



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 52 OF 2013

KADENGE BAYA MWERO.....1ST PLAINTIFF

BIBI FONDO KALAMA.....2ND PLAINTIFF

-VERSUS-

BARKA SWALEH AWADH.....1ST DEFENDANT

ZEINAB YUSUF.....2ND DEFENDANT

RULING

1. By the Notice of Motion dated 27th July, 2020 as filed herein on 7th August 2020, Zeinab Yusuf (*the 2nd Defendant/Applicant*) prays for orders:

1. That the Deputy Registrar of this Court do execute the application to the Land Control Board Consent to sub-divide Title No. Kilifi/Ngerenyi/736 into two parcels, one of four (4) acres and another parcel of eight (8) acres in place of the 1st Plaintiff and thereafter execute the Mutation Forms in respect of the said sub-divisions in place of the 1st Plaintiff.

2. That upon the registration of the said Mutation Forms and issuance of the two separate titles subdivided from Title No. Kilifi/Ngerenyi/736, the Deputy Registrar of this Court do execute the application to the Land Control Board forms for the consent to (sell) and transfer the resultant parcel of land measuring eight (8) acres in favour of the 2nd Defendant in place of the 1st Plaintiff and thereafter execute the transfer of an interest in Land Forms in respect of the said eight (8) acres parcel of land in favour of the 2nd Defendant in place of the 1st Plaintiff.

3. That the Land Registrar, Kilifi Land Registry do register the said Mutation Forms executed by the Deputy Registrar of this Court requiring the 2nd Defendant to avail or produce the original Title Deed for Title No. Kilifi/Ngerenyi/736 other than this Court's order.

4. That the Land Registrar, Kilifi Land Registry, do register the Transfer of an interest in Land Forms duly executed by the Deputy Registrar of this Court in favour of the 2nd Defendant without requiring the 1st Defendant to avail or produce spousal consent or statutory declaration or affidavit in support of the said transfer other than this Court's order.

2. The application which is supported by an affidavit sworn by the 2nd Defendant's counsel on record Samuel Odhiambo Eleakim is based on the grounds:

(i) That Judgment was entered for the 2nd Defendant against the 1st Plaintiff to the effect that the 2nd Defendant is the rightful owner of 8 acres of Title No. Kilifi/Ngerenyi/736 and that the

1st Plaintiff's interest in 8 acres of the said parcel of land had been extinguished by adverse possession. The Court further ordered that the 2nd Defendant be registered as proprietor of the said 8 acres and that the Registrar of Lands Kilifi do delete the entry in respect of the Plaintiff's proprietorship of the suit land;

(ii) That no appeal has been preferred against the said Judgment and decree;

(iii) That the 1st Plaintiff who is the registered proprietor of the suit property cannot be traced to execute the required Land Forms and hand over the original Title Deed for the suit property for purposes of executing the decree;

(iv) That as a result thereof the Judgment and decree of this Court has remained unexecuted or unsatisfied and the 2nd Defendant is accordingly not able to earn the fruits of the Judgment; and

(v) That it will be expedient and also meet the ends of justice if the application is allowed.

3. The 2nd Plaintiff – Bibi Fondo Kalama is opposed to the application. In a Replying Affidavit sworn and filed herein on 17th March 2021, the 2nd Plaintiff avers that though the suit was instituted in the name of her father – the 1st Plaintiff and herself as the 2nd Plaintiff, she had never given any instructions to Mwashunga Mtana & Company Advocates to institute the suit on her behalf as they did on 2nd April, 2013.

4. The 2nd Plaintiff further avers that she was accordingly not aware of the existence of this suit until the time she was served with the present application. The 2nd Plaintiff further avers that the suit land is registered in the name of her father who passed away on 22nd May, 2013 and that by the time the Defendants prosecuted their counter-claims the suit against the 1st Plaintiff had already abated.

5. The 2nd Plaintiff asserts that the Defendants have never instituted appropriate applications to substitute the 1st Plaintiff with the legal representative and they are therefore not entitled to any remedy known in law as the Court was made to adjudicate on a nullity.

6. In answer to the Replying Affidavit by the 2nd Plaintiff, the 1st Defendant herein – Barka Swaleh Awadh had sworn another Replying Affidavit filed herein on 24th March, 2021 in which he refutes the averments made by the 2nd Plaintiff and proceeds to support the 2nd Defendant's application.

7. The 1st Defendant avers that contrary to the 2nd Plaintiff's contention that she was unaware of this suit, the record shows that it was the same 2nd Plaintiff who swore the verifying Affidavit accompanying the Plaint filed on 2nd April, 2013 in which she states that she had been given authority by the 1st Plaintiff to proceed with the matter.

8. The 1st Defendant further avers that the Plaintiffs filed their statements and lists of documents in support of their case and asserts that the Advocates on record for the Plaintiffs would not have had knowledge of such information if they had not been instructed by the Plaintiffs.

