



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 697 OF 2017

(Machakos ELC Case No. 298 of 2011)

CHARLES GICHINGO KIBOGIO.....PLAINTIFF

VERSUS

MOSES OLE NALOLE.....DEFENDANT

JUDGEMENT

By a Plaint dated the 17th October, 2011, the Plaintiff seeks judgement against the Defendants in the following terms:

- a) A declaration that the Plaintiff is entitled to one (1) acre portion of land to be excised from the parcel of land known as LR. NO. NGONG/ NGONG/ 8803 now subdivided into LR. NGONG/NGONG/ 48218, LR. NGONG/ NGONG/ 48217, LR. NGONG /NGONG /48216, LR. NGONG /NGONG /48215, LR. NGONG /NGONG /48214, LR. NGONG /NGONG /48213 and LR. NGONG /NGONG /48212, which properties form part of the estate of the deceased JOSEPH LEMINJOR OLE KANGO in accordance with agreement between the Plaintiff and the deceased and the decision of the Land Disputes Tribunal of the 4th May, 2006.
- b) Costs and interests of the suit.
- c) Any other or further relief that this Honourable Court may deem fit and just to grant.

The Defendants entered an appearance on 22nd November, 2011 but did not file a Defence and Judgment was entered against them on 6th August, 2013. The matter then proceeded for formal proof.

Plaintiff's evidence

PW1 Charles Gichigio Kibogio who was the Plaintiff herein, testified that he was claiming one (1) acre of land out of the 2.5 acres that he had bought in September 1987 from one Joseph Leminjio Ole Kago who is now deceased, and a title deed was issued to him. He confirmed that he bought 2.5 acres from land parcel number Ngong/Ngong/ 8817 and contended that there was a discrepancy on the actual size he had bought which position was confirmed by the District Surveyor Kajiado who informed him that the actual size of the land was only 1.5 acres. He stated that in December, 1988 he notified the vendor on the discrepancy and he promised to add him the one (1) acres but he never did so. He averred that he initiated a claim at the Kajiado Land Disputes Tribunal between himself and the vendor. Further, that the Tribunal held in his favour and ordered that the Vendor Ole Kago was to give him one (1) acre of land out of the portion he had given to his children. The said Award was adopted by the Senior Resident Magistrate Kajiado on 17th July, 2006. Despite Ole Kago appealing against the said Award at the Provincial Appeals Tribunal, he died before the matter was concluded. He stated that the Vendor Ole Kago never paid him costs as directed by the Senior Resident Magistrate and he extracted a decree from the said Court. After the death of the Vendor, he contacted one of the sons who was the Administrator of Ole Kago's estate and on enquiring on the one (1) acre of land, he advised him to go see Naikuni Advocate who was their lawyer regarding the same. When he saw the Lawyer, he promised to give him the one (1) acre of the land but the vendor's family never did so. The Lawyer advised him to initiate legal proceedings to recover his one (1) acre of the land.

The Plaintiff later closed his case.

The Plaintiff filed his submissions that I have considered.

Analysis and Determination

Upon perusal of the Plaintiff and the exhibits produced in Court and upon hearing testimony of the Plaintiff as well as consideration of the submissions filed herein, the following are the issues for determination:

- Whether the Plaintiff is entitled to the one(1) acre of land he had purchased from the Vendor.
- Whether the Defendants jointly and severally should give the Plaintiff his one (1) acre of land that was a deficit on the ground of what he had purchased.
- Who should bear the costs of this suit

The fulcrum of this suit revolves around the discrepancy in term of the actual size of land that corresponds with what is in the title deed. I note the Plaintiff was issued with a title deed on 6th July, 1990 that indicated his land measured 2.5 acres. It is the Plaintiff's contention that there was a deficit of one (1) acre of land as per the acreage on the ground as confirmed from a survey. This fact was not controverted by the Defendants' who failed to file a Defence. I note the original land LR. NO. NGONG/ NGONG/ 8803 that belonged to the vendor has already been subdivided to various portions including land parcel numbers LR. NGONG/NGONG/ 48218, LR. NGONG/ NGONG/ 48217, LR. NGONG /NGONG /48216, LR. NGONG /NGONG /48215, LR. NGONG /NGONG /48214, LR. NGONG /NGONG /48213 and LR. NGONG /NGONG /48212.

It is the Plaintiff's submissions that at no time did the vendor refute the confirmation by the Surveyor on the discrepancy of his land. He however failed to give the Plaintiff the one (1) acre of the land despite promising to do so for eighteen (18) years. The Land Disputes Tribunal vide claim No. TC. 298/3/05 entered an Award on 4th May, 2006, in favour of the Plaintiff in the following terms:

1. The objector should honour the original agreement and add to the Claimant an extra approximately one (1) acre of land from whichever parcels among those he owns.

2. Joseph Ole Kago (now deceased) should incur the cost of transferring the document and pay Government taxes to enhance this process. The District Surveyor to enter into the disputed land and excise approximately one (1), acres for the Plaintiff.

3. The Land Registrar to register an extra one (1) acre, in favour of the Plaintiff and issue him with a title deed.

The said Award from the Land Disputes Tribunal was adopted by the Senior Resident Magistrate Kajiado, which Award has never been set aside. Further, that the Vendor during attendance at the said Tribunal had admitted the discrepancy and promised to give the Plaintiff his one (1) acre of land. It is the Plaintiff's testimony that he extracted a Decree from the Senior Resident Magistrate's Court and he wants his one (1) acre of land and not money. The Plaintiff relied on section 3(1) of the repealed Land Disputes Tribunal Act of 1990 as well as Section 82(1) of the Law of Succession Act to support his arguments that the Tribunal had jurisdiction to deal with the dispute and the Appeal has abated since the vendor died and none of his administrators replaced him in the said Appeal. From the Certificates of Official Search as well as Mutation Forms, it is clear the suit land was already subdivided to different portions as indicated above.

Since the Award and Decree referred to above, have never been set aside, it is my finding that the Plaintiff is indeed entitled to the one(1) acre of land which is a shortfall of the land he had purchased. Further, I find that the same should be excised from any one of the subdivisions but whichever is preferred.

From the foregoing, I find that the Plaintiff has proved his case on a balance of probabilities and will proceed to enter judgment against the Defendants jointly as well as severally in the following terms.

- i) A declaration be and is hereby entered that the Plaintiff is entitled to one (1) acre portion of land to be excised from the parcel of land known as LR. NO. NGONG/ NGONG/ 8803 now subdivided into LR. NGONG/NGONG/ 48218, LR. NGONG/ NGONG/ 48217, LR. NGONG /NGONG /48216, LR. NGONG /NGONG /48215, LR. NGONG /NGONG /48214, LR. NGONG /NGONG /48213 and LR. NGONG /NGONG /48212, which properties formed part of the estate of the deceased JOSEPH LEMINJOR OLE KANGO in accordance with agreement between the Plaintiff and the deceased and the decision of the Land Disputes Tribunal of the 4th May, 2006 which was adopted by the Kajiado SRM on 17th July, 2006.
- ii. The Defendants to effect the subdivision and transfer of the (1) one acre of land to the Plaintiff.
- iii. The Costs of this suit is awarded to the Plaintiff.

Dated signed and delivered in open court at Kajiado this 27th day of September, 2018.

CHRISTINE OCHIENG

JUDGE