REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 154 of 2009
PROFESSOR JOSEPH MAITHA ……
PLAINTIFF/RESPONDENT

VERSUS

ELIZABETH K NDOLO *(Sued as executrix*

***of the last will of* JOSEPH MUSYIMI LELLE NDOLO …… 1ST DEFENDANT**

JUSTICE K NDOLO …….. 2ND DEFENDANT

SILA MUSYIMI NDOLO …… 3RD DEFENDANT

MWAANI ENTERPRISES LTD. ……. 4TH DEFENDANT

RULING

1. The Chamber Summons dated 30/7/2007 is premised on the provision of Order VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules and the simple prayer sought is that the Plaint be struck out and the suit be dismissed with costs to be paid by the Plaintiff.

2. The grounds in support are that:-

a. "The Plaint herein offends mandatory provisions of law more particularly Order VI of the Civil Procedure Rules of the Civil Procedure Act Cap 21 Laws of Kenya.

b. This suit is scandalous, frivolous and vexatious as no nexus whatsoever or at all has been established between the plaintiff and the defendant as regards the claim herein.

c. The Plaint discloses not by an iota any cause of action against the defendant.

d. The suit is *Res judicata* as court of appeal has ruled on all issues.

e. The suit is an abuse of the process of court as it is based on no known law."

3. In the Supporting Affidavit sworn by Justine Kasimu Ndolo sworn on 30/7/2007, her case is as follows;-

i. that all the issues raised in the Amended Plaint were determined by the Court of Appeal in C.A. 128/1995;

ii. the purported sale of the disputed parcel of land to the Plaintiff was a nullity;

iii. the sub-division of the suit land by the beneficiaries to the estate of the late Joseph Musyimi Lele Ndolo was lawful and there was no place for the Plaintiff in the sub-division;

iv. the Plaintiff's claim is in any event time-barred;

v. there being no Land Control Board consent, the whole transaction in issue was a nullity.

4. To put these matters into perspective, in the Amended Plaint dated 29th May 2007, the Plaintiff, Prof. Joseph Kamuya Maitha sought certain orders but principally "a declaration that the sub-division of deceased's land number L.R. No. 1756/7 and 1756/8 without regard to Plaintiff's interest on the land was wrongful, null and void."

5. The case by the Plaintiff is that the land in dispute originally belonged to Major General Joseph Ndolo who died on 6/4/1984 and *inter-alia* appointed Elizabeth Kamene Ndolo and Jackson Mulwa as executors of his Will. Title No. 1756 in Sultan Hamud was one of the properties he left behind and the 1st Defendant approached the Plaintiff in 1998 to purchase 1000 acres out of the 9000 acres comprised in the title to save the entire parcel of land from auction by a lending institution. The Plaintiff states that he paid the entire purchase price and was entitled to possession as at 28/11/1988. Later he agreed to buy another 600 acres but the Defendants breached the agreement and when George Matata Ndolo challenged the deceased's Will, the Court of Appeal in C.A. 128 of 1995 ruled that the land be sub-divided between the dependants of the deceased "in the ratio of 40% for the house of the 1st defendant and 30% for each of the houses of the other widows of the deceased after setting aside 1000 acres" that the Plaintiff bought through the aforesaid agreement dated 4th August 1988."

6. That in 1996, the land was sub-divided and out of that act L.R. No. 1756/8 was created measured 2400 acres while L.R. No. 1756/7 measured 1000 acres and since the Plaintiff had taken possession, his land was between No. 1756/8 and 1756/7 and the latter title was then registered in the name of the deceased.

7. The Plaintiff faults the actions of the Defendants who failed to take into account the fact that he was entitled to 1600 acres out of the larger parcel of land and that the Defendants have acted fraudulently, wrongfully and illegally.

8. The 1st Defendant without directly opposing the Application and through her advocate supports the Plaintiff's position while the 3rd Defendant supports the 2nd Defendant's position. In his Affidavit in response, he depones that the purported sale agreement between the 1st Defendant and the Plaintiff was tainted with illegality and is unenforceable.

9. Having read the rival submissions and authorities submitted by the advocates for the parties, I should begin by stating as follows;-

I have read the judgment in C.A 128 OF 1995 and of specific interest is the holding at page 16 as follows:-

"We must, however, take into account the undoubted fact that the appellant herein was the deceased's preferred wife and we can only do so by allocating to her house a larger share of the deceased's net estate. And of course the only valuable asset in the estate is the Mawani ranch which was said to be over 9,000 acres. 1,000 acres have been sold, leaving some 8,000 acres. There may still be livestock on the ranch but we shall not go into all those details. We accordingly order that out of Mawani Ranch, the

appellant and her house shall receive 40% thereof while the houses of Alice and Rose shall each receive 30%. If there still are livestock on the ranch, they shall also be shared in the same manner and in case there should be any dispute over the question of livestock, we give to the parties leave to apply to the High Court to settle any such dispute."

10. The 2nd Defendant argues that the Plaintiff has no interest in the land at all and that the decision of the Court of Appeal was final. If so, and since the Court of Appeal accepted that 1000 acres of the land was not available for distribution amongst the Defendants, why can't that bit of the judgment be similarly deemed as final and settled and that the Court of Appeal may well have settled the matter and the Plaintiff's claim may not be idle. With that one statement how can it be said that the Plaintiff's claim is frivolous and the Plaint discloses no cause of action?

11. Secondly, the 1st Defendant who was party to the purported sale agreement states that the Plaintiff's claim is genuine. She admits the Plaintiff's purchase and occupation of part of title No. 1756 before sub-division. How can the 2nd Defendant then state that "there is no nexus" between the Plaintiff and Defendants?

12. That necessarily leads me to the issue of *res-judicata.* I have said that the Plaintiff's claim was partly determined by the Court of Appeal when his purchase of 1000 acres was taken into account and when sub-division was being done between the houses. Without saying more, it is in fact the 2nd Defendant's denials that may be *res judicata* at least to the extent of the 1000 acres due to the Plaintiff.

13. In any event and if I am wrong in my holding above, was the Plaintiff party to the proceedings before the Court of Appeal? No. Were the issues in that Appeal the same as in this suit? No. Those were succession proceedings where the deceased's will was being challenged by George Matata Ndolo and so *res judicata* cannot be properly pleaded – see Section 7 of the Civil Procedure Act.

14. To my mind, once I have resolved these two issues, I need not say more save to say this:-

15. In D.T. Dobie & Co. (K) Ltd vs Muchina & Another C.A. 37/1978 it was held as follows:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment."

16. I completely subscribe to that lucid thinking and I have shown that the suit must be determined on its merits.

17. The Application dated 20/7/2007 is itself hopeless. Let all issues addressed or not addressed in this Ruling be properly canvassed at the hearing.

18. The Application is dismissed with costs to the Plaintiff.

19. Orders accordingly.

Dated and delivered at Machakos this 9th day of November 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mr Kilonzo for Plaintiff

N/A for Defendants

ISAAC LENAOLA

JUDGE