



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

LAND CASE NO. 112 OF 2002

PETER MBAABU AYUB (*Suing as the legal representative*

***of the Estate of deceased AYUB MARAMBII*).....PLAINTIFF**

VERSUS

JOHN NDEGWA.....1ST DEFENDANT

KENNETH MUGAMBI GITUMA (*Acting on behalf of deceased*

JOSPHINE WANGUI MUCHAI).....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

LAND ADJUDICATION OFFICER

MERU NORTH DISTRICT.....4TH DEFENDANT

JUDGMENT

INTRODUCTION

1. In amended plaint dated 20/5/2016 the plaintiff sought orders which are set out herein below verbatim as follows:-

- a) “An order of declaratory to the effect that the suit properties NYAMBENE/IRUNGU III/1359 formerly URUNGU III, 315 and 1359 is property owned by the plaintiff
- b) An order to cancel and/or revocation of certificate of title issued to Josephine Wangui Muchai on 19th August, 2014 same is null and void and same be vested on the plaintiff.
- c) An order of special and general damages.
- d) Costs and interest”.

2. The 1st defendant had filed his defence dated 22/6/2005 on the 23/6/2005. The 2nd defendant filed her defence dated 11/7/2002 on 12/7/2002. The 3rd and 4th defendants filed their defence dated 2/8/2002 on 8/8/2002. None of those defences were amended after amendment of the plaint.

THE PLEADINGS

The Plaint

3. In the amended plaint the plaintiff avers that the suit land **Uringu III 315 and 1359** measuring **10 acres** in total has a certificate of title issued in the name of one of the defendants. According to the plaint the 1st and 2nd and 3rd defendants fraudulently caused the names of 1st and 2nd defendant to be entered into the adjudication register hence necessitating an objection. It is averred that the land was family land gathered by the plaintiff on which the plaintiff and family have lived and carried out substantial development. It is alleged that the 4th defendant failed to exercise due diligence and failed to accord the plaintiff natural justice during the hearing of the objection proceedings and

ruled against the plaintiff without hearing him thus necessitating this suit.

The 1st Defendant's Defence

4. The 1st defendant pleads that he bought the land in **1960** and that it is he who gathered it and caused to be registered in his name. He states that the land was lawfully sold to 2nd defendant's husband one Fredrick Gituma Linguya in **1988** after which it was transferred to 2nd defendant. He also avers that no consent before the filing of the suit under provisions of the law.

The 2nd Defendant's Defence

5. The 2nd defendant avers that the land was subject to objection **No. 89** (before the Land Committee) and that it later was taken before the arbitration board vide **Case No. 731 of 1968** wherein the plaintiff lost in all those proceedings and the land was registered in the name of the 2nd defendant. She denied having influenced the registration of the land in her name and avers that such registration was properly and fairly done in accordance with the law.

The 3rd and 4th Defendants' Defence

6. The 3rd and 4th defendants denied the contents of the plaint and in the alternative aver that the dispute concerning the plaintiff's land was heard and determined in according with the law and the plaintiff lost the same after a fair hearing. They also aver that the suit contravenes the provisions of **Section 13A of the Government Proceedings Act Cap 40** Laws of Kenya.

