



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 34 OF 2013

TURBO MUNYAKA CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF

VERSUS

JOHN MBUGUA NJOROGE.....1ST DEFENDANT

WAITI NJOROGE.....2ND DEFENDANT

JAMES KIAMBUTHI MUNGAI.....3RD DEFENDANT

STEPHEN MWAURA MUNGA.....4TH DEFENDANT

FRANCIS KINGARA MBUGUA.....5TH DEFENDANT

DANIEL NJOROGE GICHARU.....6TH DEFENDANT

WAWERU WAHOME.....7TH DEFENDANT

JOHN WAWERU.....8TH DEFENDANT

JUDGMENT

1. By a plaint dated 25/3/2013 and filed in court on the same date, the plaintiff sought the following orders against the defendants jointly and severally:-

(a) A declaration that the plaintiff is registered as the absolute proprietor of all that land known as Land Title No. Makutano/Kapsara Block 2/Turbo Munyaka/91 measuring Nought Decimal Four Nought Four (0.404) of a Hectare and therefore an order of eviction to issue against the defendants, their agents, servants, employees and/or any other person claiming an interest on the aforesaid land known as Land Title No. Makutano/Kapsara Block 2/Turbo Munyaka/91.

(b) Costs of the suit.

(c) Any other relief this Honourable court may deem just to fit to grant.

The Plaintiff's Case

2. According to the plaint the plaintiff is a Co-operative Society Limited and it is the registered owner of all that parcel of land known as Land Title No. Makutano/Kapsara Block 2/Turbo Munyaka/91 measuring Nought Decimal Four Nought Four (0.404) of a Hectare.

3. The plaintiff states that the defendants without consent and/or knowledge, illegally and unlawfully trespassed and/or encroached onto the plaintiff's aforementioned parcel of land and erected structures thereon.

4. The plaintiff further states that all efforts to have the defendants vacate from its land have been futile and in vain.

The Defendant's Defence and Counterclaim

5. The defendants filed a joint defence and counterclaim dated 6/5/2013. Their defence is that they are legally occupying their respective

parcels of land having purchased the same from registered members of **Turbo Munyaka Co-operative Society Limited**.

6. The defendants state that the plaintiff acquired title to the land fraudulently having full knowledge that the defendants purchased land from **Julius Mungai** and **Joyce Nduniu Mungai** who were shareholders of the plaintiff company; that the plaintiffs concealed the process of preparation of the title from the defendants; that the plaintiff altered the area list to reflect **Plot No. 91** as being the plaintiff's and that the plaintiff also presented a fraudulent area list to the Land Registrar.

7. The defendants deny that they are trespassers on the suit land.

8. In their counterclaim, the defendants states that the plaintiff was well aware that they ought to have been issued with a title deed for the portion they occupy; that the plaintiff has no claim over their parcel of land.

9. The defendants express their prayers in the counterclaim as follows:-

(a) **An order that the defendants are legally occupying their respective parcels of land.**

(b) **An order cancelling the title deed issued to the plaintiff and an order directing the District Land Registrar to issue a title deed for parcel No. Makutano/Kapsara Block 2/Turbo Munyaka/21 to the defendants.**

(c) **Costs of the counterclaim.**

(d) **Any other relief the court deems fit and just to grant.**

The Plaintiff's Reply to Defence and Counterclaim

10. In his reply to defence and counterclaim the plaintiff reiterates the averments in the plaint and insists that it being the registered owner of all that parcel of land known as **Land Title No. Makutano/Kapsara Block 2/Turbo Munyaka/91** the defendants are actually trespassers/encroachers on the same.

11. The plaintiff also denies the contents of the defendants' defence and counterclaim against it that it acquired the suit property through fraud as alleged and denies all the particulars of fraud contained herein.

12. The plaintiff further avers that if at all the defendants purchased the suit land from the mentioned individuals as alleged but which is denied, then the transaction was done purely at the defendants own risk knowingly that the land belongs to the plaintiff and not the said individuals.

13. The plaintiff avers that the defendants' claim is baseless given that there is no documentary evidence in support of their claim. It denies the defendant's claims of fraud on its part and dismiss an order seeking for cancellation of the titled deed as baseless.

The Plaintiff's Evidence

14. The suit came up for hearing on **6/7/2015**. The plaintiff's sole witness, **Onesmus Gichiri Njoroge** who identified himself as the Chairman of Turbo Munyaka Co-operative Society Limited, gave evidence. He stated that the society bought **LR. No. 1118** and settled its members; that it also settled people who had bought land from its members; that there were **436** members; that parcel number **91** is one of those reserved by the company after the land distribution; that dissatisfied members could go and complain to the cooperatives tribunal; that none of the defendants are members of the society yet they have invaded plot number **91**; that plot number **90** was allocated to Julius Mungai Kiboo whose children have invaded plot number **91**, that the invaders complained to the police that the company had obtained title thereof in a fraudulent manner but the company was cleared of wrongdoing whereupon the society wrote demanding compensation from the wife of Julius Mungai Kiboo for use of the land; that the dispute has been dealt with by the District Commissioner and the Chief and that the latter asked Julius to vacate the land.

