



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO. 903 OF 2013**

**LEAH NJOKI THITU .....PLAINTIFF**

**VERSUS**

**JAMES KARANJA KAGECHE.....DEFENDANTS**

**JUDGMENT**

At all material times the plaintiff was registered as the owner of all that parcel of land known as **LR No. Karai/Karai/19** (hereinafter referred to as “Plot No.19”). In the year 1973, the plaintiff sold to the defendant a portion of that land measuring two (2) acres. The defendant took possession of the land that was sold to him before a formal survey and subdivision was done to excise his two (2) acres from Plot No. 19. The size of the portion of Plot No. 19 that defendant took possession of was based on an estimate that was done by the area Agricultural Officer in the year 1973. The plaintiff has contended that sometimes in the year 1979, the defendant proceeded to survey and sub-divide Plot No. 19 fraudulently without the knowledge of the plaintiff and awarded himself a portion of Plot No. 19 measuring 2.2971 acres instead of the two (2) acres that was sold to him.

As a result of this development, the plaintiff lodged a claim against the defendant at Kikuyu Land Disputes Tribunal (hereinafter “the tribunal”) and sought an order that a proper survey be done to determine the correct boundary of the plaintiff’s land and the defendant’s land taking into account the fact that the plaintiff had sold to the defendant only two (2) acres of Plot No.19. The tribunal made an award on 10<sup>th</sup> February 2011 in favour of the plaintiff. The tribunal made an order that the defendant’s parcel of land be surveyed by a Government Surveyor to determine its size and correct boundaries.

The defendant was dissatisfied with the decision of the tribunal and moved to the High Court with an application for judicial review to quash the same. This was in High Court at Nairobi Judicial Review Application No. 28 of 2011. The defendant’s application for judicial review was dismissed with costs on 27<sup>th</sup> September 2012. Following the dismissal of the defendant’s judicial review application, the order of the tribunal was implemented. A District Surveyor proceeded to the portion of land that the defendant had apportioned to himself from Plot No. 19 namely, LR No. Karai/Karai/369 (hereinafter “the suit property”) on 13<sup>th</sup> March 2013 and resurveyed the same for the purposes of determining its correct measurement. The suit property was found to measure 0.93 hectares (2. 2971 acres) which is 0.2971 acres more than the land that the plaintiff had sold to the defendant.

The plaintiff brought this suit on 24<sup>th</sup> July 2013 soon after the resurvey of the suit property seeking;

- i. A declaration that a portion of LR No. Karai/Karai/369 (“the suit property”) measuring 0.2971 acres belongs to the plaintiff.

ii. A Permanent injunction restraining the defendants by themselves, their agents, servants from practising horticulture, occupying, erecting structures on or otherwise howsoever interfering with the plaintiff's ownership and or interest in the said portion of the suit property measuring 0.2971 acres.

iii. Costs of the suit.

vi. Any other relief deemed appropriate by the court to grant.

v. Mesne Profits.

In her plaint, the plaintiff narrated the facts giving rise to her claim which I have set out herein above in detail. The defendant was served with summons to enter appearance and entered appearance in person on 14<sup>th</sup> August 2013 and again on 23<sup>rd</sup> August 2013 through the firm of M.A. Egala & Company Advocates. The defendant did not however file a statement of defence. Following a request that was made by the plaintiff, interlocutory judgment was entered against the defendant on 23<sup>rd</sup> October 2013 in default of defence.

The suit came up for formal proof on 6<sup>th</sup> October 2015 when the plaintiff gave evidence and closed her case. In her testimony, the plaintiff reiterated the contents of the plaint. In summary, the plaintiff told the court that she sold to the defendant a portion of her land measuring one (1) acre and that the defendant was using more land than she had sold to him. She stated that the defendant had added himself one (1) more acre on top of the one (1) acre that she had sold to him. The plaintiff stated that the defendant refused to surrender the additional land that he acquired irregularly even after being asked to do so. She urged the court to order the defendant to surrender the extra land that he acquired from the original parcel of land that belonged to her.

After the evidence of the plaintiff, the plaintiff's advocate made closing submissions in writing. I have considered the plaintiff's claim and the evidence that was tendered in proof thereof. The plaintiff's claim against the defendant is based on fraud and trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause.

