



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO.179 OF 2014

(FORMERLY KERUGOYA ELC CASE NO. 195 OF 2014)

GEOFFREY MUGWANJAMAINA (*Suing as the personal representative of*

MAINA MUGWANJA).....PLAINTIFF

VERSUS

VIRGINIA NGUNGI NGAARI.....DEFENDANT

JUDGEMENT

1. By a plaint dated 11th March 2008 and filed in court on 12th March 2008, the Plaintiff sought the following reliefs against the Defendant;
 - a. *The decision of the District Commissioner, Mbeere District in Minister's Appeal case No. 146/1995 was ultra vires, illegal, void and that the same be quashed and/or set aside, and subsequently the cancellation of the name of MainaMugwanja as the proprietor of land parcel No. Mbeere/Mbita/2451 was illegal, null and void and the registration of Virginia NguniNgari as proprietor of land parcel No. Mbeere/Mbita/2451 was illegal, null and void and the said registration be cancelled and the land reverts to the name of MainaMugwanja. (Sic)*
 - b. *The Defendant, her agents, servants or anybody claiming through her be restrained from entering, selling, leasing, or in any way interfering with the Plaintiff's user and occupation of land parcel No. Mbeere/Mbita/2451.*
 - c. *The Plaintiff be awarded costs of this suit.*
 - d. *Any other relief this honourable court may deem fit to grant.*
2. The basis of the suit and reliefs suit was that pursuant to an Appeal to the Minister under the Land Adjudication Act (Appeal No. 146/1995) the District Commissioner Mbeere District had allowed the Defendant's appeal with the consequence that his late father's *Title No. Mbeere/Mbita/2451* (hereinafter referred to as the 'suit property') was cancelled and the Defendant registered as proprietor even though his father was not party to and did not participate in the said appeal.
3. It was also pleaded that his late father upon learning of the decision of the District Commissioner instituted judicial review proceedings vide Nairobi High Court Misc application No. 266 of 2007 which was never prosecuted to its logical conclusion due to the demise of the applicant. The Plaintiff also pleaded that the registration of the Defendant as proprietor of the suit property was undertaken in violation of a stay order issued by the judicial review court.
4. The Defendant filed a defence dated 29th April, 2008 in which she denied any wrongdoing in her registration as proprietor of the suit property and averred that it was the Plaintiff's father, one MainaMugwanja, who had fraudulently obtained registration while an Appeal to the Minister was still pending. She further stated that it was the Chief Land Registrar who had placed a restriction in the register and that it was the same registrar who ordered its removal. She therefore prayed that the Plaintiff's suit be dismissed.
5. The Plaintiff called two witnesses and closed his case. The first to testify was the Plaintiff. He informed the court that he was familiar with the subject matter of the suit. He stated that the suit property was brought by his late father from one NjueKinyenje in 1980. He produced a copy of the relevant sale agreement as exhibit GM 1. It was his evidence that in 1990 his family took possession and settled on the suit property.
6. The Plaintiff also testified that sometime in 2006 there was an appeal before the Minister in which the Defendant and one NjukiNjue, the son of NjueKinyenje were parties. He reiterated that his late father was never made a party thereto and that the suit property was awarded to the Defendant by the District Commissioner without according his father a hearing. He produced copies of proceedings of the appeal as

exhibit GM 2.

7. The Plaintiff confirmed in his evidence that his late father had filed a judicial review application challenging the decision of the Minister but died before it could be prosecuted. He did not produce the pleadings and proceedings of the judicial review case. He also maintained that the decision by the District Commissioner was unfair and he asked the court to grant the order sought in the plaint. During cross-examination by the Defendant, the Plaintiff stated that there was no existing dispute over the suit property at the time it was bought by his father.

8. The Plaintiff's second witness was Simon NjeruNjue (PW 2) who was the son of NjueKinyenje who had sold the suit property to the Plaintiff's father, MainaMugwanja. He confirmed knowledge of the sale of the suit property by his late father. He stated that there was no ownership dispute concerning the suit property at the time of its sale. He further testified that the suit property was part of clan land which was allocated to his late father by the clan.

