



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 34 OF 1998**

EUNICE MUGURE MUCHORI.....1<sup>ST</sup> PLAINTIFF

IBRAHIM BAIYA MUCHORI.....2<sup>ND</sup> PLAINTIFF

JIM B. MUCHORI.....3<sup>RD</sup> PLAINTIFF

**VERSUS**

PETER MACHARIA.....DEFENDANT

**JUDGMENT**

1. The plaintiffs filed a plaint dated **8/4/1998** which they subsequently amended. On **31/5/2010** they filed a further amended plaint on the same date. In that further amended plaint they seek the following orders against the defendant:-

(a) **A declaration that the registration of parcels No. Kiminini/Kapko Block 2/Wamuini 'B'/169, 744, 743 and 742 was void *ab initio* for being in contravention of a subsisting court order and the same should be quashed.**

(b) **An order be made rectifying the register, so that the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants be deleted and the names of the plaintiffs substituted in their place.**

(c) **Costs.**

(d) **Any other relief that this court may deem fit to grant.**

**The Plaint**

2. The descriptions in the plaint which are not denied in the defence, are as follows: the plaintiffs state that they are the administrators of the late **John Muchori Baiya** who died in **1996**; the 3<sup>rd</sup> plaintiff is the administrator of the estate of the late Ruth Njeri Muchori; the 1<sup>st</sup> defendant is the administrator of the estates of the late Kariuki Macharia Esther Waithira alias Esther Wambui Kariuki, Lucy Wangari Kariuki Frida Wanjiku and Naomi Wanjiru Kariuki.

3. The facts are that whilst John Muchori Baiya and Kariuki Macharia were alive the Saboti Land Disputes Tribunal determined the land dispute between them in favour of Kariuki Macharia which award gave him **9 acres** and was adopted as a judgment of the court in **Kitale PMC Land Case No. 4 of 1994**.

4. However vide **Kitale HC Misc. Appl. 150 of 1997** the said award was quashed. There was a stay order, staying the tribunal

decision pending the determination of the certiorari application but the existence of that order notwithstanding the 1<sup>st</sup> defendant had the land registered in the names of the late Kariuki Macharia, Esther Waithira Alias Esther Wambui Kariuki, Lucy Wangari Kariuki Frida Wanjiku and Naomi Wanjiru Kariuki. The plaintiff pleads that that registration was void *ab initio* and should be cancelled to pave the way for rectification of the register so that the plaintiffs may be registered as proprietors.

### The Defence

5. In a defence dated **26/5/1998** the defendants admitted the contents of **paragraphs 5, 6 and 7** of the original plaint to the effect that the plaintiffs are the administrators of the estate of the late John Muchori Baiya; that the Saboti Land Disputes Tribunal heard and determined a land dispute in favour of Kariuki Macharia awarding him **9 acres** of land in Wamuini Farm which award was adopted in **Kitale PMC Land Case No. 4 of 1994**. They denied **paragraphs 8, 9, 10, 11 and 12**.

6. In an amended defence of **20/2/2001** the defendants specifically denied the suit land ever belonged to John Muchori Baiya who they alleged to have forcefully and illegally entered the land; that the subdivision of the land was done pursuant to resolutions of an annual general meeting of Wamuini Farm and thereafter the beneficiaries of the late Kariuki Macharia's estate obtained titles to their shares and that that subdivision was not in any manner connected to the land disputes tribunal award; the defendants maintained that the titles the defendants hold are valid. They counterclaimed for a declaration that they are the bona fide proprietors of **Kiminini/Kapkoi/Wamuini 'B'/169, 744, 743 and 742** and that the plaintiff's occupation and use of the said parcel is unlawful and they should be evicted forcefully if they do not vacate. They also sought *mesne profits* and costs.

