



**REPUBLIC OF KENYA**

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

**CHUKA LAND CASE NO 13 OF 2017**

**FORMERLY MERU ELC CASE NO.04 OF 2016**

**MAKEMBO KAYA.....PLAINTIFF**

**VERSUS**

**SILAS NYAGA.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MUGAMBI KAMUYU.....2<sup>ND</sup> DEFENDANT**

**ELIJAH MUTHENGI KAMUYU.....3<sup>RD</sup> DEFENDANT**

**GRACE GITHINJI KAMUYU.....4<sup>TH</sup> DEFENDANT**

**RUTH MWENDE.....5<sup>TH</sup> DEFENDANT**

**JMG.....6<sup>TH</sup> DEFENDANT**

**JOHN KAMUNYU GAKIRORU.....7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In his plaint, the plaintiff seeks the following prayers against the defendants jointly and severally:-

- (i) An order directing each and every defendant to return to the plaintiff the parcel of land as set out in paragraph 11 of the plaint.
- (ii) An order that the plaintiff be registered as owner of the said plot.
- (iii) Costs of the suit.

2. The plaintiff claims that he was deprived of his land fraudulently and at paragraph 15 of his plaint pleads the following particulars of fraud:

- (i) Compromising the land adjudication officers to deprive the plaintiff of his parcels of land.
- (ii) Denying the plaintiff an opportunity to put his case forward.
- (iii) Failing to record the proceedings in a manner detrimental to the plaintiff's case.
- (iv) Unlawfully depriving the plaintiff of his parcels of land.

3. In the Joint Statement of Defence, the defendants denied the plaintiff's claim and prayed that the plaintiff's suit be dismissed with costs to them.

4. To place matters in their proper perspective, I deem it necessary to produce in full the witness statement of the plaintiff and of the 7<sup>th</sup> defendant who subdivided and gave the suit lands to his children.

5. The plaintiff's witness statement is reproduced in full herebelow without any alterations whatsoever, including corrections of spelling or any other mistakes, if they exist.

### **PLAINTIFF'S STATEMENT**

I have always been the owner of land which was registered as L.R. 1584 Gatunga Adjudication Section.

The defendants herein conspired with the land officers and deprived me of parts of my land as set out in the plaint. I then filed this case to protect my interests.

**DATED AT MERU THIS 15<sup>TH</sup> DAY OF JANUARY, 2016**

6. The 7<sup>th</sup> defendant's witness statement is reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes, if they exist:-

### **STATEMENT OF JOHN KAMUNYU GAKIRORO**

I am the above named person and the 7<sup>th</sup> defendant who wishes to state as follows:

1. That I am the initial owner of L.P. No. 1545 within Gatunga Adjudication Section which I have on my own volition subdivided into eight (8) portions for transfer to my children.
2. That the entire portion of land comprises of a portion that I inherited from my father and another one that I purchased from a third party.
3. That I consolidated both portions and had them adjudicated as one.
4. That the plaintiff has instituted numerous complaints against me relating to L.P. No. 1545 Gatunga Adjudication Section which have all been dismissed in the various forums.
5. That for instance on 6.10.2010 the Chief Gatue Location constituted a panel to adjudicate on the plaintiff's claim. The panel ruled in my favour.
6. That on 20.3.2001 the plaintiff's complaint was again heard and determined in my favour before a committee constituted by the District Officer Tharaka North Location.
7. That further on 2.5.2008 the arbitration board for Gatunga Adjudication Section conducted proceedings relating to a complaint by the plaintiff touching on P/No. 1545 within the same section and found in my favour in a ruling delivered on 9.5.2008.
8. That the plaintiff has to the best of my knowledge never challenged the decision of the board.
9. That I have not obtained ownership of the subject parcel of land through fraud as alleged by the plaintiff.
10. That I pray that the plaintiff's suit be dismissed with costs.

**DATED AT MERU THIS 10<sup>TH</sup> DAY OF APRIL, 2017**

7. PW1, Makembo Kaya, told the court that the land he was claiming had been given to him by his stepfather, one Kamwara. He testified that he had occupied the land for 48 years before he was kicked out by the defendants. He went on to state that he moved to the Land Adjudication Committee which made a decision that the land belonged to the defendants. PW1 went up to the Arbitration Board whose decision he was dissatisfied with. He then obtained the consent of the District Adjudication and Settlement Officer (DLASO) and filed this case. He produced as his exhibits documents concerning apposite proceedings which took place before this suit was filed.