9. The Defendant herein, Virginia NgunyiNgari, testified that the suit property was owned by her late husband, HesbornNgare. It was clear from the evidence that her late husband had several cases before the unit committee and Land Adjudication Officer (LAO) concerning the suit property during the process of land adjudication and demarcation. The cases involved her late husband and NjueKinyenje who sold the suit property to the Plaintiff's father. She produced copies of various summonses to the concerned parties to appear before either the unit committee or LAO for resolution. The said summonses were dated between 1976 and 1990 and were produced as exhibits D3, D4A and D4B.

10. The Defendant further testified that while the said objections were still pending, the late NjueKinyenje sold the suit property to the Plaintiff's father, MainaMugwanja. When her husband died in 2007 or thereabouts, she took over the pending land cases and pursued an appeal to the Minister when she lost before the LAO. When the appeal was decided by the District Commissioner Mbeere District (DC) on 22nd September 2006, the outcome was in her favour in consequence of which she was registered as proprietor. She produced a copy of the proceedings and decision of the DC as an exhibit. She also produced copies of her title deed, certificate of search and copy of green card as exhibits D7 (a) (b) and (c) respectively.

11. The Defendant's second witness was John Ngari who was a witness during the hearing of the appeal before the DC. He stated that he grew up in the same village with the Defendant's husband and that they belonged to the same clan. He supported the Defendant's ownership of the suit property and stated that the land belonged to her late husband. He wondered how a parcel of land with a pending case before the LAO could be sold. He confirmed that upon the appeal to the Minister being heard by the DC, the suit property was restored to the Defendant.

12. The parties in this suit do not appear to have framed the issues for determination. If they did, the court was unable to trace the same in the court file. The court will, therefore, proceed to frame the main issues for determination herein. Although the Plaintiff has complained over various irregularities and illegalities, the main issues for determination are as follows:

- a. Whether the decision of the DC, Mbeere District in Minister's Appeal case No. 146 of 1995 was *ultra vires*, illegal, void and liable to be quashed or set aside.
- b. Whether the cancellation of the name of MainaMugwanja as proprietor of *Title No. Mbeere/Mbita/2451* and subsequent registration of the Defendant as proprietor thereof was illegal, null and void.
- c. Whether the Defendant's registration as proprietor of the suit property should be cancelled.
- d. Whether an order of injunction should issue restraining the Defendant from entering, selling, leasing or interfering with the Plaintiff's user and occupation of the suit property.
- e. What are the appropriate orders or reliefs the court should make in the circumstances?
- f. Who shall bear the costs of the suit?

13. In adjudicating over the said issues, the court has borne in mind the various mechanisms of dispute resolution which are established by the Land Adjudication Act and other relevant laws. The court shall endeavor to give effect to the legislative intent as expressed in the Land Adjudication Act.

14. The first issue relates to the challenge of the decision for the DC in respect of the Appeal to the Minister. The basis of the Plaintiff's grievance is that his late father who was the registered proprietor of the suit property at the material time was not given a hearing during the appeal. The evidence on record shows that he was not a party thereto and he did not participate in the proceedings. The court is satisfied that the late MainaMugwanja was deprived of his interest in the suit property without being accorded an opportunity of being heard. He was entitled to be heard or at least to be accorded notice of hearing of the appeal. Such a right should be accorded to a proprietor even where his initial registration was considered irregular. The court therefore finds that there was a violation of the rules of natural justice hence the resultant decision was illegal and liable to be set aside or quashed.

15. There is one aspect of this case which is not clear altogether. If the Plaintiff or his late father were aggrieved by the violation of the rules of natural justice, why wasn't the application for judicial review pursued to its logical conclusion even after the death of MainaMugwanja? The Plaintiff merely testified that leave was granted to commence judicial review proceedings and that a stay was granted. No good reason was given as to why an order of *certiorari* was not pursued in those proceedings in order to grant the decision maker an opportunity to relook at the appeal in full compliance with the rules of natural justice. One wonders whether the filing of the instant suit was a scheme to avoid such an eventuality.

16. The second issue relates to the legality of the deregistration of the Plaintiff's father as proprietor and registration of the Defendant as the new proprietor. It was contended by the Plaintiff that such actions were totally illegal because there was an order of stay granted by the Judicial review court and that his father was deceased by then. I have perused the evidence tendered by and on behalf of the Plaintiff and noted that neither the pleadings nor the relevant orders in the judicial review matter were tendered in evidence at the hearing hereof. There is also no evidence to demonstrate that the stay order was ever served upon the Defendant or the Chief Land Registrar. It is abundantly clear that the Defendant was registered as proprietor on the basis of the decision in the Minister's Appeal. So unless and until such decision is set aside or annulled, actions taken pursuant thereto cannot be termed illegal.