7. The reply to defence filed by plaintiffs on **23/11/2004** denied the contents of defence and counterclaim.

8. On **8/7/2019** this matter came up for mention to fix a hearing date and it was allocated for **14/10/2019**. On **14/10/2019** the defendant was absent though served. The matter never proceeded then. The matter was adjourned to **25/11/2019**. On **25/11/2019** Mr. Teti held brief for Mr. Okoth for the defendant. Owing to Mr. Okoth's absence the court rescheduled the hearing for **26/11/2019**. On **26/11/2019**, Mr. Kiarie appeared for the plaintiffs and Mr. Wanyama holding brief for Mr. Okoth for the defendant. Mr. Wanyama prayed for adjournment which application was opposed by Mr. Kiarie. The court declined to adjourn the hearing ordered the hearing to proceed at **10.56 a.m.** after the taking of the evidence of the plaintiff, Mr. Wanyama applied for an adjournment for the second time and naturally, Mr. Kiarie opposed the application. The court declined to grant an adjournment as sought and ordered the hearing to proceed. To facilitate this, the file was placed aside till the afternoon session. The file was called out later in the afternoon and the defendant was absent and Mr. Wanyama indicated again that he did not have his witnesses. In its ruling the court noted that the suit was filed in **1998**, that is, about **21** years ago, that it had earlier issued a notice to parties that matters filed before **2013** required to be finalised urgently to pave the way for the hearing of the newer suits, that the defendant's counsel had been aware of the hearing date all along and that no good reason had been advanced for the adjournment sought. The court declined the adjournment and ordered the defence case to proceed.

### The Plaintiffs' Evidence

9. **PW1, Collins Kipruto**, a Court Staff in the ELC Registry produced the original file record for **Kitale Misc. Civil Appl. No. 51 of 1997** between **Patrick Nyoko Muchori and 2 Others -vs- Saboti Land Disputes Tribunal & Another**. The same had been filed as **Eldoret Misc. No. 150 of 1997** but was later transferred to Kitale and issued the new number above.

10. **PW2, Eunice Mugure Muchori** testified and adopted her statement dated **7/6/2019** as her evidence-in-chief. She stated that John Muchori Baiya was her late husband; he died in **1996**; Ibrahim Baiya, 2<sup>nd</sup> defendant and John B. Muchori are her sons, however from her father's evidence Ibrahim turned out to be a son to her elder co-wife. She produced a grant of letters of administration to her late husband's estate **P. Exhibit 2** showing the three plaintiffs as well as one Ruth Njeri Muchori were made administrators on **2/9/1996**. She also produced a certificate of confirmation of that grant dated **19/4/2000** as **P. Exhibit 3**. According to her, her late husband had land in Wamuini 'A' Company and he was also one of the directors. The land that he had which did not have any dispute was **39 acres**; he also bought **3** more acres in **1998** from his brother Stephen Kamau which **3 acres** were adjacent to the **39 acres**. Dr. John another brother to her late husband sold her husband **4.5** acres. Lastly he also bought **1.5 acres** from one Muchai Kabira making the total of the newly purchased to be **9 acres**. The family took possession of the land and utilized the same. However a land dispute arose between the deceased and Kariuki Macharia and upon being taken to the Land Disputes Tribunal by PW2's husband the elders awarded all the **9 acres** to Kariuki Macharia. That decision was adopted in **Kitale PMCC No. 84 of 1995** and Kariuki was declared the owner that was on **20/6/1995**. However on **7/7/1995** PW2's husband lodged a case at Eldoret being **Eldoret Misc. No. 347 of 1995**. A stay of execution was granted by the Eldoret Court; a ruling was issued on **19/5/1997** striking out

the application and granting the applicant leave to file a fresh application. Her husband subsequently filed **Eldoret Misc. No. 150 of 1997** which was transferred to Kitale and renamed **Kitale HC Misc. No. 51 of 1997** whose original file record was produced by **PW1** as **P. Exhibit 1**. The decision in that application was that the elders' award was quashed while the plaintiffs' family was still in possession of the land; they aver that they are still in occupation of the land to date. While the judicial review application was ongoing, Kariuki Macharia went against the stay orders and obtained title to the suit land in his name on **19/11/1997**. She produced the official search certificates for plots **Nos. 169, 742, 743 and 744** showing that the registers thereof were opened on **18/11/1997** while the judicial review notice of motion was still pending. She prayed that the title deeds for those plots be cancelled and the land do revert back to the estate of her late husband.

