



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 372 OF 2017

(Formerly Nairobi ELC No. 963 of 2006)

MARITUAI KARINGITHE(Suing as the legal representative

of the estate of Karkise Ole Mosiro).....1ST PLAINTIFF

BOMAN MOSIRO.....2ND PLAINTIFF

ELIJAH MOSIRO.....3RD PLAINTIFF

VERSUS

SIMON NDUNGU SUPEYO.....1ST DEFENDANT

JOSEPH CRESPIERS SUPEYO2ND DEFENDANT

JUDGEMENT

By a Plaint dated the 11th September, 2006, the Plaintiffs pray that Judgment be entered as against the Defendant for:

- a) A declaration that the Plaintiffs are lawful occupiers of LR No. Ngong/ Ngong/ 845
- b) A permanent prohibitory injunction to restrain the Defendant, its servants, agents, employees and/or any other persons exercising delegated authority from evicting, interfering with the peaceful and quiet possession and/or otherwise dealing in any manner with LR No. Ngong/ Ngong/ 845.
- c) Costs of the suit

The 2nd Defendant filed his Defence and Counterclaim dated the 30th October, 2007 where he denied the allegations in the Plaint except for the description of the parties. He contended that the Plaintiff's occupation and erection of residential structure on Ngong/ Ngong/ 845 hereinafter referred to as the 'suit land" amounts to trespass. He confirmed that the suit land is registered in the names of SIMON NDUNGU SUPEYO and TUMPES OLE SUPEYO who are the absolute and indefeasible owners and deny the allegations of fraud contained in the Plaint. Further, that the family of the late Karkise had full knowledge of the Defendants' registration. He denies obtaining the title to the suit land fraudulently and explains that the panel of elders concluded that suit land was to be subdivided into 50 and 30 acres with 50 acres to be given to Plaintiffs' family while 30 acres to be retained by the Defendants' family respectively. Further, the award by the panel of elders was null and void as they lacked jurisdiction to determine issues of ownership of land registered under the Registered Land Act and theirs being first registration could not be amended nor cancelled by the said elders. He insists there was no warning to the Defendants against interfering with suit land. He contends that

suit land was allocated to the 1st Defendant and the late Tumpes Ole Supeyo after adjudication and the same was registered in their joint names after publication and closure of adjudication register. He sought for the following orders in the counterclaim:

1. An order directing the Plaintiffs and their respective families, relatives or agents and any other person claiming interest under them to vacate suit land LR No. Ngong/ Ngong/ 845.
2. In the alternative to (a) above, the Plaintiffs and their respective families, relatives or agents and anyone claiming interest under them be evicted from LR. Ngong/ Ngong/ 845.
3. Costs of this suit and interest.
4. Such further orders or relief which the Honourable Court may deem fit to grant.

The Plaintiffs filed their reply to Defence where they denied the averments therein and reiterated their claim as per the Plaint.

Evidence of the Plaintiffs

PW1 Marituai Karingithe stated in Court that she was married during the Mau Mau uprising to one Karkise Mosiro and entered the suit land where she bore all her children. It was her testimony that her husband had been arrested and jailed during the period of demarcation but could not recall the parcel number. She confirmed that they been allocated the suit land where her matrimonial home is situated. She claimed when her husband was released from jail, the family of Karango Supeyo claimed their land and that was the beginning of the dispute herein. She insisted that they have resided on the suit land todate. It was her testimony that the Court directed the Defendants not to interfere with their land. Further, that she resided on the suit land with her family including her co wife's children. In cross examination she could not recall their parcel number, nor the earlier case filed. She confirmed that the suit land was big and they resided in one homestead as a family. Further, that the homestead was in the middle of the suit land and one portion was un utilized. She denied knowledge of her parcel number including her neighbour's land and the Criminal Case in Kibera Law Courts. It was her testimony that her sons had documents confirming suit land belonged to them but did not know if a portion had been sold to third parties.

