



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 198 OF 2015

JOSEPH MAINA WAMBUTUPLAINTIFF

VERSUS

PHILIP MURIITHI GITHAE1ST DEFENDANT

ANNAH MUMBI MURIITHI2ND DEFENDANT

JUDGMENT

BACKGROUND

1. By a Complaint dated 14th July, 2015 as filed herein on 16th July 2015, Joseph Maina Wambutu (*the Plaintiff*) prays for judgment against the two Defendants jointly and severally for:

- (a) *A declaration that the Plaintiff is the rightful owner of Plot No. Karatina Township Block II/440;*
- (b) *An order cancelling the names of the Defendants as the owners of Plot No. Karatina Township Block II/440 and in lieu therefore an order registering the Plaintiff as the owner of the said plot.*
- (c) *An order directing the Defendants to sign all documents of transfer of Plot No. Karatina Township Block II/440 in favour of the Plaintiff and in their default, an order directing the registrar of the court to sign the said documents on their behalf;*
- (d) *Costs of the suit;*
- (e) *Interest on (d) above; and*
- (f) *Any further or better relief that the Honourable court may deem fit to grant.*

2. Those prayers arise from the Plaintiff's contention that prior to the issuance of titles, the parcel of land now known as Karatina Township Block II/440 was owned jointly in equal shares by the 1st Defendant and one Wamae Muriithi. On or about 26th June, 1996, the said Wamae Muriithi sold his ½ share to the Plaintiff.

3. The Plaintiff avers that he subsequently entrusted the 1st Defendant with the task of following up the processing of a lease for the suit property and contributed a sum of Kshs.20,000/- for the purpose. Contrary to the Plaintiff's expectations, the 1st Defendant proceeded to have the lease registered in the joint names of himself and his wife who is the 2nd Defendant. Despite demand made

and notice of intention to sue the Defendants have failed to rectify the anomaly thereby necessitating this suit.

4. But in his statement of Defence dated 3rd September, 20-15, Philip Muriithi Githae (*the 1st Defendant*) denies that they jointly with the Plaintiff sub-divided the plot amongst themselves. On the contrary, the 1st Defendant asserts that an alienated plot could not be sub-divided before a lease was processed. The 1st Defendant further avers that Karatina Town Council equally had no authority or mandate to split an unsurveyed plot into the portions E2A and E2B as alleged by the Plaintiff.

5. The 1st Defendant further denies that the Plaintiff played any role in facilitating the process of obtaining the lease for the suit property and invites the Plaintiff to strict proof.

6. Anna Mumbi Muriithi (*the 2nd Defendant*) is similarly opposed to the grant of the orders sought by the Plaintiff. In her Statement of Defence dated 31st August, 2015 as filed herein on 8th September 2015, the 2nd Defendant denies that the suit property was ever sub-divided into Plot Nos E2A and E2B as stated by the Plaintiff.

7. The 2nd Defendant accuses the Plaintiff of proceeding to occupy the entire suit property despite their protestations with the 1st Defendant. She accordingly denies that the Plaintiff is the rightful owner of the suit property and invites him to strict proof.

THE PLAINTIFF'S CASE

8. In support of his case, the Plaintiff called two witnesses at the trial.

9. PW1 – Joseph Maina Wambutu is the Plaintiff himself and a businessman in Karatina. PW1 told the court the 1st Defendant is his neighbor and that they used to be friends before the dispute herein.

10. PW1 testified that Plot No. E2 Karatina Township was originally allocated to Annie Julieta vide a letter of allotment dated 26th June, 1996 before it was transferred to the 1st Defendant together with one Wamae Muriithi. PW1 purchased ½ portion from the said Wamae Muriithi vide a Sale Agreement dated 17th June, 1996. That Agreement was approved by the County Council vide its minutes dated 18th July, 1996.

11. PW1 told the court that he then took possession of the plot and constructed a house which he lives in to-date. He approached the 1st Defendant who was the co-owner to help him apply for the Certificate of Lease as PW1 did not have the original Allotment letter and PW1 deposited Kshs.100,000/- into the 1st Defendant's account for that purpose.

12. PW1 testified that contrary to their arrangement, the 1st Defendant processed the lease but in his name and that of the 2nd Defendant. Thereafter the 1st Defendant filed Nyeri HCCC No. 50 of 2009 against PW1 before later withdrawing the case.

