



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 50 OF 2017**

**CHRISTOPHER NJERU KAMUTI** (*Suing as Legal*)

*Representative of Kamuti Kamuingu*).....**PLAINTIFF**

**VERSUS**

**EUGENIO NJAGI M'CHEGE**.....**DEFENDANT**

**JUDGEMENT**

1. This suit has a chequered and convoluted history. It was initially filed as *Embu SRMCC No. 151 of 1983* by one Julius Mugo against Eugenio Njagi. The said suit was later on referred to a Panel of Elders for resolution. This was a referral from the Magistrates' Court.
2. The record shows that a Panel of Elders (hereinafter called the Panel) was constituted for the purpose of resolving the land dispute between the parties. The Panel was chaired by a District Officer (DO). The said Panel heard the dispute and rendered an award dated 8<sup>th</sup> February 1990 in favour of the Plaintiff. The Plaintiff was awarded 4 ½ acres out of *Title No. Gaturi/Nembure/2438* (hereinafter called parcel No. 2438).
3. The said award was transmitted to the Magistrate's Court and read to the parties on 14<sup>th</sup> March 1990. The Defendant soon thereafter applied for setting aside the said award and for a fresh arbitration to be conducted. The Defendant accused the District Officer of misconduct. It was also alleged that he had chased away the two elders the Defendant had appointed and replaced them with others who were identified by the Locational Chief.
4. By a ruling dated and delivered on 19<sup>th</sup> April 1991, the Magistrate's Court dismissed the Defendant's application for setting aside the award of the Panel. The court did not find any evidence of misconduct or malpractice on the part of the District Officer who was chairing the Panel.
5. The Defendant was once again aggrieved by that decision and appealed against it to the High Court at Meru. The High Court heard and allowed the appeal. The award of the Panel was set aside on the ground that it was not signed by the Chairman. The award had only been signed by the elders.
6. The record also shows that there was a considerable delay in bringing the suit to hearing between 1995 when the appeal was concluded and 2013. The original Plaintiff passed on in April 2013 and the current Plaintiff obtained letters of administration to enable him prosecute the suit.
7. The original pleadings in the suit are old and tattered. They are hardly legible. The nature of the dispute can, however, be discerned from the proceedings of the Panel and the witness statements filed by the parties. Consequently, the court granted leave to the parties to file pleadings or amended pleadings on 16<sup>th</sup> October 2017. The Plaintiff filed an amended plaint on 24<sup>th</sup> October 2017 articulating his claim whereas the Defendant filed an amended defence on 1<sup>st</sup> November 2017 articulating his defence.
8. The Plaintiff's case was that his late father Kamuti Kamuingu (hereinafter Kamuti) and the Defendant's father, M'chege wa Kairangu (hereinafter M'chege) jointly bought parcel No. 2384 from one Gachiani in the 1930s. The said land was about 9 acres and was to be shared equally.
9. It was the Plaintiff's case that at the material time, the Defendant was the one recording the minutes of the Iruma clan during the land demarcation process. The Defendant was a teacher at the material time hence literate.
10. The Plaintiff further contended that contrary to M'chege's wish the Defendant decided to register the entire land in his own name. When the Defendant was questioned by the clan on why he had taken the entire land, he made a written undertaking to sub-divide it and transfer half of it to Kamuti. The Defendant, however, never honoured the undertaking and he never transferred one half of the land to the Plaintiff's

father even after sub-dividing it into two.

11. On the other hand, the Defendant denied the Plaintiff's claim in its entirety. He contended that he was the absolute registered owner of Title No. *Gaturi/Nembure/3685* (hereinafter described as parcel No. 3685) which was a subdivision of parcel No. 2384. He contended that parcel No. 2384 was given to him by his own father in 1961. He later on sub-divided it into two parcels and sold one parcel (No. 3684) and he retained parcel No. 3685.

12. It was the Defendant's case that Kamuti was only allowed to plant coffee on parcel No. 3685 on a temporary basis and that he was to remove the coffee stems upon vacating. He, however, died in 1969 before removing the coffee.

13. When the suit was listed for hearing on 30<sup>th</sup> January 2018, the Plaintiff called 2 witnesses and closed his case whereas the Defendant was the sole witness for the defence.

14. At the hearing hereof, the Plaintiff testified as PW 1. He adopted his witness statement dated 3<sup>rd</sup> March 2015 and filed on 4<sup>th</sup> March 2015. PW 1 reiterated the contents of the amended plaint in his testimony. He asserted that his late father and the Defendant's late father bought parcel No. 2438 jointly by contributing one cow and one goat each. The suit property was to be shared equally between the two families but the Defendant decided to short-change the family of Kamuti.

15. It was the testimony of PW 1 that after sub-dividing parcel No. 2438 into parcel Nos. 3684 and 3685, the Defendant sold the former and charged the latter to Kenya Commercial Bank to secure payment of a loan. The title deed for parcel No. 3685 was said to have been held by Kenya Commercial Bank for over 30 years.

16. During cross-examination by the Defendant's counsel, PW 1 stated that he was present at the clan meeting at which the Defendant undertook to sub-divide the land and give one half of it to the Kamuti family. He further stated that the coffee stems on parcel No. 3685 covered about one acre and that the Defendant had leased out part of the land.

