



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 347 OF 2017

DAVID MUNGAI GITAU1ST PLAINTIFF

MICHAEL GITAU NGANGA.....2ND PLAINTIFF

VS

JOHN MURIGI KIMANI.....DEFENDANT

JUDGMENT

1. The Plaintiffs moved this Court by their plaint filed on 1/9/15 seeking Judgement against the Defendant in the following terms; -

a) A declaration that any acts done pursuant to the decree extracted on 13th July 2001 in Murang'a Chief Magistrates Court Land Dispute Tribunal (L.D.T) Case No. 25 of 2001 in which the decree was later declared null and void and struck off the record are null and void in that there was no decree capable of being enforced or executed.

b) A declaration that the 1st Plaintiff DAVID MUNGAI GITAU is still the bona fide registered owner of LOC.6/GIATHAINI/1462 while the 2nd Plaintiff MICHAEL GITAU NGANGA is still the bona fide registered owner of LOC.6/GIATHAINI/1291.

c) The Land Registrar, Murang'a County be ordered to delete entry NO. 5 in the Lands register in respect of LOC.6/GIATHAINI/1462 and restore entries Nos. 3 and 4 and delete entries No. 5 and 6 in respect of LOC 6/GIATHAINI/1462 and restore entries Nos. 3.

d) A declaration that any title issued to the Defendant in respect of LOC.6/GIATHAINI/1461 and LOC.6/GIATHAINI/1291 pursuant to the impugned decree is null and void and the same to be deemed as dully cancelled.

e) Costs of this suit and interest.

f) Any other relief this Honourable Court may deem fit to grant.

2. The basis of the Plaintiffs' suit is that LR Nos LOC.6/GIATHAINI/1462 & 1291 are registered in the names of 1st and 2nd Plaintiff respectively and therefore they are legitimate owners.

3. That on or around 7/12/00 the Plaintiffs together with the Defendant were sued by one Lydia Njoki Murigi in L.D.T case No. 272/2000. The said Lydia Njoki Murigi who happened to be the daughter of the Defendant herein sought to have the land already sold to the Plaintiffs by the Defendant to revert to the

Defendant and herself on the grounds that the Plaintiffs had defrauded her father, the Defendant herein. The tribunal ruled that the two parcels of land be reverted to the original owner, the Defendant and her daughter Lydia Njoki Murigi Jointly. Aggrieved by the decision of the tribunal aforesaid, the Plaintiffs filed an appeal at the Provincial Land Disputes Appeal Committee at Nyeri which upheld the decision of the Murang'a District Tribunal. Further aggrieved by the ruling the Plaintiffs filed an appeal No. HCCC Civil Appeal No. 80 of 2002 in Nyeri where the High Court set aside the ruling of the Provincial Disputes Appeals Committee made on 10/4/02 and the award made by Land Disputes Tribunal in Murang'a Land Disputes No 272 of 2000.

4. Invariably whilst the Plaintiffs were fighting to annul the awards in Nyeri, the Defendant extracted a decree from the award of the Land Dispute Tribunal -Murang'a case no. 25 of 2001 when Judgment had not been entered. The decree dated 13/7/2001 was declared null and void on 26/7/2007 by the learned Resident Magistrate R.B.N Maloba who held as;

“At no time was the award entered as a judgement of this Honourable Court. I note that there is a decree given under the seal of this Court on 13th July, 2001. This is a decree that must have been granted under a mistaken belief that the award had been entered and since no award was entered, the decree so granted is null and void and has no force of law. It is hereby struck off the record forthwith”.

5. That the Plaintiffs invoked section 91 of Civil Procedure Act seeking restitution of the two parcels of the land but the application brought by Notice of Motion dated 24/7/15 was dismissed on the ground that the purported decree dated 13/7/2001 was a nullity and therefore a claim of restitution could not be founded on the said impugned decree.