13. PW1 told the court the two plots were numbered E2(a) and E2(b) and the sub division thereof was approved by the council. Later on PW1 conducted a search and found out that Plot No. Karatina Township Block II/429 was registered in the name of the 1st Defendant while Karatina Township Block II/440 wherein PW1 resides was registered in the 2nd Defendant's name. PW1 urged the court to find that he was entitled to Plot No. E2(a) which is currently plot No. 440.

14. On cross-examination, PW1 conceded that he had not produced any document to show that the plot was divided into E2(a) and E2(b) and/or that the sub-division had the approval of the Commissioner of Lands. He further conceded that there was no letter of allotment for plot E2(a) and (b) and that the only allotment letter was Plot E2.

15. PW2 – Justus Munyiri Kibira is the Acting sub-county Administrator, Mathira East. He told the court his duties include coordinating, supervising and implementing duties of the County Administration.

16. PW2 testified that according to their records, Plot No. E2 owned by Anna Julieta and Another was transferred to the 1st Defendant and Wamae Muriithi. Wamae then sold his portion to the Plaintiff. To confirm the position, there were minutes dated 26th June, 1996 supporting the transfer.

17. PW2 further testified that on 6th June, 1996, the land was sub-divided into two equal portions E2(a) and E2(b) by the District

Surveyor. The parties then applied for a transfer which was minuted on 26th June, 1996. Thereafter the 2 plots were given different numbers, E2(a) became Parcel 439 and E2(b) became Parcel 440.

18. PW4 testified further that parcel No. 439 was registered in the 1st and 2nd Defendants' names. He had no records of the registered owner of Plot No. 440. PW2 further told the court that he had visited the parcels of land and that the parcel which is developed is No. 440.

THE DEFENCE CASE

19. The Defence called two witnesses in support of their case at the trial.

20. DW1 – Philip Muriithi Githae is the 1st Defendant and a Businessman in Karatina. He told the court that in 1991, he was allotted an unsurveyed Plot No. E2 in the name of Annie Julieta Supplies which was a business name owned by DW1 and his wife. DW1 told the court they complied with the conditions set out in the letter of allotment and paid the sum of Kshs.7,430/- as the requisite fees.

21. DW1 testified that he thereafter engaged the services of a Surveyor and was issued with a beacon certificate. Subsequently DW1 undertook the task of obtaining a title and was issued with a certificate of Lease in his name and that of his wife Anna on 24th April, 2013 for Block II/440.

22. DW1 further told the court that he was also given another Plot E1 which is not connected to E2. He equally processed a certificate of Lease for it and was issued with one again – in the joint names of his wife Anna Mumbi and himself.

23. DW1 told the court it was not true that before he was issued with a title deed, E2 was subdivided into E2(a) and E2(b). That would not have been possible before issuance of a title and without the knowledge of DW1 who had all the original documents in his possession.

24. DW1 further testified that the Plaintiff is known to him through a man called Wamae Muriithi who approached him and purchased ½ a share of his plot. The said Wamae sold his share in E2 to the Plaintiff. DW1 therefore told the court he had no problem sharing Block II/440 with the Plaintiff but the Plaintiff should have no claim over Plot E1 which is now parcel No. 439.

25. DW1 told the court the Plaintiff has now erected a structure on the boundary of Plot 440 in a manner to suggest that he owns the entire plot and had encroached on DW1's half portion. He asked the court to order the Plaintiff to remove the structures he has erected in his portion of the land.

26. On cross-examination, DW1 told the court they are registered owners with the 2nd Defendant in Plot No. Block II/440 which was formerly E2. He further told the court the allotments for Plots E1 and E2 were the same except for the signatory. Both plots were 0.0440 Ha on the allotment letters and he did not understand how the acreage later changed for plot No. 440 to become 0.028 Ha.

27. DW1 told the court the Plaintiff constructed on the plot in the 1990s. He could however not include him in the title for Plot 440 since that is what he was told by the Commissioner of Lands. They had never agreed on where the boundaries for Plot 440 would be.

28. DW2 – Anna Mumbi Muriithi is the 2nd Defendant and a wife to the 1st Defendant. She told the court they used to operate a business by the name Julieta Suppliers. They were then allotted 2 unsurveyed plots in Karatina being Plots E1 and E2. Later they were issued with the Certificates of Lease for the two parcels of land.

