



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 146 OF 2015

(FORMERLY HCCC NO. 59 OF 2004)

ITUMU MBUTEL.....PLAINTIFF

VERSUS

IRERI NJERU.....1ST DEFENDANT

PETER MUGO IRERI.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 29th November 2004 and amended on 23rd November 2017, the Plaintiff sought the following reliefs against the 1st and 2nd Defendants;

a. This honourable court does declare that the Plaintiff is the rightful owner of parcel No. Embu/Gangara/764 by virtue of adverse possession and under Embu customary rights. (Sic)

b. This honourable court does order the cancelling and/or rectification of the title of Embu/Gangara/764 namely to delete the name of the second Defendant Peter Mugo Ireri and substitute the same with the one of the Plaintiff, Itumu Mbutei. (Sic)

c. This honourable court's declaration that the Plaintiff is entitled to enjoyment of his private property as conferred to him by statute namely the Constitution of Kenya. (Sic)

d. A permanent injunction to issue against the first and second Defendants restraining them either by themselves, their agents and/or servants from trespassing and/or interfering with the Plaintiff's quiet user, enjoyment and possession of the suit premises and from continuing and/or repeating the trespass and destruction of the Plaintiff's property on all the parcel of land. (Sic)

e. General damages for trespass to land.

f. Costs of the suit and interest.

2. It was pleaded in the said amended plaint that *Title No. Embu/Gangara/764* (hereinafter called the *suit property*) was "customary land" which was previously owned by the Plaintiff's father one, Mbutei s/o Kive. It was further pleaded that during the process of land demarcation and land adjudication, the Plaintiff was awarded 3 parcels of land one of which was the suit property.

3. The Plaintiff further pleaded that owing to the fact that he was working and living in Nairobi at the material time, he instructed the 1st Defendant, who was his cousin, to register the three properties awarded to him in his name. However, the 1st Defendant decided to register one of the three properties i.e. the suit property in the name of 2nd Defendant. The 2nd Defendant is the son of the 1st Defendant and the current registered owner of the suit property.

4. It was contended by the Plaintiff that the 1st Defendant had fraudulently caused the suit property to be registered in the name of the 2nd Defendant and listed two particulars of fraud against him in paragraph 12 of the amended plaint.

5. The Defendants filed a statement of defence and counterclaim denying the Plaintiff's claim in its entirety. It was denied that the suit property ever belonged to the Plaintiff's father. It was pleaded that at all material times, the suit property belonged to the 2nd Defendant whose registration was a first registration after the due process of land adjudication was undertaken. It was further stated that the 2nd Defendant was registered as proprietor in 1996 hence the issue of adverse possession could not arise.

6. The Defendants denied the allegations and particulars of fraud and stated that the process of land demarcation, adjudication and registration was undertaken by the Government of Kenya and not the 1st Defendant.

7. In their counterclaim, the Defendants stated that the Plaintiff had damaged their crops and trees on the suit property and unlawfully denied the Defendants access to, and use of, the suit property. They, therefore, sought the following reliefs in the counterclaim against the Plaintiff;

a. An order of eviction of the Plaintiff from the suit property.

b. An order of permanent injunction restraining the Plaintiff, his servants, relatives, agents or any person purporting to be working on his behalf from entering, farming, cultivating, damaging crops or doing any act that would defeat or interfere with the suit property.

c. General damages for loss of user, destruction of crops and trees, costs and interest or any other relief that the honourable court shall deem fit to grant.

8. The Plaintiff filed a reply to the amended defence and a defence to counterclaim on 13th December 2017. The Plaintiff denied the Defendants' counterclaim in its entirety.

9. At the hearing hereof, the Plaintiff testified on his behalf as PW 1. He adopted his witness statement dated 11th December 2017 as his sworn testimony. He reiterated his case as pleaded in his amended plaint. It was his evidence that when land demarcation was taking place around 1972, he contributed Kshs 600/- though the 1st Defendant for the exercise although he was working in Nairobi at the material time.

10. It was the Plaintiff's case that upon completion of the process, he was notified by the 1st Defendant that he had been awarded 3 parcels of land i.e. Embu/Gangara/711, 1265 and the suit property. He later on confirmed this information from family elders. Being satisfied with the allocations he continued occupying the suit property without any problem until 1998 or thereabouts when the 2nd Defendant laid a claim of ownership thereof. He stated that he was taken by surprise at the claim and decided to confirm the ownership of the suit property from the Lands Registry. That is when he discovered for the first time that the 2nd Defendant was, indeed, the registered proprietor thereof.

