



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Environment and Land Case 1846 of 2007

PETER KARANJA KINYANJUI..... PLAINTIFF

VERSUS

PETER KAMAU MATIRU..... DEFENDANT

JUDGMENT

By plaint dated 03.04.06 and filed on 13.04.06, the plaintiff prayed for judgment against the defendant for the following orders:-

1. A permanent injunction restraining the defendant, his servants and/or agents from interfering with the plaintiff's quiet and peaceful enjoyment and development of all that piece or parcel of land known as MUGUGA/SCHEME/953 which is exclusively his by virtue of competent purchase and/or otherwise alternatively owned through adverse possession.
2. That the defendant be condemned to meet the costs of and incidental to this suit.
3. Any other or further relief this honourable court deems fit to grant to avoid defeat of the ends of justice.

By defence dated 29.06.06 and filed the same day, the defendant essentially denied the plaintiff's substantive claims and prayed for dismissal of the plaintiff's suit with costs and that a resurvey be done on the suit land, L.R. No. MUGUGA/JET SCHEME/953.

At the hearing of the suit before me, the plaintiff was represented by learned counsel, Mr S.M.W. Kinuthia while the defendant was represented by learned counsel, Mr J.K. Gachie.

Only the parties testified in this matter.

The essence of the plaintiff's evidence is that he became registered absolute proprietor of the suit land measuring approximately 0.40 hectares on 16.12.86 under the Registered Land Act, Cap.300. He produced a Certificate of Official Search dated 19.11.07 (Plaintiff Exhibit 1) to that effect. He said he bought the land from one Suleiman Kamau Matiru in 1986 and produced a sale agreement dated 27.11.86 (Plaintiff Exhibit 2) to that effect. He said when Suleiman Kamau first got the land, it was Government land and that when Suleiman sold the land to him, both Suleiman Kamau and himself were

registered together as proprietors on 27.11.86 as owners in common. The plaintiff produced the relevant Land Certificate (Plaintiff Exhibit 5). The land was later sub-divided on 29.01.87 and he got 1 acre out of it. Survey was done by Gatome & Associates of Kiambu. Plaintiff produced a photocopy of Mutation Form dated 27.11.86 on the matter (Plaintiff Exhibit 6) and that after the survey he was registered as owner of the suit land.

Plaintiff next referred to proceedings he said took place before the Kikuyu Land Disputes Tribunal in May, 2002 following a complaint there by the defendant herein who is a son of Suleiman Kamau and who was laying claim to part of the suit land which previously belonged to his father, Suleiman Kamau Matiru. It was plaintiff's case that defendant's father never himself laid such claim and that the defendant herein lodged his claim before the Tribunal some 16 years after the survey of the land by Gatome & Associates was done. Plaintiff said in the Tribunal proceedings that the defendant wanted a re-survey of the land.

The plaintiff urged this court to grant him the prayers sought in his plain plus costs of the suit.

When cross-examined by defendant's counsel, plaintiff acknowledged that the defendant has not forcefully tried to evict him from the suit land. Plaintiff also conceded that he had not adduced evidence of the illegal activities he ascribed to the defendant vide paragraph 8 of his plaint. Plaintiff also told this court with regard to the Tribunal proceedings that no issue of boundary dispute arose in those proceedings. Plaintiff's attention was drawn by defendant's counsel to Tribunal proceedings (Defence Exhibit 'B') in which the plaintiff is reported to have said he would have had no objection to a second surveyor visiting the site (suit land) to make out his 1 acre. Plaintiff denied telling the Tribunal that he would have no objection in having the suit land re-surveyed to mark out his 1 acre. Plaintiff denied appearing before the Tribunal on 12.06.02 shown at the top of Defence Exhibit 'B' as the date of the Tribunal proceedings. In any case he pointed out a discrepancy in the Tribunal proceedings constituting Defence Exhibit 'B' in that at the bottom of the same proceedings the date of the proceedings is shown as 24.05.02.

Plaintiff told this court that on 04.04.06 (4 years later) he received from the Kiambu District Land Registrar a notice of re-surveying the suit land; that the reference of the notice was 'Boundary Dispute'; that the resurvey was to be on 27.04.06; and that on 27.04.06 he did not appear before the Tribunal as he had filed the present suit instead. It was the plaintiff's contention that there has been no boundary dispute over the suit land and that had the defendant raised with him an issue regarding boundary dispute, he (plaintiff) would have had a problem with any suggestion of a re-survey because according to him the defendant never sold him the land in the first place. Plaintiff said the Tribunal found there was no boundary dispute but that he had nothing to show that the Tribunal made such a finding.