29. On cross-examination, DW2 testified that she did not know the person who has built on Plot 440. She further told the court that E1 and E2 are different plots but next to each other.

ANALYSIS AND DETERMINATION

30. I have carefully perused and considered the pleadings filed herein, the testimonies of various witnesses who testified herein and the evidence adduced at the trial. I have similarly perused and considered the written submissions placed before me by the Learned Advocates for the parties.

31. By this suit instituted on 16th July, 2015, the Plaintiff sought a declaration that he is the rightful owner of Plot No. Karatina Township Block II/440 and that the court should issue an order cancelling the names of the Defendants as the proprietors thereof. In addition, the Plaintiff craves an order directing the Defendants to sign all documents to transfer for the suit property in favour of the Plaintiff and that in default, the Deputy Registrar of this court be directed to execute the same.

32. It is the Plaintiffs case that on 26th June, 1996, he purchased a half share in the unsurveyed Residential Plot No. E2 situated in Karatina Township from one Wamae Muriithi. As at the time of the purchase, the said plot was owned by the said Wamae and the 1st Defendant herein in equal shares.

33. The Plaintiff told the court that the said Plot No. E2 was subsequently sub-divided into two plots referred to as Plot E2(a) and E2(b). The Plaintiff took possession of Plot E2(a) and proceeded shortly thereafter in 1997 to construct a dwelling house in which he resides to date.

34. It was further the Plaintiff's case that the 1st Defendant retained the portion known as Plot E2(b) and that since he did not have the original documents, he entrusted the 1st Defendant with the responsibility of processing the certificate of Lease for the said plots of land. In this respect, the Plaintiff told the court that he gave a contribution of Kshs.20,000/- to the 1st Defendant to help in the processing of title.

35. The Plaintiff told the court that contrary to the arrangement they had with the 1st Defendant and in breach of the trust he had bestowed upon him, the 1st Defendant proceeded instead to process a certificate of Lease in his name and that of the 2nd Defendant who is his wife.

36. In his statement of Defence dated 3rd September 2015, the 1st Defendant denied the Plaintiff's claim, and in particular, that Plot No. E2 was sub-divided into E2(a) and E2(b). It was further the 1st Defendant's position that Karatina Town Council had no authority or mandate to split an unsurveyed plot prior to the issuance of a title. The 1st Defendant equally denied that the Plaintiff made any contribution towards the processing of title and/or that he had breached any trust as stated by the Plaintiff.

37. In her separate Statement of Defence dated 31st August, 2015, the 2nd Defendant equally rejected the Plaintiff's claim to the suit property. It was similarly her case that Plot No. E2 was never sub-divided and that the Plaintiff had occupied the whole of it without the authority of her husband and herself.

38. Even though the Defendants vehemently deny in their pleadings that the Plaintiffs had any claim whatsoever on the said Plot No. Karatina Township Block II/440, at the trial herein, the 1st Defendant changed tune and told the court that he had no problem sharing the said property with the Plaintiff since he was aware the Plaintiff had purchased the half-share of the same property that the 1st Defendant had earlier on sold to the said Wamae Muriithi.

39. While his wife maintained she did not know who had built on the said property, it was difficult to see why the 1st Defendant despite the knowledge that the Plaintiff was entitled to a portion of the land proceeded to register the same solely in his name and that of his wife and had refused to transfer even the half-portion he acknowledged to belong to the Plaintiff.

40. According to the 1st Defendant, he had no problem sharing Plot No. Karatina Township Block II/440 but the Plaintiff should have no claim over Plot E1 which he told the court is now Plot No. Karatina Township Block II/439. Interestingly, the Plaintiff has nowhere in his pleadings sought to be given any portion of the said plot No. Block II/339.

41. As I understood his case, the Plaintiff's position was that the original Plot No. E2 was sub-divided into Plot Nos E2(a) and E2(b) and that these are the parcels that subsequently upon registration came to be referred to as Karatina Township Block II/439 and 440.

42. While the Defendants were unanimous in their position that there was no sub-division of the original Plot No. E2 the Plaintiff called as a witness the Nyeri Sub-county Administrator for Mathira East within whose jurisdiction the subject properties fall.

Testifying herein as PW2, the sub-county Administrator corroborated the Plaintiffs case that the said Plot No. E2 was sub-divided into Plot Nos E2(a) and E2(b) on 6th June, 1996 by the area District Surveyor.

