



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 23 OF 2005

DAVID N. KITONYI.....1ST PLAINTIFF

OBADIAH MUTISYA KITONYI.....2ND PLAINTIFF

LABYUS KITONYI.....3RD PLAINTIFF

BENJAMIN MUTUA KITONYI.....4TH PLAINTIFF

AGNES MUENI KIOKO.....5TH PLAINTIFF

VERSUS

JOSEPH M. NZIOKA.....DEFENDANT

JUDGMENT

1. In the Complaint dated 8th January, 2005, the Plaintiffs averred that the Plaintiffs are the lawful heirs to the Estate of the late Onesmus Kitonyi Mutisya (*deceased*); that the 1st to 3rd Plaintiffs are the registered proprietors of agricultural parcels of land known as Donyo Sabuk/Komarock Block 1/8992; 8993 and 8994 (*the suit properties*) whereas the 4th and 5th Plaintiffs are the owners of Donyo Sabuk/Komarock Block 1/8995 and Donyo Sabuk/Komarock Block 1/4010 and 4011.

2. The Plaintiffs further averred that on 8th October, 2004, the Defendant wrongfully lodged and registered restrictions against the Plaintiffs' titles to all the afore named parcels of land, claiming ownership of the suit properties; that due to the said restrictions, the Plaintiffs have been unable to obtain the titles for the suit property and that the Defendant has no legal or sustainable interest in the suit property.

3. The Plaintiffs have prayed for the following prayers:

a. A declaration that the Defendant's act of restricting the Plaintiffs' land parcel Nos. Donyo Sabuk/Block 1/8992, Donyo Sabuk/Komarock Block 1/8993, Donyo Sabuk/Komarock Block 1/8994, Donyo Sabuk/Komarock Block 1/8995, Donyo Sabuk/Komarock Block 1/4010 and Donyo Sabuk/Komarock Block 1/4011 is wrongful and unlawful.

b. An Order that the said restrictions be removed.

c. Costs of the suit.

d. Interest at court rates.

4. In the Defence and Counter-claim, the Defendant averred that he purchased 20 acres of the suit property from Onesmus Kitonyi around 1986 and that the Plaintiffs are holding the parcels of land in Trust for him, being heirs of their father's aforesaid land; that the deceased surveyed the 20 acres with the surveyor at Kangundo Survey Office and that his claim is only for 20 acres which he purchased.

5. In the Counter-claim, the Defendant averred that he is legally entitled to the ownership of 20 acres of the suit property; that the Plaintiffs hold the suit property in his trust and that the restriction he registered should be sustained until the suit is heard and determined. The

Defendant is further seeking for the Deputy Registrar of this court to sign the transfer forms for the 20 acres of the suit property in his favour.

6. The 1st Plaintiff, PW1, informed the court that the late Onesmus Kitonyi Mutisya (*Mutisya*) was his late father while Naomi Kitonyi is his mother; that the Defendant used to be his father's lawyer; that his father was the registered proprietor of the suit properties; that the suit properties were transferred to the Plaintiffs vide High Court Succession Case Number 140 of 1996 and that the entire land was Block 1/291 measuring 40.45 hectares.

7. According to the 1st Plaintiff, after all the titles were registered, and when they went to collect the title documents, they realized that a restriction had been registered against the titles. According to the 1st Plaintiff, they appeared before the Machakos Land Registrar on the issue of the restriction and that in the same meeting, the Defendant claimed that he had purchased 20 acres from the original title number 291.

8. PW1 stated that he is aware that the Defendant had showed an interest in the purchase of 20 acres of the original land; that the Defendant paid to his father a deposit of Kshs. 20,000; that the transaction collapsed when the Defendant surveyed the land without his father's consent and that the Defendant never made any further payments for the land.

9. According to the evidence of PW1, other than the Defendant not finalizing paying the purchase price, he never obtained the consent of the Land Control Board and is therefore not entitled to the land. In cross-examination, PW1 informed the court that his late father never refunded the Kshs. 20,000 that he was paid and that his father was allocated 100 acres by Komarock Farmers Ranching Co-operative Society where he was a member.

10. PW2 informed the court that the Plaintiffs are her sons; that Onesmus Kitonyi is her late husband; that her late husband was allocated land by Komarock Farmers Ranching Co-operative Society where he was a member and that her late husband never sold the said land to the Defendant or at all. In cross-examination, PW2 stated that her late husband sub-divided the land before he died.