8. The plaintiff produced a photocopy of a letter through which he claimed his stepfather had given him the suit land. Asked if his stepfather wrote the letter he said that it was written by his stepfather's daughter, one Kamwara. The document was undated and unsigned. He claimed that Lucy Kamwara, and not his stepfather had thumb printed it. He admitted that this dispute had been arbitrated up at various fora where he had lost his claim. He claimed that the dispute had been escalated to the level of the minister, where he had also lost. He admitted that he never challenged the minister's decision in any court.

9. Questioned regarding the claim that the defendants had committed fraud by compromising land adjudication officers, PW1 only said that the son of the brother of the brother of the 7<sup>th</sup> defendant was a member of the land committee. He was severally evasive regarding several matters but grudgingly admitted that he did not live on the parcels of land occupied by the defendants. He also admitted that he knew that the sixth defendant was a minor who was in form one in Secondary School.

10. PW2, Lucy Kambura Kamwara, told the court that she was the daughter of Kamwara, who was deceased. She asked the court to rely on her witness statement dated 23<sup>rd</sup> October, 2018 and filed on 9<sup>th</sup> November, 2019. A conspectus of her evidence was that prior to his demise,

her late father, Mwikamba Mpindi Kamwara, had shared his land between the plaintiff, Makembo Kaya and herself. She states that the plaintiff complained to the area chief and local areas. She went on to say that the area chief wanted to buy their land and when they refused he assisted the 7<sup>th</sup> defendant, John Kamunyu Gakiroro, to grab the plaintiff's land.

11. PW2 did not know what parcels of land were registered in the names of the various defendants and in the name of the plaintiff. She claimed that her father had written a letter giving the suit land to the plaintiff but claimed that the letter was in the possession of their advocate. She also told the court that the defendants did not occupy the parcels of land the defendant's occupied. The court noted that she demurred when called upon to answer questions.

12. In the court's view, PW2's evidence had no meaningful probative value in support of the plaintiff's case.

13. DW1, Cyrus Nyaga, the 1<sup>st</sup> defendant, asked the court to adopt his witness statement dated 10<sup>th</sup> April, 2017 as his evidence in this suit. In his statement he told the court that he obtained land parcel No. 1546 Gatunga Adjudication Section from his father and had cultivated and continuously lived on it from time immemorial. He states that he had litigated the plaintiff's complaints in many forums and in all of them Land Parcel No. 1546 was declared to be his. He states that any claims of fraud are false. He goes on to say that the plaintiff had never challenged the decisions made in the apposite forums. He concluded that the plaintiff has no justifiable and justiciable claim against him and asks the court to dismiss the plaintiff's claim with costs.

14. DW1 told the court that the late Kamwara had not left any land to the plaintiff. He told the court that Kamwara's land was at Kithunguru, far from his land. He denied knowledge of PW2, Lucy Kambura. He told the court that he saw her for the first time in court.

15. DW2, John Kamunyu Gakiroro, the 7<sup>th</sup> defendant told the court that the 1<sup>st</sup> defendant was his neighbor and that the 2<sup>nd</sup> to 6<sup>th</sup> defendants were his sons and daughters. He told the court that he subdivided his land and gave each of the 2<sup>nd</sup> to 6<sup>th</sup> defendants a parcel of land. He told the court that he had disputes with the plaintiff at various fora and had always been declared owner of his land.

16. DW3, Joseph Mwangangi, adopted his father's witness statement and testified that he got his land from his father. His evidence was congruent to that of his father. DW4, and DW5 gave similar evidence. They all denied getting their parcels of land fraudulently. By and large, DW3, DW4 and DW5 gave credible evidence.