43. PW2 further told the court that from their records, the parties involved applied for a transfer of the plots after the sub-division and that the same were reflected on the minutes of the Karatina Town Council meeting held on 26th June, 1996. It was further his testimony that subsequently, the two plots were given different reference numbers, with Plot No. E2(a) becoming Parcel No. 439 and E2(b) becoming Parcel No. 440.

44. These were changes that were clearly known to the Defendants. At paragraphs 4, 5 and 6 of his written Statement dated and filed herein on 3rd September, 2015, the 1st Defendant alludes to the changes as follows:

“During this process, the changes in Karatina Town Council were never sent to the Commissioner of Lands. The records with the Commissioner of Lands still reflect the names of the allottee, Annie Juliet Suppliers. We then registered the business name with the Registrar of Companies and now the new company transferred the plot to both of us as it was our company.

Neither Wamae Muriithi nor Joseph Maina Wambutu cared to pursue the issue of registration with the Commissioner of Land. I footed all the necessary payments and I was under no obligation to include those changes if the parties showed no interest.

The unsurveyed Plot No. E2 after surveying became Karatina Township Block II/440. Plot number Karatina Township Block II/439 though mine has no bearing to this. It should not be brought in this case.”

45. That being the case, the 1st Defendant was clearly in the know about the Sub-divisions that had been done on the ground and cannot purport to run away from them on the basis that when he went to pursue the titles, he discovered that the records held by the Commissioner of Lands did not reflect the changes.

46. Indeed by his own admission, he was as early as 1997 aware that the Plaintiff had commenced construction on the portion of land that later came to be registered as Block II/440, a position he had not challenged some 18 years later when the Plaintiff instituted this suit.

47. The claim by the Defendants that Plot No. 439 belongs to them and that it should not be brought into this case is equally without basis. For a start, unlike in the case of the original Plot No. E2 for which the Defendants produced the allotment letter and the payments made therefore, there was nothing to support the contention that the Defendants had also been allocated an original Plot No. E1 and or that they accepted the terms of the said allotment. Secondly, it was clear from the independent evidence of PW2 that Plot No. 439 was a creation of the sub-division of the original Plot No. E2.

48. At any rate, a perusal of the survey plan attached to the Letter of Allotment for Plot No. E2 (Plaintiff's Exhibit 9) reveals that the unsurveyed Residential Plot No. E2 was located between Plot Nos 258 and 307. The sub-division plan for the space in between plot No. 258 and 307 also reveals that 2 plots were thereby created. Those plots were the Plot No. 439 and 440 as can be seen from the Plaintiff's Exhibit 9b.

49. Arising from the foregoing, I am persuaded that that Plot No. E1 purported to have given birth to Plot No. 439 did not exist. On the contrary, the original Plot No. E2 was sub-divided into Plot Nos E2(a) and E2(b) which parcels of land were subsequently registered as LR No. Karatina Township Block II/339 and LR No. Karatina Township Block II/440. Given that the Defence concedes that the Plaintiff was entitled to half a share of the original Plot No. E2, it follows that the Plaintiff is entitled to the said LR No. Karatina Township Block II/440 which he has resided in since the year 1997.

50. Arising from the foregoing, I am satisfied that the Plaintiff has proved his case to the required standard. Accordingly I hereby enter judgment for the Plaintiff and make the following orders:

(a) A declaration is hereby made that the Plaintiff is the rightful owner of Plot No. Karatina Township Block II/440.

(b) An order is hereby made cancelling the names of the Defendants as the owners of Plot No. Karatina Township Block II/440 and directing that instead the Plaintiff be registered forthwith as the owner thereof.

(c) The Defendants are hereby directed to forthwith sign all documents of transfer for Plot No. Karatina Township Block II/440 in favour of the Plaintiff within 30 days from today. In default the Deputy Registrar of this court is hereby directed to henceforth execute the said documents of transfer on behalf of the Defendants.

(d) The Plaintiff shall have the costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYERI THIS 2ND DAY OF DECEMBER, 2021.

IN THE PRESENCE OF:

MS MWAI LUCY FOR THE PLAINTIFFS

MS GICHAMA FOR THE 1ST DEFENDANT

MS WAMBUI MWAI FOR THE 2ND DEFENDANT

COURT ASSISTANT - WARIO

.....

J. O. OLOLA

JUDGE



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