



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 32 "B" OF 1997

ALLOYSIOUS IRIGA.....PLAINTIFF

VERSUS

SETTLEMENT FUND TRUSTEES.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT

LUCY KIRUMBA M'MIBJIWE.....4TH DEFENDANT

BETH MUTHONI RUKARUIA.....5TH DEFENDANT

M'RUKARIA M'TURUCHIU.....6TH DEFENDANT

JUDGMENT

INTRODUCTION

1. In a plaint dated 7th February, 1997 the plaintiff sought the following orders:

(i) An injunction do issue restraining the defendants, their employees, and/or agents from cancelling, terminating or in any other way interfering with the plaintiffs allocation of plots numbers 282/458, 282/484, 282/485, 282/486, 282/616 and 282/646 ex-Lewa settlement scheme, Meru District.

(ii) An injunction do issue restraining the defendants, their employees, and/or agents from allocating the said plot numbers 282/458, 282/484, 282/485, 282/486, 282/616 and 282/646 Ex-Lewa settlement scheme Meru District to a third other persons and from registering the same to any other persons.

(iii) An injunction do issue compelling the defendants, their employees and/or agents to avail the files in their custody and control in respect of the plot numbers 282/458, 282/484, 282/485, 282/486, 282/616 and 282/646 so as to enable the plaintiff make payments of the necessary dues in respect of the said plots.

(iv) Costs of the suit with interest thereon.

(v) Any other or further relief that this honourable court may deem fit and just to grant.

2. This suit was filed contemporaneously with a chamber summons application under order xxxix rules 1, 2 & 3 (now order 40) CPR section 3 A CPA and all enabling provisions of law. The plaintiff/applicant was seeking the very same orders in the plaint but in a temporary nature pending the hearing and determination of that application and the suit. The application was filed under certificate of urgency and when the same was placed before the duty court on 20th March 1997, the honourable court certified the same urgent and granted interim orders pending the interparties hearing on 20/5/1997.

3. Several other interlocutory application followed thereafter. On 13/10/2005, the plaintiff amended the plaint with leave of the court wherefore he sought an order declaring the transfer of parcel no. 282/458 and 282/646 to the 3rd and 4th defendants null and void and transferring the same back into the plaintiff's name.

4. On 7/11/2005 the 3rd and 4th defendants filed their defence through the firm of Gikunda Anampiu & Co. Advocates. On 22/12/2008, the plaintiff further amended his plaint seeking an order declaring the transfer of parcel no. 282/24, 282/458 and 282/646 to the 3rd and 4th defendants respectively fraudulent and therefore null and void and transferring the same back into the plaintiffs name and in default the deputy registrar of this court to so execute all transfer instruments on behalf of the 3rd & 4th defendants to effectuate transfer. On 02.12.2008, M/S Wanjiku A. Mbiyu instructed by the Hon. Attorney General filed a memorandum of appearance for the 1st and 2nd defendants. Again on 28th April 2015, the plaintiff through the new firm of advocates Ms. Muia Mwanzia & co. advocates filed a 2nd further amended plaint.

5. On 07/07/2015 the firm of B.G Kariuki & Company advocates instructed by the 3rd, 4th and 5th defendants filed amended defence. On 15/10/2016, the 3rd, 4th & 5th defendants through the same firm of advocates filed defence and counterclaim. On 27/09/2016, the same firm of advocates appearing for the 3rd, 4th and 5th defendants filed defence to 3rd further amended plaint. On 22/11/2016, the plaintiff through the firm of Muia Mwanzia & Co. Advocates filed a reply to defence.

PLAINTIFF'S CASE

6. The plaintiff in his sworn testimony stated that on 10.9.1986 he was allocated six (6) plots within Ex-Lewa settlement scheme being parcel numbers 458, 484, 485, 486, 616 and 646. Subsequently, a change was created on those parcel of land. He then took possession of the six (6) parcels of lands and started farming. He planted potatoes and later wheat farming. In 1999 he acquired another parcel of land no. 24 from one Colonel Franklin Nthiga. On 23.5.2013 he was issued with a title deed which he produced in evidence. He continued paying the settlement scheme charges which he also produced in evidence. Sometime in 1996 he was informed by a neighbor that there were some people who were using fraudulent means to dispossess the rightful owners from their plots. On 19/12/1996, he visited Arthi house to find out the status of his parcels of land. After checking the files he found out that plot no. 458 had an outstanding arrears of Kshs.4569.35 plot no. 484 had arrears of Kshs. 8143.30 plot no. 485 had arrears of Kshs.10,372. Plot no. 486 had no arrears. Plot no. 616 had arrears of Kshs.20,685.15. Plot no. 646 had arrears of Kshs.10, 765.70. He went back to make arrangement to clear the outstanding arrears.