17. The court has perused the evidence on record and noted that the decision in the Minister's appeal was rendered on 22nd September 2006 during the lifetime of the late MainaMugwanja. According to the death certificate produced in court, he died on 24th May 2007. The Chief Land Registrar directed the removal of the restriction on 29th June 2007 and the same was removed on 3rd July 2007 in consequence of which the Defendant was entered in the register as proprietor. This was not an *inter vivos* transaction. It should be borne in mind that the restriction in the register was entered by the Chief Land Registrar on 14th January 2000 (the same day the Plaintiff's father was registered as proprietor) to restrict in dealings with the suit property pending finalization of the appeal to the Minister. The Chief Land Registrar was therefore at liberty to deal as appropriate under section 28 of the Land Adjudication Act upon the appeal to the Minister being finalized unless served with a court order to the contrary. As stated above, there is no evidence of service of such order.

18. The third issue is whether or not the Defendant's registration as proprietor of the suit property should be cancelled at this stage. The court is of the view that it would follow that the Defendant's registration should be cancelled since it was the product of the impugned decision. There are no two ways about this issue.

19. The fourth issue is whether a permanent injunction should be issued against the Defendant in terms sought in the plaint. What is contemplated here is, of course, a permanent prohibitory injunction on the supposition that the court shall conclusively resolve the substantive ownership dispute between the parties. The decision of the Minister in an appeal under the Land Adjudication Act is intended to be final unless otherwise challenged by way of judicial review or other mode prescribed by law. The Plaintiff did not follow any such mode but instead decided to file a fresh suit. The effect of this was to take away the decision making power from the Minister and bring it to a civil court. This court is therefore minded to remit the dispute back to the Minister for a conclusive resolution in accordance with **section 29 of the Land Adjudication Act**. In the event, it would be premature to issue the orders of injunction sought.

20. The fifth issue relates to the appropriate orders to be made in the circumstances of this case. The Plaintiff in this suit was aggrieved essentially by the decision making process by the District Commissioner, Mbeere District. A judicial review application was filed for appropriate relief but was abandoned upon the demise of the Applicant. His personal representative who is the Plaintiff herein, chose to file a civil suit for setting aside the said decision together with all consequential orders. If the orders sought in the plaint were to be granted as they are, they would leave the Defendant without a legal remedy at all as opposed to judicial review proceedings. The court is therefore inclined to remit this dispute back to the Minister for a fresh consideration of the appeal with the participation of the Plaintiff as an interested party.

21. In conclusion, the findings of the court on the issues for determination may be summarized as follows:

- a. The decision of the DC, Mbeere District in the Minister's Appeal No. 146 of 1995 was made in violation of the rules of natural justice hence liable to be quashed or set aside.
- b. The cancellation of the name of MainaMugwanja as proprietor of *Title No. Mbeere/Mbita/2451* and the subsequent registration of the Defendant as proprietor thereof was not illegal, null and void.
- c. The Defendant's registration as proprietor though not illegal should be cancelled in view of the court's finding on the first issue.
- d. It would be premature to issue an order of permanent injunction to restrain the Defendant from entering, selling, leasing or interfering with the Plaintiff's user and occupation.

22. Taking into account the circumstances of this case and the provisions of **Article 159 (2) (d) of the Constitution of Kenya 2010, section 19 of the ELC Act, 2012** and the overriding objective of the court to dispense justice in a timely, expeditious, proportionate and cost effective manner, the court grants the following reliefs:

- a. A declaration be and is hereby issued that the decision of the DC Mbeere District in the Minister's Appeal case No.146 of 1995 was made in violation of the rules of natural justice hence the same is quashed.
- b. The dispute is remitted back to the Minister to consider the Appeal afresh with the participation of the Plaintiff, as the administrator of the estate of the late Maina Mugwanja and make a decision thereon in accordance with the provisions of section 29 of the Land Adjudication Act.
- c. The registration of the Defendant as proprietor of *Title No. Mbeere/Mbita/2451* is hereby cancelled in view of the above orders.
- d. Each party shall bear its own costs.

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

In the presence of Mr Kamunya holding brief for Ms Wairimu for Plaintiff and the Defendant in person.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

27.09.17