



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 118 OF 2009

JOSEPHINE MUENI KILUTA.....PLAINTIFF

VERSUS

FLORENCE NGINA KIMEU.....DEFENDANT

JUDGMENT

1. In the Amended Complaint dated 10th May, 2010, the Plaintiff averred that Ronald Kiluta (*deceased*) purchased land known as Ndalani/Ndalani/Block 1/541 (*the suit land*) from one John Benedict Kilonzo; that the deceased obtained the necessary Land Control Board consent to transfer the suit property in his name and that when the deceased conducted an official search on 3rd January, 2005, he was informed that the suit property was registered in favour of Johnstone Mwaka Lumbi Kitemu (*the 2nd Deceased*).
2. The Plaintiff is seeking for a declaration that he is the one who is entitled to the suit property and for an order of permanent injunction to restrain the Defendant or her agents from alienating and dealing with the suit property. The Plaintiff has also prayed for general damages.
3. In her Amended Defence, the Defendant averred that the suit property forms part of the vast Estate of Johnstone Mwaka Lumbi (*the 2nd deceased*); that the 2nd deceased purchased the suit property from one Paul Muasya Katubi vide an Agreement of Sale of 12th September, 2004 and that the Plaintiff's land is Ndalani/Ndalani/542 which is adjacent to the suit property.
4. In her Counter-claim, the Defendant has prayed for a perpetual order of injunction stopping the Plaintiff from trespassing or dealing in any manner with land known as Ndalani/Ndalani/Block 1/541 measuring approximately 2.020 Ha and for general damages for trespass.
5. The Plaintiff, PW1, informed the court that she is the widow of the late Mr. Kiluta who died on 2nd December, 2009 and the Legal Administrative of his Estate; that the deceased purchased the land from John Benedict Kilonzo on 9th December, 1999 and that in January, 2005, the deceased discovered that the land was registered in the name of the Defendant's late husband, Johnstone Mwaka Lumbi Kitemu (*the 2nd deceased*). According to the evidence of PW1, the purported transfer of the suit property to the Defendant's husband was done fraudulently because her late husband had already purchased the same land.
6. PW1 finally stated that they took possession of the suit property in 1999 and that by the time they bought the land, it had five houses; that they have been collecting rent from the tenants in the said five houses and that her late husband bought parcels numbers 833, 543 and 541 together with the developments thereon. PW1 produced in evidence several documents which I shall refer to later.
7. The Defendant, DW1, informed the court that she is the wife of the late Johnstone Mwaka Lumbi; that the late Johnstone is the registered proprietor of the suit property and that she has been in use and occupation of the suit property since the year 2004.
8. According to DW1, she has houses on the suit property and a Title Deed for the said land and that the Plaintiff's late husband is the registered proprietor of parcels numbers 833 and 543. It was the evidence of DW1 that parcel of land number 541 belonged to Katuvi Musau who distributed it amongst his children; that they bought parcel number 541 from Katuvi's son, Paul Musya, who also owned parcels numbers 539, 540 and 541 and that parcel number 543 abutts the said three properties. According to DW1, Benedict built his houses on the wrong parcel of land and that is why he started harassing her late husband in respect to parcel number 541.
9. The Secretary of Matungulu Ranching Company, DW2, stated that the register for the company shows that Katuvi Musau owned six (6) parcels of land, to wit, parcel numbers 643, 542, 543, 541, 540 and 539; that Katuvi transferred his parcels of land to his two sons: Patrick Katuvi (*parcels numbers 643, 542 and 543*) and Paul Musya (*541, 540 and 539*) and that parcel number 541 was transferred to Paul Muasya in the year 1993.
10. According to DW2, the records in his possession shows that Paul Musya sold parcel number 541 to Johnson Mwaka in the year 2004 although he did not witness the transaction. According to DW2, he was not aware if the Plaintiff's husband purchased the same land in 1991 and that the Defendant's husband was the Treasurer of the Ranching Company.

11. The Plaintiff's counsel submitted that the letter dated 22nd October, 2001 by Matungulu Yatta Ranching Co. Ltd and signed by Johnstone Mwaka Lumbi as a Director was part of a fraudulent scheme by the said Johnstone because the same company had already issued a receipt for the said land to the late John Benedict Kilonzo for the transfer of the suit property.

12. The Plaintiff's counsel submitted that the 2nd deceased fraudulently transferred the suit property to himself on 13th September, 2004; that it was not possible for him to enter into an Agreement on 12th September, 2004, transfer the land to himself on 13th September, 2004 and have a Title Deed issued in his favour on 14th September, 2004.

13. The Plaintiff's advocate submitted that the extract of the members' record is not a genuine register; that the late Johnson Benedict Kilonzo purchased the suit property from the original allottee, Katuvi Musau, which he sold to the 1st deceased and that the transfer of the suit property to the Defendant's late husband is void because the Land Control Board did not give its consent in respect of the alleged transaction.

14. The Defendant's advocate submitted that the Defendant produced in evidence the Agreement dated 12th September, 2004 between Johnstone Mwaka Lumbi and Paul Muasya dated 12th September, 2004 and that the register of Matungulu Ranching Company Limited shows that the suit property was transferred to Paul Muasya by his late father on 10th January, 1993.

