



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO.174 OF 2017

CLEOPHAS MAKORI MAGETO.....1ST PLAINTIFF

REBMAN MOMANYI MAGETO.....2ND PLAINTIFF

DUNCAN RASI MAGETO.....3RD PLAINTIFF

GEORGE NYAKUNDI MAGETO.....4TH PLAINTIFF

VERSUS

SAMWEL OMARIBA MAGETO.....1ST DEFENDANT

JAMES BOGONKO MAGETO.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiffs and Defendants are the sons of the late Benson Mageto Omariba-deceased and Alice Obegi Mageto. The deceased was the registered owner of land parcel number CENTRAL KITUTU /MWONYERERO/178. The Plaintiffs' claim against the Defendants is that the Defendants unlawfully sub-divided the deceased's land into 3 portions namely CENTRAL KITUTU/MWONYERERO/1821, CENTRAL KITUTU/MWONYERERO/1822 and CENTRAL KITUTU/MWONYERERO/1823. The said parcels shall hereinafter be referred to as parcels 178, 1821, 1822 and 1823 respectively. Parcel number 1822 was subsequently registered in the name of James Bogonko Mageto (2nd Defendant), parcel number 1823 was registered in the name of Samwel Omariba Mageto (1st Defendant) while parcel number 1821 was registered in the name of Benson Mageto Omariba.

2. It is the Plaintiffs' case that their late father had prior to his death in 2012 demarcated his land parcel no. 178 among his six sons, shown them where to build their houses and fixed boundaries which they had maintained during their father's lifetime. After their father's death in 2017, the Plaintiffs discovered that the Defendants had sub-divided their father's land into three portions aforesaid. It is the Plaintiffs' contention that the said sub-division and registration of parcels number 1822 and 1823 in the names of the 1st and 2nd Defendants was done clandestinely without the knowledge of the registered owner and the Plaintiffs and is therefore unlawful, null and void.

3. The Plaintiffs therefore pray for judgment against the Defendants jointly and severally for an order of injunction restraining the Defendants from evicting the Plaintiffs from parcels number CENTRAL KITUTU /MWONYERERO/1822 and CENTRAL KITUTU /MWONYERERO/1823 and a declaration that the sub-division of parcel number CENTRAL KITUTU/MWONYERERO/1821 is null and void.

4. The Defendants filed a Statement of Defence and Counterclaim dated 10th October 2017 denying the Plaintiffs' claim. In the Counterclaim they stated that the Plaintiffs had entered the Defendants' land and started plucking the Defendants' tea on parcels 1822 and 1823. They sought an order of injunction restraining Plaintiffs from interfering with their land parcels.

5. The Plaintiffs' attempts to have the matter resolved through mediation were rejected by the Defendants and the matter proceeded for hearing.

PLAINTIFFS' CASE

6. The 1st Plaintiff (PW1) testified on his own behalf and on behalf of his Co-Plaintiffs and produced the documents in the Plaintiffs' List of Documents as their exhibits. He told the court that their late father was the registered owner of land parcel number CENTRAL KITUTU/MWONYERERO/178 measuring 2.3 hectares.

7. Sometime in December 2012 their late father demarcated the said parcel among his six sons in the presence of the Chief and some village elders. The boundaries between each of the parcels were marked by kay apple trees and a traditional tree called "Omutembe". He stated that during their father's lifetime the six brothers lived harmoniously on the parcels that they had been allocated by their father.

8. PW1 testified that sometime in 2017 when their father was critically ill, they discovered that the Defendants had sub-divided parcel number 178 into three portions and registered two parcels in their names. They brought this information to their father's attention but he died before he could have it resolved by the Chief. He told the court that he and the 2nd Plaintiff had constructed houses on the portions of land that had been allocated to them by their late father but the Defendants had threatened to evict them as they claimed that the said houses were on the Defendants' land. Owing to the constant threats of eviction, the 3rd and 4th Plaintiffs had not constructed any houses on the suit property. He testified that out of all their siblings, only the Defendants had acquired title deeds in respect of their late father's land.

9. In cross-examination, he stated that the two portions registered in the Defendants' names comprise half of the original parcel number 178. He confirmed that the Defendants obtained their titles during their father's lifetime. He said that he had not been shown any document to demonstrate that the Defendants had obtained the consent of the Land Control Board. He said he had produced minutes dated 4.1.2013 showing that their father's land had been sub-divided in accordance with the measurements agreed upon on 27.12.2012. He denied that the parcel which is registered in their father's name is divided into 4 portions. He stated that each of the six portions have some tea bushes on them which was planted by their late father. He told the court that the Defendants were claiming half of the original land belonging to their late father yet their father had given each of his six sons an equal share. He confirmed that the dispute arose in 2017 just before their father died.

10. Daniel Makori Onsongo who testified as PW2 told the court that he attended a meeting towards the end of 2012 chaired by the Chief where they discussed how the deceased's land was to be divided among his six sons. He stated that after the land was divided, beacons were fixed but he was not sure if the deceased's sons obtained title deeds.

11. Upon cross-examination, he stated that by the time he recorded his witness statement, the beacons had partially been destroyed although he was not sure when they were destroyed.

12. Ong'era Rasi a village elder testified as PW3. He corroborated the evidence of PW1 and PW2 that a meeting had been held in December 2012 where the deceased's land was divided among his sons. He said he was present when the beacons were fixed but the said beacons have since been removed.

13. Alice Obegi Mageto (PW4) who testified as the Plaintiffs' last witness told the court that she was the mother of the Plaintiffs and Defendants. It was her testimony that her late husband divided his land among all his sons before his death in 2013 in the presence of the Chief and village elders. She stated that some of the boundary features that had been put in place after the said sub-division had been destroyed. She confirmed that she was present when the sub-division was done and the discussions were documented and signed by the Chief, village elders and her late husband. She said she wanted her sons to stay on the portions that had been given to them by their late father.

DEFENDANTS' CASE

14. James Bogonko Mageto (2nd Defendant) testified as DW1. He testified that he was the registered owner of land parcel number CENTRAL KITUTU/MWONYERERO/1822. He told the court that he was given the said parcel of land by his late father. He produced that Consent of the Land Control Board as an exhibit along with other exhibits in the Defendants' List of Documents. He said that none of his brothers had encroached on his land but he wanted them to confine themselves to their land.

15. Upon cross-examination he denied that his father had divided his land in 2013. He stated that even though his name and ID number appeared on the minutes of the meeting purportedly held on 4.1.2013, he was not present at the said meeting and he did not sign the said minutes. He denied that the meeting ever took place. He claimed that his mother who testified as PW4 was not truthful.

16. Samwel Omariba Mageto, the 1st Defendant testified as DW2. He confirmed that the Plaintiffs and the 2nd Defendant were his brothers. He told the court that his late father gave him and the 2nd Defendant land in 1990. He said he obtained his title deed in 2014. He denied that there was a family meeting in 2013 where his father divided his land. He denied having signed the minutes dated 4.1.2013. He stated that his land was occupied by the 2nd Plaintiff who had constructed a semi-permanent house on it.

17. Upon cross-examination, he stated that before his father's death, he had lived harmoniously with his brothers but a dispute arose in 2017 after his father's death. He reiterated that his father gave him land in 1990 after signing all the relevant transfer documents. He denied that him and DW1 had obtained their titles fraudulently.

18. The Defendants did not call any independent witnesses. After the close of the Defendants' case, the parties were granted time to file their written submissions and both parties complied by filing their submissions which I have considered.

PLAINTIFFS' SUBMISSIONS

19. Learned counsel for the Plaintiffs summarized the facts of the case and submitted that the Plaintiffs had proved their case on a balance of probabilities. It was his contention that the deceased had demarcated the suit property among all his sons during his lifetime in 2013 and any

other sub-division as alleged by the Defendants was fraudulent.

DEFENDANTS' SUBMISSIONS

20. On his part learned counsel for the Defendants submitted that the defendants obtained their titles in respect of CENTRAL KITUTU /MWONYERERO/ 1822 and 1823 during their father's life-time and that the said sub-division was lawful. He submitted that the Plaintiffs had failed to prove any fraud on the part of the Defendants. It was his further contention that the Defendants had not demonstrated that they had the capacity to institute the suit as the land in question was initially registered in the name of Benson Mageto Omariba- deceased. He argued that the mere fact that the plaintiffs were the sons of the deceased did not give them the capacity to sue.

ISSUES FOR DETERMINATION

21. Having considered the pleadings, evidence on record and the rival submissions, the following issues arise for determination:

1. Whether the Plaintiffs have locus standi to institute the suit.
2. Whether the Defendants fraudulently sub-divided land parcel number CENTRAL KITUTU/MWONYERERO/178 and obtained titles in respect of CENTRAL KITUTU/MWONYERERO/1822 and 1823.
3. Whether the Plaintiffs are entitled to the reliefs sought.

22. The Plaintiffs filed suit claiming that the Defendants who are their brothers unlawfully and clandestinely sub-divided land parcel number CENTRAL KITUTU/MWONYERERO/178 which was registered in the name of their father Benson Mageto Omariba-deceased into 3 portions and obtained title deeds for two of the said portions. The remaining portion is still registered in the name of the deceased. In the Plaint, the Plaintiffs did not indicate in what capacity they filed suit nor did they produce any Grant of Letters of Administration in respect of the estate of the deceased. However, it is clear that they are claiming the suit property by virtue of the fact that they are the sons of the late Benson Mageto Omariba and that they are therefore entitled to inherit his land.

23. It is trite law that in order for one to claim a beneficial interest in the estate of a deceased person, he must obtain a Grant of Letters of Administration.

24. In the case **Charles Ratemo Nyambati Vs Jacton Ocharo & 4 others (2016) eKLR** the Honourable Court observed as hereunder;

“A legal representative is a person who has been issued letters of grant. This is provided under section 82(a) of the Law of Succession Act..... “The applicant herein has a specific claim which is the estate of his deceased brother. It cannot therefore be anyone having a claim on this estate who can file a claim. The law of Succession is clear that it must be the legal representative. The applicant has not shown that he is the legal representative. He therefore lacks the locus standi specific to this estate of his deceased brother.”

25. Furthermore, in the case of in **Hawo Shanko v Mohamed Uta Shanko [2018] eKLR** the court held that:

“.....The general consensus is that a party lacks the Locus standi to file a suit before obtaining a grant limited for that purpose.... It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him/her the authority to file the suit.

.Without a limited grant being issued allowing the filing of the suit, the plaintiff would be like someone who has entered a closed room without opening the door. All that the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that despite the validity of the suit or the strength of the case, the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit.”

26. Similarly, in the case of **Trouistik Union International vs. Mbeyu & Another [1993] eKLR**, the Court of Appeal emphasized that personal representatives are people who have obtained grant and not blood relations. That if an administrator brought an action before obtaining a Grant, the same would be incompetent from inception. That a suit commenced by a party who has not obtained Letters of Administration was therefore incompetent as the party filing it lacked the *locus standi* to present and prosecute the suit. The court relied on their own decision in the case of **Otieno v Joash Ochieng Ougo & another (1987) eKLR** to hold that

“The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the action is incompetent at the date of its inception”.

27. In the absence of Letters of Administration, I am constrained to hold that the Plaintiffs lack the *locus standi* to institute this suit and on this ground alone, the suit must fail.

28. Even assuming that the Plaintiffs had the *locus standi*, the onus was upon them to prove fraud against the Defendants. Fraud is a serious allegation that must be pleaded, particularized and proved to a standard higher than on a balance of probabilities.

29. The courts have repeatedly held that allegations of fraud must be strictly proved. In the case of **Koinange & 13 Others V. Charles**

Karuga Koinange 1986 KLR at page 23 Justice Amin citing the case of **Ratilal Patel Makanji (1957) EA 314** observed as follows:

“When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof.....Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required”

30. Furthermore in the case of **Vijay Morjaria .v. Nansingh Madhusingh Darbar& another [2000]eKLR (Civil Appeal No. 106 of 2000)** Tunoi JA (as he then was) stated as follows:-

“...It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

31. In the instant case, the Plaintiff pleaded fraud but did not provide any particulars of the alleged fraud in the Plaintiff. In the circumstances, the Plaintiffs did not lay a basis for their case nor did they prove the same to the required standard.

32. Consequently, the Plaintiffs’ suit fails and the same is hereby dismissed. On the other hand, the Defendants have proved their Counterclaim and I therefore enter judgment on the Counterclaim and make the following final orders:

a. An order of injunction is hereby issued against the Plaintiffs restraining them from utilizing Land Parcel No. Central Kitutu/Monyerero/1822 and 1823, save for the portions where they have constructed their houses.

b. As the parties are brothers, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF FEBRUARY, 2022

J.M ONYANGO

JUDGE