7. On 28/1/1997, he received a letter from the ministry of land and settlement informing him that he had defaulted in paying rent for plot no. 485 and gave him 60 days to pay the arrears. On 29/1/1997 he visited Ardhi House Nairobi and upon checking the records he found out that plot no. 485 had been actually re-allocated to one Erick Mutuma on 22.1.1997 and on 27/1/1997. It was further re-allocated to M'Rukaria M'Turuchiu (6th defendant). By then he was in actual possession and occupation of the plot. He also checked plot no. 616 and found out that the same had been re-allocated on 22/1/1997 to one Jeremy Kinoti who transferred to M'Rukaria M'turuchiu on 27/1/1997 and a title deed issued. The files in respect of the other four files were missing.

8. He visited Ardhi house several times but was unable to trace them. He decided to instruct his lawyers who commenced these proceedings. The lawyer also obtained restriction orders as he continued farming on his plots. In 2005 or thereabouts the 3rd and 4th defendants attempted to enter into his farm. He moved to court and obtained injunction orders. He also instructed his lawyers to lift restrictive orders which had been placed on plots no. 484 and 486 on 24.7.2003. Thereafter he transferred the two plots to his two sisters namely Susan Mumbi Wamatu and Ann Wamboi Nderi.

9. Thereafter he discovered some transfers in respect of two plots on suspicious manner being no. 458 and 646. The two plots were transferred using court order dated 04/09/2003. The two plots were transferred to Beth Muthoni Rukaria on 23/12/2003. In December 2003, he received a call from his contract farmer one David Beek who told him that some people had approached him asking him to stop farming on grounds that the owner had sold the land. He conducted some investigations and discovered that his land no. 24 had fraudulently been transferred to one Lucy Kirumba M'Mbijiwe on 23/12/2003 and a title deed issued. He reported the matter to the police. He also obtained an inhibition order against any transaction on the said property. The CID also placed a restriction order against all the titles. After the police finished their investigations they arrested three suspects namely Robert Karanja, Ann Wamboi and Martin Kinoti. The three suspects were later arraigned and charged in Meru court being Criminal case no. 90 of 2004 (Meru).

1ST, 2ND, 3RD, 4TH AND 5TH DEFENDANT'S CASE

10. The 1st, 2nd, 3rd, 4th and 5th defendants did not offer any testimony at the hearing of this case. All the five defendants did not attend court either by themselves or through proxies.

6TH DEFENDANT'S CASE

11. The 6th defendant in his evidence stated that he bought plot no. Ex-Lewa 24 from the sister of the plaintiff namely Wamboi. He said that he bought a total of four (4) plots and was issued title deeds. He bought the parcels of land through a power of Attorney given to her by her brother who is also the plaintiff in this case. He stated that he occupies plot no. 24 registered in the name of his daughter Lucy Kirumba M'Mbijiwe. He further stated that parcel no. 616 is registered in his name. He bought it from Wamboi Nderi who is the plaintiff's sister. Parcel numbers 646 and 458 are also registered in one of his daughter namely Beth Muthoni Rukaria.

PLAINTIFF'S SUBMISSIONS

12. In the submissions filed by the firm of Muia Mwanzia & Co. advocates, the plaintiff argued that the defendants especially the 1st and 2nd defendants were fraudulent in their dealings over the two parcels of land which they allocated to the 5th defendant without due process.

13. The plaintiff further submitted that there was a carefully orchestrated plan by the defendants to cancel his allocation. The plaintiff contends that on 4/9/2003 a court order was forged which was used to transfer parcel nos. 458 and 646 to the 5th defendant herein. There was also another fraudulent transfer on parcel no. 24 on 23/12/2003 where a title deed had been issued to the 4th defendant herein Lucy Kirumba.

He stated that he is still holding the original title to plot no. 24 to date.

14. The plaintiff further submitted that the 4th -5th and 6th defendants are a family and that they acted in cahoots and conspired to defraud him of his property.

15. The learned counsel submitted that the plaintiff has proved every element of fraud itemized in his plaint. It is also submitted that the defendants have benefited out of an illegality and did not call any evidence to rebut the plaintiff's assertions which are factual. In conclusion the plaintiff submitted that the defendant's dealings are acts of deceit, fraud and abuse of the legal process leading to issuance of title to them. Trickery and hiding of files cannot be a tool to pass a good title. He stated that the 4th, 5th, and 6th defendants cannot in law give what they do not have. He cited the maxim "*Nemodat quod no habet*" which means a thief cannot confer good title on another except with the true owner's authority. He relied on the following cases:

- *PETER NDUNGU NGAE & 2 OTHERS VS JOHN MUGANE KAROMO (2014) eKLR*

4-6TH DEFENDANTS SUBMISSIONS

16. The 4th – 6th defendants through the firm of B.G Kariuki & co. advocates submitted that the plaintiff has not proved his case to the required standard. The 4th, 5th and 6th defendants stated that the plaintiff has not demonstrated how the parcels of land in question were transferred to the 4th, 5th and 6th defendants. The 4th, 5th and 6th defendants also contends the letter written by the director of survey dated 10/6/1996 which was written to the plaintiff indicated that he had committed breaches of the letter of allotment. The 4th, 5th and 6th defendants also submitted that the cause of action arose in 1986 and that the same is time barred by dint of provisions of the limitation of Actions act cap 22 Laws of Kenya. The defendant did not cite any case in support of their defence.