Evidence of the Defendants

DW1 David Ndegwa Ndungo confirmed that he used to be the District Surveyor Kajiado from 1980 upto 2014 when he retired. He explained that in June 2012 there was an Order of Court requesting the Surveyor Kajiado and Land Registrar, Kajiado North to survey land parcel number Ngong/ Ngong/ 845. He confirmed that after the complainant had paid the requisite fees, they visited the suit land together with the District Land Registrar, Local Assistant Chief in the presence of Advocates for the Plaintiffs' and Defendants respectively. He explained that by using a Mutation Number 347- 382 dated 23rd February, 2010 he surveyed the suit land and put beacons. Further, he discovered that Ngong/ Ngong/ 846 had encroached on Ngong/ Ngong/ 845 wholly. He produced his report as Defense Exhibit No. '1'. He confirmed referring to Map for Ngong/ Ngong/ Sheet No. 20 / South West which he produced as Defense Exhibit '2'. It was his testimony that suit land was subdivided into two vide Mutation Serial No. 276730 dated 10th April, 2008 with the resultant numbers being Ngong/ Ngong/ 41726 measuring 16.77 hectares and Ngong/ Ngong/ 41727 measuring 16.58 hectares respectively. He presented the said Mutation as Defense Exhibit No. '3'. He further produced Mutation dated 28th February, 1991 for Ngong/ Ngong/ 8390 which showed the acreage as 44.64 hectares as exhibit 4. He explained that the Survey Office had prepared a report, which was sent to the High Court in Nairobi, which he produced as exhibit No. 6. He was categorical that parcel number ngong/ngong 845 and ngong/ngong/846 were distinct.

DW2 Joseph Supeyo Tumpes in his testimony confirmed owning parcel Ngong/ Ngong/ 845, which neighbours Ngong/ Ngong/ 846. Further, that Ngong/ Ngong/ 846 belonged to the Plaintiffs'. He provided a history of Ngong/ Ngong/ 845 and stated that it was registered in the name of Simon Ole Supeyo and Karugu Ole Supeyo who were brothers. Further, that Karkise Ole Mosiro moved into Ngong/ Ngong/ 845, forcefully built thereon and left his land Ngong/ Ngong/ 846. It was his testimony that in 2012 the Surveyor including the Land Registrar, local Chief and Plaintiffs' Advocate visited the disputed property. The Surveyor noted the beacons had been uprooted and they used GPS to determine their location. He insists Plaintiffs have refused to move from the suit land. He contended that after the Survey exercise where it confirmed Ngong/ Ngong/ 845 belonged to them, three members of the Plaintiffs' family were arrested and charged in a criminal case for including Ngong/ Ngong/ 20075 to be part of Ngong/ Ngong/ 845 after which it was subdivided into smaller plots which resulted into a much bigger acreage.

DW3 RUFUS KARIMA KALAMA who was previously the Land Registrar Kajiado North confirmed that in June 2012 he conducted a site visit to establish existence of Ngong/ Ngong/ 845 and Ngong/ Ngong/ 846 respectively. He explained that the genesis of their site visit was because the Defendants had complained of an overlap. It was his testimony that he went to the site together with District Surveyor D N Ndungo assisted by Everlyne M. Mideche and Simon Wainaina. He further testified that they found the Plaintiffs' had completely subdivided and disposed of their land after which they proceeded to create more land on the Registry Index Map (RIM) and overlapped with suit land Ngong/Ngong/845. Further, that the new plots were superimposed on the Defendants' land and they were disposing of the superimposed plots to unsuspecting buyers who were given titles but shown the Defendants' land. He confirmed preparing a report dated the 29th June, 2012 and relied on the Surveyor's findings.

DW4 Francis Gitonga who was a Police Officer based at Ongata Rongai Police Station testified that he investigated a criminal case in respect to the suit land Ngong/Ngong/845. He explained that he proceeded to investigate mutation for Ngong/ Ngong/ 20075, which was a resultant subdivision of Ngong/ Ngong/ 846. Further, that this was the mutation that gave rise to numerous subdivisions hence encroaching on the Defendants' land. Upon investigation, it was discovered that the said Mutation was signed by Nasinkoi Ene Nasieku and not Lagina Ole Mosiro and Maritual Karingithe as indicated. Further, that the alleged signature of the surveyor who purportedly prepared the Mutation Form was forged. It was his testimony that after the investigations Nasinkoi Ene Nasieku, Elijah Mosiro and Francis Bomen Mosiro were charged at Kibera Court vide file No. 366 of 2014. He produced his report as an exhibit and stated that Simon Ndungu Supeyo passed away after testifying in the said case. He contended that the parcels of land created were as a result of forged mutations.

The Defendants filed their submissions but the Plaintiffs failed to do so.

Analysis and Determination

Upon consideration of the Plaintiff, Defence, Plaintiffs' and Defendants' testimonies', exhibits and submissions, the following are the issues for determination:

- Who are the registered proprietors of land parcel number Ngong/ Ngong/ 845 and Ngong/ Ngong/ 846 and are their titles absolute and indefeasible
- Did the Arbitral Tribunal have jurisdiction to determine issues of land ownership.
- Are the Plaintiffs entitled to orders sought in the Plaintiff.
- Are the Defendants entitled to orders sought in the Counterclaim.

