



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 221 OF 2014**

**(FORMERLY MERU CIVIL CASE NO. 20 OF 1995)**

**IRERI NDWIGA.....PLAINTIFF**

**VERSUS**

**BEDAN IRERI M'MITI.....DEFENDANT**

**JUDGEMENT**

1. This suit has a long and chequered history. It has been subject to various alternative dispute resolution mechanisms in the past. It has been dealt with by the relevant Assistant chief, Location Chief, District Officers and a panel of Elders. The Arbitral award by the elders was challenged by one of the parties with the consequence that it was set aside by the High Court vide a judgement dated 17<sup>th</sup> May 1994. It was further ordered that the dispute between the parties be heard *de novo* before the High court.

2. It would appear from the record that the suit has been pending before the superior court for at least 24 years. The parties have amended and re-amended their pleadings over the years. The Defendant has been involved in criminal proceedings in *Embu Chief Magistrate's Criminal Case No. 1515 of 2015* over alleged fraud and forgery with respect to the suit property. That case was still pending by the time the hearing of this suit was concluded. The Defendant's attempt to stay the hearing and conclusion of this suit pending the conclusion of the said criminal case was rejected by the court.

3. This is one of the several cases the court has come across in Embu whereby two or more claimants share a common name and each of them claim to be the owner of the property in dispute. By a further amended plaint amended on 25<sup>th</sup> April 2017, the Plaintiff pleaded that he was the registered proprietor of *Title No. Gaturi/Weru/313* (hereinafter the *suit property*). It was further pleaded that sometime in 1975 the Defendant fraudulently caused himself to be registered as proprietor after lodging an application for change of name from *Bedan Ileri M'Miti* to *Ileri Ndwiga*.

4. The Plaintiff further pleaded that the Defendant falsely used a non-existent national I.D. card No. 140839/61-5 for the purpose of effecting the said change of name and falsely presented himself to the Lands office as the genuine Ileri Ndwiga and thereafter changed his name to *Bedan Ileri M'Miti*. The Plaintiff, therefore, sought the following reliefs against the Defendant.

*a. That the Defendant do retransfer Title No. Gaturi/Weru/313 to the Plaintiff in default of which the Executive Officer of the court be authorized to re-transfer the same into the Plaintiff's name.*

*b. That the costs of the suit before the Magistrate's Court and the superior court be awarded to the Plaintiff.*

*c. Interest on costs at 18% p.m.*

*d. Any other or further relief.*

5. By a further amended defence amended on 15<sup>th</sup> November 2017, the Defendant denied the Plaintiff's claim in its entirety. The Defendant pleaded that he was the registered owner of the suit property and that the Plaintiff has never been the registered owner thereof. The Defendant stated that the suit property initially belonged to his *Gicuku* clan and that he was allocated the land by the clan in 1961.

6. The Defendant further stated that he lawfully applied for change of name in 1975 through the relevant Land Control Board which consented to the change in consequence whereof his name was corrected in the land register. He therefore denied the alleged fraud and particulars of fraud pleaded by the Plaintiff. He, therefore, asked the court to dismiss the Plaintiff's suit with costs.

7. At the trial hereof, the Plaintiff called three (3) witnesses and closed his case whereas the Defendant called three (3) witnesses and closed his case. Upon conclusion of the hearing on 15<sup>th</sup> November 2018 the court granted the Plaintiff 45 days to file and serve his written

submissions whereas the Defendant was granted 45 days upon service to do the needful. The record shows that the Plaintiff filed his submissions on 16<sup>th</sup> January 2019 whereas the Defendant filed his on 2<sup>nd</sup> April 2019.

8. The court has considered the pleadings on record, the witness statements, the oral evidence as well as the documentary evidence tendered by and on behalf of the parties. The court has also considered the written submissions on record. The court has noted that the parties did not file an agreed statement of issues for determination. In the circumstances, the court shall frame the issues for determination as provided for under the law.

9. Under the provisions of **Order 15 Rule 2 of the Civil Procedure Rules**, the court may frame issues for determination from any of the following;

- a. Allegations made on oath by the parties.
- b. The pleadings.
- c. The contents of documents produced by either party.

10. Consequently, the court is of the opinion that the following issues arise for determination in this suit;

- a. Whether the suit property rightfully belongs to the Plaintiff or the Defendant.
- b. Whether the allegations of fraud against the Defendant were proved.
- c. Whether the Plaintiff is entitled to the reliefs sought in the further amended plaint.
- d. Who shall bear the costs of the suit.