Analysis and findings:

15. Both the Plaintiff and the Defendant are widows. The Plaintiff is the wife of the late Ronald Kiluta while the Defendant is the wife of the late Johnstone Mwaka Lumbi Kitemu. The wives of the late Ronald Kiluta and Johnstone Mwaka have averred that their late husbands purchased land known as Ndalani/Ndalani Block 1/541 (*the suit property*).

16. According to the Plaintiff, her late husband purchased the suit property from John Benedict Kilonzo on 9th December, 1999. On the other hand, the Defendant's case is that her late husband purchased the same land from Paul Muasya, the son of Katuvi Musau, who was the original owner of the suit land. The assertion by the Defendant was supported by DW2, the Secretary of Matungulu Ranching Company Limited.

17. According to the evidence of DW2, in the year 1969, one Katuvi Musau owned 150 shares within Matungulu Yatta Ranching Company Limited which entitled him to six (6) parcels of land being Ndalani/Ndalani Block 1/539, 540, 541, 542, 543 and 833. It was his evidence that when Katuvi Musau died, the land was passed to his children Patrick Mwikya Katuvi and Paul Musya Katuvi. Incidentally, none of the two sons testified in this matter.

18. To support her case, PW1 produced in evidence the Sale Agreement of 9th December, 1999 between her late husband and John Benedict Kilonzo. The Agreement shows that John Benedict was the proprietor of parcels of land numbers 541, 543 and 833 situated in Ndalani. The Agreement further states that the said John Benedict Kilonzo had agreed to sale to the Plaintiff's husband the three parcels of land all measuring approximately 12.13 acres.

19. The Agreement between the Plaintiff's late husband and John Benedict Kilonzo was witnessed by Jennifer Kilonzo advocate. To support the allegation that the land initially belonged to John Benedict Kilonzo, the Plaintiff produced in evidence a receipt dated 8th November, 1994 for Kshs. 10,000 purportedly issued by Matungulu Yatta Ranching Company Limited. The copy of the receipt shows that Benedict paid to the Ranching Company Kshs. 10,000 for the transfer of parcel numbers 541, 543 and 833.

20. The Defendant has not denied that the Plaintiff's late husband owns parcel numbers 833 and 543. In fact, the Defendant produced extracts of title showing that the Plaintiff's late husband was registered as the proprietor of parcel numbers 843 and 543 on 14th February, 2006. However, it is the Defendant's position that her husband was registered as the proprietor of parcel number 541 on 14th September, 2004

21. The evidence of the purported purchase of parcel number 541 by the Defendant's late husband is captured in the Agreement of 12th September, 2004, between himself and Paul Musya, the son of the late Katuvi Musau.

22. An extract of the Register of Matungulu Yatta Ranching Company was produced by DW2. The said register shows the late Katuvi Musau as having initially owned parcel numbers 643, 542, 543, 541, 540, 710, 9 and 833. Under the title "*current issue: 1999, June, 10th*", the same register shows the change of ownership of the said parcels of land from Katuvi Musau to Paul Muasya Katuvi; John Benedict Kilonzo Nzi and Patrick Mwikya Nzioki.

23. The register shows that as at 10th June, 1999, the ownership of parcel numbers 539, 540, 541, 643, 9 changed from Katuvi Musau to Paul Muasya Katuvi while parcels numbers 543 and 833 passed to John Benedict Kilonzo Nzioki. Patrick Mwikya was awarded parcel number 542.

24. Although the Plaintiff produced in evidence the Agreement of 9th December, 1999 showing that the late Ronald Kiluta purchased parcels number 542, 543 and 833 from John Benedict, the Register from Matungulu Yatta Ranching Company shows that John Benedict Kilonzo only acquired parcel numbers 543 and 833 from the late Katuvi Musau. Those two parcels of land have since been registered in favour of the Plaintiff's husband's name.

25. The evidence by the Plaintiff is that the register of the Ranching Company was interfered with by the Defendant's husband who was not only an official of the Ranching Company, but also a beneficiary of the said fraud. The burden of proving that the Register of the Company was interfered with lay with the Plaintiff. However, the Plaintiff did not discharge that burden. Consequently, the register of the company

constitutes a true reflection of the owners of the land as at the years 1999, 2000 and 2004.

26. The Plaintiff having not produced evidence to show the interference of the Register of Matungulu Yatta Ranching Company, I find that the Defendant's late husband acquired parcel number Ndalani/Ndalani Block 1/541 from Paul Musya Katuvi, the son of Katuvi Musau. There is no evidence before me to show that John Benedict Kilonzo acquired parcel number 541 from the late Katuvi Musau.

27. That being the case, parcel number Ndalani/Ndalani/Block 1/541 was validly registered in the name of the Defendant's husband on 13th September, 2004. For those reasons, I dismiss the Plaintiff's Amended Plaint dated 10th May, 2010 with costs and allow the Defendant's Amended Defence and Counter-claim dated 23rd September, 2011 as follows:

a. An order of permanent injunction be and is hereby issued restraining the Plaintiff, her agents or servants from trespassing, fencing, or in any way dealing with parcel of land known as Ndalani/Ndalani/Block 1/541 measuring approximately 2.02 Ha.

b. The Plaintiff to pay the costs of the Counter-claim.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 1ST DAY OF NOVEMBER, 2019.

O.A. ANGOTE

JUDGE