Plaintiff told this court that the defendant has never physically disturbed his quiet enjoyment of the suit land but that he (defendant) has disturbed him mentally by spreading rumours about the suit land.

As already noted, the defendant also testified in this case. He denied interfering with the plaintiff's quiet enjoyment of the suit land and said he has no intention of doing so. For that reason, he said no restraining order is required. He also denied spreading rumours against the plaintiff to cause him mental distress or at all. Defendant acknowledged that on one occasion before 12.06.02 he lodged a complaint before the Land Disputes Tribunal requesting that the boundary of the suit land be measured because as a family he and other family members knew that the land given to the plaintiff was larger than the 1 acre he bought; that the plaintiff herein was summoned before the Tribunal and attended the same; that the plaintiff said before the Tribunal that he had no problem with resurveying of the suit land; and that the Tribunal ruled that the land be measured again at the defendant's cost. Defendant herein

said he went to Kiambu Land Office and paid for resurveying the suit land and was told to go back on 27.04.06 to lead the District Land Surveyor and District Land Registrar and take them to the suit land to do the resurvey. He produced a notice from the Kiambu District Land Registry (Defence Exhibit 'A') summoning the plaintiff herein to appear at the disputed land on 27.04.06 in connection with the dispute. Defendant said, however, that the resurvey did not take place because when he went to Kiambu Land Office on 27.04.06 to pick the Land Surveyor and Land Registrar and take them to the suit land, he learnt that a case had been filed in the High court regarding the land, so the Land Registrar said he would not measure the ground until the High Court case was over. Defendant denied doing anything adverse to the plaintiff's interest in the land as alleged in the plaint.

Defendant herein produced what he described as proceedings of the Kikuyu Land Disputes Tribunal (Defendant Exhibit 'B'), which have already been commented upon by the plaintiff herein. Defendant said the proceedings are for 12.06.02; that he was with the plaintiff during the Tribunal proceedings on that date; that the date 24.05.02 at the bottom of the said typed proceedings must be a typing error; and that he had not noted the discrepancy in the two dates until the day he testified before this court, i.e. 07.07.08. He said he had no intention of doing anything adverse to the plaintiff's interests in the suit land to warrant any injunction against him. Defendant reiterated the prayers in his defence dated 29.06.06 and filed the same day.

Cross-examined by plaintiff's counsel, the defendant said he was present on 27.11.86 when his father agreed to sell 1 acre of his land to the plaintiff; that he (defendant) was not given part of the purchase money; but that he was not present when the subject land was being surveyed. Defendant said only his father and the surveyor were present during the survey of the land but that he (defendant) does not know if his father signed the Mutation Form (Plaintiff Exhibit 6). He said he saw the boundaries after the survey; that on the ground the subject land is bigger than 1 acre by about $\frac{1}{4}$ acre; that cedar posts were dug into the ground to differentiate the plaintiff's land from his (defendant's) land and that his problem is about the size of the land taken by the plaintiff from his (defendant's) father. Defendant said his father subsequently died in September, 1993, i.e. about 7 years from the time he sold the land to the plaintiff; that he succeeded his father; and that the excess land belongs to him (defendant) as owner. Defendant confirmed that the plaintiff has never moved the boundary placed in 1986 from its original place. Defendant said he had no document to show that his father complained about the size of the land given to the plaintiff. Defendant said he officially sought re-measuring of the land in 2002, i.e. 7 years after his father's death. Defendant added that he never wrote to the plaintiff regarding the size of the land given to the plaintiff and ascribed his delay in seeking re-measuring of the land to lack of finances. He said his father was old and that he (father) told him to arrange for the land to be re-measured so as to recover the excess land. Defendant told this court that before the Tribunal he claimed there was a boundary dispute between him and the plaintiff. He said he wanted the plaintiff to get exactly his 1 acre, which would change the boundary and that to him his complaint was a boundary dispute. Defendant said he had never taken a surveyor to the subject land but that he knew the land is bigger than 1 acre, whose measurements he said are 210 feet squared and that this is known throughout the world. He said he went to school up to Standard 7. He added that he has letters of administration from his father but he did not have them with him in court.

Still in cross-examination, the defendant was referred to Plaintiff Exhibit 7, i.e. summons dated 23.05.02 from Kikuyu Land Disputes Tribunal. He acknowledged that he was required by that summons to attend the Tribunal on 30.05.02 but that the Tribunal proceedings were postponed to 12.06.02. Defendant acknowledged, however, that there is no indication in Plaintiff Exhibit 7 to confirm the postponement he, defendant alluded to.