What I need to determine therefore is whether the plaintiff has proved that the defendant acquired a portion of the parcel of land formerly known as Plot No. 19 measuring 0.2971 acres fraudulently and proceeded to enter and take possession thereof without any justifiable cause. The plaintiff has demonstrated that at all material times she was one of the registered owners of Plot No. 19. See P.Exh.1. The plaintiff led evidence that she sold a portion of Plot No. 19 measuring 2 acres to the defendant. The plaintiff produced in evidence the proceedings and decision of the Kikuyu Land Disputes Tribunal and the decree that was issued by the Principal Magistrate's Court at Kikuyu in Land Case No. 4 of 2011 in which it was confirmed that indeed the plaintiff sold to the defendant land measuring 2 acres only. See P. Exh. 3 and P.Exh.5. The said decision of the tribunal was upheld in the High Court which dismissed the defendant's application that sought to review the same. See P.Exh.4. The plaintiff led evidence and demonstrated through the decision of the tribunal and the decree referred to above that during the survey that gave rise to the suit property that was registered in the name of the defendant, the defendant acquired more land than was sold to him. The plaintiff demonstrated that instead of the 2 acres, the defendant acquired 2.2971 acres. See P.Exh.7. The plaintiff proved that the defendant acquired land measuring 0.2971 acres in excess of the 2 acres that was sold to him by the plaintiff which excess land is comprised in the suit property.

This suit was not defended by the defendant. The plaintiff's testimony and evidence were not controverted by the defendant. The fact that the plaintiff owned Plot No. 19 and sold a portion thereof measuring 2 acres was not contested. The fact that the plaintiff acquired land measuring 0.2971 acres in excess of the land that was sold to him by the plaintiff was also not contested. The plaintiff's testimony that the said excess land is comprised in the suit property and that the defendant is using the same for agricultural purposes without his consent or authority was also not challenged. The plaintiff having proved that the portion of the suit property measuring 0.2971 acres belongs to her and that the same was

not supposed to be transferred to the defendant, the onus was upon the defendant to justify his ownership, occupation and continued use of the said parcel of land. In the absence of any evidence from the defendant, the only conclusion this court can make is that the defendant acquired the said portion of land fraudulently and that he has no justifiable cause for entering, occupying and using the same.

Under section 24 of the Land Registration Act, 2012, the registration of the defendant as the proprietor of the suit property vested upon him absolute ownership thereof together with all rights and privileges associated with such ownership. Section 26(1) of the Land Registration Act, 2012 on the other hand provides that a certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer by a proprietor may be challenged on the grounds of fraud or misrepresentation or on account of illegality in the manner in which it was acquired. Section 80(1) of the Land Registration Act gives the court power to rectify the register of land by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. See also section 143(1) of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed).

For the foregoing reasons, I am satisfied that the plaintiff has proved her claim against the defendant and that she is entitled to the prayers sought in the plaint save for mesne profits which was not proved. I therefore enter judgment for the plaintiff against the defendant on the following terms;

1. I declare that the plaintiff is the lawful owner of a portion measuring 0.2971 acres of all that parcel of land known as LR. No. Karai/Karai/369 registered in the name of the plaintiff.
2. LR. No. Karai/Karai/369 shall be surveyed by the Kiambu County Surveyor at the cost of the plaintiff within sixty (60) days from the date hereof and a portion thereof measuring 0.2971 acres which is adjacent to the land held by the plaintiff shall be excised and registered in the name of the plaintiff who shall meet all the expenses involved.
3. Either party shall be at liberty to apply with regard to the implementation of the order granted in paragraph 2 above.
4. After the registration of the said parcel of land measuring 0.2971 acres in the name of the plaintiff as aforesaid, there shall be a permanent injunction restraining the defendant, his agents and/or servants from entering, using, occupying, erecting structures on or otherwise howsoever interfering with the plaintiff's rights or interest in the said parcel of land.
5. Each party shall bear its own costs of the suit.

**Delivered and Dated at Nairobi this 4<sup>th</sup> day of November, 2016.**

**S.OKONG'O**

**JUDGE**

**In the presence of**

**N/A**

**for the Plaintiff**

**N/A**

**for the Defendants**

**Kajuju**

**Court Assistant**