**11. PW3, Stephen Kamau Kairu** testified on the same date and he adopted his statement filed in court on **10/6/2019** as his evidence-in-chief in this matter. **PW3** stated that he is the younger brother to John Muchori; that he had a share in Wamuini Farm which entitled him to **3 acres** of land which he used until **1978** and when he was transferred to Naivasha while working as a prison warden, he sold the land to John Muchori for **Kshs.30,000/=**. The land was adjacent to John's land. According to **PW3**, his brother Augustine Muchori and one Kabira sold **4.5 acres** and **1.5 acres** respectively to John Muchori Baiya whereupon John took possession of all these parcels. He produced a receipt No. **902** dated **11/3/1975** for **Kshs.4,040/=** being payment for a share issued by Wamuini Farmers Company Ltd as **P. Exhibit 8**. The plaintiffs then closed their case.

**12.** Owing to the events narrated earlier in this judgment, the court then deemed the defendant's case closed and ordered the parties to file submissions. However the suit was later on reopened by way of a ruling delivered on **30/6/2020** for the purpose of the hearing of the defence case.

**13.** The defence case proceeded on **30/7/2020** when **DW1**, the defendant **Peter Macharia Kariuki** testified.

**14. DW1** stated that he is the administrator to the estate of the late Kariuki Macharia and adopted a replying affidavit in the record dated and filed on **17/11/1999** as his evidence in the suit. Upon cross-examination he stated that his father died in **1995**; that he had a land dispute with John Muchori Baiya; that the case was heard in **1994** by tribunal. He stated that his father had bought shares in Wamuini Farm and admitted that his father did not have possession of the 9 acres by the time the committee finalised its work. He testified further that the Land disputes Tribunal award granting his father the suit land, was adopted in a **1994** case at Kitale; however the same was subsequently challenged in **Eldoret JR. No. 150 of 1997**; he denied knowledge of any order made in the judicial review proceedings that the leave granted in those proceedings would operate as a stay; he admitted that the judicial review case was transferred to Kitale from Eldoret in **1997** and that the tribunal award was subsequently quashed by the court; he stated that in **1997** titles were issued in respect of the land comprising the **9 acres** in the name of different persons as follows:-

- (a) **Kapko Block 2/Wamuini 'B'/169 to Esther Waithera;**
- (b) **Kapko Block2/Wamuini 'B'/744 to Lucy W. Kariuki;**
- (c) **Kapko Block 2/Wamuini 'B'/743 Fridah Wanjiku; and**
- (d) **Kapko Block 2/Wamuini 'B'/742 to Naomi Wanjiru.**

**15.** He stated that he and his group obtained possession and built a structure thereon but there occurred a violent dispute while they were farming on the land; he maintained that he does not know who is in possession of the land at the time of giving evidence.

**16.** Upon further cross-examination by Mr. Kiarie for the plaintiff he admitted that there was issued an order of stay.

**17.** However upon re-examination by Mr. Okoth, he maintained that when the surveyors adjudicated the land, his family was issued with 9 acre portion. He also denied that he was served with an order in the judicial review proceedings. That marked the close of his evidence.

**18.** The plaintiffs filed their submissions on **8/1/2019**. I have perused the court file and found no submissions filed on behalf of the defendant. However instead of filing submissions, he filed a notice of appeal and a request for documents for certified copies on **6/12/2019** that is **12** days after the order on submissions.