11. The Plaintiff called 4 other witnesses who supported his evidence in various respects. It turned out that both PW 2 and PW 4 were involved in the land demarcation process and in the allocation of the suit property to the Plaintiff. They were, however, not involved in the registration of the suit property as the matter was left to the 1st Defendant who was the chairman in charge of allocations for their house. It also turned out that the Plaintiff had tried to resolve the dispute through family and clan elders without success. The elders had resolved that the suit property belonged to the Plaintiff but the dispute was escalated to another level.

12. The Defendants testified on their own behalf and closed their respective cases. The 1st Defendant stated that he was involved in the process of land demarcation and adjudication. It was his evidence that when he called upon the Plaintiff to participate in the process, the latter informed him that he was not interested in clan land. The Plaintiff was, however, allocated two (2) parcels of land. He denied ever changing particulars of ownership of the suit property as contended by the Plaintiff. 1st Defendant contended that it was his son, the 2nd Defendant, who was allocated the suit property during the adjudication process.

13. The 2nd Defendant adopted his witness statement filed on 15th February 2018. His case was that he was allocated the suit property by his clan during the land demarcation and adjudication process. He was registered in 1996 and that he had built a brick house on the suit property where he conducted business. He further stated that the Plaintiff never lodged any objections or complaints during the land adjudication process.

14. The court has considered the pleadings, the evidence and the documents on record in this suit. The court is of the view that the following issues arise for determination;

a. Whether the 2nd Defendant was fraudulently registered as proprietor of the suit property.

b. Whether the Plaintiff has made out a case for a declaration that he is the owner of the suit property by virtue of adverse possession or under Embu customary rights.

c. Whether the Plaintiff has made out a case for cancellation of the 2nd Defendant's title and rectification of the register.

d. Whether the Plaintiff is entitled to the reliefs sought the other reliefs in the amended plaint.

e. Whether the 2nd Defendant is entitled to the other reliefs sought in the counter-claim.

f. Who shall bear the costs of the suit.

15. The court has considered the entire evidence on record on the 1st issue. The court believes the Plaintiff's evidence and that of the elders that he was, indeed, allocated the suit property by the elders during the land adjudication process. The subsequent alternative dispute resolution processes initiated by the Plaintiff also confirmed that he was the rightful owner of the suit property.

16. There is evidence on record that the 1st Defendant was involved in land demarcation with respect to his house and he was instrumental in

getting the Plaintiff to be allocated some parcels of clan land during the absence of the latter. In fact, he was the chairman of his house. It was in such role that he took advantage of his position to deprive the Plaintiff of the suit property and to have it registered in the name of his own son.

17. The 1st Defendant put great emphasis on the fact that it was the government which undertook the process of land demarcation, adjudication and registration hence he should not be blamed if anything went wrong. It is, of course, true that the government was in charge of the process but it was not the government which was picking out the names of the beneficiaries of clan land in the various adjudication sections. The government was not involved in allocation of clan land to individuals at the house level. It was the various elders and heads of clans, sub-clans and houses who were involved. It was these individuals who identified and forwarded the names of the members of their clans or houses to be registered as proprietors by the government.

18. The court is satisfied that the 1st Defendant was the one who caused his son, the 2nd Defendant, to be registered as proprietor of the suit property while truly knowing that the suit property had been allocated to the Plaintiff by the concerned elders. The 2nd Defendant was a minor at the material time and it must be the 1st Defendant who engineered his fraudulent registration. The court is, therefore, satisfied that the Plaintiff has demonstrated that he was fraudulently deprived of the suit property.

19. The Defendant resisted the Plaintiff's claim on the basis that the Plaintiff did not lodge any complaints or objections during the land adjudication process as provided for under the **Land Adjudication Act**. There is evidence on record that the Plaintiff was away in Nairobi at the material time. He may not have seen the final adjudication register upon publication. His omission to inspect the register, however, did not give the 1st Defendant a licence to defraud him of the suit property.

20. It is amazing how the 1st Defendant went to great length to defraud his own relative. There is evidence on record that the 1st Defendant was allocated at least six (6) parcels of land during the process of land demarcation and adjudication. Why, then, would the 1st Defendant be so greedy as to defraud his orphaned cousin of the suit property? The 1st Defendant must have known that the Plaintiff's father had lived on and was eventually buried on the suit property. The 1st Defendant must have been actuated by insatiable greed in what he did.

