



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 33 of 2006

MARTIN NDONGA MULI.....PLAINTIFF

VERSUS

MICHAEL BONFACE MULI .....RESPONDENT

JUDGMENT

The plaintiff filed the instant suit against the defendant on 12<sup>th</sup> April, 2006 in person. Later he instructed the firm of **Messrs B.M. Musau & Co. Advocates** to take over and act for him. Upon coming on record, the said firm successfully applied to amend the plaint. In the amended plaint, the plaintiff seeks as against the defendant;-

- A declaration that the plaintiff is the sole or part owner of the parcel of land known as Kangundo/Mbitini/316 “ *the suit premises*”
- Revocation and cancellation of the defendant’s title deed in relation to the suit premises and the registration of the plaintiff as the sole or part owner of the suit premises.
- A permanent injunction restraining the defendant from interfering with the plaintiff’s enjoyment of the suit premises.
- Costs and interest

The plaintiff averred in his plaint that he was a brother to the defendant and beneficiaries of the suit premises which originally belonged to their mother, the late **Justina Methi Muli**. Sometimes back their deceased mother divided the suit premises into 3 portions and allocated them for her sons, the defendant, **Thomas Muli** and the plaintiff respectively. However, one of their brothers, **Thomas Muli** sold his portion to the defendant and relocated to Embu. The defendant thereafter effected the transfer of the entire suit premises to himself secretly through fraud, conspiracy and or misrepresentation. It was the plea of the plaintiff. In the circumstances that the defendant be prohibited from interfering with his portion of the suit premises and revocation of the title deed and thereafter the suit premises be registered in his name as the sole or part owner of the suit premises. He conceded though that there had been previous proceeding involving them in the Land Disputes, Machakos in Claim No. 120 of 2005.

In his statement of defence, the defendant admitted that the plaintiff was his brother but denied everything else. He also admitted that his brother. **Thomas Muli** sold his portion of the suit premises to him but denied ever transferring the same to himself secretly. He denied fraud and or misrepresentation attributed to him and the particulars thereof.

The suit came before me for hearing on 2<sup>nd</sup> July, 2012. The defendant was absent. His counsel, **Mr. Kamanda** asked for adjournment which was denied and the case thereafter proceeded to hearing.

The plaintiff in his testimony merely reiterated what he had pleaded in the plaint. Suffice to add that their mother subdivided the suit premises to them in 1960's. The defendant is their youngest brother. In 2005, the defendant called a family meeting. By then their mother had passed on. At the meeting the defendant told the plaintiff that he intended to evict him from the suit premises since the entire suit premises now belonged to him. He showed the family, the title deed. The plaintiff though was never involved in the transfer of the suit premises to the defendant which was effected on 15<sup>th</sup> August, 1989. At that time, their mother was ailing and as per Kamba customs, she was staying with the defendant. Otherwise he was still in occupation of his portion of the suit premises.

Cross-examined by **Mr. Kamanda**, learned counsel for the defendant, he stated that their mother died in 1991. Prior to her death, she was staying with the deceased more so when she started ailing. One of his brothers **John Makau** had since passed on. It was him and the defendant who were otherwise in occupation of the suit premises. There was nothing wrong with their mother dividing her land. The only problem is that the mother never told them about giving out the entire suit premises to the defendant. In any event she did so when she was mentally unstable. He had sued the defendant in the tribunal, but the tribunal had not made decision.

**PW2, Angela Syomunyu Makau** testified that the plaintiff and defendant were her brothers in law. She was the wife of **John Makau Muli**, deceased. Her husband had been given a parcel of land just like his other brothers by their late mother. Prior to her death; her mother in law was staying with the defendant. She later became mentally ill. After her death, the defendant called a family meeting where he informed them that the plaintiff should vacate the suit premises. He showed them a title deed. However, the family had not been involved in the transfer of the suit premises to the defendant. As the mother in law was mentally unstable most of the time, she could not have transferred the suit premises to the defendant.

Cross-examined, she confirmed that her mother in law had a huge parcel of land. The plaintiff did not stay on the suit premises, though he cultivated it. He stays in another parcel of land.

That then marked the close of the plaintiff's case. As the defendant was absent, his counsel opted not to offer any evidence in rebuttal to the plaintiff's claim. Parties though agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered them.

The issues for determination in this case are essentially two, whether the plaintiff is entitled to the suit premises or a portion thereof and costs.

Dealing with 1<sup>st</sup> issue, the plaintiff testified and called one witness. From their evidence, it is common ground that during land adjudication process in Kangundo Mbitini area, the suit premises were registered in the name of **Justina Methi Muli**, the mother to the plaintiff and defendant. The plaintiff had 3 siblings, **John Makau**, deceased, the defendant and **Thomas Muli**. At the time of adjudication, the deceased had already subdivided the suit premises into 3 portions amongst her sons, the defendant included. The elder son **John Makau**, deceased apparently did not get a share of the suit premises as he had already been allocated a separate portion of land elsewhere by the mother and a title issued to him. The plaintiff, defendant and **Thomas Muli** started farming their respectively portions growing general farm crops until 1965 when they started farming coffee. After sometime, **Thomas Muli** sold his portion of the suit premises to the defendant and relocated to Embu.

The plaintiff and defendant lived peacefully and each cultivated their respective portions of the suit premises until 29<sup>th</sup> September 2005 when the defendant called a family meeting and produced a title deed proclaiming that the entire suit premises as being his. He further informed the meeting that he wanted the plaintiff to stop cultivating his portion of the suit premises. The family as it were, were surprised by the turn of events as they had not been involved in the transaction leading to the transfer of the suit premises to the defendant. In those circumstances they alleged that the defendant obtained such registration through

fraud, conspiracy and or misrepresentation.