**Determination**

19. I have considered the pleadings and the evidence and the filed submissions.

20. Furthermore I have perused the evidence of the witnesses of the plaintiff and the evidence of the defendant.

21. The undisputed evidence is that there was a land dispute over the suit land that was taken to the Saboti Land Disputes Tribunal and resolved in favour of the late Kariuki Macharia, the defendant's father, declaring him the owner of 9 acres of land in Wamuini Farm. As required by law that award was adopted as a judgment of the court on 20/6/1995 in **Kitale PMC Land Case No. 4 of 1994**. Subsequently the enforcement of that judgment was stayed by an order made in judicial review proceedings filed by the plaintiff's father. **Kitale HC Misc Civil Application No. 51 of 1997 (Formerly Eldoret HC Misc Civil Application No. 150 of 1997)**.

22. On 26/2/1998 the High Court quashed the Tribunal award and the judgment in **Kitale PMC Land Case No. 4 of 1994** became of no effect.

23. The plaintiff's argument is that once the tribunal decision was quashed the 9 acres that had been awarded to the defendant's father reverted back to the John Muchori Baiya, and that the interference by the defendant by way of subdivision of the title while a stay was still in place and the subsequent registration of the resultant subdivisions in the names of Esther Waithera, Lucy Wangari Kariuki, Fridah Wanjiku and Naomi Wanjiru was void and should be cancelled.

24. The defendant admits of the existence of the Tribunal award, the magistrates court judgment and the Judicial review proceedings that nullified both the award and the judgment. In this court's view it behoved the defendant in the circumstances of this suit to present evidence to demonstrate that there was a successful appeal against the decision of the High Court in the judicial review proceedings and this he did not do. He also admitted that his father did not in possession of the 9 acres by the time the Survey Committee of Wamuini Farm finalised its work. In this court's view, the nullification of the award and judgment of the Tribunal and the Magistrate's court respectively left the defendant's father in the same position that he was in before the award: landless. It is logical then that the late John Muchori Baya was also left in the same position that he was in before the award, that is, as owner of the suit land.

25. The evidence of the plaintiffs therefore satisfactorily supports the claim in the plaint. The plaintiffs have therefore established their claim on a balance of probabilities against the defendants. I therefore enter judgment in favour of the plaintiffs against the defendant and I issue the following orders:

(a) A declaration that the registration of parcels No. **Kiminini/Kapkoi Block 2/Wamuini 'B'/169** in the name of Esther W. Waithira, No. **Kiminini/Kapkoi Block 2/Wamuini 'B'/744** in the name of Lucy Wangari Kariuki, No. **Kiminini/Kapkoi Block 2/Wamuini 'B'/743** in the name of Frida Wanjiku and No. **Kiminini/Kapkoi Block 2/Wamuini 'B'/742** in the name of Naomi Wanjiru was void *ab initio*.

(b) A declaration that the registration of parcels No. **Kiminini/Kapkoi Block 2/Wamuini 'B'/169** in the name of Esther W. Waithira, No. **Kiminini/Kapkoi Block 2/Wamuini 'B'/744** in the name of Lucy Wangari Kariuki, No. **Kiminini/Kapkoi Block 2/Wamuini 'B'/743** in the name of Frida Wanjiru and No. **Kiminini/Kapkoi Block 2/Wamuini 'B'/742** in the name of Naomi Wanjiru is hereby cancelled.

(c) An order that the land register in respect of **Kiminini/Kapkoi Block 2/Wamuini 'B'/169**, **Kiminini/Kapkoi Block 2/Wamuini 'B'/744**, **Kiminini/Kapkoi Block 2/Wamuini 'B'/743** and **Kiminini/Kapkoi Block 2/Wamuini 'B'/742** shall be rectified to reflect the registration of plaintiffs herein as proprietors of those parcels in the order in which they may by their mutual consent prefer.

(d) The defendant shall bear the costs of this suit.

Dated, signed and delivered at Nairobi via electronic mail on this 17<sup>th</sup> day of December, 2020.

**MWANGI NJORGE**

**JUDGE, ELC KITALE.**



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