



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 300 OF 1995

JULIUS MUTABA KIOKOPLAINTIFF

VERSUS

KYENGO KIOKODEFENDANT

J U D G E M E N T

The plaintiff Julius Mutaba Kioko has filed this case against his brother Kyengo Kioko averring that his claim against the defendant is for eviction from his land parcel no. Muputi/Kimutwa/1781 which land the plaintiff acquired by way of purchase and the defendant unlawfully refused to vacate and is still persisting in so doing. He therefore seeks eviction from the said land, costs of the suit and interest thereon at court rates from the date of filing till payment in full.

The defendant has filed a defence to that claim averring that the plaint lacks details as regards the alleged purchase and the defendant will seek further and better particulars of the plaintiffs claim, that alternatively and without prejudice to the foregoing the defendant avers that the plaint is bad in law for non disclosure of any or any reasonable cause of action and the defendant hereby gives notice of his intention to raise a preliminary point of law as to the competence of the plaint and by extension the plaintiffs entire suit, denied paragraph 3 and 4 of the plaint.

In his counter claim the defendant averred that parcel number muputi/Kimutwa/1781 belonged to the parties father Kioko Ngatu as confirmed by the parties clan decision dated 23.2.1991, that the plaintiff being the defendants brother was adequately provided for in the said decision of the clan, that alternatively and without prejudice to the foregoing no grant of letters of administration of the estate of the parties father has been issued with the defendants knowledge and participation and should the plaintiff purport to have purchased the land from the parties deceased father the said purchase would be null, void and tainted with deceit and fraud. The particulars of fraud are given in paragraph 7 of the plaint and are that in so far as the transfer into the name of the plaintiff was effected on 16.3.1995 as indicated in the land register the purported sale and transfer is null and void as the purported vendor had died on 2.9.1994, that the said transfer does not purport to have been effected by the grantee of a confirmed grant of letters of administration of the estate of Kioko Ngatu Mui the original owner of the suit parcel. That in the further alternative and without prejudice to the foregoing the defendant had been in continuous un disturbed occupation of parcel number Muputi/Kimutwa/1781 for more than 12 years which occupation is adverse to the plaintiffs claim. The defendant has fully developed the suit land and put up permanent buildings thereon.

In the premises he prays for an order that the suit parcel is registered in the name of the plaintiff as trustee for the defendants benefit and that the said trust be terminated and the plaintiff be compelled to sign the

necessary papers to effect transfer of the suit parcel in favour of the defendant and in default the same be executed by the Deputy Registrar of this honorable court. That on that merit the plaintiffs suit be dismissed and the counter claim be allowed with costs.

In the reply to defence the plaintiff repeated the contents of his plaint and states that he is the registered owner of parcel number Muputi/Kimutwa/1781 which parcel was taken out of Muputi/Kimutwa/1647, that Muputi/Kimutwa 1647 belonged to the plaintiffs father Kioko Nguta who sold a portion of that land and now what is Muputi/Kimutwa/1781 upon subdivision and subsequent transfer to the said Kioko Nguta, that the defendant was given a portion out of parcel no. 1647 by his father and registered as Muputi/Kimutwa/1782.

In the defence to the counter claim the plaintiff avered that he denies the contents of paragraph 6,7,8 and 9 of the counter claim and puts the defendant to strict proof, in particular he denied that Muputi/Kimutwa/1781 is family land, that letters of administration into the estate of Kioko Nguta were not necessary to effect sub-division and transfer for that had been done before his death, denies that there was any fraud involved in subdivision and subsequent transfer of parcel no. Muputi/Kimutwa/1781 into the name of the plaintiff, that the defendant has not stayed in parcel number 1781 for more than 12 years with quiet possession because he moved to that parcel no. 1781 from 1782 when their father died, that the counter claim is misplaced and an after thought, that judgement be entered for the plaintiff in terms of the plaint and the defendants defence and counter claim be dismissed.

The plaintiff was the sole witness on his side and the sum total of his evidence is that the defendant is his elder brother. His father died on 2.9.1994. He is the last born of his father. He lived with his father and he took care of him and his late father said that he will give him the suit plot and he plaintiff gave his father 15,000/=. His brother the defendant was supposed to reside on plot no. 1782. He refused and his father went to court and obtained an order exhibit 1 compelling the brother to move to plot 1782 and he was (defendant) forced out of plot 1781 in 1982. His father gave him transfer and when he went to check he found the title deed ready and he took it. He says the brother has no grant to the estate of his late father and he denies obtaining the land fraudulently. He maintains it in his shamba.

