



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 63 OF 2000**

**BETHA NDUBA M'ITWARUCHIU.....PLAINTIFF**

**VERSUS**

**WACHIRA WAMBUGU..... DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. Plaintiff is the registered owner of parcels number LAIKIPIA/DAIGA UMANDE BLOCK 6/936/937 AND 399 and she has titles to that effect. She apparently bought these parcels of land from her uncle, one M'Ndegwa Muketha as parcel No. K.113 being 2 shares from **MWICHWIRI TWO FARMERS CO. LTD**, a land buying company. She allegedly bought the land in 1980, but she is not in occupation of these parcels of land.

2. Defendant allegedly bought share no. K112 consisting of 4 acres of land from 4 members of one family. He settled on the land, fenced it, developed it and he has been in occupation of the land to date from 1984.

**Pleadings**

3. Plaintiff filed suit on 15.6.2000 claiming that defendant had wrongfully, illegally and unlawfully encroached and occupied her parcels of land wit L.R LAIKIPIA/DAIGA UMANDE block 6/396, 397 and 399 and, without any right or claim to the said properties fenced round the said lands with a barbed wire thereby denying the plaintiff the quiet enjoyment of her property.

4. Plaintiff is claiming for general damages and eviction of the defendant from L.R Laikipia/Daiga Umande Block 6/396, 397 and 399 as well as costs of the suit. The case proceeded exparte many years ago and judgment was entered for the plaintiff against defendant on 21.6.2001. But this judgment was later set aside and defendant was able to file a defence and a counter claim dated 8.4.2003 and amended on 11.6.2012.

5. In his pleadings, defendant avers that his land was No.K112 which is 4 acres while that of plaintiff is K 113 also measuring 4 acres. He avers that the directors of the land buying company fraudulently sold and allocated part or whole of the plaintiff's parcel no. K113, and then on the map, they subdivided plaintiff's parcel no. K112, gave it new numbers which they allocated to plaintiff. He therefore counterclaims as follows:

- (a) An order declaring that the directors of the said company sold and allocated parcel no. 113 and then subdivided defendant's No. 112 to new numbers and allocated and transferred fraudulently to the plaintiff though defendant is still in possession of the suit land.
- (b) The order of declaration that the subdivision and transfer of defendant's parcel no. 112 as no's Laikipia/Daiga Umande Block 6/396, 397 and 99 is illegal and unconstitutional and therefore null and void.
- (c) An order for the cancellation of the above 3 titles and for plaintiff's name to be removed and defendant's name be entered in the register.
- (d) An order that plaintiffs claim is time barred and therefore bad in law.

**The evidence**

6. Despite the long shelf life of this case, the hearing only took off from 10.7.2017. Plaintiff testified and also adopted her statement dated 12.6.2012 as her evidence. Her evidence is that in 1980's she bought land parcel No. K113 from her uncle M'Ndegwa Muketha which land the latter had acquired as shares from Mwichwiri two farmers Co. Ltd.

7. The consideration was Shs.30,000, which she paid. She was also shown the land by M’Ndegwa’s son, one George Muthuri. They then met the secretary of the committee who replaced M’Ndegwa’s name with that of plaintiff in respect of land no. K113.

8. According to plaintiff, surveying and demarcation was done in 1977 and thereafter title deeds were issued. That is how she acquired title no. Laikipia/Daiga Umande Block 6/396 and 397. She lodged a complaint as her land was small. She was then allocated parcel no. 6/399 while defendant was given parcel no. 398 where he had built a house. According to plaintiff, defendant only held one share. According to plaintiff, defendant illegally took possession of her land whereby he even destroyed her fence and occupied the land to date.

9. In support of her case plaintiff produced the documents found in her list dated 21.8.2012 as her exhibits excluding item no. 5 (the letter from chairman Mwichwiri farmers company to the District land registrar).