Particulars of fraud and or misrepresentation given were that the defendant registered the suit premises in his name while he knew that the suit premises were left behind by their deceased mother for the benefit of himself and his brothers, failed to disclose to the Commissioner of Lands that the plaintiff was entitled to the same, falsely obtaining the requisite consent to the transfer, registering the transfer without the consent of their late mother who was very old and sick and incapable of entering the kind of transaction, failed to obtain the consent of his brothers and effecting the transfer discreetly and suspiciously obtained the consent for the transfer from the relevant Land Control Board falsely.

It is trite law that fraud is a serious charge which must be strictly proved. The burden of proving fraud is very heavy. In the instant case much as the plaintiff pleaded fraud and or misrepresentation and gave the particulars thereof, he never in his testimony and that of his witness attempted to prove the fraud and or misrepresentation pleaded nor the particulars. Yes the suit may not have been defended; but it was still the duty of the plaintiff to prove the fraud and misrepresentation thereof. He did not prove that it was the defendant who caused transfer. It may well be that the transfer was voluntarily effected by their late mother. There was no prove by cogent evidence that the defendant failed to disclose to the Commissioner of Lands the plaintiff's interest in the suit premises nor did he prove that such disclosure was necessary.

From the documents on the file, it would appear that the deceased mother voluntarily appeared before the Land Control Board and willingly consented to the transfer. Of course the plaintiff has alleged that at the time of the transaction, their mother was very old, mentally sick and incapable of entering such transaction. Clearly, this is a mere allegation not backed by any solid evidence. One would have expected that the plaintiff will have medical documents to back up such claim. He did not even tender in evidence the death certificate which would have shown the age of the deceased at the time of death and the cause of death. The suit premises were at the time still registered in the name of the deceased. If indeed the deceased had shared out the suit premises to her sons, there was nothing to stop her from changing her mind subsequently and transferring the entire suit premises to the defendant. After all, he was the youngest son and who was taking care of her. Perhaps the plaintiff did not give as much assistance and or attention to her in her sunset years like the defendant. It cannot be that merely because of a portion the suit premises had been allocated to the plaintiff and was later handed to defendant by their mother be evidence of fraud. It is also instructive to note that the tribunal in which the plaintiff had lodged his claim before coming to this court observed as follows;-

***“...when the title deed was produced to the court, we at one time thought it was not genuine. The tribunal chairman Mr. Joseph Ndolo went to the Land Registrar's Office Machakos to check. It was confirmed that the title deed was genuine and was issued on 15<sup>th</sup> August, 1989 – about 2 years before the death of their mother. The land had been registered in the name of Justina Methi Muli before. All the documents related to this transfer were found to be correct. The registered land includes the 2 benches which Ndonga says was given to him by his mother. Having summarised the evidence, the court finds that the title deed was issued to the objector after the consent papers were processed by the Land Board Kangundo. We find no reasons to interfere with the wishes of their mother. In the plaint filed by the claimant he says that the land was transferred in a dubious manner. The court does not agree with that statement because as we have said earlier, the transfer was proper and supported by the consent papers. In the circumstances the court finds that the claim brought here by the claimant cannot stand and we hereby dismiss...”***

I could not agree more with this finding. It has not been challenged anywhere by the plaintiff. It is also instructive that the transfer was effected 2 years before their mother passed on. There was no evidence from Kangundo Land Control Board that the consent obtained if at all was fictitious. On the whole, I find the claim by the plaintiff that the defendant engineered the transfer of the suit premises fraudulent and or by misrepresentation unproved.

It is common ground that following the disclosure to the family by the defendant that he was now the sole registered proprietor of the suit premises, the plaintiff lodged a claim with Kangundo Land Disputes Tribunal claiming a portion of the suit premises given to him by his mother. That is the same claim he is

making in the instant suit. From the decision of the tribunal, it emphatically found that the suit premises belonged to the defendant.

Subsequently, thereto, the defendant lodged the award with the Chief Magistrate's Court to be adopted as a judgment and decree of the court. It was then according to the replying affidavit filed in court on 26<sup>th</sup> March, 2007, that the plaintiff ran to this court and filed this suit. To my mind this suit is an abuse of the process of court. The award has yet to be set aside. It may well have been adopted already as a judgment and decree of the court. It will be legal absurdity to have two contradictory decrees of the court in relation to the suit premises. If I was to grant the prayers sought in this suit, it will run counter to the decree issued by the Chief Magistrate's Court pursuant to the award. However, the plaintiff has submitted that there should be no such fear since the tribunal in making the award acted in excess of jurisdiction and therefore the award is a nullity. My simple response is that as long as the award has not been reviewed and set aside or quashed it remains a valid award from which a decree can issue and be executed. This is not the forum to declare the proceedings before the tribunal to have been a nullity for want of jurisdiction. In any event no such evidence was led. As correctly pointed out by the defendant therefore, the plaintiff filed this suit as a way of stalling the proceedings in the Chief Magistrate's Court. There can be no better abuse of the process of the court than this.

In the result, I find that the plaintiff has not proved his case that he is entitled to the suit premises or a portion thereof. The suit is accordingly dismissed with costs to the defendants.

**DATED at MACHAKOS this 22<sup>ND</sup> day of NOVEMBER, 2012.**

**ASIKE-MAKHANDIA  
JUDGE**

**DATED, SIGNED and DELIVERED at MACHAKOS this 30<sup>TH</sup> day of NOVEMBER, 2012.**

**GEORGE DULU  
JUDGE**