



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 451 OF 2017

HAMISI MGUTA RAISI.....PLAINTIFF

AND

HEMEDI HAMISI MWDZUMBA.....DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by a plaint dated 29th November, 2017 seeking orders that the Title deed held by the defendant be declared irregular and the same to be cancelled, revoked and/or annulled, and for the court to order for a fresh title to be issued in favour of the plaintiff.

2. The plaintiff's case is that the defendant is currently the registered and beneficial owner of LAND PARCEL NO.KWALE/UKUNDA/1331 (THE SUIT PROPERTY) having had the same vested in him pursuant to a vesting order in Kwale Succession Cause No. 134 of 2012. The plaintiff avers that the suit property belonged to his late mother Mwanakombo Muyema who passed away before independence and before adjudication was undertaken. That the defendant is the plaintiff's nephew, being a son to the plaintiff's brother Hamisi Kassim Madonga (deceased) from his second wife, Mwanamisi Bindo. The plaintiff contends that the suit land was never part of the legal estate of the late Hamisi Kassim Madonga and neither was he enjoined in the Kadhi's proceedings. The plaintiff states that the status of the suit property came to his attention in 2014 when he conducted a search at the lands office, Kwale after which he placed a caution to protect his interest. That subsequent efforts to resolve the dispute amicably have been in vain.

3. The plaintiff testified that the defendant registered himself as proprietor of the suit property through transmission. It is the plaintiff's evidence that the defendant's father did not have title and the first title is the one that was issued to the defendant. The plaintiff's evidence is that the land was family land which belonged to the plaintiff's late mother who was also the defendant's grandmother. The plaintiff stated that he was not involved in succession cause no. 134 of 2012 at the Kadhi's court and only came to learn defendant had obtained an order from the Kadhi's court to inherit the land.

4. The defendant was duly served with summons to enter appearance but did not enter appearance or file defence and upon request by the plaintiff, interlocutory judgment was entered against the defendant on 26th April 2018. The suit proceeded for formal proof on 21st March, 2018 when the plaintiff testified and did not call any witness. The plaintiff produced copy of search dated 18th October, 2017, copy of agreement dated 3rd May, 2012 and copy of judgment dated 10th June 2013 in Kwale Principal Magistrate's Court Succession Cause No. 134 of 2012 – In the matter of **Hamisi Kassim Madonga (deceased) and Mwanahamisi Hamisi Bindo (Petitioner) –v- Abdallah Hamisi Mwandonga (respondent)**.

5. The court has carefully considered the evidence on record and the submissions made. The issue that calls for determination is whether the plaintiff has proved his case to the required standard and whether he is entitled to the prayers sought.

6. The plaintiff avers that the suit property belonged to his late mother, Mwanakombo Mvyema who passed away before independence and before adjudication. There were no Grant of Letters of Administration produced in respect to the estate of the said Mwanakombo Mvyema (deceased) who the plaintiff states was the owner of the land and who is said to have died before independence, which I presume is before 1963. It is trite law that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person.

7. The powers of the personal representation are set out under Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya which provides as follows:

82. Personal representative shall subject only to any limit limitation imposed by their grant, have the following powers:

a) to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arising out of his death for his personal representative;

b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best;

i) any purchase by them any such assets shall be voidable at the instance of any other person interested in the asset so purchased and;

ii) no movable property shall be sold before confirmation of the grant.

c) to assent, at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof.

8. Section 80 of the same Act provides when grant takes effect and states:

1. A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.

2. A grant of Letter of Administration, with or without the will annexed, shall take effect only as from the date of such grant.

9. It is clear therefore that a party cannot purport to act on behalf of the estate of a deceased person without Letters of Administration. In light of the foregoing and in view of the fact that the plaintiff has pleaded that the suit property belonged to his late mother, and considering that the plaintiff has not tendered any evidence indicating that he has taken out letter of administration in respect of the estate of his late mother, it is my finding that the plaintiff lacks the requisite locus and had no legal capacity to institute the suit herein. The suit is therefore incompetent and a nullity.

10. Turning to the other issues, it is not disputed that the suit property is registered in the defendant's name. The plaintiff's evidence is that the defendant got registered as proprietor of the land through transmission. Indeed the plaintiff produced the judgment in Kwale PMC Succession Cause No. 134 of 2012. I have perused the said judgment. Among the estate of the deceased in Succession Cause No. 134 of 2012 is PARCEL OF LAND KWALE/UKUNDA/1331 which is the suit property herein.

11. Section 26(1) of the Land Registration Act No. 3 of 2012 provides as follows:

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima evidence that the person named as the proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements restrictions, and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except-

a. On ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” (emphasis is mine)

12. Whereas the plaintiff contends that the suit land was never part of the estate of Hamisi Kassim Madonga, and that he was neither enjoined in the proceedings at the Kadhi's court, it is clear that the suit property was one of the properties listed as forming part of the estate of Hamisi Kassim Madonga (deceased). No doubt under the law, transmission is one of the lawful methods registrations of a proprietor of land is effected through. From the material on record, the defendant got registered over the suit property by transmission. The plaintiff has pleaded and stated that he was not enjoined in the successions proceedings. If that be the case, then the plaintiff was expected to take steps to move the Kadhi's court to have the judgment therein set aside, reviewed or varied. As it is, the plaintiff has not challenged that judgment which is still in force. In my view, the remedy was not to file the present suit as this court is not exercising its appellate jurisdiction in the present suit. In my view, the plaintiff has failed to tender any evidence to demonstrate that the registration and transfer in favour of the defendant were tainted with illegality or breach of statutory provisions. In the absence of any tangible evidence implicating the defendant in any fraudulent, illegal or corrupt scheme, I am not persuaded that the defendant is not holding a good title. It is trite law that any allegation of fraud must be pleaded and strictly proved. The plaintiff has neither pleaded nor proved any allegation of fraud. There is therefore no basis for the court to cancel or revoke the defendant's title and have the same registered in the plaintiff's name.

13. The upshot of this is that this court is not satisfied that the plaintiff has proved his case against the defendant on a balance of probabilities. Accordingly, the plaintiff's case is dismissed. As the defendant did not participate, I make no order as to costs.

Order accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 5th day of March 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

No appearance for plaintiff

No appearance for defendant

Yumna Court Assistant

C.K. YANO

JUDGE