7. This suit was heard *de novo* beginning **19/2/2018**.

THE EVIDENCE OF THE PARTIES

The Plaintiff's evidence

8. The plaintiff testified on **19/2/2018**. He testified that his father the original plaintiff died on **1/7/2011** and that he obtained a limited grant to his estate which he produced as **P. Exhibit 1**. He adopted his statement dated **31/8/2015** as his evidence-in-chief. He said the land belonged to his grandparents, that is his grandfather named Ayub Marambi and his great grandfather named Rimberia and that the latter gathered the land. Before adjudication the plaintiff and others lived on the land and demarcation was done as per occupation. Gathering of the land was done in **1968** by his father. He referred to the Demarcation Book No. 2238 at page 32 and said the original owner of the land according to that book was his grandfather Ayub Marambi. He stated that the 1st defendant is not part of the community and that he came from Kiirua **30 kms** away, that he has never occupied the land, that his relative was working as a Land Adjudication Officer, that his name was secretly entered into the records which event was referred to the CID. When the 1st defendant was summoned by the CID he failed to attend. The 1st defendant then sold the land secretly to Fredrick Gituma (now deceased) and now the currently registered owner of the land is Josephine Wangui Muchai. According to the plaintiff the 1st defendant did not feature in the gathering of the land. The District Land Adjudication and Settlement Officer wrote to the Land Registrar to halt the transfer relating to the land as a dispute was pending; that letter was produced as **P. Exhibit 2**. The plaintiff avers that he does know how the land came to be owned by Josephine Wangui. He testified that the two parcels are supposed to be one parcel and he doesn't know how they got different numbers bearing the numbers **315** and **1359**. He also disputed the 1st and 2nd defendants' version of sale saying that the defendants have not demonstrated the land was actually sold and for how much. He stated that the outcome of the first case was in favour of the 1st defendant and subsequently the plaintiff complained to the Provincial Land Adjudication and Settlement Officer and they were heard by the same Committee again. He does not give the result of the second hearing but avers that he went to the Provincial Land Adjudication and Settlement Officer thereafter who was not convinced that the land was properly heard and demanded that the District Land Adjudication and Settlement Officer provide him with the record for perusal. The District Land Adjudication and Settlement Officer was reluctant. **P.Exhibit 4** is a letter dated **3/7/1987** from the Provincial Land Adjudication and Settlement Officer asking for the Committee and the Arbitration Board proceedings and judgements for his perusal. He stated that when he came back to Meru he noted that the land had been secretly to Fredrick Gituma and in the year **2001** it was transferred to Josephine Wangui. He produced a letter dated **24/8/1982** from the Senior Chief Uringu Location admonishing Ayub Marambi not to cultivate the land until the end of the dispute as no person who conducted such development in the pendency of the case would be compensated if he lost the case. **P. Exhibit 6** is a letter from the Divisional CID officer Meru dated **28/11/1985** to Ayub Marambi concerning **Land Case No. 731 of 1968**; that letter appears to have summoned the plaintiff and the Committee members to the CID office "for further action". According to the plaintiff the letter marked **P. Exhibit 6** was in response to his father's quest to have the matter investigated. It is apparent his father had written a letter dated **25/11/1985** for that purpose and the CID letter was written in response thereto. The plaintiff produced the consent by the District Land Adjudication and Settlement Officer as **P. Exhibit 8** which showed that the Land Adjudication Officer had consented to institution of proceedings regarding Parcels Nos. **315** and **1359**. That consent is signed and is dated **14/5/2002**. This suit was apparently filed on **13/6/2002** after that consent was obtained. It was the plaintiff testified that the consent stops all other processes; that by the time of obtaining the consent the land was in the name of the 2nd defendant; that titles issued in the year **2004**. He produced a certificate of official search showing that the registered owner of Parcel No. **1359** as at **19/8/2004** was Josephine Wangui Muchai. He averred that Joseph Ndegwa and Josephine Wangui reside at Kianjai; that the plaintiff's houses, trees and crops are on the land; that his father was buried on another parcel in another Adjudication Section. He prayed that the land be awarded to him as the successor of Ayub Marambi. He therefore prays for the registration of the 2nd defendant to be cancelled and that the land be registered in his name.

9. When cross examined by Mr. Otieno for the 1st and 2nd defendants the plaintiff admitted that both the Land Committee and the Arbitration Board proceedings ended in favour the 1st defendant and that his father was given a hearing. He also admitted the titles were issued in the year **2004** to Josephine Wangui and that there was no criminal charge that was preferred against the defendants. Upon cross examination by Mr. Kieti for the 3rd and 4th defendants he admitted that he, his brothers and his father attended the Committee case and his father had witnesses. He stated that when he pleads that his father was not given audience he is referring to the board proceedings.