17. The parties filed and exchanged submissions.

18. The plaintiff's written submissions are reproduced in full herebelow without any alterations whatsoever, including correction of any spelling or other mistakes, if any exist:

**PLAINTIFF SUBMISSIONS.**

In his plaint dated 15/1/2016 and filed in Court on the same day, the plaintiff claims that he has always been the registered owner of L.R. NO. 1545 Gatunga Adjudication Section. The first to the seventh defendants filed objection proceedings before the Gatunga Adjudication Section who ruled against the plaintiff in that L.R NO. 1546 was ordered to be registered in the name of the first defendant while L.R NO. 1545 was ordered to be registered in the name of the seventh defendant.

Further encroachment on the plaintiff original parcel of land was affected when the first and seventh defendants subdivided their respective parcels of land into L.R NO. 3860,3861,3862,3863 and 8364 each of which were registered in the names of the second, third, fourth, five and sixth defendants respectively.

It is the plaintiff case that such subdivisions and subsequent alienation was fraudulent and unlawful. The plaintiff has set out the particulars of the fraud in paragraph 15 of the said plaint.

Apart from denying the plaintiff's claim, the defendants did not specifically contradict the available evidence. They claimed that the parcels of land were sold to them by one MANYENJE but there were no particulars offered. There was no written agreement, no consideration offered. The plaintiff is still in possession of the original parcel of land.

We submit that the plaintiff has proved his case on a balance of probabilities. In the circumstances we pray that judgement be entered for the plaintiff against the defendants with costs.

**DATED AT MERU THIS 11<sup>TH</sup> DAY OF JULY, 2019**

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**FOR: B.G KARIUKI & CO**

**ADVOCATES FOR THE PLAINTIFF**

19. The defendants' written submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or other mistakes, if any exists:

**DEFENDANTS' SUBMISSIONS**

Your Lordship, we wish to tender the following submissions on behalf of the Defendants.

### **The Plaintiff's claim**

In summary, the Plaintiff's claim against the defendants is that:-

- (a) He has always been the registered owner of L.R. NO. 1584 Gatunga Adjudication Section.
- (b) Upon hearing Objection number 45, 46 and 356 of 2012 between the Plaintiff and the 1<sup>st</sup> and 7<sup>th</sup> Defendants it was determined that L.R. NOs. 1545 & 1546 Gatunga Adjudication Section be registered in the names of the 7<sup>th</sup> and 1<sup>st</sup> Defendants respectively.
- (c) The 1<sup>st</sup> and 7<sup>th</sup> Defendants proceeded to sub-divide their respective portions.
- (d) The dealings by the Defendants were fraudulent and illegal.

It is on this basis that the Plaintiff seeks an order for the Defendants to return their respective parcels of land.

### **The Defence**

The Defendants denied the Plaintiff's claim in a joint statement of defence which in sum sets out the following;

- (a) There have been previous proceedings between the Plaintiff on one side and the 1<sup>st</sup> and 7<sup>th</sup> Defendants on the other side which were all determined in favour of the latter.
- (b) The Defendants were not aware of any Objection proceedings number 45, 46 and 356 OF 2012.
- (c) The dispute between the parties was determined in Arbitration Board cases 91/2007, 92/2007 and 93 /2007 which decision have never been set aside.
- (d) The Defendants did not engage in any fraudulent activities.

### **The applicable law**

Your Lordship in his evidence the Plaintiff conceded that he had litigated his claim before various forums and lost in all of them.

He further conceded in cross examination that he had no proof of the itemized particulars of fraud.

Your Lordship looking at the plaint it is not particularly clear the exact remedy that the Plaintiff seeks for the following reasons.

- (a) There was no attempt by the Plaintiff to relate L.R. NO. 1584 Gatunga Adjudication Section to parcels numbers 1545 and 1546 of the same section.
- (b) It is not pleaded on what basis the Plaintiff claims the Defendants parcels of land.
- (c) It is not clear from the plaint which parcel between numbers 1545 and 1546 resulted into the sub-divisions pleaded in paragraph 13 of the plaint.
- (d) It is also not clear whether there is any claim against the 1<sup>st</sup> Defendant.
- (e) Prayer (i) in the plaint makes reference to "**parcels of land set out in paragraph 11 of the plaint**" whereas that paragraph only lists one parcel.

It our submission that considering the manner in which the Plaintiff's claim is pleaded, it would be difficult for the court to determine the nature of dispute before it.