21. The 2nd issue relates to adverse possession and rights under Embu customary law. The evidence on record does not support a claim for adverse possession. There was no clear evidence of exclusive possession by the Plaintiff. The evidence on record revealed that the 2nd Defendant had built a brick house on part of the suit property from which he was undertaking business whereas the Plaintiff appeared to be cultivating some other portion of the suit property. The minimum statutory period of 12 years was not satisfied since the 2nd Defendant was registered in 1996. See **Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184**

22. The Plaintiff's prayer for a declaration that he is entitled to be registered as owner on account of Embu customary rights is not tenable for at least two reasons. First, there was no evidence on record on what Embu customary law on registration of land entailed. Under **section 51 of the Evidence Act (Cap 80)**, the existence of African customary law is a question of fact. It has to be proved on evidence. Second, the suit property was subjected to the process of land adjudication under the **Land Adjudication Act** after which the 2nd Defendant was fraudulently registered as proprietor instead of the Plaintiff. In my view, the only viable option is to order cancellation of the offending registration and consequential rectification of the register.

23. The 3rd issue is on rectification of the register. The court has found and held as a fact that the Plaintiff was defrauded the suit property by the greedy actions of the 1st Defendant whom he had trusted as a cousin. The provisions of **section 80 of the Land Registration Act, 2012** state that;

“(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.

(2) The register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

24. The evidence on record is that the 1st Defendant caused the 2nd Defendant to be registered as proprietor when the 2nd Defendant was a minor of tender years. The 2nd Defendant did not any steps with respect to his registration as proprietor. Being a minor, he could not be legally answerable for any actions. He could not incur legal liability as a minor. Any participation in and knowledge of fraud can only be attributed to his father, the 1st Defendant, who was the mover of the fraud. It is also strange that the name of the minor was entered in the register directly instead of an adult or guardian in trust for the minor. A minor had no legal capacity to hold the suit property in his own name. Be that as it may, the court is satisfied that knowledge of the fraud on the part of the 1st Defendant could be imputed to the 2nd Defendant who was a minor at the material time since a minor could only act through a guardian. The answer to the 3rd issue is in favour of the Plaintiff.

25. The 4th issue is whether the Plaintiff is entitled to the other reliefs sought in the amended plaint. The court is of the view that the Plaintiff, having demonstrated and proved his case, is entitled to some of the remedies sought in the amended plaint. The court is of the opinion that the Plaintiff is only entitled to prayers (b) and (d). For reasons given hereinbefore, the court is not satisfied that a declaration of adverse possession or declaration of ownership under Embu customary law is tenable. The court is also not satisfied that a general declaration that the Plaintiff is entitled to enjoy his property rights conferred by statute law and or the Constitution of Kenya would serve any useful purpose.

26. The court is not satisfied that the Plaintiff is entitled to general damages for trespass to land. The 2nd Defendant has been the registered

proprietor of the suit property all along. He could not, therefore, be said to have been a trespasser since there was a legal basis for his occupation. Any declarations or orders made in favour of the Plaintiff in this judgement can only operate prospectively and not retrospectively.

27. The 5th issue is whether the 2nd Defendant is entitled to the reliefs sought in the counterclaim. For reasons given in the judgement, it is obvious that the 2nd Defendant is not entitled to the reliefs sought in the counterclaim. The court has found and held that the suit property rightfully belongs to the Plaintiff and that the 2nd Defendant was fraudulently registered as proprietor thereof. The answer to the 5th issue is, therefore, in the negative.

28. The 6th and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court has noted that all the parties herein are close relatives. The court is of the view that the appropriate order to make is for each party to bear his own costs.

29. The upshot of the foregoing is that the court finds that the Plaintiff has proved his case to the required standard. The Defendants' counterclaim shall be dismissed. Accordingly, judgement is hereby entered for the Plaintiff against the Defendants in the following terms;

- a. The Land Registrar, Mbeere shall rectify the land register by cancelling the registration of the 2nd Defendant, Peter Mugo Ileri, as proprietor of *Title No. Embu/Gangara/764* and substitute it with the name of the Plaintiff, Itumu Mbutei forthwith.
- b. A permanent injunction is hereby issued against the Defendants restraining them by themselves, their agents or servants from trespassing upon and interfering with the Plaintiff's user, enjoyment and possession of the suit property.
- c. The Defendants' counterclaim is hereby dismissed in its entirety.
- d. Each party shall bear his own costs.

30. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 25th day of OCTOBER, 2018.

In the presence of Ms Muriuki holding brief for Mr Kathungu for the Plaintiff, the 2nd Defendant in person and in the absence of the 1st Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

25.10.18