11. The 2nd Plaintiff, PW3, stated that the late Onesmus Kitonyi was his father; that after his death in 1995, his mother, PW2, obtained the Letters of Administration in High Court Succession Case No. 1499 of 1998; that the entire Estate of the deceased has been distributed to the deceased's dependants and that the 100 acres piece of land was sub-divided into five portions, to wit Donyo Sabuk/Komarock Block 11/8992 – 8996 and Donyo Sabuk/Komarock Block 11/4010 and 4011.

12. It was the evidence of PW3 that the Defendant was his father's advocate in a matter that was in court in 1984-1985; that his late father was required to pay costs of the suit of Kshs. 19,000; that he requested the Defendant as his advocate to lend him Kshs. 20,000 to settle the said costs and that before he died, his father asked his children to pay off the debt that he owed the Defendant.

The Defence case:

13. The Defendant, DW1, informed the court that he is an advocate of the High Court; that in 1984/1985, the late Onesmus informed him that he is selling his land measuring 20 acres in the Komarock area; that he agreed to buy the said land which was part of plot number 131 measuring 100 acres and that he told him to survey the said 20 acres so that he could buy it.

14. According to the Defendant, the late Onesmus was unable to have the 20 acres surveyed; that he (*DW1*) engaged a surveyor who surveyed and beaconed the said 20 acres; that the late Onesmus was selling the land at Kshs. 3,000 per acre and that the cost of the 20 acres was Kshs. 60,000. It was the evidence of DW1 that he paid the late Onesmus a total of Kshs. 40,000 by way of a cheque and that he assisted Onesmus to form a company known as Flying Tigers Limited.

15. According to the Defendant, as at the time the late Onesmus sold to him the 20 acres, the entire land had not been surveyed; that when the late Onesmus died, the land was surveyed and that the portion of land that he had bought was registered in favour of the 2nd Plaintiff; that the 2nd Plaintiff re-sold the 20 acres to him and that he picked the purchase price which he used to buy a bus which was later repossessed.

16. According to the Defendant, he has never been repaid the Kshs. 60,000 that he paid for the land; that he entered into two Sale Agreements; that one of the Agreements shows the acknowledgment of the purchase price and that he deducted from the purchase price his legal fees in incorporating a company for the deceased. According to the Defendant, the Plaintiffs are holding the 20 acres of the suit property in trust for him.

17. In cross-examination, DW1 stated that he bought the suit property in 1984/1985; that he filed his Counter-claim in the year 2005; that he bought the 20 acres from the late Onesmus and that he was not aware that the Estate of Onesmus was distributed upon his death in 1997.

18. According to the Defendant, he lost the copy of the Sale Agreement in respect to the suit property; that he sent a surveyor on the land in the year 1985; that although the land is agricultural, they never sought the consent of the Land Control Board to sub-divide the land and that he did not have the consent of the Board because he purchased the land directly from a member of the Society. According to the Defendant, all they wanted was the transfer of membership of the Society from Onesmus to himself and that whatever was granted to the 2nd Plaintiff is what he is entitled to.

Submissions:

19. The Plaintiffs' advocate submitted that the Plaintiffs are not administrators of the deceased Estate, and cannot, therefore, be sued on any issue, valid or otherwise, touching on the deceased's Estate and/or transaction alleged to have been undertaken by the deceased; that on or about 8th October, 2004, the Defendant wrongfully and unlawfully registered restrictions against the Plaintiffs' land titles claiming ownership of the said properties and that it is as a result of this wrongful and unlawful act by the Defendant that the suit herein was filed.

20. Counsel submitted that the alleged sale of the suit property, if any, became null and void for all purposes within six (6) months of the alleged transaction pursuant to Section 6 of the Land Control Act; that if any money was paid to the deceased by the Defendant, which was not proved, then the same ought to have been recovered by the Defendant from the deceased's administrator/personal representative as a debt pursuant to Section 7 of the Land Control Act and that the Defendant's purported Counter-claim is statute-barred.

21. Counsel submitted that a claim for land cannot be brought after twelve (12) years from the date of the alleged cause of action arose; that the Defendant's purported Counter-claim was brought over nineteen (19) years from the date the alleged cause of action allegedly arose (1986) and that other than alleging that he did some legal work for the deceased (*Onesmus Kitonyi Mutisya*), the Defendant did not prove and/or demonstrate that he ever bought land from the deceased.

22. The Plaintiffs' advocate submitted that the Plaintiffs have proved their case on a balance of probability, and that Judgment be entered against the Defendant as prayed in the Plaint; and that costs of the suit be awarded to the Plaintiffs.

