895/27*) shares the same I.R. Number with L.R. No. 209/11445, the evidence by PW4 that the said title never existed is true. Although PW4 later on tried to recant his evidence, he still could not produce evidence to show that L.R. No. 11895/27 ever existed. Indeed, his attempt to prove that the title for L.R. No. 11895/27 was surrendered upon sub-division did not succeed because he was unable to produce a copy of the registered Surrender document.

47. The forgery in respect to the preparation of a title for L.R. No. 11895/27 purportedly issued to the 1st Defendant in 1992 is further fortified by the evidence showing that the 1st Defendant was registered in the year 2005. The Defendants were unable to explain how the 1st Defendant could have been registered as the proprietor of L.R. No. 11895/27 in 1992 and yet it was registered as a Self Help Group in the year 2005.

48. The Government Surveyor, PW2, informed the court that when L.R. No. 11895/8 (*which changed to L.R. No. 25062 in the year 2000*) was surveyed, the land abutting it was L.R. No. 11895/R. According to PW2, when the re-survey of 2006 was done, L.R. No. 11895/R became L.R. No. 11895/34. It was the evidence of PW2 that L.R. No. 11895/34 is in between the Plaintiff's land (*L.R. No. 25062*) and the 1st Defendant's land (*L.R. No. 11895/27*).

49. The assertion by PW2 that by the year 2006, the land abutting L.R. No. 25062 was L.R. No. 11895/R is true. This fact can be established from the Deed Plan of L.R. No. 25062 (*the Plaintiff's land*). However, a perusal of the Deed Plan annexed on the Defendants' purported title for L.R. No. 11895/27 shows that L.R. No. 11895/27 and L.R. No. 25062 is separated by a road, and not L.R. No. 11895/R.

50. If indeed the Defendants' title for L.R. No. 11895/27 was issued in 1992, why is it that the Deed Plan for L.R. No. 25062 which was prepared in the year 2000 shows the neighbouring land was L.R. No. 11895/R and not a road?

51. The documents and the evidence before me shows that when the 1st Defendant was registered on 24th February, 2005, its officials, in collusion with the Director of Surveys, engaged in a scheme of not only taking possession of the then an unallocated portion of land, L.R. No. 11895/R, but also L.R. No. 25062. Indeed, this scheme was perpetrated by way of conducting a re-survey in the year 2006. The said re-

survey gave rise to three new numbers, including changing the Plaintiff's title from L.R. No. 25062 measuring 17.58 Ha to L.R. No. 11895/33 measuring 8.6 Ha.

52. The creation of L.R. No. 11895/34 and 11895/35 which never existed before alienated the Plaintiff's land by more than 9 Ha. All along, the Plaintiff, or the former registered proprietors of the suit land were never informed or involved in the said changes. Indeed, by the time the initial owner of the land was formally selling the suit land in the year 2004, he was not aware of the changes that had been made on L.R. No. 25062 in the year 2006.

53. The title in respect of L.R. No. 25062 that was issued in the year 2000 had fixed boundaries. Those boundaries could not be changed at the whim of the Director of Surveys, and more so without involving the registered proprietor. The actions of the Director of Surveys in re-surveying L.R. No. 25062 in the year 2006 whose effect was to reduce the acreage of the said land amounted to appropriation of the Plaintiff's land without compensation. That action is contrary to the provisions of Article 40(3) of the Constitution which prohibits the state from depriving a person of property of any description, or of any interest in, or right over, property of any description.

54. The analysis of the evidence before leads me to the conclusion that the re-survey of L.R. No. 25062 by the Director of Surveys was unlawful, null and void. Furthermore, the purported creation of L.R. Nos. 11895/27, 11895/33, 11895/34 and 11895/35 was a nullity *ab initio*.

55. For the reasons I have given above, I find and hold that the Plaintiff has proved its case on a balance of probabilities. Consequently, the Plaintiff's Amended Plaint dated 17th December, 2010 is allowed as follows:

a. A declaration be and is hereby issued that the 1st Defendant's Leasehold Title L.R.No.11895/27 Mavoko Municipality bearing names "Kasina Housing Scheme Society" is fake, null and void.

b. A mandatory and/or permanent injunction be and is hereby issued directed to the Defendants, their members, servants, employees and agents to stop encroaching, trespassing into, destroying the boundaries, constructing shelters, erecting temporary or permanent structures, or interfering with the Plaintiff's properties and quiet possession in all that parcel of land, L.R. No. 25062, Mavoko Municipality.

c. An independent Surveyor be appointed and directed to show survey beacons of L.R. No. 25062 Mavoko Municipality for the Plaintiff to put a permanent fence on the Plaintiff's parcel of land L.R. No. 25062.

d. That the re-survey conducted by the Director of Survey on land parcel L.R. No. 25062, Grant I.R 84437 with a Deed Plan No. 231422 attached to the said title 25062, and as appearing on the re-survey map registered and dated 14th December, 2007 with file Ref. No. CR. 34/52/72, computation No. 55575 and Field No. W.C be and is hereby declared null and void for infringing and violating the Plaintiff's rights of ownership of property.

e. That land L.R. No. 25062, Grant I.R 84437 and its attached Deed Plan No. 231422 its size, beacons, boundaries, shape or form be restored and maintained as it was appearing before the re-survey and as appearing in the Deed Plan No. 231422 and attached to the said Leasehold Title No. 25062.

f. Costs and interest of this suit to be paid by the Defendants.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE