



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU
E.L.C. CASE NO. 14 OF 2017
(FORMERLY KERUGOYA ELC NO. 50 OF 2012 &
EMBU HCC 134 OF 2008)

NICHOLAS IRERI JACOB.....1ST PLAINTIFF

JOHN MIRITI JACOB2ND PLAINTIFF

VERSUS

NJERU KARUGANO.....1ST DEFENDANT

PATRICK MURIITHI JACOB.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 15th September 2008 and filed in court on 17th September 2008, the Plaintiffs sought the following orders against the Defendants;

a. Cancellation of title for Kagaari/Gitare/T.160 in the name of the 1st Defendant and subsequently the 2nd Defendant and an order for registration of the 2nd Plaintiff as the proprietor.

b. Costs of the suit.

2. It was pleaded that the 2nd Plaintiff was the beneficial owner of Title No. Kagaari/Gitare/T.160 (hereinafter the “suit property”) located within Runyenjes Municipality on account of allocation as a son of one of the elders of the Gicuku clan of the Mbeere tribe in 1961 or thereabouts. It was also pleaded that on or about 14th July 1978 the 1st Defendant fraudulently had himself registered as owner of the suit property. It was further pleaded that on 17th May 2001 the 1st Defendant fraudulently transferred the suit property as a “gift” to the 2nd Defendant. The Plaintiffs further pleaded that all along they have been in possession of the suit property.

3. The 1st Defendant filed his statement of defence on 9th October 2008. Save for the description of the Plaintiffs, he made a general denial of all the allegations in the plaint. This defence was simply a mere denial without any positive statement of defence.

4. The 2nd Defendant also filed a statement of defence on 9th October 2008 and similarly made a mere denial of all the allegations in the plaint, save for the description of the parties and the jurisdiction of the court. There was no positive statement of defence.

5. Although all the parties were unrepresented, they made every effort to comply with pretrial procedures under **Order 11 Civil Procedure Rules**. They managed to file their witness statements. The 2nd Plaintiff and the 1st Defendant also filed a list of documents. They were apparently unable to agree on a statement of issues. The 2nd Plaintiff filed his version of the issues for determination while the Defendants filed none. The court will therefore frame the issues for determination in the course of this judgement.

6. This suit was heard before me on 10th April 2017 and 14th June 2017. The 2nd Plaintiff called 4 witnesses and closed his case while the Defendants called 3 witnesses. The 1st Plaintiff did not participate in the proceedings apart from the filing of the plaint. The hearing was concluded on 14th June 2017 when the suit was fixed for judgement on 27th July 2017 since the parties did not wish to file any submissions.

7. At the hearing hereof, the 2nd Plaintiff stated that he was known as John Miriti Jacob son of Jacob Njiru and that he was born in 1958. He testified that in 1978, his father informed him that he had a plot known as Kagaari/Gitare/T.160 which had been grabbed by the 1st Defendant, Njeru Karugano. He further stated that his clan, Gicubu Clan, was given some land to distribute amongst its landless members and that his name was recorded as Muriithi Jacob instead of Miriti Jacob. He produced a copy of the clan register as exhibit P.2.

8. The 2nd Plaintiff further testified that sometime in 1978 his father approached the 1st Defendant on the issue and they both went to the Land Registry to check on how the names in the green card were changed. At the time, the 1st Defendant claimed he did not know how the change had come about and was willing to return the plot. He stated that soon thereafter he joined the Kenya Air force and it became difficult for him to trace the 1st Defendant and pursue the matter.

9. The 2nd Plaintiff also testified that when the 1st Defendant transferred the suit property to the Defendant as a gift in 2001, he reported the matter to the Criminal Investigation Department who investigated the matter and recommended the prosecution of the two Defendants and a surveyor who was involved in the alleged fraud. However, he was advised by the office of the Director of Public Prosecutions to pursue a civil remedy in the matter. A copy of the green card was produced as exhibit P1 whereas the investigation report was produced by a CID Officer from Embu CID Office as exhibit P3.

10. The 2nd Plaintiff (PW 1) finally testified that he was in possession of the suit property until 2014 when the 2nd Defendant forcibly moved in and destroyed the fence and banana stems without a court order in his favour.