11. The court has considered the entire evidence on record on the first issue. This issue shall not entirely turn on the change of name by the Defendant. The court is of the view that the Defendant was also known as "Ileri" at some point as demonstrated by the various documents he tendered at the trial which described him as Bedan Ileri s/o Ndwiga and Bedan Ileri Ndwiga. It is not, however, clear as to when he was simply known as *Ileri Ndwiga*.

12. The court is of the opinion that resolution of the first issue will largely turn on who as between the Plaintiff and the Defendant was actually allocated the suit property by his respective clan. There is no dispute that the Plaintiff belongs to *Kina* clan whereas the Defendant belongs to *Gicuku* clan.

13. The Plaintiff testified that although he was a minor at the time of allocation it was the policy of his clan to allocate minors some land. He testified that his name was forwarded by his father to his clan for purposes of allocation and that his name was included in the clan allocation list. The record shows that his name was included in the list which he produced. The record was actually produced by the Land Registrar (DW3) since the Defendant objected to its production by the Plaintiff.

14. The Defendant, on the other hand, testified that he was allocated the suit property by his *Gicuku* clan and that his name was No. 34 on the allocation list. He could not, however, produce a copy of the clan allocation list since it was certified. Upon the Defendant's application, the court issued a summons to the concerned Land Adjudication Officer to attend court for the purpose of identifying and producing the list.

15. When the Land Adjudication Officer (DW3) attended court on 15<sup>th</sup> November 2018 she disowned the copy of the allocation list the Defendant sought to produce (Defence MFI-9). She stated that that document was not certified by her office hence she did not know its origin. She further testified that her office did not have any adjudication records to show how adjudication in the concerned section was undertaken. No such records were available at the headquarters of the Ministry of Lands either.

16. The Defendant's second witness, DW2, was said to be one of the elders involved in the allocation of the suit property to the Defendant, then known as Ileri Ndwiga. His evidence at the trial was that he could not remember who Ileri Ndwiga was and to which clan he belonged. He could not even recognize his own signature in his witness statement. His further evidence was that there were members of other clans other than *Gicuku* who were allocated land in the area known as *Gaturi/Weru*. His evidence was thus not very helpful to the Defendant.

17. The other aspect for consideration with respect to the first issue is the payment of the applicable fees to the government. There is no doubt that the Defendant was in possession of the original receipts which were issued in 1966. He claimed the payments were made by his father since he was still a student at the time. The Plaintiff also claimed that it was his own father who paid the fee and that the original receipts got lost whilst in the court file in previous proceedings at Meru.

18. The court is of the opinion that nothing much really turns out on this point. The allotment of the suit property was not dependent on a racing contest so that the fastest runner to the Lands office would become the legitimate owner. It is the allocation process prior to payment which really matters. So, a fraudster who has financial muscle cannot simply become the legitimate owner of all clan land by paying for all the allotments made to his fellow clansmen.

19. In the circumstances of this case, the court believes that the Defendant or his father may have made the payments for two reasons. First, he was in possession of the original receipts. There was no evidence on record to demonstrate that the Plaintiff had ever reported their loss to either the court or the police service. Second, the court has perused the Plaintiff's earlier testimony recorded before the Hon. Justice Alex

Etyang on 4<sup>th</sup> June 1997. It was the Plaintiff's evidence then that he could not pay the fee because somebody else had already paid the fee and collected the title document.

20. The consequence of the foregoing is that the court finds and holds that the Plaintiff is the rightful owner of the suit property. The evidence on record demonstrates that he was allocated the suit property and that the list presented by his clan was the one acted upon by the authorities in the registration process. The whereabouts of the list from Gicuku clan remains unknown and it is obvious that it was never acted upon by the authorities.

21. The second issue is whether the Defendant acquired the suit property through fraudulent means. As the court has already found, the Ileri Ndwiga who was registered when the land register was opened on 20<sup>th</sup> November 1961 was the Plaintiff and not the Defendant who may have had similar names at the material time. The court is further satisfied that the Defendant used dishonest means to have the suit property registered in his name through a change of name in 1975.