On the issue as to who are the registered proprietors of land parcel number Ngong/ Ngong/ 845 and Ngong/ Ngong/ 846 and are their titles absolute and indefeasible. It is not in dispute that the Plaintiffs family claim ownership of Ngong/ Ngong 846 while the Defendants family claim proprietorship of Ngong/ Ngong 845. Further, that the two parcels neighbor each other. The Plaintiffs have instituted this suit seeking to be declared proprietors of Ngong/ Ngong 845 claiming they have been residing thereon and it is the Defendants who have illegally acquired it. Further, that the Defendants should be permanently restrained from interfering with their land. The Defendants in their Defence, Witness Testimonies and Submissions insist they are the registered proprietors of the suit land Ngong/ Ngong/845 and it is actually the Plaintiffs who have interfered with their occupation and possession of the same. The Plaintiffs further failed to file their submissions while the Defendants' in their submissions relied on the cases of **Florence Nyaboke Machani V Mogere Amosi Ombui & 2 others (2014) eKLR; Okech Ogendo V Radi Chepkurgat Chelugut & 5 Others (2019) eKLR; Gladys Wanjiru Ngach V Teresia Chepsaat & 4 others (2008) eKLR; Muriuki Marigi V Richard Marigi & 2 Others (Nyeri CA No. 189/ 96 unreported); Daniel K. Cherai & 2 Others V Kipkoech Kangongo & Another (2018) eKLR; Solomon Meme Muthamia V Ntaari Kabutura & Land Adjudication Officer Meru (2001) eKLR; Patrick Waweru Mwangi & Another V Housing Finance Co. of Kenya Ltd (2013) eKLR; Hilda Kagure V Moses Leshao HCCC ELC (2012) eKLR; and Daniel Kamau Mugambi V Housing Finance Company of Kenya Ltd (2006) eKLR** to buttress their arguments.

I wish to point out that this is a dispute that has been ongoing from the early 1970s. Parties have been in and out of Court seeking determination of the same. The Plaintiffs called only one witness PW1 who testified and later the Plaintiffs' failed to attend court severally despite being duly served. PW1 in her testimony contended that the Defendants were registered on their land when her husband was in jail. In the parties pleadings and evidence, it emerged that in 1980 there were arbitral proceedings in respect to the

suit land between the Plaintiffs and Defendants' families where the elders directed that the suit land was to be subdivided into two, with the Plaintiffs getting 50 acres while the Defendants retaining 30 acres. These arbitral proceedings were however not adopted by the Court in accordance with the provisions of section 7 of the repealed Land Disputes Tribunal Act. In associating myself with the decision of **Florence Nyaboke Machani V Mogere Amosi Ombui & 2 others (2014) eKLR**, where the Court of Appeal held that a court can set aside an award of a tribunal which has not been adopted, I proceed to set aside the said Award as the proceedings were undertaken when the suit land was already registered in the Defendants' name under the Repealed Registered Land Act. Further, as per the provisions of section 3 of the repealed Land Disputes Tribunal Act, the elders did not have jurisdiction to deal with registered land. Be that as it may, I hold that since the Award was never adopted by the Court, it could not stand on its own, and I will hence declare it null and void at this juncture.

In PW1's testimony, she failed to produce any documents to prove the Plaintiffs' claim over ownership of the suit land Ngong/Ngong/845. She said it was her sons who knew the parcel number and documents in respect to the dispute herein. It was her testimony that she had been residing on the suit land together with her children as well as grandchildren. As for the Defendants' evidence, DW2 provided the root of their title in respect to the suit land and was categorical that the same had been allocated by the Land Demarcation Committee in the 1960's after which the register was opened on 29th October, 1968 with a title deed issued to that effect. Further, the register for Ngong/Ngong/ 846 was also opened on 29th October, 1968. From the Green Card in respect to the suit land it is evident that the same was first registered in the name of SIMEON OLE SUPEYO and KARANU OLE SUPEYO on 29th October, 1968. DW2 explained that after they obtained their title, Karkise Mosiro who was husband to PW1 forcefully entered their land and put up a structure thereon and refused to move despite being directed to do so. DW1 and DW3 who were the Land Surveyor and Land Registrar respectively while implementing an order of the Court issued in 2012, undertook measurements on the disputed site and confirmed that the beacons had been uprooted while the owners of parcel Ngong/ Ngong 846 had fully encroached on suit land. Further that the owners of parcel Ngong/ Ngong 846 had subdivided their land, disposed of the same after which they superimposed on suit land, subdivided it and proceeded to sell to unsuspecting third parties. It is interesting to note that the owners of parcel Ngong/ Ngong 846 are the Plaintiffs herein, even proceeded to change the RIM and forge Mutation to claim the suit land. Further, after disposing of their land, they proceeded to extend the boundary of one of the subdivisions Ngong/ Ngong/ 20075, forged a Mutation and commenced subdividing it, which actions led to the 2nd and 3rd Plaintiffs including one Nasinkoi Ene Nasieku being charged at Kibera Law Courts. I note that the suit land has since been subdivided into Ngong/ Ngong 41726 and Ngong/ Ngong 41727. LR Ngong/ Ngong 41726 has further been subdivided into Ngong/ Ngong 42003; Ngong/ Ngong 42004; Ngong/ Ngong 42005; Ngong/ Ngong 42006; Ngong/ Ngong 42007; Ngong/ Ngong 42008; Ngong/ Ngong 42009; Ngong/ Ngong 42010; Ngong/ Ngong 42011; Ngong/ Ngong 42012; Ngong/ Ngong 42013; Ngong/ Ngong 42014 and Ngong/ Ngong 42015. Some of the aforementioned parcels i.e Ngong/ Ngong 42005; and Ngong/ Ngong 42015 have been further subdivided. The Plaintiffs in their Complaint alleged the Defendants fraudulently procured a title in respect to the suit land when there was already one in existence; failed to disclose to the Land Registrar that the land originally belonged to Karkise Ole Mosiro and failed to inform the late Karkise Mosiro that they obtained title. However based on the evidence before Court, I find that they failed to discharge the burden of proof which was upon them in both their oral and documentary evidence to prove these allegations.