11. The next witness for the Plaintiff was Rev Linus Njuki Mwara (PW 2). He stated that he was the secretary of Gicubu clan from 1960 onwards. He stated that there were 102 plots which were available for distribution to those members who had missed out on earlier land allocations. The names of allottees were brought by the elders. He testified that one clansman known as Jacob Njiru was given a plot for his son Miriti Jacob who was then a small child. The name was entered in the register and he produced the same as exhibit P.2. The name appearing in the register was Miriti Jacob. PW 2 confirmed knowing the parents of both PW 1 and the 2nd Defendant but was categorical that the plot in Gitare was for PW 2 since the parents of the 2nd Defendant were allocated land in a different area.

12. The third witness to testify was Albert Ileri Mbarire (PW 3) who is the cousin of the 2nd Plaintiff. He testified that the suit property was initially being cultivated by his grandmother until 1980s when she died. He then took over cultivation of the suit property until 2011 when the Defendant forcibly took it over. He stated that he was the one who placed a caution on the property after the 1st Defendant transferred it to the 2nd Defendant in order to prevent further dealings since PW 1 was away in India at the time.

13. The fourth witness was Sergeant Charles Emodo, F. No. 64681 who came to identify and produce the

investigation report on behalf of the DCIO Embu West sub-county. He confirmed that Inquiry No. 2 of 2002 was opened on a complaint from Rtd Major Miriti Jacob over the suit property. He confirmed that the inquiry was concluded and the file forwarded to the office of the Attorney General for advice. According to their records, it was directed that no further action should be taken. He then produced a copy of the investigation report opinion as exhibit P.3. That concluded the Plaintiffs' case.

14. The 1st Defendant, Njeru Karugano, testified as DW 1. He stated that sometime in 1979 he bought a plot known as KAGAARI/GITARE/T.161 from one, Njeru Kariuki. He produced a copy of the relevant sale agreement and copies of the application for transfer and receipt for attestation fees from his advocate. He further stated that when he went to collect his title deed he was informed that there was a mistake in his title which indicated it was in the name of Muriithi Jacob. He was then asked to go away and look for the latter and take him to the Lands Office to enable them rectify the error.

15. DW 1 stated that he tried his best to look for the said Muriithi Jacob through the local Assistant Chief without success. Later on, he was approached by one Jacob Mbarire, the father of the 2nd Plaintiff, who told him that the said plot belonged to his son Miriti Jacob. When both of them went to the Lands Office, the officials there rejected the claim and insisted that they wanted Muriithi Jacob and not Miriti Jacob. He further stated that many years later, he was approached by Patrick Muriithi Jacob (2nd Defendant) and his father over the said plot. He further stated upon examining the national ID cards of the two he was satisfied that the 2nd Defendant was the rightful owner of the Plaintiff. He therefore accompanied them to the Lands Office and facilitated the transfer of Title No. Kagaari/Gitare/T. 160.

16. During cross-examination by the 2nd Plaintiff, the 1st Defendant stated that it was the mistake of the Lands Office to register parcel T. 160 in his name and that they had refused to correct the mistake without the owner of that parcel being present. He also denied dealing with plot No. T. 160 and giving it away as a gift to the 2nd Defendant.

17. The 2nd Defendant, Patrick Muriithi Jacob, testified as DW 2. He stated that at around the year 2000, he heard from the grapevine that he had a plot to his name somewhere. When he inquired from his father, the latter was never categorical that he had such a plot. Later in the same year, he followed up on the issue and he and his father went to see DW 1 who assisted him to have the plot transferred to his name. It would appear that it is at that time that his father remembered that DW 2 had been allocated a plot in 1961 during the land adjudication exercise.

18. The 3rd defence witness was Jacob Njagi Mwaniki who testified as DW 3. He confirmed that DW 2 was his son. He stated that he was allocated a plot in 1961 during the land adjudication process while he was a small child. He only came to remember the issue of the plot when the Plaintiffs laid claim thereon. When he was shown a copy of the clan register, he disowned it and stated that it belonged solely to the Plaintiffs' family even though his name appeared thereon.

19. In my opinion, the main issues for determination in this suit are as follows:

- a. Who is the rightful owner of Title No. Kagaari/Gitare/T.160?
- b. Was the said property fraudulently transferred to the 1st and/or 2nd Defendants?
- c. Whether the Plaintiffs are entitled to the reliefs sought in the plaint.
- d. Who shall bear the costs of the suit?

20. On the 1st issue, contradicting evidence was given by the 2nd Plaintiff on the side and the Defendants on the other. I have considered the 2nd Plaintiff's evidence and that of his witnesses on this matter as well as the Defendants' evidence. The court is inclined to accept the Plaintiffs' evidence. It was backed up well by the clan register which bore the name of his father and the name of his elder brother. This

evidence was also corroborated by the evidence of PW 2 who was the secretary of the Gicubu Clan from 1960 onwards. He was clear that he knew the family of the Plaintiffs and that of the 2nd Defendant and that the father of the 2nd Defendant was allocated land elsewhere.