ANALYSIS AND DETERMINATION

17. The plaintiff in his sworn evidence demonstrated how he acquired plots no. 458, 484, 485, 486, 616, 646 and later 24 from Ex-lewa settlement scheme and one Colonel Frankline Nthiga. He also showed how he complied with all terms of allotment before he was issued with title deeds. The plaintiff has also sworn that he is in occupation of the suit properties and paid rent as on when it feel due and payable. He narrated how he visited the lands office in Nairobi on 19/2/1996 where he found that all parcel numbers had rent arrears except parcel no. 466. File no. 485 was missing. The plaintiff further stated that on 28/01/1997 he received a letter from the ministry of lands and settlement informing him that he had defaulted over parcel no. 485 and gave him 60 days to remedy the situation. He stated that upon perusal of the letter it raises suspicion in that the letter is dated 10/06/1996 and the post mark date is 23/01/1997. After receiving the letter, he went to Ardhi house where he found that the said parcel no. 485 had been re-allocated to one Erick Mutuma on 22/1/1997 and transferred to the 6th defendant M'Rukaria M'Turuchiu on 27/01/1997. Those averments on oath were not controverted by the defendants especially the 1st and 2nd defendants.

18. I am satisfied that the purported re-allocation of plot no. 485 to Erick Mutuma on 22/1/1997 and subsequent transfer to 6th defendant herein on 27/6/1997 was shrouded with fraud and irregularity. The plaintiff also stated that his land parcel nos. 458 and 646 were fraudulently transferred to the 5th defendant using a fake court order produced as P. exhibit no. 17.

19. The defendants especially the 5th defendant did not show how she acquired the two properties from the plaintiff herein. I also find that the defendants committed acts of fraud and irregularity in transferring parcels no. 458 and 646 from the plaintiff to the 5th defendant. The plaintiff has also demonstrated before this honourable court how he acquired parcel no. 24. He even went to court and obtained an injunction order on 18/10/2015. Upon this investigation he discovered that the said parcel of land was transferred to the 4th defendant herein on 23/12/2003 without his knowledge. He showed the original title deed to that land. Again the defendants especially the 4th defendant did not explain to this court how she acquired the said parcel of land. I find and hold that the defendants also committed acts of fraud and irregularity in acquisition of that parcel of land.

20. In the upshot, I find and hold that the plaintiff has proved his claim on the required standard. Indeed this court is satisfied that the defendants jointly and severally orchestrated and committed acts of fraud and irregularity in attempting to repossess the plaintiffs land parcel no. 485 without a fair hearing and contrary to the rules of natural justice.

21. I am also satisfied that the transfer of land parcel no's 24, 458 and 464 from the plaintiff to the 4th and 5th defendants was irregular fraudulent and therefore null and void.

22. In the upshot I make the following orders;

(i) An injunction be and is hereby issued restraining the 1st and 2nd defendants their employees and/or agents from cancelling, terminating, transferring or in any other way interfering with the plaintiffs allocation of plots numbers 282/458, 282/646 and 282/616 Ex-Lewa settlement scheme Meru Central district as initially allocated to him.

(ii) An injunction be and is hereby issued restraining the 1st and 2nd defendants, their employees and/or agents from allocating the said plots numbers 282/458, 282/646 and 282/616 Ex-Lewa settlement scheme Meru Central District to third parties and from registering the same to any other persons except the plaintiff herein.

(iii) A mandatory injunction be and is hereby issued compelling the 1st and 2nd defendants their employees and/or agents to avail the files in their custody and control in respect of plot numbers 282/646, 282/458 and 282/616 so as to enable the plaintiff make

payments of the necessary dues in respect of the said plots and an order directing the 1st and 2nd defendants to transfer plot nos. 282/646, 282/458 and 282/616 to the plaintiff in whole while cancelling the 5th defendant.

(iv) An order be and is hereby issued declaring the transfer of parcel nos. 282/24, 282/458 and 282/646 to the 3rd and 4th defendants respectively fraudulent and therefore null and void and re-transferring the same back into the plaintiff's name.

(v) The costs of this suit to be borne by the defendants jointly and severally.

Read, delivered and signed in the open court at Meru this 14th day of June 2018

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MR. E. CHERONO

ELC JUDGE

In the presence of:

CC: Galgalo

Mr. Mwanzia for the plaintiff

B.G Kariuki for 3rd, 4th, 5th and 6th defendant present

1st and 2nd defendant absent