



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 43 OF 2015

NDOVU BUILDERS & GENERAL CONTRACTORS LTD.....PLAINTIFF

VERSUS

HON. THE ATTORNEY GENERAL.....1ST DEFENDANT

THE DIRECTOR OF SURVEYS.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE LAND REGISTRAR-MACHAKOS.....4TH DEFENDANT

THE DISTRICT SURVEYOR- MACHAKOS.....5TH DEFENDANT

PETER WAMBUA MAUYE.....6TH DEFENDANT

JOSEPH MUSYOKI WAMBUA.....7TH DEFENDANT

JUDGMENT

1. In the Plaintiff dated 17th February, 2015, the Plaintiff has averred that it is the registered proprietor of land known as Muputi/Kiima-Kimwe/2601 while the 6th and 7th Defendants were the registered owners of land known as Muputi/Kiima-Kimwe/2594; that it acquired parcel of land number 2601 by outright purchase from one Zuhura Rajab Hamisi and that the land was registered in its favour on 10th August, 2009.

2. The Plaintiff has averred that after purchasing the parcel of land known as Muputi/Kiima-Kimwe/2601 (*the suit property*), it took possession of the same by fencing it and sinking a borehole thereon; that on 2nd August, 2010, the Machakos District Surveyor made amendments to the Survey Map relating to parcel number 2601 and that the said amendments were unprocedural because the District Surveyor acted unilaterally and failed to involve the Plaintiff before effecting the said amendments.

3. The Plaintiff is seeking for a declaration that the amendments which were made by the District Surveyor in respect of parcel of land known as Muputi/Kiima-Kimwe/2601 to be null, void and of no legal effect and an order for the cancellation of the Title Deed that was issued to the 6th and 7th Defendants after the amendments being title number Muputi/Kiima-Kimwe/2594.

4. In their Defence and Counter-claim, the 6th and 7th Defendants averred that they are the registered proprietors of Muputi/Kiima-Kimwe/2594 while the Plaintiff is the registered proprietor of parcel number Muputi/Kiima-Kimwe/ 2601; that if any amendments were made by the Surveyor in respect of the two properties, then the same was done procedurally, legally and in a fair manner and that the amendments did not prejudice the Plaintiff's claim in respect of parcel number Muputi/Kiima-Kimwe/2601.

5. In their Counter-claim, the 6th and 7th Defendants averred that in the year 2010, the Plaintiff trespassed on parcel of land known as Muputi/Kiima-Kimwe/2594, sank a borehole thereon and erected a fence; that the court in Machakos CMCC No. 445 of 2013 issued an order directing the District Surveyor to establish on which land the borehole had been sunk and that the Surveyor established that the Plaintiff had sunk a borehole on parcel number 2594 which belongs to them.

6. The 6th and 7th Defendants are seeking for an order of injunction restraining the Plaintiff from trespassing on land known as Muputi/Kiima-Kimwe/2594 and for general damages.

7. The Plaintiff's Managing Director, PW1, informed the court that the Plaintiff bought parcel of land known as Muputi/Kiima-Kimwe/2601

from one Zuhura Rajab. According to PW1, he was shown the land he was buying by the Vendor and that parcel number 2601 was adjacent to parcel number 2595 which he also bought.

8. After purchasing parcel number 2601, it was the evidence of PW1 that he was issued with a Title Deed, whereafter he removed the fence around the plot that had been put up by Zuhura and replaced it with his own fence using concrete polls and a chain link. In addition to the fence, PW1 informed the court that he also sunk a borehole on parcel number 2601 and that the 6th and 7th Defendants are his neighbours.

9. PW1 informed the court that in the year 2012, the 6th and 7th Defendants informed him that parcel number 2601 belonged to them and that on further inquiry, he discovered that a mutation had been prepared altering the map and that the alteration of the map had the effect of *“removing parcel number 2601 and taking to a different location on the ground.”* The Plaintiff produced several documents in evidence which I shall refer to later.

10. The Vendor, PW2, informed the court that she sold to the Plaintiff parcel of land known as Muputi/Kiima-Kimwe/2601 in the year 2008; that the said land was transferred to the Plaintiff in the year 2009 and that she bought parcel number 2601 in 1991 from Mr. Martin who is the uncle of the 6th and 7th Defendants.

11. PW2 stated that when she bought the suit land in 1991, the 6th and 7th Defendants' uncle had not processed title documents; that the title to the suit land and the other neighbouring plots were still in the name of the Vendor's mother's name and that after obtaining the Grant of Letters of Administration, Martin, the Vendor, also died. Because Martin did not have a family, PW1 stated that the 6th and 7th Defendants substituted Martin as the administrators of his mother's Estate; that it is the 6th and 7th Defendants who transferred parcels number Muputi/Kiima-Kimwe/2595 and 2601 to her and that she has the map that sub-divided parcel number 2597 which was given to her by the late Martin.

12. PW2 informed the court that by the time plot number 2597 was being sub-divided, parcels number 2601 and 2595 were already in existence and that the 6th and 7th Defendants knew the location of parcels number 2595 and 2601 on the ground.

