



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT**  
**AT NYAHURURU**

**ELC CASE NO 215 OF 2017**

**JAMES MATHENGE MUNYIRI.....PLAINTIFF**

**VERSUS**

**DISTRICT LANDS REGISTRAR.....1<sup>st</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL.....2<sup>nd</sup> DEFENDANT**

**THE SETTLEMENT FUND.....3<sup>rd</sup> DEFENDANT**

**JUDGEMENT**

1. Before me for determination is a matter wherein the plaintiff filed his plaint on the 4<sup>th</sup> August 2015 wherein he prayed for orders that a declaration do issues that there was an error on the face of the initial title deed to the suit property indicating that the said parcel of land is approximately 20 acres instead of 24 acres
2. The plaintiff also prayed for a declaration that 4 acres of land out of all the parcel of land known as Marimanet Melwa Block 1/1468 (Mohotetu) belong to the Plaintiff herein.
3. And lastly for the issuance by the 1<sup>st</sup> Defendant of title deed for the Plaintiff's parcel of land measuring 4 acres out of all that parcel of land known as Marimanet Melwa Block 1/1468 (Mohotetu).
4. And lastly the Plaintiff prayed for costs of the suit.
5. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated the 26<sup>th</sup> October 2015 seeking temporal orders of injunction against the 3<sup>rd</sup> Defendant from evicting him from the suit land.
6. It is on record that the Plaintiff served the Defendants with the Notice of Motion, Summons to Enter Appearance together with a copy of the plaint and Application, on the 4<sup>th</sup> March 2016, 7<sup>th</sup> March 2016 and on the 14<sup>th</sup> March 2016 respectively through his advocate M/s Hari Gakinya and Co. Advocates, as per the affidavit of service sworn by one Julius Kamotho Njaga on the 21<sup>st</sup> July 2016 and filed in court on the same day.
7. The 2<sup>nd</sup> Defendant entered appearance through the Hon Attorney General on the 8<sup>th</sup> March 2016 and filed its Defence on the 13<sup>th</sup> June 2016.
8. That on the 21<sup>st</sup> July 2016, parties appeared before judge sitting in the Nakuru Environment and Land Court to prosecute the application dated the 26<sup>th</sup> October 2015, wherein by consent, they agreed to maintain the status quo to the effect that the Plaintiff continues occupying the 4 acres of land that he was occupying.
9. That the court adopted the consent entered by the parties and vide its order issued on the 12<sup>th</sup> October 2016, parties were asked to maintain the status quo pending the hearing of the main suit and to comply with the provisions of order 11 of the Civil Procedure Rules.
10. That on the 19<sup>th</sup> June 2017 when the matter came before me for pre-trial, while there was no appearance for the Defence, the Plaintiff's Counsel informed the court that in as much as they had complied with the provisions of order 11 of the Civil Procedure Rules, the 2<sup>nd</sup> Defendant had only complied partly by not filing their witness statements.