The documents are as follows

(I) TITLE DEED LAIKIPIA/DAIGA UMANDE BLOCK 6/397 (NYARIGINU)-PEXH 1

(II) TITLE DEED LAIKIPIA/DAIGA UMANDE BLOCK 6/399 (NYARIGINU)-PEXH 2

(III) COPY OF GREEN CARD FOR L.R NO. LAIKIPIA/DAIGA UMANDE BLOCK 6 (NYARIGINU) P/NO. 399-PEXH 3

(IV) SKETCH MAP- PEXH 4

(V) DECREE AND THE CERTIFICATE OF COSTS ISSUED IN FAVOUR OF THE PLAINTIFF ON 3<sup>RD</sup> SEPTEMBER, 2001-PEXH 5

(VI) GREEN CARD FOR P/NO. 397 LAIKIPIA/DAIGA UMANDE BLOCK 6 (NYARIGINU)-PEXH 6

(VII) TITLE DEED CLEARANCE CERTIFICATE-PEXH7

(VIII) COPY OF GREEN CARD FOR P/NO 396 LAIKIPIA/DAIGA UMANDE BLOCK 6 (NYARIGINU)-PEXH 8

(IX) JUDGMENT OF COURT DELIVERED ON 21<sup>ST</sup> JUNE, 2001 BY HON. W.K. TUIYOT – JUDGE, PEXH9

10. Plaintiff did not call any other witness although in her list of statements of witnesses dated 21.8.2018, she had intended to call George Muthiri (her cousin) and the district land registrar as her witnesses.

11. Defendant testified and he also relied on his statement recorded on 25.4.2017 as his evidence. His evidence is that he bought shares from 4 members of Mwichwiri two farmers co. Ltd and he was allocated land parcel no. K-112 measuring 4 acres. He developed the land and even built a permanent house from 1984. He avers that plaintiff’s land was no. K. 112 measuring 4 acres and she was on the right hand side of defendant. He claims that directors of the company fraudulently subdivided his land, gave it new numbers as 396, 397 and 399 which they gave the plaintiff.

12. DW 2, one Francis Mwari Kanyangi also testified and adopted his statement dated 25.4.2011 as his evidence. He avers that him and his brothers owned Ballot Number K-112 measuring 4 acres at Mwichwiri two farmers co. ltd. His brother called Kanyangi Karaigwa had 2 shares while himself and Kinyua Gathura had a share each. It is this land that they sold to defendant on 10.5.1984. DW 2 stated that defendant took over the land and that is where he has lived with his family since then. DW 2 avers that plaintiff was their neighbor as she owned land ballot no. K. 113.

13. In support of his case, defendant relied on the documents in his list dated 6.6.2012. the documents are:

(i) Defence exhibit 1 – sale agreement dated 10.5.1984 (item 3)

(ii) Defence exhibit 2 - receipts for ballot no. K-112 (item 2)

(iii) Defence exhibit 3 the map showing positioning of parcel no. K112 and K-113 (item 1).

(iv) Defence exhibit 4 new map showing the parceling of suit land with new numbers (item 5)

(v) Defence exhibit 5 a, b and c copies of green card for land parcels no. 396, 397 and a similar one 397 each measuring 0.42 hectares of land.

#### **Determination**

14. I have considered the history of this case, the evidence tendered by the parties and the submissions thereof. The undisputed issues are;

(1) That the suit land emanated from Mwichwiri two farmers co. ltd, a land buying company where acquisition of land was through buying of shares.

(2) That both plaintiff and defendant were not original shareholders. They acquired their parcels from previous shareholders.

(3) That plaintiff's share was apparently no. K-113 while that of defendant was K-112 and that the two parcels were adjacent to each other.

(4) That plaintiff is now the registered owner of parcel no. K396 measuring 0.42 hectares, 397 measuring 0.42 hectares and 399 which measures 0.81 hectares.

(5) That defendant is the one occupying the suit land on the ground.

15. Against this background, and considering the lengthy litigation history, this court will strive to determine the dispute between the parties hopefully once and for all.

16. Section 26 of land registration act provides that:

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.*”**

17. Article 40 (1) of the constitution states that:

**“Every person has the right either individually or in association with others to acquire and own property .....”**  
Subsection 6 thereof provides that:

**“The rights under this article do not extend to any property that has been found to have been unlawfully acquired”.**

18. What these provisions of law provide is that it is not enough to display a title. One has to indicate the root of the title. In the present case, one has to trace their claim from the shares in Mwichwiri two farmers co. ltd.

19. Since both plaintiff and defendant admit that they are neighbours on the ground, then it is important to establish the acreage of the suit land. Plaintiff avers that her land K112 was 6 shares while defendant had one share and that after she forfeited some of the land to give way to public land, her land was reduced to 4 ½ acres. She doesn't have any evidence to support this claim of 6 shares to herself and 1 share of defendant. She has not come out clearly as to what acreage was there for land no. K113.

20. Defendant on the other hand was consistent that his land was 4 shares amounting to 4 acres. He produced a map, the apparent original one (Defence exhibit 3) showing the positioning of parcel no. K112 and K113. There is a sequence in which the parcels are given numbers i.e. K110, 111, 112, 113, 114, 115 and so forth and so forth. The measurement of each of the parcels (112 and 113) is indicated as 4.0.