The defendant was next referred by plaintiff's counsel to Defence Exhibit 'B', said to be the

proceedings of the Tribunal held on 12.06.02, and he said that apart from the complainant Peter Kamau Matiru and respondent Peter Karanja Kinyanjui in those proceedings, the names of those who attended those proceedings are not shown. In interpose here to note that names of members of the panel of elders are shown at the end of Defence Exhibit 'B'.

It was the defendant's evidence that upon discovering that the land was bigger than 1 acre, he talked to the plaintiff as a neighbour peacefully, telling him it was good to re-measure the land and that the plaintiff was agreeable.

With regard to Defence Exhibit 'A', i.e. letter from the Land Registrar Kiambu on the subject of Boundary Dispute and calling on Peter Kamau Matiru (defendant herein) and P. Kinyanjui (plaintiff herein) to appear at the disputed land on 27.04.06, the defendant told this court that the wording is standard. And as to what he told the Tribunal during the proceedings he said had been held, he referred this court to the statement ascribed to him in Defence Exhibit 'B'. The statement alluded to by the defendant herein reads as follows:

'In 1986, my late father Kamau Matiru alias Solomon Kamau sold an acre of his five acres land MUGUGA/JET SCHEME/593 to the respondent at Shs.70,000/=. As a result, a government surveyor visited the site and marked the boundary between the two parcels namely:-

- (i) Parcel 954 – 4 acres Kamau Matiru
- (ii) Parcel 953 – 1 acre Peter K. Kinyanjui

Title deeds for the two parcels were consequently issued. However, the surveyor who measured the one acre erred and gave the respondent more than what had been sold to him. Our request to have the one acre measured again by another surveyor has not been accepted by the respondent. Hence we have always smelt a rat.

The family wishes is that the Tribunal visits the site to have the one acre correctly carved out with its boundaries correctly relocated.'

The same proceedings ascribe the following statement to the respondent there (Mr P.K. Kinyanjui):

'I am amongst those few who would not grab someone else's property. Hence if the complainant is convinced that I got more land than the acre I bought and if he accepts to meet the costs involved, I would have no objection to a second surveyor visiting the site to mark out what is my one acre parcel. In fact, we are good neighbours and I would hate to have a wedge between us.'

Defendant herein said he was the registered owner of land adjacent to the suit land but could not recall off-head when he was so registered. He said he did not harass the plaintiff in the Tribunal and that he was looking for justice.

When re-examined by his own counsel, the defendant said that his prayers are that a re-survey would remove any dispute between the plaintiff and defendant regarding the suit land. He added that he and plaintiff are good neighbours otherwise; that he has never harassed the plaintiff and has no intention of doing so. Defendant concluded that he has no intention of interfering with plaintiff's quiet enjoyment of the suit land until the legal process is followed.

Upon conclusion of the defendant's testimony, his counsel announced that to be the close of the

defence case.

Both counsel sought and were granted permission to file written submissions and they did so. On 24.09.08 both counsel adopted their written submissions and asked for a date for Judgment.

The essence of plaintiff's submissions is as follows: The defendant laid claim to ¼ acre of land parcel Muguga/Jet Scheme/953 and arranged that Kiambu Land Registrar should go to the land and resurvey its boundaries with a view to the defendant being given the ¼ acre he claimed to be in excess of 1 acre sold by the defendant's father to the plaintiff. Plaintiff's counsel pointed out that on 27.11.86, the defendant's father, Kamau Matiru sold 1 acre of L.R. Muguga/Jet Scheme/953 for Kshs.70,000/=. It was plaintiff's counsel's position that the defendant was not a party to the sale agreement and that he cannot obtain benefit from it. He, *inter alia*, referred in this regard to Chitty on Contract, 27th Edition who at page 62 states:

'... it is now established that no stranger to the consideration can take advantage of a contract, although for his benefit.'

Plaintiff's counsel proceeded to point out that the defendant did not file a counter-claim for the court to order the boundary between the plaintiff's L.R. Muguga/Jet Scheme/953 and his adjacent land to be refixed. Arising from the foregoing, plaintiff's counsel submitted that the court cannot accede to the defendant's oral request in his evidence that the boundary be reset. Plaintiff's counsel also submitted that the Kikuyu Land Disputes Tribunal had no jurisdiction to entertain what he described as the defendant's fictitious claim for resolution of a land dispute between him and the plaintiff as it was barred by section 13 (3) of the Land Disputes Tribunals Act, No.18 of 1990 as read with section 7 of the Limitation of Actions Act, Cap.22. He further submitted that jurisdiction on matters of all registered parcels of land under the Registered Land Act, Cap. 300 lies with the High Court. He did not, however, cite any particular provision of the Registered Land Act with regard to his last submission above.