13. According to PW2, the amendments that were done to the Registered Index Map of the area on 2nd August, 2010 was done without their knowledge and that the sub-division of parcel number 32 which was done in 1990 represents the true picture of the plots on the ground.

14. It was the evidence of PW2 that her late mother bought parcels numbers 2598 and 2602 and she bought parcels number 2595 and 2601 and that her mother had the initial mutation form that gave rise to the said sub-divisions.

15. According to PW2, parcels numbers 2595 and 2601 are on the same line on the ground; that parcel number 2600 remained in the name of Martin (*deceased*) and that the mutation of parcel number 2600 in the year 2010 was meant to sub-divide parcel number 2600 alone and not Plot No. 32.

16. PW2 informed the court that the distorted mutation and map moved parcel number 2601 to where parcel number 2602 is situated and that the amendments are a forgery.

17. The Surveyor, PW3, produced in his evidence the report of 16th February, 2015. According to PW3, the purported mutation of parcel number Muputi/Kiima-Kimwe/2597 was not signed by the Surveyor who carried out the survey to amend the Preliminary Index Diagram; that the acreage for each plot is not reflected on the mutation; that the mutation appears to be a sub-division of parcel number 2600 and not plot number 32 and the cancellation of plot number 2600 is not counter-signed.

18. According to PW3, the sub-division of Muputi/Kiima-Kimwe/32 was done in 1990 and the registration for plot numbers 2594-2602 was done on 21st May, 1990; that the transfers of parcels number 2595 and 2601 in favour of Zuhura Rajab were done on 10th August, 2009 and that on the ground, parcels number 2595 and 2601 have been fenced by a chain link.

19. PW3 informed the court that Zuhura (PW2) has fenced plot numbers 2602 and 2598 with a live hedge and that the Plaintiff sunk a borehole on parcel number 2601 in the year 2009.

20. PW3 finally stated that the amendments of 2010 to the already surveyed plots could only be effected with the consent of the registered owners of the land to be affected and that titles for parcels numbers 2594-2602 were issued in 1990 after the mutation for their creation was done.

21. The 6th Defendant, DW1, informed the court that he is the registered proprietor of parcel of land known as Muputi/Kiima-Kimwe/2594; that he acquired the land through Succession Cause No. 267 of 2004 whose grant was confirmed on 20th December, 2010 and that the adjudication of the entire land belonging to the late Nthamo Mauye was done in the year 1990.

22. According to DW1, in the year 2010, the Plaintiff encroached on parcel number 2594 and that his Defence and Counter-claim should be allowed.

23. In cross-examination, DW1 stated that he is not the biological son of the late Mauye Nthamo, the original owner of parcel number 32 which was sub-divided to create parcels numbers 2594-2602; that the sub-division of parcel number 32 was done in the year 1990 and that the late Martin was the son of the late Mauye Nthamo.

24. According to DW1, it is Martin who sold to PW2 parcels number 2595 and 2601 and that he was not aware that Zuhura, PW2, sold

parcel number 2601 to the Plaintiff. DW1 informed the court that the Plaintiff sunk a borehole in the year 2010 and that he fenced the land after doing the borehole. According to DW1, the Plaintiff sunk a borehole on parcel number 2594.

25. DW1 testified that he instructed the Surveyor to sub-divide parcels number 2597 and 2600; that the sub-division of those plots gave rise to parcels number 3361-3365 and that the 6th and 7th Defendants signed the mutation form of the said sub-division.

26. DW1 denied that the 2010 mutation was in respect of parcel number 32; that they sold parcel number 2601 to Zuhura and that the current map reflects the position of the plots after the 2010 mutation.

27. The 7th Defendant, DW2, stated that he is the registered proprietor of parcel of land known as Muputi/Kiima-Kimwe/2594, which is a sub-division of parcel number 32 that was owned by the late Mauye Nthamo; that parcel number 2594 and 2595 are adjacent to each other and that in the year 2010, the Plaintiff encroached on parcel number 2594.

28. In cross-examination, DW2 stated that in the year 2010, they instructed the Surveyor to sub-divide parcel of land known as Muputi/Kiima-Kimwe/2600 and that the Plaintiff has unlawfully dug a borehole on parcel number 2594.

29. The Plaintiff's advocate submitted that there is no dispute that the Plaintiff is the registered proprietor of land known as Muputi/Kiima-Kimwe/2601; that the dispute is the exact location of the plot on the ground and that parcel number 2601 is a product of the sub-division of parcel number 32 which was effected in the year 1990.

30. Counsel submitted that the mutation plan which the Defendants are relying on dated 2nd August, 2010 is riddled with mistakes and irregularities; that the mutation of parcel number 2600 and the amendment of Plot No. 32 cannot be carried out simultaneously and that the amendments that were done in the year 2010 were meant to shift the existing boundaries of parcel number 2594 to where parcel number 2601 was situated.

31. The 6th and 7th Defendants' advocate submitted that the 6th and 7th Defendants are the lawful owners of parcel of land known as Muputi/Kiima-Kimwe/2594; that the Plaintiff has sunk his borehole on parcel number 2594 and that the Plaintiff should be dismissed with costs.

