



REPUBLIC OF KENYA

IN THE Environment And Land Court At Chuka

CHUKA ELC CASE NO 218 OF 2017

FRANKLINE NJAGI ZAKAYO.....PLAINTIFF

VERSUS

KITHINJI ZAKAYO.....DEFENDANT

JUDGMENT

1. In his plaint, the plaintiff prays for judgment against the defendant for:

a. A declaration that there exists an innocent mistake on the face of title numbers MUTHAMBI/GATUA/1601 and 1602 and the Land Registrar Meru South to be ordered to rectify the register of land parcel number MUTHAMBI/GATUA/1601 to read in the name of FRANKLIN NJAGI ZAKAYO and land parcel number MUTHAMBI/GATUA/1602 to read in the name of KITHINJI ZAKAYO.

b. Costs of the suit.

2. PW1, the plaintiff told the court that the defendant was his brother and that both of them were sons of the late M'Nkiria M'Ichoro. He asked the court to adopt his witness statement dated 1st March, 2017 as his evidence in this suit.

3. PW1 testified that land parcels MUTHAMBI/1601 and MUTHAMBI/1602 constituted family which was bequeathed to both of them by their father. They were registered owners of the parcels of land on 6th November, 1997.

4. PW1 told the court that the intention of his father was for him to occupy parcel No. 1601 and his brother to occupy parcel No.1602. However, an innocent mistake happened and during registration the numbers were swapped. He told the court that he had extensively developed the parcel of land he occupied, inter alia, by constructing gabions, planting macadamia trees, gravellier trees, bananas, tea bushes and napier grass. He further told the court that the defendant had failed to conduct proper agricultural husbandry, which neglect, had led to deterioration in productivity.

5. PW1, told the court that since the distribution of their father's property they had lived amicably with no animosity or bad blood until 2016 when he realized that the portion of land which was allocated to him and where he had settled his family and made extensive developments was registered in the name of the defendant, his brother. He said that intervention by his eldest brother, Alexander Nyaga, who was named caretaker of the family, by his deceased father bore no fruits. He said that intervention by the area chief also bore no fruits. Also attempts by the family to have the two brothers facilitate the registration of the portions they occupied, to the rightful owners were rebuffed by the defendant. PW1 testified that instead

of his brother facilitating the correction of the innocent mistake that spawned this dispute, the defendant contrived outrageous demands.

6. The evidence of PW2, PW3 and PW4 was consistent in support of the evidence that PW1 had given. PW2 was the eldest brother of PW1 and the defendant. PW3 was PW1's wife. She testified that parcel number 1601 contained her matrimonial home. She said that on the land there was a permanent 4 rooms residential house which had water and electricity and also had a kitchen. She told the court that on the land were extensive developments including coffee trees, tea bushes, macadamia trees, other trees such as gravelia, bananas and napier grass. She testified that she had dairy cows and a cowshed. She was unequivocal that the defendant had refused to facilitate the correction of the innocent mistake on the title documents because he had neglected his portion of the land allocated to him by his deceased father and was therefore envious of her better developed land and wished to unjustly benefit from her sweat. PW4, who said that he was the parties' uncle supported PW1's evidence.

7. DW1 the defendant told the court that he lived on parcel NO. 1601 where he had a stone house and had tea and coffee on the land. The next moment he told the court that there was no development on parcel No. 1601. Then immediately thereafter he changed his story and said that his reluctance to have the mistakes on the title documents rectified was because he had agreed with his brother that he would give him 0.4 acres of land before he facilitated the required correction. He said that his brother had reneged on this agreement. He said that the moment PW1 agreed to do so, he would sign the necessary transfer documents.

8. During cross-examination DW1 admitted that his house was on parcel No. 1602.

9. The dispute in this case is simple. There is no dispute that land parcel numbers MUTHAMBI/GATUA/1601 and 1602 were part of family land bequeathed to the parties in this suit by their deceased father. I frame the issues for determination as:

1. Were the parties innocently registered as owners of portions of land which they did not occupy.
2. If so, should the court order rectification of the register so that parcel No. MUTHAMBI/GATUA/1601 is registered in the name of FRANKLIN NJAGI ZAKAYO and land parcel No. MUTHAMBI/GATUA/1602 is registered in the name of KITHINJI ZAKAYO.

10. I have carefully considered the pleadings and the oral evidence proffered by the parties. PW1 and his witnesses gave consistent and credible evidence. On the other hand DW1, the defendant gave evidence which was veritably garbled. One minute he said that he occupied the parcel of land occupied by the plaintiff and that he owned the developments therein. The next moment he changed his mind and told the court that he lived on parcel No. 1602. Then he said that he was willing to facilitate corrections of the innocent mistake which spawned this suit only if the plaintiff gave him 0.4 acres of land. The sages opined that if one chose to be a liar, one must develop a very good memory. The defendant has not developed a good memory that could assist him to develop credible lies. He is a blatant liar who wants to extort land from his brother, the plaintiff.

11. I find that the prayers sought by the plaintiff are merited. However, I am inclined not to grant costs to the plaintiff who is the defendant's brother with the hope that this will assist to bring about harmonious co-existence in the family.

12. Judgment is entered for the plaintiff against the defendant in the following terms:

1. It is declared that there exists innocent mistakes on title numbers MUTHAMBI/GATUA/1601 and MUTHAMBI/GATUA/1602 and the same should be rectified.
2. The Land Registrar, Meru South (Tharaka Nithi County) is ordered to rectify the apparent mistakes so that FRANKLIN NJAGI ZAKAYO is registered as proprietor of Land Parcel No. MUTHAMBI/GATUA/1601 and KITHINJI ZAKAYO is registered as proprietor of Land Parcel

MUTHAMBI/GATUA/1602.

3. It is so ordered.

Delivered in open court at Chuka this **13th day of November, 2017** in the presence of:

CA: Ndegwa

Morara h/b Kijaru for the plaintiff

Githinji Zakayo - defendant

P.M. NJORGE

JUDGE