Plaintiff's counsel urged the court to give judgment to the plaintiff with costs as prayed in the plaint.

In his counter-submissions, counsel for the defendant acknowledged that the defendant's father sold 1 acre of his land to the plaintiff. Counsel, however, averred that when survey was done to excise the one acre from defendant's father's land, more than 1 acre was so excised. Defendant's counsel proceeded to narrate that following the defendant's father's death, the defendant took out letters of administration of his father's estate and that he (defendant) eventually lodged a claim before Kikuyu Land Disputes Tribunal for resurveying of the subject land. Defendant's counsel pointed out that according to the defendant the Tribunal, with the plaintiff's consent, ruled that the land in question be resurveyed and that the defendant should cater for the costs of resurvey; that the defendant paid the costs for resurveying but that before the resurvey could be done and after the plaintiff had been informed of the date of resurvey, the plaintiff filed the present suit in the High Court seeking a permanent injunction restraining the defendant or his agents, etc. from interfering with the plaintiff's quiet enjoyment and development of the land in question which the plaintiff says is exclusively his by virtue of competent purchase and/or otherwise alternatively owned by him through adverse possession.

Defendant's counsel submitted that the plaintiff's suit is bad in law and cannot succeed, pointing out that the plaintiff acknowledged during cross-examination that the defendant had not done anything illegal or physically disturbed the plaintiff's quiet enjoyment of the land. Defendant's counsel also submitted that the plaintiff never gave evidence-in-chief to support his claim for injunction. Defendant's counsel further submitted that the defendant strictly followed legal procedure and stated that he had no

intention of disturbing the plaintiff in the possession of the subject land otherwise than through the legal process. Counsel added that the plaintiff did not prove irreparable loss not capable of being compensated by damages, neither did he show what loss he would suffer if the injunction sought is not granted. It was defendant's counsel's further submission that as there is no threat of interference by the defendant with the subject land, the balance of convenience is in favour of not granting the injunction.

Defendant's counsel also pointed out that the plaintiff had contended that any ruling given by the Kikuyu Land Disputes Tribunal was void allegedly because the Tribunal had no jurisdiction and that such ruling was time-barred. Defendant's counsel said of the plaintiff's contention that it is misconceived in that if the plaintiff was dissatisfied with the ruling, he should have either appealed against it to the Provincial Land Disputes Tribunal or filed application for judicial review of the ruling, which the plaintiff never did. Defendant's counsel submitted that the issue whether the Tribunal had jurisdiction or not cannot legally be challenged through a plaint and that if the plaintiff was dissatisfied with the order of the Tribunal for the land to be re-surveyed, the plaintiff should have sought an order restraining the District Land Registrar/Surveyor from resurveying the land (instead of seeking injunction against the defendant who had made no threat to the plaintiff's quiet enjoyment of the land). Defendant's counsel pointed out that the issue brought to this court is not whether or not a resurvey of the subject land should be done or not but whether there is reason to grant injunction against the defendant. Defendant's counsel submitted that the plaintiff's evidence supports stoppage of a resurvey. Defendant's counsel submitted that whether or not the defendant's claim before the Tribunal was time-barred was not an issue to be brought to this court by way of plaint.

Defendant's counsel urged that the plaintiff's case be dismissed with costs to the defendant and also asked for an order that a resurvey be done on L.R. No. Muguga/Jet Scheme/953.

I have given due consideration to the rival cases and submissions of the parties.

The issues for determination by this court seem to turn on proceedings said by the defendant herein to have taken place before the Kikuyu Land Disputes Tribunal on 12.06.02. According to the defendant herein, who is shown as complainant in the said proceedings, the plaintiff herein not only participated in the said proceedings but also consented to the Tribunal's ruling to the effect that the land in controversy be re-measured. The proceedings in question were produced by the defendant before this court as Defence Exhibit 'B'. There are unhappy features of the Tribunal proceedings, chief of which is that at the top they indicate the date they were held as 12.06.02 while at the bottom they are dated 24.05.02. The defendant, whom the proceedings seem to have favoured, told this court that the date 24.05.02 at the bottom of the proceedings must be an error. He insisted that the said Tribunal proceedings were on 12.06.02.