21. Defendant and plaintiff have also produced another map P. exhibit 4 (D exhibit 5) showing parcel no's 396, 397, 398, 399. None of the two litigants is able to tell how the survey was done for the land to transition from the numbering of parcels as K111, 112, 113 etc. to numbers 396, 397, 398, 399 etc. The company would have been in a better position to shed light on this issue.

22. At some point during the trial, defendant did apply to enjoin Mwichwiri two farmers co. ltd as a third party to the proceedings of which the application was allowed via a consent recorded on 4.5.2009. However, nothing came from that process and it appears defendant did not pursue Mwichwiri to ensure that they fully came on board.

23. What is apparent in disputes of this nature is that the land buying companies acquire large parcels of land, subdivide the same and allot to various members through a process of balloting. Share numbers or certificates are then issued. Some land buying companies don't operate with transparency which causes unending vicious disputes that are passed on from generation to generation. Meanwhile the company's close shop and they became **“missing in action”** as happened in the instant case. Often shareholders do utilize their shares in a manner they so desire. The land is used as an economic commodity, where it can be sold and it is passed on from one owner to another. When disputes arise, the parties are left to sort the disputes in the legal platforms without the input of these land buying companies.

24. What is apparent is that the land numbers K112, K113 don't appear to exist anymore just like the company which came up with these numbers (Mwichwiri). So how can the court discern which land belonged to plaintiff and which one was for defendant?

25. The parcels no.396 and 397 measure 0.42 hectares or approximately thereof which means that each parcel no. 396 and 397 is 1 acre. For land no. 399, it is 0.81 hectares which is about 2 acres. The 3 parcels no. 399, 397 and 396 hence consist of 4 acres. Yet each litigant wants about 4 acres.

26. Defendant has averred that plaintiff's land was in the right side of his land meaning that he recognizes that plaintiff has some land. Plaintiff on the other hand admits that she was allocated 396 and 397 which land she found to be small hence the allocation of 399. She avers that defendant occupies and owns 398. How is it that plaintiff was able to cross over the land of defendant to be allocated more land? Is it a case where parcel no. 399 belonged to no one such that upon complaining one could get this land?

27. I am inclined to believe that the allocation of land no. 399 to plaintiff was irregular and not in line with the allocation of the land on the ground.

28. It cannot therefore be true that defendant had encroached on all of plaintiff's land. Defendant did also own land on the ground.

29. It is not also clear whether there is existence of parcel no. 398. As particulars of this parcel have not been availed.

30. Having established that part of plaintiff's land was not lawfully obtained and considering that Mwichiri farmers appear to be behind the mess, then the best option is for the parties to share whatever is available equally. On this point I have taken into consideration the alleged original map (D-Exh3) which shows that parcels no. 112 and 113 were equal.

31. Plaintiff was originally allocated parcel no. 396 and 397. This is the land which she ought to have. For parcel no. 399, the one that crosses over to defendants land it should go to defendant.

**32. Final orders:**

**(1) It is hereby declared that plaintiff is the rightful owner of land parcels No's Laikipia/Daiga Umande Block 6/396 measuring 0.42 hectares and 397 measuring 0.42 hectares.**

**(2) It is hereby declared that defendant is the rightful owner of parcel no. Laikipia/Daiga Umande Block 6/399 measuring 0.81 hectares (2 acres).**

**(3) An order is hereby issued for the cancellation of title no. Laikipia/Daiga Umande Block 6/399 from the name of Betha Ndumba M'Itwaruchiu and instead, Wachira Wambugu is to be registered as the proprietor of this land.**

**(4) The district Land Registrar and district surveyor are to visit the suit land and indicate on the ground where the 0.42 hectares of 396 and 0.42 hectares of 397 are positioned on the ground.**

**(5) Defendant is to give to plaintiff vacant possession of the land no. 396 and 397 measuring 0.42 hectares and 0.42 hectares respectively by removing the fence on these parcels within 14 days from date when the boundary will be marked out in line with point no 4 above.**

**(6) As to costs I have considered the lengthy litigation history as well as the fact that the land buying company appears to have perpetuated the mess. As such I direct that each party bears their own costs of the suit.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 28<sup>th</sup> NOVEMBER, 2018 IN THE PRESENCE OF:-**

C/A: Janet

Kirimi holding brief for Kiome for defendant

Rimita for plaintiff

Plaintiff

Defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**