22. So, how did the Defendant manage to change his name in 1975 and what documents did he employ? The material on record indicates that he filled out a statutory form claiming that he Bedan Ileri M'Miti was also known as Ileri Ndwiga and declared his national Identity Card (hereinafter I.D. *card*) number as 140839/61-5. That is, indeed, the number which was entered in the land register on 21<sup>st</sup> October 1975 upon the purported change of name. The Defendant claimed at the trial hereof that he lost that I.D. card and that he did not have a copy thereof. It was his case that he never supplied a copy thereof to the Lands office since there was no such requirement at the material time.

23. If the purpose of a national I.D. card is to identify an individual who is a citizen of Kenya who, then, was the bearer of I.D. card No. 140839/61-5? The court has taken into consideration the evidence of Gladys Naliaka Soita (PW2) who was an officer from the National Registration Bureau. She tendered a certified copy of a report dated 13<sup>th</sup> March 2017 which she had prepared upon request from the Directorate of Criminal Investigations. It was her evidence that she had found that I.D. No. 3522497 belonged to one Bedan Ileri M'Miti whereas I.D. card No. 140839/61-5 was non-existent. It was her further testimony that an I.D. card number once issued to an individual is never altered during his lifetime. It was her evidence that whereas the serial number of a card may change, the national identity number does not change.

24. The court is satisfied that I.D. card No. 140839/61-5 which was used by the Defendant to effect the change of name was fictitious and non-existent. It was simply used for the purpose of fraudulent acquisition of the suit property. The court does not believe the Defendant's suggestion that a loss of national I.D. card necessitates a change of one's national I.D. card number. The court does not believe that when the Defendant's earlier physical I.D. card got lost, then the relevant details in the database of the National Registration Bureau also got lost. The Defendant was simply a fraudulent and dishonest land grabber. The mere fact that the Defendant obtained the consent of the Land Control Board in effecting change of name does not mitigate his fraudulent act. The court is thus satisfied that the fraud pleaded against the Defendant has been adequately proved to the required standard. The court agrees, as submitted by the Defendant, that the standard of proof is beyond a balance of probabilities but not as high as beyond reasonable doubt.

25. The third issue for consideration is whether the Plaintiff is entitled to the reliefs sought in the suit. Since the court has found that the Plaintiff is the rightful owner of the suit property and that the Defendant acquired the suit property through fraudulent means, it would follow that the Plaintiff is entitled to the reliefs sought in the further amended plaint.

26. The fourth issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event as stipulated in the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no reason why the successful party should be deprived of costs. The Plaintiff shall, therefore, be awarded costs of the suit.

27. At the conclusion of the trial on 15<sup>th</sup> November 2018, the Defendant's advocate orally applied to recall DW2 for the purpose of cross examination. DW2 had testified for the Defendant earlier on and the Defendant did not seek to have him declared a hostile witness. The said application was based upon **sections 153 and 163 of the Evidence Act (Cap. 80)**. The court rejected the said application summarily and reserved the reasons.

28. The said application was based on the ground that the Defendant had discovered various inconsistencies in the evidence of DW2 in that his evidence in a previous criminal case was at variance with his evidence at the trial hereof. The court was not given any reason as to why the Defendant's advocate did not cross-examine DW2 on his previous evidence when DW2 testified on 2<sup>nd</sup> October 2018 under **section 153 of the Evidence Act (Cap. 80)**. The court is also of the view that DW2 was not liable to be cross examined under **section 163 1(c)** of the said Act without leave of court since DW2 was the Defendant's own witness. No such leave was sought.

29. The court is further of the view that a distinction ought to be drawn between a hostile witness and an unfavourable witness. The former is one who either deliberately refuses to testify or refuses to tell the truth. A hostile witness may, on application by the party calling him, be declared hostile and cross-examined. An unfavourable witness is a co-operative witness whose evidence either fails to prove the intended point or even ends up proving quite the opposite. See **Cross R, Evidence. Butterworth & Co. (Publishers) Ltd, (1958) pp. 208-211**. That is really where the evidence of DW2 falls. He could not remember much hence he could not give evidence favourable to the Defendant. He could not even recognize his own signature.

30. The upshot of the foregoing is that the court finds that the plaintiff has proved his case against the Defendant to the required standard. Consequently, there shall be judgement for the Plaintiff against the Defendant as prayed in paragraphs (a) and (b) of the further amended plaint together with costs.

31. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **16<sup>TH</sup>** day of **MAY, 2019**.

In the presence of Mr. Gachuba holding brief for Ms Ndorongo for the Plaintiff; Defendant present in person and in the absence of the Advocate.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**16.05.19**