11. The matter was certified ready for hearing and leave was granted to the 2<sup>nd</sup> Defendants to file their statements within 30 days from the 19<sup>th</sup> June 2017.
12. That vide an affidavit of service dated the 28<sup>th</sup> August 2017 and filed in Court on the 29<sup>th</sup> August 2017, the court having been satisfied that the 2<sup>nd</sup> Defendant had been duly served but had neither complied with Order 7 Rule 5 (c) of the Civil Procedure Rules nor appeared in court to defend the case ordered that the matter proceeds for hearing.
13. The Plaintiff's evidence on oath and while relying on his statement was to the effect that he is the registered owner of the piece of land Known as No. Marimanet Melwa Block 1/1468 (Mohotetu) measuring 24 acres having bought the same from the 2 shares he held with Muhotetu Farmers Company.
14. That each share was approximately 12 acres of land and produced the letter dated 5<sup>th</sup> June 2014 and signed by the company secretary Mr. William Gachea Nguyo as exhibit 1 to confirm this fact.
15. That upon purchase of the land, he was issued with the title deed on the 1<sup>st</sup> January 2008 herein produced as exhibit 2, whereby he took possession of the same in the same year although he had started using the land in the year 2006 prior to the issuance of the title deed.
16. That in the year 2012, in a bid to raise school fees for his children, the Plaintiff had offered to sell part of his land where he had enlisted the services of Muhetetu Agencies to sell 20 acres of the land out of the 24 acres.
17. That his offer for sell was accepted by the Ministry of Lands Settlement Scheme, at Ksh 120,000/= per acre the same totaling to Ksh 2,400,000/= for the 20 acres as was evidenced by the letter dated the 22<sup>nd</sup> February 2012 and marked as exhibit 5.
18. The Ministry had then required the plaintiff to signify if the offer was acceptable by attaching a draft sale agreement thereto.
19. The Plaintiff, through the law firm of Mukite Musangi Advocates Company and vide a letter dated the 8<sup>th</sup> March 2012, addressed to the Director of lands settlement and marked as exhibit 4 had accepted the offer and attached the sale agreement as instructed.
20. The Plaintiff testified that indeed he was paid the sum of Ksh 2,400,000/= which money was deposited in his bank account a fact which was confirmed by his advocate vide a letter dated the 13<sup>th</sup> August 2012 herein marked as exhibit 6 and that although the said letter indicated that he had been paid Ksh 2,160,000/=, the balance had been taken by his agents.
21. The Plaintiff's agent had thereafter written a letter dated the 6<sup>th</sup> June 2013 which did not clearly indicate to whom it was addressed to but which was marked as exhibit 3 and had requested that the suit land be divided into two parts so that the plaintiff could keep his own share of 4 acres while the Ministry could have their own share of 20 acres.
22. That it was during the transfer process that the Plaintiff had discovered an error on the title deed to the effect that instead of reflecting that the land measured 24 acres, the same had reflected 20 acres. Based on this discovery, it was the plaintiff's testimony that he went to the Nanyuki to get the assistance of a land surveyor who went to the ground and indeed established that the land was 24 acres, that is 9.72 hectares and not 8.15 hectares as had been indicated on the title deed.
23. That vide a letter dated the 16<sup>th</sup> July 2013, by the Laikipia District surveyor, addressed to the District Registrar, herein marked as exhibit 7, the surveyor confirmed this discrepancy and had asked that the records be amended.
24. That the plaintiff also reported the matter to his chief who vide his letter dated the 12<sup>th</sup> July 2013 and marked exhibit 8 wrote to the Ministry of State for Special Programmes, Department of Settlement seeking for intervention on the matter.
25. That in the meantime, the Settlement Fund Trustee, the 3<sup>rd</sup> Defendant herein, proceeded with the transfer and were issued with their title deed marked as exhibit 9, on the 25<sup>th</sup> July 2013 which reflected their land to measure 8.150 hectares.
26. That although the title was issued to the 3<sup>rd</sup> Defendant herein, the Land Registrar had refused to issue him with his title deed of 4 acres despite having been asked to do so by the Plaintiff's Advocate. He produced a letter dated the 19<sup>th</sup> March 2014 which was marked as exhibit 10 to support his evidence.
27. The plaintiff testified that although the 3<sup>rd</sup> Defendants have not taken possession of their land, yet the surveyor had placed beacons on the land and he was utilizing his own 4 acres of land of which he now prayed for orders to issue to the land Registrar to issue him with the title having satisfied the court that then first title had a mistake on the face of it regarding its acreage.
28. That upon the closure of the plaintiff's case, he filed his submissions on the 7<sup>th</sup> November 2017 which in fact reaffirmed the evidence adduced in court.
29. The Plaintiff's submission is to the effect that the Defendants having been duly served with the requisite pleadings to this suit, only the 2<sup>nd</sup> defendant herein entered an appearance and filed its defence which were mere denials with no substance to the issues raised by the plaintiff in his Plaintiff. That then 2<sup>nd</sup> Defendat had also failed to avail himself in court to support his statement of defence.

30. That the 1<sup>st</sup> and 3<sup>rd</sup> Defendants on the other hand did not enter any appearance nor file any defence to the Plaintiffs' claim and as such the court ought to take notice that they had no defence to the Plaintiff's claim.

31. That to sum it all up, the Plaintiff's claim was against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants herein and the same was not challenged in the circumstance.

32. That from the evidence adduced in court, the Plaintiff's claim was basically that there was an error on his title deed which reflected that his land had measured 8.150 hectares instead of 9.92 hectares on the ground as proved by the surveyor's letter produced as exhibit 7, an error which the Plaintiff had prayed that the court do find that indeed this error existed.

33. Secondly it was the Plaintiffs' submission that upon entering into a sale agreement with the 3<sup>rd</sup> Defendants and having sold them 20 acres out of his share of 24 acres of land and having received the payments herein, that the 1<sup>st</sup> Defendant be compelled to issue the Plaintiff with the title deed for the remaining 4 acres of land.

34. I have duly considered the evidence adduced before court by the plaintiff and find that the same was believable as it was backed by genuine documents and was not contested as the 2<sup>nd</sup> defendant who did not appear at the hearing either in person or through counsel and neither did the 1<sup>st</sup> and 3<sup>rd</sup> Defendants file any defence documents thereto.