10. **PW2 Solomon Mugwika M'Ambau** testified on 21/2/2018 that he is a neighbour to the plaintiff; that he and the plaintiff's father gathered and demarcated the land at the same time around the year 1968; that however Ayub Marambi had been living at Nkono far from the suit land; that he had acquired that there before he acquired the suit land; that it is his grandparents who had the land before him; that Peter Mbaabu is on the land; that the witness does not know the defendants; that the land has to his knowledge has never been sold and it belongs to Peter Mbaabu. When cross examined by Mr. Otieno for the 1st and 2nd defendants he stated that Mbaabu plot is number 1104; that after gathering his land was registered in his father's name; that Marambi was buried somewhere else away from the suit land; that Peter Mbaabu has another parcel of land elsewhere.

11. When cross examined by Mr. Kieti PW2 stated that he heard of the dispute concerning the suit land that his father was called as a witness but he does not know the outcome of the case; that often he was not at home as he was working far away in Mombasa, Kisumu and Kitale.

The 1st Defendant's Evidence.

12. The 1st defendant testified on **21/2/2018** he adopted his statement filed on **26/1/2016** as his evidence-in-chief. He stated that he bought the shamba. His statement dated **26/1/2016** states that he bought parcel No. **315** and **1357** (Uringu III Adjudication Section) from a family of a man called Mukiyama and Mito M'Itoro in the year 1968; that the chief at the time, one Benson Nguthuri, witnessed the transaction; that later he sold the land to one Mutiga who also died and later on the land was transferred to Mutiga's wife Joseph Wangui Muchai who also passed away. The statement states that Ayub was a son to M'Itoro; that he had chased Ayub more than two times from the suit land and that after his death in 2007 he left his parcel with his son Peter Mbaabu who has refused to vacate the land. When he was cross examined by Mr. Otieno he stated that he bought the land in 1968 before the gathering from four people and it became 10 acres; that the land bothered him so he sold it. The title came out in the name of the buyer. He stated that the land is not Ayub's. He testified that he was a driver and as he was passing through Kirindini chief's office he heard that a parcel of land was being sold. He went to the chief's office he bought the land. It was 11 ½ acres. He sold the land as he feared for his safety. He sold the land to Mutiga and then Mutiga left it to his wife. He testified that at no time was the land registered in Mutiga's name; it was registered in his wife's name. He stated that he was chased away from the land; that there were four cases concerning the suit land, three at the committee and one at the arbitration board and the sellers came and testified in those cases. He denied collusion with the land officers and averred that the case ended at the Arbitration board.

13. Under cross-examination by Mr. Kieti he stated that there was a case before the chief in which he and Mito were the accused. He identified Mito as a brother to Ayub Marambi and in that case it was alleged he alone sold the land to the 1st defendant. However the 1st defendant maintained that Mito did not sell the land to him while alone buy in the company of three others. It is the 1st defendant version when the case was conducted before the Arbitration Board the board ruled that he had acquired the land legally. Upon re-examination by Mr. Otieno he identified the persons from whom he bought the land as Mukiyama, M'Ituru, Mito and Kirigwa who were kin to Marambi. It was his father's evidence that Marambi had his parcel just contiguous to the one which he bought from the 4 persons.

14. **DW2 Onemus Mungathia** testified on **21/2/2018** and adopted his statement made on **26/1/2016** as his evidence-in-chief. His witness statement states that the land in dispute was gathered by John Ndegwa who was the plaintiff's deceased father's neighbour. His further evidence is that Peter Mbaabu Ayub was away in school in Form 3 in **1968** and that his father tried to gather the 1st defendant's land in his absence. When the plaintiff's father made attempt to his name registered in the land's record, one Shadrack Mito the plaintiff's step- father alerted the 1st defendant and went to the demarcation office with all of Marambi's relatives who sold the land to the 1st defendant. He identified them as M'Ituru son of Limberia, his grandfather Mukiyama Limberia (brother to M'Ituru), Mito Mukamia the plaintiff's stepfather and Kirikua M'ituru who is also identified as plaintiff's stepfather. They are said to have renounced the ownership of the land in favour of the 1st defendant. Ayub Marambi's portion is said to have been left intact and has been developed by the plaintiff and his brother. Ayub Marambi's portion was not purchased by the 1st defendant. It was his father's evidence that the plaintiff lost all adjudication cases that he had filed against the 1st defendant, at the RER stage, Arbitration Board, and A/R cases. His further evidence is that the plaintiff has caused other people to trespass on the suit land promising to give them a share in case he finally gets the land.

15. While under cross examination **PW2** stated that his home is ½ km away from the suit land; that Gituma was his age mate and friend who confided in him that he was going to buy the land; that the 1st defendant gathered the land which was bought with money; that he gathered his land at around the same time as the 1st defendant; that the 1st defendant was informed that the land was being measured while he was at Kiirua; that the whole land was about **10 acres Parcel No. 1359** was about **3 acres** while **Parcel No. 315** about **7 acres**.

16. **DW3 Kenneth Mugambi Gituma** testified on **22/2/2018** and adopted his statement filed on **26/1/2016** as evidence-in-chief. The net effect of his statement is that his mother Josephine Wangui Muchai bought the parcel of land from the 1st defendant and the plaintiff has leased the suit land to other persons yet he has his own parcel in the neighbourhood.

SUBMISSIONS

17. The plaintiff filed his submissions on the **8/3/2018** and the 3rd and 4th defendants on **10/4/2018**. I have perused through the record and I have not seen any submissions filed on behalf of the 1st and 2nd defendants.

DETERMINATION

Issues for Determination

18. The issues that arise for determination in this suit are as follows:

(a) Who is the rightful owner of the suit land?

(b) Was any consent issued before the filing of the suit under relevant provisions of the law?

(c) Is the suit fatally flawed for contravening the provisions of Section 13A of the Government Proceedings Act Cap 40?

(d) What orders should issue?

(a) Who is the rightful owner of the suit land?

19. It is the evidence of the 1st defendant that he was a driver and as he was passing through Kirindini chief's office he heard that a parcel of land was being sold; he went to the Chief's Office he bought the land; that was **11 ½ acres**; that he bought parcels No. **315** and **1357** (Uringu III Adjudication Section) before the gathering in the year **1968**. He identified the persons from whom he bought the land as Mukiama, M'Ituru, Mitu and Kirigwa who were kin to Marambi. His statement states that Ayub was a son to M'Ito; according to the 1st defendant, Marambi had his parcel lying contiguous to the one which the 1st defendant bought from the 4 persons named above. **DW 2** testified that that portion belonging to the plaintiff's father is said to have been left intact and has been developed by the plaintiff and his brother.

20. The plaintiff argued in his submissions that there was no evidence that the 1st defendant had bought the land. It is true that there was only the oral evidence of **DW1** and **DW2** on the issue and no documentary evidence. However, it should not be forgotten that most of the good evidence in this case lay in the records of the disputes that were decided at the Committee and arbitration Board proceedings which it was incumbent on the plaintiff to present before court which he never did. The only presumption can be that the contents thereof were not in favour of his case.

21. When cross examined by Mr. Otieno for the 1st and 2nd defendants the plaintiff admitted that both the Land Committee and the Arbitration Board proceedings ended in favour the 1st defendant and that his father was given a hearing. Upon cross examination by Mr. Kieti for the 3rd and 4th defendants he admitted that he, his brothers and his father attended the Committee case and his father had witnesses.

22. The submissions of the plaintiff question why there are no witnesses from among his kin called by the defendants to support their case. The converse should be the more relevant and proper question: why his kin did not testify to support his case, and it can be presumed that it is because they actually sold the land.