When cross examined he stated that although he gave his father 15,000/= the plaint does not mention a gift, he maintain he gave out money but he has no agreement of sale in court but it is there. He also says that there were witnesses although he has decided not to call any. He agrees that the entry in the register of title is dated 16.3.1995 by which time his late father had already passed away. He agrees his father died before the entry was made but he denies that it is not a trick. He confirms that he did not take out succession proceedings. He confirms that after the defendant had been sued by his father and that case ended plot 1781 remained the property of his late father. The defendant was also the sole witness on his side and he confirms that the plaintiff is his younger brother. He confirms that his late father sued him in case no. 402/92 over the suit property previously it was clan land and after the dispute his father retained plot 1781 while he defendant was given 1782 and the plaintiff was given 1780 and 1783, that the extract of title shows that the name of his brother was inserted on 16.3.1995 long after his late father had died in 1994. That although his brother claims to have purchased it from his father he has not showed him an agreement to that effect. It is his evidence that the suit plot is for inheritance by both of them. When cross examined he agreed that his father had sued him in connection with the suit property. He has no letters of administration to his late fathers estate. His testimony is that the property should revert back to the estate of his late father for distribution after proper letters of administration have been obtained. Both counsels filed written submissions. The points relied upon by the plaintiff are:-

1. Since the title is registered in the plaintiffs name as the absolute proprietor it cannot be said that it forms part of the deceaseds estate.
2. The defendant can only claim a portion of this land after he is made a legal representative to the estate of his late father. He has no locus standi and on this point alone his claim fails.
3. In answer to the allegation of fraud the plaintiffs submission is that during the life time of his late father the father acted in such a manner as to transfer his interests in the said land to the plaintiff.

The plaintiff and the deceased did all that was necessary to effect the transfer and all that was left was for the plaintiff to collect the title. These transactions took place before the deceased died in 1994. More so the defendant never called Machakos land registrars registry officials to come and explain how the title moved from the deceased to the plaintiff. If called they would have clarified any anomalies that may have existed and so it is their stand that the defendant's evidence on this point has no probative value.

4. That the claim for adverse possession cannot hold as it has not been commenced by filing of originating summons.

5. The proceedings of the case between the defendant and his deceased father shows that the two were not in good terms and this court should impute that this shows even if his late father had been alive he would not have given his land to the defendant. On the basis of the foregoing counsel urged the court to allow the plaintiff's claim. The points raised by the defendant's submissions are that:-

(1) The parties to the dispute are brothers. (2) The suit property was originally part of family land no. Muputi/Kimutwa/1647 which was subdivided and gave birth to 1780, 1781, 1782 and 1783. That 1780 and 1783 went to the plaintiff while 1782 went to the defendant and 1781 was left with the father.

(3) That the plaint in PMCC no. 402 of 1992 has been admitted by the plaintiff to be showing the true position of the state of affairs.

(4) There is no dispute that the late father of both parties died while possessed of the suit property and so no disposition of the suit land could be effected otherwise than through succession proceedings. No such proceedings have been undertaken.

(5) That the plaintiff came to court in pr. 3 pleading title without disclosing the name of the purported vendor, the date of purchase or the existence of a written agreement and this offends the provisions of section 3(3) of the law of contract Act cap 23 Laws of Kenya. It also manifests fraud on the part of the plaintiff because:-

(i) The plaintiff effected the transfer to himself on 16.3.1995 long after the deceased's death. Letters of administration were necessary although the plaintiff says that they were not necessary. (ii) There was no land control board consent transferring the land from the father to the plaintiff which has been exhibited herein.

(iii) Registration of the land into the plaintiff's name was effected without the consent of the defendant who was also a beneficiary to the late father's estate.

6. That fraud aside the material before court is enough to assist the court make a finding of trust and declare that the plaintiff holds the said land in trust for himself and the defendant. The said trust ought to be terminated to pave the way for each beneficiary to get his rightful share on that basis the counsel urged the court to dismiss the plaintiff's suit and allow the counter claim.

On the court's assessment of the facts herein it is clear that the evidence is brief and straight to the point and the findings of this court in respect of the same bearing in mind the submission of both parties is as follows:-

1. There is no dispute that the disputed plot parcel number Muputi/Kimutwa/1781 was registered in the name of the late father. Both parties have laid a claim onto the title from two different angles.