The Defendants' Evidence

15. **DW1, Stephen Mwaura** who is the 4th defendant testified on **16/7/2018**; his evidence was that **James Kiambuthi Munga**, the 3rd defendant is his brother; that **Julius Mungai Kiboo** and **Joyce Nduniu Mungai** were their parents; that the initial area list of the company had **436** members; that his father was member number **90** and his mother member number **91** on the area list; that the 1st defendant bought a parcel of land from the witness' mother on **20/3/2002** and the 6th and 7th defendants are sons to the 1st defendant and all have been in possession of the land for many years; that the 2nd defendant and his father took possession of their portion of land after buying it on **2nd February 1997**; that **DW1** was also given a plot on which he lives with his brother Kiambuthi; that the 8th defendant bought a plot on behalf of a church; that the church is still built on its portion; that before the witness' parents died there was no dispute concerning the land; that title was issued in the plaintiff's name before their death; that the society named in the title does not exist, its name having been changed to Munyaka Marketing Cooperative Society Ltd; that the title should have been in the latter name; that the chairman (**PW1**) secretly obtained title to the land while they had fled the area because of the infamous tribal clashes despite knowledge that some people had bought land from the witness' parents; that while preparing the area list his mother's name was substituted with that of the plaintiff and the original area list substituted with a fresh one in which his mother's name had been removed; that the names on the **P.Exh 2** and the Title Deed differ and that other complaints had also arisen to the effect that other people's names had been removed from the area list.

Submissions

16. The plaintiff filed his submissions on **15th October 2018** and the defendants filed his on **23rd October 2018**. I have considered the pleadings the evidence and the submissions of the parties. The issues that arise in this suit are as follows:-

(1) Was there fraud on the part of the plaintiff in the acquisition of title in respect of plot number Makutano/Kapsara Block 2/Turbo Munyaka/91?

(2) Are the defendant's trespassers on the suit land?

(3) What orders should issue?

(1) Was there fraud on the part of the plaintiff in the acquisition of title in respect of plot number 21?

17. It is not disputed that in accordance with **P.Exh 1** the plaintiff was registered as a cooperative society pursuant to the provisions of the Co-operative Societies Act on **8/5/1964**; that its name was changed to Munyaka Marketing Cooperative Society Limited on **7/4/1986**; that it acquired title to the suit land on **2/10/08** in the old name of Turbo Munyaka Co-operative Society Limited; that the area list whose certified copy was produced as **P.Exh 2** named "Munyaka F.C.S." as the holder of the suit land.

18. There is evidence that as at **23rd January 1998** the dispute concerning the suit land cropped up at a meeting of the District Commissioner called to discuss the status of issuance of title to the members. It would appear from **P.Exh 8** that Julius Mungai Kiboo claimed that the suit land belonged to his wife and the said exhibit seems to suggest that he should seek the court's intervention if he continued holding that opinion.

19. The defendants on the other hand produced a photocopy of a receipt in the name of Joyce Nduniu Mungai dated **21/8/97** for title deed fees in respect of an unstated land parcel; agreements dated **20/3/2002**, **2/2/1997** and **6/6/1989** which also do not state any land reference number were also produced. In the agreement dated **6/6/1989** Julius Mungai is seen to be selling a plot of land to the **4th** defendant. In the agreement dated **2/2/1997** Julius Mungai is seen to be selling a plot of land to one Shadrack Njoroje. In the agreement dated **20/3/2002** Joyce Nduniu is seen to be selling a plot of land to the **1st** defendant.

20. The copy of the area list that was marked **D.MFI 9** did not bear any authentication marks. It is not admissible in evidence. In any event it is not supported by any documents showing how the said Joyce Nduniu had acquired the suit land to enable her name to be included in the area list.

21. **D.Exh 2**, a copy of a receipt purported to have been issued by "**Munyaka Farmers' Cooperative Society Limited**" does not show that it was issued in respect of the suit land yet by the time it was issued the suit land had already been issued with a number that is plot number **91**. It also raises a question as to why the stamp it bears reads "**Munyaka Farmers Cooperative Society Ltd**" while the new name adopted by the plaintiff is "**Munyaka Marketing Cooperative Society**" and the old name of the plaintiff is as stated in the plaint. I find that these names refer to different entities and that that exhibit does not support the defendant's case.

22. I do not also find any other document for example, share certificate or a sale agreement between Joyce Nduniu and the Turbo Munyaka Cooperative Society Limited showing the latter sold the suit land to the former, or that the land was allocated to Joyce.

23. I also observe that the name of the plaintiff having changed, it is possible to have the title deed amended to reflect the new name and the issuance of the title in the old name is therefore only an irregularity that can be rectified by the Land Registrar in the normal manner provided for by the law. It is not *per se* evidence of fraud.

24. For the above reasons I find that the defendants have not proved any fraud on the part of the plaintiff in the acquisition of the title to the land.

(2) Are the Defendant's Trespassers on the Suit Land?

25. The plaintiff is the registered owner of the suit land and it follows therefore that without the licence of the plaintiff the defendants are trespassers on the suit land.

CONCLUSION

(3) What orders should issue?

26. I therefore enter judgment against the defendants jointly and severally and issue the following orders:

(a) A declaration that the plaintiff is registered as the absolute proprietor of all that land known as Land Title No. Makutano/Kapsara Block 2/Turbo Munyaka/91 measuring Nought Decimal Four Nought Four (0.404) of a Hectare.

(b) An order that the defendants and all persons who claim under them shall remove themselves and their property from Land Title No. Makutano/Kapsara Block 2/Turbo Munyaka/91 in default of which they shall be evicted therefrom;

(c) The defendants shall bear the costs of this suit.

Dated, signed and delivered at Kitale on this 15th day of November, 2018.

MWANGI NJOROGE

JUDGE

15/11/2018

Coram

Before - Hon. Mwangi Njoroge Judge

Court Assistant: Picoty

Mr. Teti holding brief for Arunga for defendant

Mr. Khisa holding brief for Analo for plaintiff

COURT

Judgement read in open court.

MWANGI NJOROGE

JUDGE

15/11/2018