6. The Defendant was served with the summons to enter appearance and plead on the 3/9/15 but failed to so enter appearance nor file a defence forcing the Plaintiffs to file a request for judgement on 7/10/15. The Request for judgement was entered on 7/10/2015, however, on 30/3/2016 the Advocates for the parties agreed by consent to set aside the judgement entered in favour of the Plaintiffs thus paving way for the Defendant to file his defence.

7. In his defence the Defendant denied the Plaintiffs claims and argued that it is the Plaintiffs who fraudulently transferred the ownership of the two parcels to themselves.

8. On application by the Plaintiffs this case which had earlier on been filed at the CMCC Murang'a and was transferred to the ELC Court at Kerugoya for hearing and determination on 30/9/16.

9. When the matter came up for pretrial conference on 10/5/17 the Defendant's Advocates as well as the Defendant were absent in Court despite being served as shown by the affidavit of service dated 9/5/17 which is on record. On the 11/7/17 only the Plaintiffs and their Advocate were present and there was no appearance by the Defendant and his Advocate and no explanation for their absence. See Affidavit of service filed 11/7/17. On application by Mr. Mwaniki, learned counsel for the Plaintiffs the case proceeded to trial, undefended.

10. At the trial the 1st Plaintiff gave evidence on his behalf and that of his Co-Plaintiff, who also happens to be his father. He explained that they were registered owners of the LR Nos LOC.6/GIATHAINI/1462 and LOC.6/GIATHAINI/1291 respectively having been so registered on the 28/6/99 and 24/7/97 respectively. That the awards of the LDT Murang'a and Provincial Land Disputes Tribunal which had purported to nullify their ownership were set aside by the High Court in Nyeri vide its Ruling issued on 21/7/2001. That the entries on the titles concerning their names and substituting with that of the Defendant were based on an illegal decree as held by the learned resident Magistrate on 26/7/2007. That to date there are no orders that support the continued registration of the Defendant's name on the title and the same should be cancelled by the Court and be replaced with the Plaintiffs names as earlier registered.

11. It is clear from the Plaintiffs unchallenged evidence that they are the registered proprietors of the suit

land. There is no evidence to support the continued subsistence of the Defendant's name on the title. There is no evidence that the Plaintiffs obtained the titles through fraud or other illegal means. Although the Defendant pleaded in his unprosecuted defence that the Plaintiffs fraudulently transferred the ownership of the pieces of land from the Defendant to themselves, no such particulars of fraud were pleaded and of course no evidence having been led by the Defendant, those averments remain mere allegations.

12. The Plaintiffs having proved that they are the registered owners of the suit properties by virtue of being so registered I declare them as such in the absence of any evidence to the contrary.

13. As regards the declaration that any acts done pursuant to the decree extracted on 13th July 2001 in Murang'a Chief Magistrates Court in L.D.T Case No. 25 of 2001 in which the decree was later declared null and void and struck off the record are null and void in that there was no decree capable of being enforced or executed. I see no reason to disturb the orders made by the learned Judge, Lady Justice Okwengu J on the 21/7/2001 in that regard. There is no evidence to show that the aforesaid order has been appealed, set aside or varied.

14. Ultimately therefore I made the final orders as follows; -

a) A declaration that the 1st Plaintiff DAVID MUNGAI GITAU is still the bona fide registered owner of LOC.6/GIATHAINI/1462 while the 2nd Plaintiff MICHAEL GITAU NGANGA is still the bona fide registered owner of LOC.6/GIATHAINI/1291.

b) The Land Registrar, Murang'a County be and is hereby ordered to delete entry No. 5 in the Lands register in respect of LOC.6/GIATHAINI/1462 and restore entries Nos. 3 and 4 and delete entries No. 6 and 5 in respect of LOC 6/GIATHAINI/1291 and restore entries Nos. 3 and 4.

c) A declaration that any title issued to the Defendant in respect of LOC.6/GIATHAINI/1461 and LOC.6/GIATHAINI/1291 pursuant to the impugned decree is null and void and the same to be deemed as dully cancelled.

d) The Plaintiffs shall have the costs of the suit.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 5TH DAY OF OCTOBER 2017

J.G. KEMEI

JUDGE