2. The plaintiff says that the late father gave him this land during his lifetime as a gift although he plaintiff paid 15,000.00 to the father. It is on record that there is no documentation of this

transaction which has been exhibited. The plaintiff said they were available and even a witness was available but he was not availed in the absence of such documentation this court has nothing before it which it can use to rule in favour of the plaintiff that the late father gave him the land as a gift and he reciprocated by paying the father 15,000/= as a token of appreciation.

3. It has to be borne in mind that the late father had an interest in land parcel number 1781 and he could only divest that interest from himself to the plaintiff through consent of the area land control board. No such consent has been exhibited by the plaintiff. The position in law is that any disposition in land which does not have the blessing of the area land control board is invalid null and void. The plaintiff went round this by saying that his father took him to the lands office and filled all the necessary papers and all that was left was for him plaintiff to collect the title deed. None of these papers were exhibited. The plaintiffs counsel submitted that the defendant should have called for them. It is the finding of this court that it is the plaintiff who was alleging their existence and he is the one who had knowledge of them. They would also have supported his case and so he should have produced the same. Failure to produce them leads to the conclusion that none exists as alleged. It therefore follows that there is nothing to show that the plaintiff was documented in respect of this property before the deceaseds death.

4. Even if it can be taken that the deceased wished the plaintiff to have this property as a gift but did not perfect it before death it amounts to an incomplete gift. The position in law is that an incomplete gift cannot be perfected by a court of law. It follows that the plaintiff cannot come to this court and ask this court to perfect for him that which his late father did not perfect.

5. It was submitted by the plaintiffs counsel that the title is an absolute proprietorship and it cannot be faulted. The finding of this court is that the registration in the name of the plaintiff is not a first registration and so it can be faulted.

6. A further finding of this court is that the plaintiff deliberately withheld the pleading of vital particulars in his plaint of how or when he had acquired the said property deliberately to mislead the court as he plaintiff was in possession of the full facts of the case.

7. In the absence of proof that the plaintiff was given consent of transfer of the suit land and documented before the father died it means that the change of title into his name after the death of his father was wrongful if not fraudulent and it cannot be upheld. He plaintiff required the process of succession to effect that transfer.

He himself said that it was not necessary but no basis for this assertion has been shown in view of the findings of his court on the date of the registration. In the absence of such succession process and in the absence of proof of transfer of title before the death of the father it means that the plaintiff has wrongfully registered himself in respect of the said title and he cannot be protected by this court.

Turning to the claim of the defendant in his counter claim the court is satisfied as submitted by the plaintiffs counsel that the claim of adverse possession must fail as it has not been brought by way of originating summons.

2. The court agrees with the submissions of the defence lawyer that the defendant has shown that the registration of the plaintiff in respect of the title was wrongful if not fraudulent and it cannot stand to vest any proprietary interest in his favour as against 3rd parties.

3. The court however agrees with the submissions of the plaintiffs counsel that the defendant can only champion the interests of his late fathers estate only when he has letters of administration.

4. There was mention of a trust existing in respect of the said title in favour of the defendant from the plaintiff. It is the finding of this court that trust exists only where there is a valid title where there is an invalid title no trust can be inferred as in the case subject of these proceedings.

In the final analysis it is the finding of this court that both parties have to loose but this court will make orders under the relief such further and other relief that the court may deem fit to grant and finally adjudicate the dispute between the parties. The final orders of this court therefore are:-

1. The plaintiffs claim for an eviction order to issue against the defendant is dismissed.
2. An order be and is hereby issued and ordered to the effect that the plaintiff was wrongfully registered as title holder and that title cannot be up held. 3. An order be and is hereby made and ordered that the wrongful registration of the plaintiff in respect to the said title is ordered to be cancelled and title ordered to revert back into the name of late Kioko Ngatu.
4. After such rectification is effected then the parties do take out successions proceedings to determine who is to inherit the said portion of land.
5. The plaintiff is given 45 days from the date of the reading of this judgement to execute all the necessary forms to effect re transfer of the title back into the name of the decased Kioko Ngatu in order to enable succession proceedings to take place. In default of no. 5 above the Deputy Registrar of this court is authorized to execute such papers on behalf of the plaintiff in order to give effect to the Judgement herein.
6. The proceedings herein were occasioned by the wrongful conduct of the plaintiff and so he will pay costs of the proceedings to the defendant.
7. The counter claim is dismissed with no order as to costs as it is the plaintiff who wrongfully took the defendant to court.
8. There will be liberty to apply.,

Dated, read and delivered at Machakos this day of, 2003.

R. NAMBUYE

JUDGE