On the other hand, the plaintiff denied appearing before the Tribunal on 12.06.02. However, he himself told this court that in May, 2002 he was summoned before the Tribunal following a complaint lodged there by the defendant herein vide which the defendant claimed that part of the suit land belonged to his father. The plaintiff said he was served by the Area Chief on 23.05.02 with summons (Plaintiff Exhibit 7) to appear before the Tribunal on 30.05.02. However, he (plaintiff) pointed out that the proceedings are shown at the bottom of Defence Exhibit 'B' to have been on 24.05.02, i.e. before the due date shown in the summons. He said he was summoned to appear at the Tribunal on 30.05.02 while according to the proceedings the Tribunal session had taken place on 24.05.02! He denied appearing before the Tribunal on 12.06.02. The plaintiff, however, acknowledged the fact of his having attended the Tribunal on some unspecified date in 2002 following a claim lodged there by the defendant that part of the land in question belonged to him (defendant) – a claim the plaintiff said the defendant's

father never himself made during his life after selling a portion of the subject land to the defendant.

Two dates appear in the same Tribunal proceedings, Defence Exhibit 'B': the date 12.06.02 appears near the top while the date 24.05.02 appears near the bottom. Ordinarily, the date appearing towards the top of the proceedings would either be the same as or be earlier than the date appearing towards the end of the proceedings. Here the order has been reversed. This does not make practical sense. I take the proceedings to have been held on 12.06.02. Either way the year of the proceedings is accepted by both parties to be 2002. I hold that the plaintiff participated in the Tribunal proceedings on 12.06.02.

The plaintiff herein produced Plaintiff Exhibit 7 summoning Peter Kamau Matiru who was the complainant (defendant herein) and Peter Karanja Kinyanjui who was respondent (plaintiff herein) to appear at the subject land in connection with a dispute relating to Muguga/Jet Scheme/954 and Muguga/Jet Scheme/953. The defendant herein told this court that at the Tribunal where he was the complainant in 2002, he claimed there was a boundary dispute between him and the plaintiff herein. Defendant herein told this court that although the plaintiff herein bought 1 acre of land from his (defendant's) father in 1986, the defendant got more than 1 acre and that the defendant's purpose for going before the Tribunal was to press for the plaintiff to get exactly the 1 acre he bought. Defendant told this court that his complaint before the Tribunal envisaged a change of the subject boundary, which in his (defendant's) interpretation amounted to a boundary dispute. On the other hand, the plaintiff herein maintained before this court that there was no boundary dispute and, therefore, that the Tribunal had no jurisdiction to entertain the complaint lodged by the defendant herein before it.

Section 3 of the Land Disputes Tribunals Act, No.18 of 1990 provides, *inter alia*, as follows:

'3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to —

(a) the division of, or the determination of boundaries to, land, including land held in common ... shall be heard and determined by a Tribunal established under section 4.'

The name given to a tribunal established under section 4 is 'Land Disputes Tribunal'.

I hold that the complaint lodged by the defendant herein before the Kikuyu Land Disputes Tribunal was a boundary dispute within the meaning of section 3 (1) (a) of the Land Disputes Tribunals Act and that the Tribunal had jurisdiction to entertain the dispute.

It is clear from the action filed before the High Court vide the present suit that the plaintiff herein was dissatisfied with the decision taken by the Tribunal. In this regard, section 8 of the Act is relevant. It provides, *inter alia*, as under:

'8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.'

Being dissatisfied with or aggrieved by the decision of the Tribunal, the plaintiff's recourse provided by the ruling law was to appeal to the Provincial Land Disputes Appeals Committee pursuant to section 8 (1) of the Act, not to institute civil proceedings by way of plaint as done here. The plaintiff herein who before this court challenged the legality of the 2002 Kikuyu Land Disputes Tribunal's proceedings never challenged those proceedings when he participated in them in 2002. I have already shown herein-above that the proper way to challenge them subsequently was by way of appeal, which the plaintiff herein

never lodged. Instead he purported to challenge the Tribunal proceedings by way of plaint. As the suit herein is contrary to clear provisions of the applicable law, the prayers sought by the said suit cannot be granted.

In view of the foregoing, the plaintiff's suit herein must be and is hereby dismissed.

The defendant herein prayed not only for dismissal of the plaintiff's suit but also for an order that a resurvey be done on L.R. No. Muguga/Jet Scheme/953. While the prayer for dismissal of the suit is in order since it flows directly from the defence, the prayer for resurvey lacks parentage since there is no counter-claim to form a basis for such prayer. The prayer for resurvey is dismissed. This means that the defendant has been successful only in respect of part of his prayers, but it is the greater part.

The plaintiff shall meet 70% of the defendant's costs of the suit.

Orders accordingly.

Delivered at Nairobi this 10th day of November, 2008.

B.P. KUBO

JUDGE



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