21. The court does not accept the evidence of the Defendants on as issue as credible or even plausible. It is incredible that the 2nd Defendant came to know about his “ownership” of the suit property from the blues and then quickly arranged to go and see the 1st Defendant over transfer of the plot. He testified that his father was unaware that such a plot had been allocated to him. If, indeed, the plot was allocated to his son in 1961, how come DW 3 was not aware of this plot and did not take possession for over 39 years? And how come the 2nd Defendant did not plead his alleged ownership in his defence?

22. The court was also not impressed by the credibility and truthfulness of the 2nd Defendant on his date of birth. The 2nd Defendant stated that he was born in 1961 and that what he declared as his date of birth during registration for the national ID card (i.e 1962) was a big lie. He was, in effect, admitting to the commission of a serious criminal offence under the **Registration of Persons Act (Cap 107)**. So, if the 2nd Defendant lied to the Kenyan authorities while obtaining his identity card why should the court believe that he would tell the whole truth while giving evidence in a court of law?

23. The court finds it interesting that both the 1st Defendant and the Lands Registry rejected the 2nd Plaintiff’s claim to ownership on the basis that they wanted the names to match in every respect. They wanted Muriithi Jacob and not Miriti Jacob. So how come they accepted Patrick Muriithi Jacob instead of Muriithi Jacob? And how come the Lands Office could not refer this dilemma to the government administrative machinery but instead chose to channel the matter through a private citizen, Njeru Karugano?

24. In view of the foregoing, the court is satisfied on a balance of probabilities that the rightful owner of the suit property is the 2nd Plaintiff whose name appears to have been misspelt as Muriithi Jacob instead of Miriti Jacob by the Lands Office. The 2nd Defendant’s claim on the same property is not credible and the same is rejected.

25. The 2nd issue is whether the suit property was fraudulently acquired by the 1st Defendant and then fraudulently transferred to the 2nd Defendant as a gift. The court has examined all the evidence on record on this issue. The copy of the green card produced by the 2nd Plaintiff shows that the 1st Defendant was the first registered owner. He was so registered on 14th July 1978. That is when the register was opened. There is no indication that Muriithi Jacob was the first registered owner. There is no indication on the register of any error or mistake in respect of the entry. The next entry is a transfer by the 1st Defendant to the 2nd Defendant on 17th May 2001 and the consideration is stated as a gift. There is no indication that the transfer was a correction of any previous mistake or error by the Lands Office.

26. Other than a statement by the 1st Defendant that he was registered as the owner of the suit property due to an error on the part of the Lands Office, there was no oral or documentary evidence from the Lands Office to support that defence. No letter was produced from the Lands Office on the alleged mistake and no witness was ever called from that office to attest to the alleged mistake. The court does not find the defence of the 1st Defendant credible. If the Lands Office committed an error in registration, it was up to that office to correct the error. It was not his business to look for the rightful owner or to transfer the suit property as a gift in order to correct the alleged mistake or error on the part of a government office. It is also noteworthy that this defence of mistake was not pleaded in the defence.

27. The court, therefore, finds that both the initial registration of the suit property to the 1st Defendant and the subsequent transfer to the 2nd Defendant were dishonest and fraudulent. Following my finding on the 1st issue herein, there was no legal basis for the 1st Defendant’s initial registration and the subsequent transfer to the 2nd Defendant. The court therefore answers the 2nd issue in the affirmative.

28. In view of my findings and holding on the 1st and 2nd issues, it follows that the 2nd Plaintiff is entitled to the reliefs sought in the plaint. The court shall therefore issue an order for cancellation of Title No. KAGAARI/GITARE/T. 160 in the name of the 2nd Defendant and an order for its registration in the name of the 2nd Plaintiff, John Miriti Jacob.

29. The final issue relates to costs of the suit. The general rule is that costs follow the event and a successful party should be awarded costs unless there is a good reason to order otherwise. The court therefore awards costs of the suit to the 2nd Plaintiff to be paid by the 1st and 2nd Defendants.

30. It is adjudged.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **27th day of JULY, 2017**

In the presence of 2nd Plaintiff, 1st Defendant and 2nd Defendants and in the absence of the 1st Plaintiff.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

27.07.17