9. I have carefully perused the 2nd Defendant's application and the respective responses by the 2nd Plaintiff on the one hand and the 1st Defendant on the other. I have similarly perused and considered the written submissions filed by the 2nd Plaintiff in person. The 2nd Defendant did not file any submissions in support of his case.

10. This suit was instituted in the names of the two Plaintiffs vide a Plaint dated 28th March, 2015 but filed herein on 2nd April, 2013. In the Plaint drawn by the Law Firm Mwashunga Mtana & Company Advocates, the two Plaintiffs sought an order of permanent injunction restraining the two Defendants from dealing with the suit property. They further sought an order of vacant possession of the suit property which is registered in the name of the 1st Plaintiff – Kadenge Baya Mwero.

11. In a verifying Affidavit sworn on 28th March, 2013 in support of the Plaint, Bibi Fondo Kalama (*the 2nd Plaintiff*) swore briefly as follows:

1. That I am the 2nd Plaintiff and a daughter to the 1st Plaintiff herein hence competent and authorized to swear this Affidavit.

2. That I have read the Plaint herein and confirm that the averments therein are true and correct.

3. ...

12. By an unsigned Letter of Authority filed by the Plaintiffs said Advocates on the same 2nd day of April 2013, the 1st Plaintiff is shown to have given authority to the 2nd Plaintiff to proceed with the matter on his behalf.

13. Subsequent to the institution of the suit, the two Defendants filed separate Defences and Counter-claims in which they sought *inter alia* to be declared as the rightful owners of portions of Plot No. Kilifi/Ngerenyi/736 which they pleaded they had bought from the 1st Plaintiff.

14. As it turned out when the suit was set down for hearing, neither of the Plaintiffs nor their Advocate on record turned up at the trial. Being satisfied that the Plaintiffs had been properly notified of the hearing date through their Advocates on record, this Court dismissed the Plaintiffs' case for want of prosecution and the two Defendants proceeded to tender evidence in support of their respective counter-claims.

15. In a Judgment delivered herein on 19th September, 2017, the Court was satisfied that the Defendants had each proved their Counter-claims against the Plaintiffs on a balance of probabilities and entered Judgment as sought in the said Counter-claims.

16. By the present application before me, it turns out that the Judgment remains unexecuted and that the 2nd Defendant being unable to

trace the 1st Plaintiff to execute the transfer now urges this Court to direct the Deputy Registrar to execute the relevant documents necessary for transfer in lieu of the 1st Plaintiff.

17. In her Replying Affidavit filed in opposition to the application, the 2nd Plaintiff denies having instructed Messrs Mwachunga Mtana & Company Advocates to institute the suit against the two

Defendants. She further asserts that she was unaware of these Court proceedings and the Judgment against them until the moment she was served with the present application.

18. While I did not think the 2nd Plaintiff is being candid in her claim that her father and herself never instructed an Advocate to institute the suit on their behalf, she avers as follows at Paragraphs 6, 7 and 8 of the Replying Affidavit:

“6. That I aver that the suit property is registered in (*the*) 1st Plaintiff’s names. Annexed is a copy of title marked as “BFK1”.

7. That I aver that my late father (*1st Plaintiff*) met his demise on 22nd May, 2013. Annexed is a copy of death certificate marked as “BFK2”.

8. That I aver that by the time the Defendants prosecuted their counter-claims the suit against the 1st Plaintiff had already abated a fact they failed to disclose to the Court.”

19. While the Defendants have through a Replying Affidavit sworn and filed by the 1st Defendant on 24th March, 2021 denied knowledge of the 1st Plaintiff’s demise, it is apparent from the Certificate of Death annexed to the 2nd Plaintiff’s Replying Affidavit that the 1st Plaintiff indeed passed away as stated on 22nd May, 2013 at the prime age of 96 years.

20. That being the case, it is evident that as at 15th March, 2017 when the Defendants prosecuted their counter-claims, the 1st Plaintiff had not been in existence for some 4 years or so. By that time and by the time Judgment was delivered on 19th September 2017, no one had been substituted in place of the 1st Plaintiff.

21. While the Defendants may not have had knowledge of the 1st Plaintiff’s demise, and while it may as well be that it is the 2nd Plaintiff and their Advocates on record who failed to make that disclosure to the Court, it cannot be denied that the resultant Judgment was of no much legal effect upon the deceased 1st Plaintiff and or his estate.

22. As it were, the suit property is registered in the name of the 1st Plaintiff who is now deceased. There is no evidence that any Letters of Administration have been taken out for the deceased’s estate and the 2nd Plaintiff cannot be said to be her legal representative in the circumstances herein.

23. That being the case, I did not think the Deputy Registrar of this court can be directed to execute the mutation and transfer documents in regard to the property registered in the name of the deceased as the Deputy Registrar is neither an administrator nor a legal representative of the estate.

24. It follows that I am unable to allow the Motion dated 27th July, 2020. The same is dismissed with no order as to costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 17TH DAY OF MARCH, 2022.

In the presence of:

No appearance for the Applicant

No appearance for the Respondents

Court assistant - Kendi

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J. O. Olola

JUDGE