23. On his part, the Defendant's advocate submitted that the Defendant requested the Estate of Onesmus Kitonyi (*deceased*) to transfer to him 20 acres of the suit property which he had purchased from the deceased; that it is only after the Plaintiffs declined that the Defendant proceeded and applied to the Registrar for the restrictions to be registered against the suit property and that the restriction was registered lawfully pursuant to Section 76 of the Land Registration Act, 2012. Counsel relied on the decision of the court in the case of **David Macharia Kinyuru vs. District Land Registrar, Naivasha & another [2017] eKLR** and submitted that the restriction that was registered against the suit property was done lawfully.

24. It was submitted that Trusts are provided for under the Land Registration Act 2012 at Section 28; that a trust does not need to be registered and that the existence of a trust is borne by evidence adduced. It was submitted that during cross-examination, the 2nd Plaintiff admitted that the Defendant paid a total of Kshs. 20,000 to Onesmus Kitonyi Mutisya (*deceased*) and that the Defendant paid the full purchase price of Kshs. 60,000 during the incorporation of Flying Tigers Limited, a company associated with the deceased and the 2nd Plaintiff.

25. Counsel submitted that the Defendant's claim is based on trust; that it follows that the claim is one that is not subjected to the statute of limitation of actions; that the Plaintiffs stand in a position of trust to the Defendant and that the Plaintiffs have however breached the trust and transferred the suit property to themselves. Counsel relied on the case of **Mae Properties vs. Joseph Kibe & Another [2012] eKLR** where **Mabeya J. held** as follows:

“Section 20 of the Limitation Act provides:-

From this section, what is excepted from limitation is fraud or fraudulent breach of trust.”

26. It was submitted that the Defendant was not aware of the institution and proceedings in Machakos Succession Cause No. 149 of 1996 (*In the matter of the Estate of Onesmus Kitonyi Mutisya*) since he was out of the country during the period the proceedings were instituted and determined in court; that it was not practical in the circumstances for the Defendant to file any objection to the Confirmation of Grant and that the Defendant has proved his case on a balance of probability.

Analysis and findings:

27. Upon reading the pleadings in this matter, and hearing the evidence of the parties herein, the issues for determination are as follows:

a) *Whether it was unlawful for the Defendant to place restrictions on Land Reference Donyo Sabuk/Komarock/Block 1/8992, 8993, 8994, 8995, 14010 and 14011.*

b) *Whether the Plaintiffs are holding in trust 20 acres of the Land Reference Donyo Sabuk/Komarock/Block 1/8992, 8993, 8994, 8995, 14010 and 14011.*

c) *Whether the Defendant's Counter-claim over the suit property is time barred.*

d) *Who is entitled to the costs of the suit.*

28. The 1st, 2nd, 3rd and 4th Plaintiffs are sons of the late Onesmus Kitonyi Mutisya (*the deceased*) whereas the 5th Plaintiff is the deceased's daughter-in-law. The Certificate of Confirmation of Grant produced in evidence shows that upon the deceased's death on 6th November, 1995, the Plaintiffs' mother, Naumi Kitonyi, petitioned the High Court for a Grant of Letters of Administration of the deceased's Estate vide Machakos High Court Succession Cause No. 149 of 1996. (*In the matter of the Estate of Onesmus Kitonyi Mutisya – deceased*).

29. The evidence before this court shows that the grant of Letters of Administration of the deceased's Estate was made to the administrator of

the deceased's Estate (*Naumi Kitonyi*) on 7th November, 1996. The Grant was subsequently confirmed by the High Court, and a Certificate of Confirmation of Grant was duly issued to the administrator on 5th November, 1997. A copy of the said Certificate of Confirmation of Grant was produced as an exhibit by the Plaintiffs.

30. The Schedule to the said Certificate of Confirmation of Grant lists all the properties comprising the deceased's Estate, and lists the Plaintiffs herein as the beneficiaries thereof. By dint of the aforesaid Certificate of Confirmation of Grant, the High Court duly distributed the deceased's properties amongst the Plaintiffs.

31. One of the deceased properties that was distributed upon the deceased's demise is land parcel No. Donyo Sabuk/Komarock Block 1/291 measuring 40.45 hectares (*approximately 101 acres*), which the High Court ordered to be equally distributed amongst Plaintiffs. The subdivision of the deceased's said land parcel number Donyo Sabuk/Komarock Block 1/291 by the administrator of the deceased's Estate in execution of the High Court's order gave rise to Donyo Sabuk/Komarock Block 1/8992 – 18995 and Donyo Sabuk/Komarock Block 1/14010 and 14011.

32. The Plaintiffs' case is that after all the titles were registered, and when they went to collect the title documents, they realized that a restriction had been registered against the titles. According to the 1st Plaintiff, they appeared before the Machakos Land Registrar on the issue of the restriction and that in the said meeting, the Defendant claimed that he had purchased 20 acres from the original title number 291.

33. PW1 stated that he is aware that the Defendant had showed an interest in the purchase of 20 acres of the original; that the Defendant paid to his father a deposit of Kshs. 20,000; that the transaction collapsed when the Defendant surveyed the land without his father's consent and that the Defendant never paid any further payments for the land.

34. According to the evidence of PW1, other than the Defendant not finalizing paying the purchase price for the land, he never obtained the consent of the Land Control Board and is therefore not entitled to the land. In cross-examination, PW1 informed the court that his late father never refunded the Kshs. 20,000 that he was paid and that his father was allocated 100 acres of land by Komarock Farmers Ranching Co-operative Society where he was a member.

35. Although the Defendant informed the court that he had agreed with the deceased to purchase 20 acres of the suit property at a price of Kshs. 3,000 per acre, and that he paid to the deceased the entire purchase price, he did not produce in evidence the alleged Sale Agreement.

36. Indeed, the averment by the Defendant that he lost the Sale Agreement which was entered into in 1984/1985 was not collaborated in any way, either by producing a police abstract or calling the people who witnessed the signing of the Agreement. In the absence of a formal Agreement between the deceased and the Defendant, it is my finding that the purported Agreement between the Defendant and the deceased runs afoul. Section 3(3) (a) of the Law of Contract Act which provides as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

37. On the analysis of the evidence that was produced in court, it is my finding that the Defendant, who is an advocate, did not demonstrate that he purchased any portion of land parcel No. Donyo Sabuk/Komarock Block 1/291 which is an agricultural land, either from the deceased or from the administrator of his Estate. Although PW1 admitted that the Defendant paid his late father a deposit of Kshs. 20,000, no evidence was produced to show that the entire purchase price was paid by the Defendant.

38. Although the Defendant stated that he purchased the 20 acres in the year 1984/1985, he did not tell this court why he did not take possession of the land immediately, and in any event before the demise of the deceased in 1997. Furthermore, the Defendant did not show that the requisite Land Control Board's Consent was sought for and obtained pursuant to Section 8 of the Land Control Act for the subdivision and sale of the 20 acres he alleges to have bought.

39. That being the case, the alleged sale, if any, became null and void for all purposes after six (6) months of the alleged transaction pursuant to Section 6 of the Land Control Act which provides as follows:

“(1) Each of the following transactions that is to say-

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an

area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

40. Indeed, even where a party pleads the concept of trust, like in this case, the consent of the Board for the sub-division and sale of agricultural land is required. Section 6(2) of the Land Control Act provides as follows:

“(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).”

41. That being the case, the Kshs. 20,000,000 that was paid by the Defendant, and which was admitted by PW1, ought to be recovered by the Defendant from the deceased’s administrator/personal representative as a debt pursuant to Section 7 of the Land Control Act.

42. The assessment of the evidence before me shows that the Defendant did not complete the purchase of 20 acres of the suit property. The Defendant is therefore not entitled to the said land. The Defendant is only entitled to a refund of Kshs. 20,000 from the Estate of the deceased.

43. For those reasons, it is my finding that the Plaintiffs have proved their case on a balance of probability. That being the case, Judgment be and is hereby entered against the Defendant as follows:

a. A declaration be and is hereby issued that the Defendant’s act of restricting the Plaintiffs’ land parcel Nos. Donyo Sabuk/Block 1/8992, Donyo Sabuk/Komarock Block 1/8993, Donyo Sabuk/Komarock Block 1/8994, Donyo Sabuk/Komarock Block 1/8995, Donyo Sabuk/Komarock Block 1/14010 and Donyo Sabuk/Komarock Block 1/14011 is wrongful and unlawful.

b. An Order be and is hereby issued that the said restrictions be removed.

c. The Defendant’s Counter claim is dismissed with costs.

d. Costs of this suit and the Counter claim to be paid by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 23RD DAY OF APRIL, 2021.

O. A. ANGOTE

JUDGE