Section 27 and 28 of the repealed Registered Land Act stipulated that the rights of a registered proprietor of land was absolute, indefeasible and only subject to encumbrances noted in the register or overriding interests. Further section 25 and 25 of the Land Registration Act provides that a right of a proprietor cannot be defeated and that the said proprietor shall hold land together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever. It further stipulates that a Certificate of title held by a proprietor is prima facie evidence that the person named is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the same cannot be defeated except on grounds of fraud, misrepresentation, or whether it was acquired illegally or unprocedurally or through a corrupt scheme.

In the case of **Daniel K. Cherai & 2 Others V Kipkoech Kangogo & Another (2018) eKLR** the learned Judge held as follows: '**The provisions of sections 27 and 28 of the Registered Land Act Cap. 300, Laws of Kenya (repealed) stated that the rights of a registered proprietor of land registered under the Act were absolute and indefeasible and were only subject to rights and encumbrances noted on the register or overriding interests which were set out in section 30 of the Act.'**

Further in the case of **Solomon Meme Muthamia V Ntaari Kabutura & Land Adjudication Officer Meru (2001) eKLR** the Learned held that: '**In my view the express provisions of section 143(1) of the Registered Land Act need no further interpretation and the intention of parliament is expressed in ordinary plain words, namely, a first registration of title cannot be cancelled or amended at all.'**

Based on the legal provisions and associating myself with decisions cited above, I proceed to uphold the defendant's title to suit

land with the resultant subdivisions therefrom.

In the current case the Plaintiffs seek for the Defendants' title which they acquired on first registration under the Repealed Registered Land Act to be cancelled but have failed to adduce evidence to confirm they illegally or unlawfully obtained the same. The Plaintiffs seek injunctive orders as against the Defendants claiming they have been on the suit land but based on the evidence of DW1 and DW3, I find their conduct actually infringed on the Defendants rights to property. In associating myself with the case of **Patrick Waweru Mwangi & Another V Housing Finance Co. of Kenya Limited (2013) eKLR**, where the Court held that the Plaintiff therein was not entitled to injunctive which is an equitable remedy as he did not have clean hands, I find that the Plaintiffs' conduct of encroaching on the Defendants' land; superimposing their land on suit land and faking a mutation form demonstrates they do not have clean hands. In the circumstance, I will decline to grant them the injunctive orders sought as they have failed to establish a prima facie case to warrant the said orders.

It is against the foregoing that I find the Plaintiffs have not proved their case on a balance of probability and will proceed to dismiss it with costs. I proceed to enter judgment for the Defendants as per the Counterclaim and make the following final orders:

- 1) An order be and is hereby issued directing the Plaintiffs and their respective families, relatives or agents and any other person claiming interest under them to vacate suit land parcel number Ngong/ Ngong/ 845 and any resultant subdivisions therefrom.
- 2) A 90 days' notice of eviction from the date hereof, be and is hereby issued to the Plaintiffs and their respective families, relatives or agents and anyone claiming interest under them from land parcel number Ngong/ Ngong/ 845 and resultant subdivisions therefrom.
- 3) Costs of this suit is awarded to the Defendants

Dated signed and delivered in open court at Kajiado this 9th December, 2019.

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Saende and Kanyonge for defendants

No appearance for the plaintiff

Court assistant- Mpoye



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