35. The issues for determination arising herein are:

- i. Whether the Plaintiff's parcel of land No. Marimanet Melwa Block 1/1468 (Mohotetu) measured 24 acres.
- ii. Whether there was an error on the face of his title deed.
- iii. Whether the plaintiff is entitled to be declared as entitled to be registered as the owner of 4 acres out of the suit property.

36. From the evidence adduced in court, it is clear the Plaintiff herein who was the registered proprietor of suit land No. Marimanet Melwa Block 1/1468 (Mohotetu) as evidenced in the title deed marked as exhibit 2, entered into a sale agreement with the 3<sup>rd</sup> Defendant wherein he agreed to sell them 20 acres out of his 24 acres of land.

37. That it was upon completion of the transfer and the payments therein that the Plaintiff noted that there had been a mistake on the face of his title on the acreage of his land in that instead of indicating that the land had measured 9.72 hectares as per the acreage on the ground, the same had indicated that the land measured 8.150 hectares thereby hiving off 4 acres.

38. That the plaintiff had enlisted the services of a government surveyor who had gone on the ground and had found that indeed the land had measured 9.92 hectares an equivalent of 24 acres wherein he had written to the District Land Registrar to correct their records.

39. That notwithstanding, the 3<sup>rd</sup> Defendant had proceeded and executed the documents of proprietorship where they managed to get their title to the land herein which was produced as exhibit 9, on the 25<sup>th</sup> July 2013 which reflected their land to measure 8.150 hectares, an equivalent of 20 acres as per the agreed terms between the parties.

40. That this having been the case, the Plaintiff had then proceeded to request the Land Registrar the 1<sup>st</sup> Defendant herein, to issue him with title to the remaining 4 acres, a request that had fallen in deaf ears.

41. This facts were uncontroverted by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants who did not file their defence and who were in direct communication and/or transaction with the Plaintiff whose claim is against them.

42. Indeed there is no contention that the 3<sup>rd</sup> Defendant bought 20 acres of land from the Plaintiff herein, what is therefore remaining for determination is whether there was an error on the face of the title.

43. I have also looked at and considered the implications of exhibit 1, which was letter dated 5<sup>th</sup> June 2014, signed by the Muhotetu Farmer's Company secretary Mr. William Gachea Nguyo confirming that indeed the plaintiff had bought 2 shares of land each being an equivalent of 12 acres of land, Exhibit 3 was also a letter from the plaintiff's agent which did not clearly indicate to whom it was addressed to but which was requesting that the suit land be divided into two so the plaintiff could keep his own share of 4 acres while the Ministry could have their own share of 20 acres.

44. I have also considered exhibit 7 which was a letter dated the 16<sup>th</sup> July 2013, by the Laikipia District surveyor and addressed to the District Registrar, confirming that indeed the parcel of land was 9.72 hectares as per the acreage on the ground in comparison to the registered 8.150 hectares therein asking the Registrar to amend the anomaly on their records.

45. I am satisfied that indeed the Plaintiff's piece of land totaled 24 acres which had not been reflected on his title deed marked as exhibit 2 and as such I do confirm that there was an error on the face of the plaintiffs' first title.

46. Having so found, the next issue to tackle would be whether the Plaintiff is entitled to be declared as the registered owner of 4 acres out of the suit property.

47. Section 80 (1) of the Land Registration Act provides:-

*(1) "Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake."*

48. The plaintiff having testified that his parcel of land was actually 24 acres which evidence was uncontroverted as the case was undefended and further, the District land surveyor having confirmed this position through his letter which was marked as exhibit 7, I find and hold that the first registration of the Plaintiff's title to Marimanet Melwa Block 1/1468 (Mohotetu) was made through a mistake and do order the 1<sup>st</sup> Defendant herein do amend the Register in reference to the original land parcel No. Marimanet Melwa Block 1/1468 (Mohotetu) to reflect the true acreage of the land to read 9.72 hectares.

49. I am also satisfied that the Plaintiff has proved his case on a balance of probabilities and that the court has the powers under section 80 of the Land Registration Act to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake, the plaintiff, is entitled to the prayers sought in the plaint.

50. Consequently, I hereby enter judgment for the plaintiff against the Defendants in the following terms:

i. A declaration that there was an error on the face of the initial title deed to the suit property indicating that the said parcel of land is approximately 20 acres instead of 24

ii. A declaration that 4 acres of land out of all the parcel of land known as Marimanet Melwa Block 1/1468 (Mohotetu) belong to the Plaintiff herein.

iii. The issuance by the 1<sup>st</sup> Defendant of title deed for the Plaintiff's parcel of land measuring 4 acres out of all that parcel of and known as Marimanet Melwa Block 1/1468 (Mohotetu)

iv. The Plaintiff shall have costs of the suit.

**Dated and delivered at Nyahururu this 28<sup>th</sup> day of February 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**