23. The plaintiff also admitted the titles were issued in the year 2004 to Josephine Wangui and that there was no criminal charge that was preferred against the defendants. On the basis of the evidence given by the parties I find the evidence of the defence that the land was purchased by the 1st defendant to be more credible. Also, in my view the fact that the land was registered in the 2nd defendant's name before being registered in the name of her husband is not proof of fraud, for indeed a person can appoint another to be his nominee in registration, or gift the land outright to a third party.

24. Further it appears that the dispute between the plaintiff and the 1st defendant has undergone many stages and that the resolution of the dispute at each stage favoured the 1st defendant.

25. In my view the plaintiff's claim is premised on fraud and he must prove fraud on a slightly more than a balance of probabilities in order to warrant orders sought. I approve of the decision cited by the 3rd and 4th defendant in their submissions that is **John Karisa Mutsonga Vs Johnson Nyati 1984 eKLR**. I see good faith in the attempt by the 3rd defendant to have a restriction registered against the land pending the hearing and determination of this suit and in the issuance of his consent to bring this suit. No specific action that can be said to be fraudulent is alleged against him yet he must have played a central role in the determination of the disputes between the parties before this suit came to be. The 3rd and 4th defendants submit that no allegations of fraud have been levelled against the land registrar and I find this to be true. Besides, he has not been enjoined as a party in this suit.

26. Despite having admitted that there were disputes between them the plaintiff never produced in evidence decisions of the committee and the arbitration board that, being in his favour, could be deemed to have been overridden by any misrepresentation or fraud on the part of the defendants. This is a glaring gap in his case. The plaintiff's allegation that the defendant's unspecified relative worked as a land adjudication officer could have assisted him establish fraud, if he could link his office with irregular entries. He did not. None of the documents produced by the plaintiff can prove fraud on the part of the defendants. I am also of the view that none of the documents produced by the plaintiff can establish that he gathered the land. The conclusion that this court comes to is that the land was as said by the defence, purchased before gathering, and was gathered by the defendants. The plaintiff's claim is therefore not genuine.

27. If at each stage the decision of the Land Committee and the Arbitration Board favoured the 1st defendant then it is no surprise that the land was finally awarded to the 1st defendant. I find that on the basis of the plaintiff's own admissions the proper procedures were employing in resolving the dispute and that the 1st defendant was properly declared the owner of the suit land. Consequently he could transfer the land to whoever he wished and therefore sale to Mutiga and the subsequent transfer to the 2nd defendant can not be faulted.

(b) Was any consent issued before the filing of the suit under relevant provisions of the law?

28. The plaintiff produced a consent dated 14/5/2002. It was not challenged in evidence. Going by the date, that consent was issued long before the institution of this suit on 13/6/2002. I have noted that said consent was availed for court records as at the filing of the plaint. There was therefore consent properly issued before the institution of the suit and the suit is properly before this court.

(c) Is the suit fatally flawed for contravening the provisions of Section 13A of the Government Proceedings Act Cap 40?

29. The issue as to whether notice had been issued to the attorney general in accordance with the provisions of **Section 13A Of Cap 40** was raised by the 3rd and 4th defendants. The parties never addressed this issue in their submissions. Nevertheless it is worth commenting that in this day and age it is unlikely that this court can countenance the striking out or dismissal of a suit purely on the basis of want of notice even where the 3rd and 4th defendant have acknowledged receipt of the claim and defended it to the end. For that reason I find this defence frivolous and it must fail.

CONCLUSION

(d) What orders should issue?

30. For the above reasons, I hereby find that the plaintiff has failed to prove his claim against the defendants and I hereby dismiss his suit with costs.

It is so ordered.

Dated, signed at Kitale this 12th day of October, 2018

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 31st day of October, 2018

JUDGE

ENVIRONMENT AND LAND COURT, MERU.