17. The second Plaintiff's witness was Linus Njeru who testified as PW 2. He adopted as his sworn testimony his witness statement dated 3<sup>rd</sup> March 2015. It was his evidence that parcel No. 2438 was bought jointly by M'chege and Kamuti. He further stated that sometime in 1957 Kamuti gave a portion of the said land to his (PW 2's) father to cultivate coffee.

18. During cross-examination, PW 2 stated that he was not present when the land was bought. He was only present when the Defendant made a written undertaking to surrender half share to Kamuti's family.

19. The Defendant testified on his own behalf as DW1. He adopted as his sworn testimony his witness statement dated 15<sup>th</sup> September 2014. He also wished to rely upon the documents contained in his list of documents dated 15<sup>th</sup> September 2014. He denied having signed a written undertaking to surrender any land to Kamuti's family. He denied that there was any coffee on parcel No. 3685.

20. The Defendant also denied knowledge of M'chege and Kamuti having bought parcel No. 2438 jointly. It was his evidence that the said land was simply given to him by his father, M'chege in 1961. During cross-examination, he stated that it was M'chege who allowed Kamuti to plant a few coffee stems on parcel No. 3685.

21. Upon conclusion of the hearing, the Plaintiff was given 30 days to file and serve his written submissions whereas the Defendant was given a similar period after service by the Plaintiff. The record shows that the Plaintiff filed his submissions on 19<sup>th</sup> April 2018 whereas the Defendant filed his on 14<sup>th</sup> June 2018.

22. The parties herein framed a list of fifteen (15) issues for determination viz;

- i. Did M'Chege Kairanga possess capacity to give the whole of parcel No. Gaturi/Nembure/2438 to the Defendant?*
- ii. Did M'chege Kairanga give half of the portion of land parcel No. Gaturi/Nembure/2438 to the Defendant?*
- iii. Did the Defendant give a written undertaking in 1961 to give half of land parcel No. Gaturi/Nembure/2438 to Kamuti Kamuigu?*
- iv. Did the Defendant transfer half of the land to Kamuti Kamuigu or his family members?*
- v. Was land parcel No. Gaturi/Nembure/2438 divided to two (2) portions namely Gaturi/Nembure/3684 and 3685 each measuring 4 ½ acres?*
- vi. Did Njagi M'chege sell half of the portion given by his father's comprising of 4 ½ acres being land parcel No. Gaturi/Nembure/3684?*
- vii. Was Njagi M'chege entrusted by the Iruma clan to record minutes on their behalf and caused his name to be registered against land parcel No. Gaturi/Nembure. 2438?*
- viii. Whether Kamuti Kamuigu and M'chege Kairana bought land parcel No. Gaturi/Nembure/2438 in equal shares.*
- ix. Whether the Defendant fraudulently registered land parcel No. Gaturi/Nembure/2438 in his name.*

- x. *Whether the Plaintiff's family is in occupation of land parcel No. Gaturi/Nembure/3685.*
- xi. *Whether the Plaintiff has capacity to claim ownership of land No. Gaturi/Nembure/3685.*
- xii. *Whether the Defendant was given land parcel No. Gaturi/Nembure/2438 by his father M'chege Kairana.*
- xiii. *Whether the Plaintiff's father Kamuti Kamuigu had only been given a portion to plant coffee by the Defendant's father.*
- xiv. *Whether the Defendant is properly registered as the owner of land parcel No. Gaturi/Nembure/3685.*
- xv. *Who bears the costs of this suit?*

23. In my opinion, the list of issues can be condensed into fewer and more straight-forward issues. There are seven (7) which shall effectively dispose of them as follows;

- a) Whether Kamuti and M'chege bought parcel No. 2438 jointly to be shared in equal shares.
- b) Whether the Defendant gave a written undertaking in 1961 to surrender half share of parcel No. 2438 to Kamuti's family.
- c) Whether the Defendant was fraudulently registered as absolute proprietor of parcel No. 2438.
- d) Whether the Defendant was given the entire parcel No. 2438 by his father, M'chege.
- e) Whether the Plaintiff has legal capacity to claim parcel No. 3685.
- f) Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.
- g) Who shall bear the costs of the suit.

24. The court has considered the evidence of the parties, the documents on record as well as the respective submissions of the parties. Whereas the Plaintiff asserted that the suit property was bought jointly by Kamuti and M'chege, the Defendant denied that the property was jointly purchased. The Defendant stated that he was given the suit property by his father, M'chege in 1961 during land demarcation.

25. The court is satisfied on a balance of probabilities that parcel No. 2438 was bought jointly by Kamuti and M'chege for several reasons. First, if it were not so, Kamuti could not have planted coffee stems on part of the property. It is a matter of judicial notice that coffee is a long-term cash crop. Secondly, the elders could not have intervened in 1961 to have the Defendant make a written commitment to give Kamuti his share in the said property. Third, there is evidence on record that the original Plaintiff had lodged a caution against the suit property in 1978 claiming an interest in the property. Fourth, a panel of elders under the chairmanship of the District Officer Manyatta deliberated on the dispute and found that Kamuti's family had an interest in the land.