32. The undisputed facts of this case are that the late Nthamo Mauye owned a parcel of land known as Muputi/Kiima-Kimwe/32 which was sub-divided into parcel of land number 2593-2602. The said sub-division was done in 1990. The mutation form that gave rise to the sub-division of parcel number 32 was registered by the Land Registrar, Machakos on 21st May, 1990.

33. When the initial owner of parcel number 32, Nthamo Mauye, died, Martin Maleve Mauye, commenced the process of succeeding her in Machakos Succession Cause No. 267 of 2004. However, before the Grant could be confirmed, the said Martin also died, but after selling parcels number 2595 and 2601 to Zuhura, PW2. The said Martin also sold to Zuhura's mother parcels number 2598 and 2602.

34. The documents produced by the Plaintiff shows that upon the death of Martin Maleve Mauye, he was substituted by the 6th and 7th Defendants as the administrators of the Estate of the late Nthamo Mauye. The Certificate of Confirmation dated 11th February, 2009 shows that Zuhura Rajab Hamisi was allocated parcels number 2595 and 2601 by the court. The 6th and 7th Defendants were allocated parcel number 2594 to be shared equally with the remaining parcels of land being allocated to the other purchasers.

35. After the said Confirmation of Grant in Machakos High Court Succession Cause No. 267 of 2004, the Zuhura sold parcel number 2601 to the Plaintiff and retained parcel number 2595. The Plaintiff was registered as the proprietor of parcel number 2601 measuring approximately 0.06 Ha on 19th October, 2009. However, he was issued with a Title Deed for the said land on 29th October, 2009.

36. The Title Deed for Muputi/Kiima-Kimwe/2601 produced by the Plaintiff shows that the register of the said land was opened on 21st May, 1990, the same day the mutation sub-dividing parcel number 32 was registered. Indeed, that is the date that the register for parcel number Muputi/Kiima-Kimwe/2594, was opened, with the Title Deed being issued to the 6th and 7th Defendants on 20th July, 2009.

37. The mutation form for parcel number 32 that created parcels number 2593-2602 has a sketch map showing the location of all the sub-divisions and the road network. It is not clear to this court if the Registered Index Map of the area was amended to reflect the position of the sub-divisions of parcel number 32. However, I will not be surprised if the Registered Index Map was never amended because such amendments are never prioritized by the land's office.

38. What is clear to this court is that Title Deeds were issued in respect of the mutation of 21st May, 1990, meaning that the position of the plots that arose out of the sub-division of parcel number 32 were agreed up by the proprietor(s) of the said land.

39. The Defendants informed the court that after being registered the proprietors of parcel number 2594, they sought to amend parcels number 2597 and 2600, and that the sub-division of parcel number 2600 was done vide the mutation dated 29th July, 2010.

40. If that is so, the said mutation is faulty because it shows the sub-divisions arising out of parcel number 2600 (*which has been cancelled and replaced with "32"*) are parcels number 2594, 2595, 2596, 2601, 3361, 3362, 3364, 3365, 3361 and 2598. These sub-divisions, and especially parcels numbers 2594, 2595, 2596 and 2601 had already been created in 1990 and titles issued. How could the sub-division of parcel number 2600 create the same parcels of land?

41. Even if it is argued that the 2010 mutation form is for parcel number 32, it will still be faulty because parcel number 32 was sub-divided

in 1990 giving rise to parcel numbers 2593 -2602, with the Plaintiff buying parcel number 2601.

42. In any event, the purported mutation form of 29th July, 2010 is neither signed by the Surveyor who prepared it (*if at all*) neither is it registered. In fact, the Defendants did not bother to call a Surveyor to authenticate the unsigned and undated mutation form of 29th July, 2010. The same cannot therefore be used to effect any amendments to the Registered Index Map of Muputi Kiima-Kimwe registration section, or any other registration Section.

43. The totality of the evidence before me shows that the purported exercise carried out by the District Surveyor in August, 2010 which resulted in the creation of new parcel numbers was unprocedural and irregular. The Defendants and the Surveyor, or Land Registrar, cannot be allowed to use the said survey plan to relocate the Plaintiff's parcel number 2601 from its original site as depicted in the 1990 mutation form.

44. In the circumstances, I find that the Plaintiff has proved its case on a balance of probabilities. The 6th and 7th Defendants were unable to prove their Counter-claim. The Plaintiff's Plaint dated 17th February, 2015 is allowed as follows:

a. A declaration be and is hereby issued that the amendments made by the District Surveyor on 2nd August, 2010 or thereabouts to the Survey Map relating to Muputi/Kiima-Kimwe/2601 and effected by District Land Registrar are null, void and of no legal effect.

b. A declaration be and is hereby issued that the Plaintiff is the legal owner of the land comprised in L.R. No. Muputi/Kiima-Kimwe/2601 and which it has fenced off on the ground and on which it has sunk a borehole.

c. The 6th and 7th Defendants to pay the costs of the suit and the Counter-claim.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE