



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC No. 538 OF 2014

DANIEL NYONGESA MUKOLWE.....PLAINTIFF

VERSUS

ISAAC WANJALA MUKOLWE.....1ST DEFENDANT

FELIX MURUKA MUKOLWE.....2ND DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced on 22nd January 2009 through plaint filed by the plaintiff in the High Court. The plaintiff later filed an amended plaint on 24th February 2009. It is averred in the amended plaint that the plaintiff is a beneficiary of the parcel of land known as East Wanga/Malaha/796 which was originally his ancestral land having belonged to his father. That the defendants fraudulently, without justification and to the exclusion of the plaintiff subdivided the said parcel among themselves resulting in new titles known as East Wanga/Malaha/1782, East Wanga/Malaha/1783, East Wanga/Malaha/1784 and East Wanga/Malaha/1785.

2. The plaintiff therefore sought judgment for cancellation of the aforesaid new titles, reversion to the original title East Wanga/Malaha/796 to pave way for succession or proper subdivision and a declaration that the subdivisions were improper, illegal and fraudulent. Alternatively, he sought a half share of the original title East Wanga/Malaha/796 out of the aforesaid subdivisions being a share due to the first house where he belongs and a declaration that the defendants hold half of the disputed parcel in trust for him. He further sought costs of the suit.

3. The defendants filed a defence in which they denied the plaintiff's allegations and stated that the plaintiff was a mere licensee on East Wanga/Malaha/796 who surrendered the land back in writing. They urged the court to dismiss the case.

4. The matter was partly heard in the High Court and was later transferred to this court on 22nd September 2014. Parties agreed by consent that hearing proceeds from where it had reached.

5. The plaintiff testified as PW1 and stated that the defendants are his stepbrothers and that they all shared a father, John Mukolwe. That their father owned only one parcel of land known as title number East Wanga/Malaha/796 before he passed away on 25th November 2008. That the defendants sub-divided the land while their father was alive and registered the resultant four portions in their names as follows: East Wanga/Malaha/1784 which was registered in the name of the 1st defendant, East Wanga/Malaha/1785 which was registered in the name of the 2nd defendant, East Wanga/Malaha/1783 which was registered in the name of Damascus Luka Mukolwe and East Wanga/Malaha/1782 which was registered in the name of Boniface Wanzala Mukolwe. That the land was transferred after his father died without any succession cause being filed in respect of his estate.

6. PW1 further testified that there was no consent of the Land Control Board to subdivide or transfer the land and that he was not given any land from title number East Wanga/Malaha/796. That he is the 4th born in his mother's house and that he wants half of the land in title number East Wanga/Malaha/796 for his mother's house. That as at the time of his testimony, he was occupying 5 acres of the former title number East Wanga/Malaha/796. He produced certificates of official search in respect of the new subdivisions and a certified copy of the register of title number East Wanga/Malaha/796.

7. Next to testify was Ali Masero (PW2) who stated that he knew the plaintiff since birth and that the plaintiff is the son of John Mukolwe. He added that he is a member of the parties' clan. That after John Mukolwe died, the clan met in 2009 and that he was present at the meeting. That the clan divided the land equally between the two houses. He added that he did not return to the land after the meeting.

8. The plaintiff then called Joseph Wasike (PW3) who stated that he knew the family of John Mukolwe and all the parties in this suit. That John Mukolwe was his eldest biological brother and that his male children were Felix, Isaac, Protus, the plaintiff, Omwakha and Oduori.

That the plaintiff was the 4th born and that John Mukolwe's land was sub-divided by the clan after he died. He added that the plaintiff is a son of John Mukolwe and is therefore entitled to the land since he has no land elsewhere.

9. The last plaintiff's witness was Joseph Oparana who stated that he knew the parties to this case and that their father was his cousin. That the plaintiff was John Mukolwe's son and was the 4th born in their house. He added that John Mukolwe died in November 2008 and that he was present when the clan divided the land on 18th April 2009. That the clan gave 13.5 acres to the plaintiff's house and 14 acres to the house of the defendants.

10. Isaac Wanzala Mukolwe opened the defence case as DW1. He stated that his father John Mukolwe Wanzala sub-divided land parcel East Wanga/Malaha/796 in 2002 to his four sons namely Isaac Mukolwe Wanzala, Bonface Mukolwe Wanzala, Felix Muruka Mukolwe and Damascus L. Mukolwe. That the transaction was done by his father John Mukolwe until title deeds were issued. He added that three sons being the plaintiff, Fredrick Oduori and Omwaka were not given land because when their mother got married to John Mukolwe as a second wife, she already had them.

11. DW1 further stated that their father passed away on 24th August 2008 and that the subdivision of East Wanga/Malaha/796 was done on 12th November 2008 after their father had passed away. That no letters of administration were obtained prior to issuance of the new titles. That the plaintiff is the son of his father's first wife and that when he born, he found the plaintiff living with his parents. He denied engaging in any fraud and added that the documents leading to issuance of the titles were signed by William Simiyu, his brother. That their father signed the mutation form while alive.

12. Finally, William Simiyu Luonga testified as DW2. He stated that the plaintiff and the defendants are his cousins and that their father John Mukolwe Wanzala was his uncle. He added that John Mukolwe signed a mutation form in presence and that the plaintiff and one other son (Omwaka) were not given land since they came with their mothers when John Mukolwe married the mothers.

13. Parties were ordered to file and exchange submissions. Despite being given more than one opportunity to do so, the defendants did not file any submissions.

14. The plaintiff argued that the defendants used illegal means to transfer the land without obtaining letters of administration and that he was disinherited. He relied on the case of **Zacharia Wambugu Gathimu & another v John Ndungu Maina [2019] eKLR**.

15. There is no dispute that John Mukolwe Wanzala was the registered proprietor of the parcel of land known as East Wanga/Malaha/796. That much is confirmed by the certified copy of the register which was produced in evidence and which shows that John Mukolwe became proprietor on 26th September 1990 and that a title deed was issued to him on 3rd October 1990. The register further confirms that the said title was closed on 12th November 2008 upon subdivision into new titles known as East Wanga/Malaha/1782, East Wanga/Malaha/1783, East Wanga/Malaha/1784 and East Wanga/Malaha/1785.

16. Without producing any documentary evidence of death, the parties are in agreement that John Mukolwe passed away in the year 2008. There is however disagreement on the month and date of death. The plaintiff testified that he passed away on 25th November 2008, PW4 that he died in November 2008 and the 1st defendant that the date of death was 24th August 2008.

17. The plaintiff's case is that the defendants fraudulently, without justification, without obtaining letters of administration and to the exclusion of the plaintiff subdivided parcel number 796 among themselves resulting in new titles. The certificates of official search which were produced in evidence show that Boniface Wanzala Mukolwe became registered proprietor of East Wanga/Malaha/1782 on 8th December 2008, that Damascus L. Mukolwe became registered proprietor of East Wanga/Malaha/1783 on 24th November 2008, that the 1st defendant became registered proprietor of East Wanga/Malaha/1784 on 8th December 2008 while the 2nd defendant became registered proprietor of East Wanga/Malaha/1785 on 8th December 2008. It will be noted that the registered proprietors of East Wanga/Malaha/1782 and East Wanga/Malaha/1783 have not been made parties to this case.

18. The plaintiff's allegations of fraud require proof to a standard above a balance of probabilities but not beyond reasonable doubt. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR** and **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR**.

19. In the absence of concrete evidence of the date of death of John Mukolwe, it is impossible to ascertain whether the subdivisions and transfers were done by John Mukolwe himself or the defendants. Further, issues of possible disinheritance would only arise upon John Mukolwe's death and if the properties were transferred to the defendants after such death. Needless to emphasise, pursuant to **Section 2** of the **Law of Succession Act**, matters of intestate or testamentary succession to the estates of deceased persons are to be handled under the **Law of Succession Act**. This court does not have jurisdiction to determine intestate or testamentary succession.

20. Pursuant to **Section 26** of the **Land Registration Act**, the court is required to accept a certificate of title as proof of ownership. Nevertheless, a title can be nullified if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme. The section provides:

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

21. The plaintiff's case on fraud and unprocedural dealing with the property revolves around alleged death of John Mukolwe. As already noted, neither the death nor its date have been proven. I cannot take the parties word that John Mukolwe is deceased, even if they had a consent to that effect. A certificate of death must be produced. The plaintiff has not persuaded me that the defendants used illegal or fraudulent means to sub-divide and transfer the parcel of land known as East Wanga/Malaha/796.

22. As noted earlier, the registered proprietors of East Wanga/Malaha/1782 and East Wanga/Malaha/1783 have not been made parties to this case. The right to a hearing is at the core of justice. If I were to accede to the plaintiff's plea to cancel all the subdivisions and revert to the original title East Wanga/Malaha/796, I would infringe on the rights of the registered proprietors of East Wanga/Malaha/1782 and East Wanga/Malaha/1783 to a hearing.

23. In view of the foregoing discourse, the plaintiff has failed to prove his case to the standard required and I therefore dismiss it. Considering the relationship between the parties, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF FEBRUARY 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Kombwayo holding brief for Ms Munihu for the plaintiff

1st and 2nd defendants present

Court Assistant: E. Juma