Further, the Plaintiff did not produce any records to demonstrate the nature of registration of any of the parcels featuring in his plaint.

We urge the court to find that a party is bound by his pleadings and in the event that they do not disclose a cause of action then such party should not expect the trial Court to create one for them.

The Plaintiff's suit is anchored upon an allegation that the Defendants engaged in fraud when obtaining their respective parcels of land. The Plaintiff when challenged to substantiate his particulars of fraud, he expressly stated that he could not.

The court in **ROP ALBERT & ANOTHER Vs GLADYS KOSKEY & 3 OTHERS** while citing other decisions, observed that allegations of fraud must not only be pleaded with particularity but must also be strictly proved. On that account the Plaintiff completely failed to make

any attempt at proving the allegations.

The defence on their part denied the alleged acts of fraud and it was thus incumbent upon the Plaintiff to counter the denial by laying before the court evidence of impropriety.

In the end we submit that the Plaintiff has failed to prove his case on the required standard of proof as a result of which this suit deserves to be dismissed with costs.

We so humbly pray.

**DATED AT CHUKA THIS 5<sup>TH</sup> DAY OF JULY, 2019**

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FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCIATES

**ADVOCATES FOR THE DEFENDANTS**

20. I frame the issues for determination as follows:

- a) Is the plaintiff entitled to the orders he seeks?
- b) Who will pay costs?

21. I have carefully considered the pleadings, the oral evidence and the submissions proffered by the parties in support of their veritably incongruent assertions. I do agree that the case of Rob Albert & Another versus Gladys Koskey & 3 Others [eKLR] is relevant to the facts and circumstances of this case. The legal principle espoused therein is that particulars of fraud must strictly be proved.

22. That allegations or claims of fraud are serious issues is buttressed by the Court of Appeal which in the case of Vijay Morjoria versus Nansingh Madhusingh Darbar & Another [2000] eKLR [Civil Appeal No. 106 of 2000] (Tunoi JA, as he then was) opined as follows:

***“...It is well established that fraud must be specifically pleaded and that the particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”***

23. Mere nebulous allegations, however preposterous, cannot suffice. Fraud must be strictly proved.

24. The plaintiff and his witness PW2 gave garbled evidence. In civil matters, cases must be proved on a balance of probability. PW1, the plaintiff admitted that he had lost all claims he had made at various fora. From the evidence proffered in court it is clear that this dispute was determined in Arbitration cases 91/2007, 92/2007 and 93/2007. Although the plaintiff intimates that he escalated this dispute to the Ministerial Level, there is no evidence to support this claim. In any case, the plaintiff testified that he lost at that level.

25. The evidence of the 1<sup>st</sup> defendant was credible that he obtained his land through a proper adjudication process. The evidence of the 7<sup>th</sup> defendant was that he also got his land through a proper adjudication process. Then he gave the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants portions of his land.

26. The law is clear that ascertainment of land rights can only be established through the processes envisaged by the Land Consolidation Act and the Land Adjudication Act. There is no short cut. The two Acts of Parliament provide effective dispute settlement mechanisms.

27. The claim that the defendants obtained their parcels of land through fraud have not been proved. No iota of evidence was given by the plaintiff that the defendants had compromised land adjudication officers. Indeed one of the defendants, the 6<sup>th</sup> defendant, was as recently as in 2018 in Form one in a secondary school.

28. No evidence whatsoever was proffered by the plaintiff and his one witness to proof any of the four particulars of fraud pleaded in his plaint. Indeed the particulars were nebulous and veritably were devoid of any specificity.

29. I issue judgment against the plaintiff and in favour of the defendants in the following terms:

- a) This suit is hereby dismissed.
- b) The order of inhibition granted by this court against Land Parcel Numbers 3860 to 3867 Gatunga Adjudication Section is hereby vacated and any inhibition or other restrictions registered against the said parcels of land should be removed forthwith.
- c) Costs are awarded to the Defendants.

30. Orders accordingly.

**Delivered in open Court at Chuka this 21<sup>st</sup> day of November, 2019**

in the presence of:

CA: Ndegwa

Njeru Ithiga h/b Mark Muriithi for the Defendants

Makembo Kaya Plaintiff - present

**P. M. NJORGE,**

**JUDGE.**