26. The 2<sup>nd</sup> issue is whether the Defendant gave a written undertaking in 1961 to surrender half share of parcel No. 2438 to Kamuti. The court has considered the evidence on record on this issue. Although the exhibit produced by the Plaintiff to that effect was disowned by the Defendant, the court is reasonably satisfied that the undertaking was made by the Defendant for the reasons appearing in the paragraph hereinafter.

27. The undertaking was made in the English language. There is evidence on record to show that the Defendant was among the few who were schooled. He was a teacher at the material time. Although the Defendant denied having signed the hand-written undertaking at the trial, he did not specifically deny that the handwriting was his. He did not appear outraged that somebody had forged a document purporting to be his. There was no indication that the Defendant reported the matter to the CID to investigate the suspected forgery. The said undertaking was contained in the Plaintiff's list of documents filed on 22<sup>nd</sup> April 2015, that is, about three years before the trial.

28. According to *Black's Law Dictionary, (9<sup>th</sup> Edition)* a signature is defined in the following manner;

- a) *A person's name or mark written by that person or at the person's direction.*
- b) *Any name, mark, or writing used with the intention of authenticating a document.*

In the Court's view, the undertaking in issue satisfies the elements of the first definition of signature.

29. The 3<sup>rd</sup> issue is whether the Defendant was fraudulently registered as absolute proprietor of parcel No. 2438. The court has already found that the said parcel was purchased jointly by Kamuti and M'chege. The Defendant was aware all along that Kamuti had an interest in one half of it. The Defendant acknowledged as much in his written undertaking of 1961. The court is of the opinion that the Defendant was dishonestly registered as absolute proprietor thereof. That kind of dishonesty constitutes some form of fraud. The court, therefore, finds and holds that the Defendant was fraudulently registered as proprietor.

30. The 4<sup>th</sup> issue is whether the Defendant was given the entire parcel No. 2438 by his father, M'chege. The court has considered the

evidence on record on this issue. Apart from the Defendant's word that he was given the entire land by M'chege there was no other evidence to support the same. The Plaintiff's evidence on the other hand indicated that the Defendant had acted against the wishes of M'chege in registering the property in his own name.

31. The court does not find that the Defendant was given the entire land by M'chege. M'chege was aware of Kamuti's interest in one half of the property. He could only have given the Defendant half share of the property. The court is of the opinion that the Defendant may have taken advantage of his position as secretary of his clan and dishonestly caused the registration of the entire land in his name. There was no indication on record that M'chege protested the action of the elders to summon the Defendant so that he may undertake to give Kamuti his share. The court, therefore, finds that M'chege did not give the Defendant the entire land but half share to which the former was entitled.

32. The 5<sup>th</sup> issue is whether the Plaintiff has the capacity to lodge a claim for parcel No. 3685. According to the record, the current Plaintiff was joined in the suit as a personal representative of the original Plaintiff, Julius Mugo. A copy of a limited grant *ad litem* was produced. In my opinion, the current Plaintiff can prosecute the suit on behalf of the original Plaintiff who is deceased. There is no evidence on record to show that the legal capacity of the original Plaintiff was challenged for the 35 years the matter has been pending.

33. The court has also perused the amended plaint and amended defence herein. The Plaintiff has been described as a personal representative of the estate of the late Kamuti in paragraph 1 of the amended plaint. That description is **admitted** by the Defendant in paragraph 2 of this amended defence. There is nowhere else in the amended defence that the capacity of the Plaintiff to maintain or prosecute the suit has been challenged. The court, therefore, finds that on the Defendant's own pleading, the Plaintiff has legal capacity to prosecute the suit.

34. The 6<sup>th</sup> issue is whether the Plaintiff is entitled to the reliefs sought in the amended plaint. The main relief sought is the cancellation of the Defendant's name as proprietor of parcel No. 3685 and its replacement with the Plaintiff's name in trust for Kamuti's family. The court having found in favour of the Plaintiff on all the preceding issues, it would follow that the Plaintiff is entitled to the reliefs sought.

35. The 7<sup>th</sup> issue relates to costs. Although costs are at the discretion of the court, the general rule is that costs follow the event as provided for under **section 27 of the Civil Procedure Act (Cap 21)**. A successful litigant is thus entitled to costs of the action unless, for good reason, the court directs otherwise. There is no good reason why the Plaintiff should not be awarded costs of the suit. The Plaintiff shall have costs of the suit.

36. The upshot of the foregoing is that the court is satisfied that the Plaintiff has proved his case to the required standard as provided for by law. Accordingly, judgement is hereby entered for the Plaintiff against the Defendant as prayed in the amended plaint. The Defendant shall bear the costs of the suit.

37. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **12<sup>th</sup>** day of **JULY, 2018**.

In the presence of Ms Beth Ndorongo for the Plaintiff and Ms Muthama holding brief for Ms Muthoni Ndeke for the Defendant.

Court clerk Mr Muinde.

**Y.M. ANGIMA**

**JUDGE**

**12.07.18**