



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 15 OF 2019

NTHAMBI MANG'EA1ST PLAINTIFF

CATHERINE NDULU MULEMBA

(Legal representatives of the Estate of

Mukusyo Mulwa Deceased)2ND PLAINTIFF

VERSUS

VERONICAH MULUNDI MULWADEFENDANT

JUDGMENT

1. The Plaintiffs filed this suit vide Complaint dated 7th March, 2019 and filed on 8th March, 2019. They pray for judgment against the Defendant for:

- a) **A declaration that the transfer of Land Reference Number Makueni/Kako/197 from the name of Mukusyo Mulwa to the Defendant's name was fraudulent, illegal and void.**
- b) **That the title deed to Land parcel No. Makueni/Kako/197 as currently held revoked and the title to the said property does revert to Mukusyo Mulwa (deceased) and that the Land Register does rectify the same accordingly.**
- c) **A declaration that the Plaintiffs are entitled to a share of the estate of the deceased including property land reference number Makueni/Kako/197.**
- d) **Any other relief that this Honourable Court deems fit.**
- e) **Costs of this suit.**
- f) **Any other relief that this Honourable Court may deem just to grant.**

2. The Defendant filed her Statement of Defence dated 23rd April, 2019 on 24th April, 2019 in which she prays that the suit herein be dismissed with costs. Alongside the Defence, the Defendant also filed a preliminary objection dated 23rd April, 2019 wherein she contends that the orders sought in the Complaint can be granted by the Succession Court and thus this court lacks jurisdiction. She further contends that the Plaintiffs lack capacity to bring this suit because the special grant issued to them was void *ab initio*.

3. The matter was certified as ready for trial on 16th October, 2019. It was set down for hearing on 29th October, 2020. The 2nd Plaintiff took the witness stand first. She adopted her statement dated 7th March, 2019 as her sworn evidence in chief. She stated that she is the daughter of Bridgit Ndeve Mukusyo. That her mother is the sister to the Defendant and that the land dispute is in relation to LR. No. Makueni/Kako/197. That the suit property once belonged to her grandfather one Alphonse Mulwa Mukusyo who is now deceased. She produced a copy of her grandfather's certificate of death as PEX No. 1. That her grandfather was survived by two daughters and she seeks her mother's share on behalf of her twelve siblings. She stated that the Defendant has nine children. She produced a certificate of official search dated 15th March, 2000 as PEX No. 2 which indicates the proprietor of the suit property at that time as her grandfather, Mukusyo Mulwa. That the suit property is no longer in her grandfather's name. She produced a certificate of official search dated 21st February, 2018 as PEX No. 3 showing the current proprietor as Veronichah Mulundi Mulwa, the Defendant herein.

4. She further stated that she was not aware how the suit property changed ownership. That she was aware about Machakos High Court Succession Cause No. 210 of 1999 in respect of the Estate of Mukusyo Mulwa. That she was aware that the Petitioner in that case was Veronicah Mulwa. In regard to the said succession cause, she produced a copy of a notice dated 14th July, 2016 issued by the Deputy Registrar, Machakos High Court to Veronicah Mulwa as PEX No. 4(a). She also produced a copy of a court Order by Lady Justice P. Nyamweya as PEX No. 4(b). She produced a copy of an affidavit sworn by Veronicah Mulwa in support of the petition for letters of administration in the above succession proceedings, which listed the Defendant, as the only surviving beneficiary of the estate of Mukusyo Mulwa. That she registered a caution against the title of the Defendant once she realized that her mother had not been apportioned a share of the suit property.

5. She stated that she knows the 1st Plaintiff. That the 1st Plaintiff got married to her grandmother under Kamba customary law before 1980. That the 1st Plaintiff has also been disinherited by the Defendant of her share of the suit property. That there have been family discussions to resolve the land dispute. She produced an undated letter marked PEX No. 5(a) authored by New Ethanga Mbaa – Kako Sub branch which gave an indication that the suit property ought to devolve to the 1st Plaintiff under Kamba customs. She produced another undated written request by her grandfather's twin brother addressed to the Land Registrar Makueni to assist the 1st Plaintiff to obtain the title deed for the suit property. The letter was marked as PEX No. 5(b). She produced three sets of written clan resolutions dated 3rd August, 1996, 3rd April, 1995 and 5th August, 1996 wherein the clan had decided that the Defendant relocates from the suit property and resettles in an alternative piece of land at Nguu. The said land purportedly also belonged to Mukusyo Mulwa. The three clan resolutions were marked as PEX Nos. 6(a) – 6(c) respectively. She produced a copy of an application for late registration of death dated 13th July, 2000 done by the 1st Plaintiff as the wife of Mukusyo Mulwa. The application was marked as PEX No. 7. Lastly, the 2nd Plaintiff produced a certificate of special limited grant dated 6th March, 2019 giving her and her co-plaintiff leave to file this suit. It was marked PEX No. 8. She prayed for judgment in accordance with her Pleint.

6. In cross-examination, the 2nd Plaintiff confirmed that she was aware that Machakos HCSC No. 210 of 1999 was finalized in the year 2000. That she was aware that the Defendant obtained confirmation of grant on 17th March, 2000 and became the registered proprietor of the suit property shortly thereafter. That she had no proof that the Defendant had fraudulently removed the caution she had lodged in 2018. That the Defendant did not consent to the Plaintiffs being given the special limited grant in 2019. That she did not know who the author of PEX No. 5(a) was or when the letter was drafted. That she did not know when the letter marked as PEX No. 5(b) was drafted. That in the clan resolutions marked as PEX Nos. 6(a) – 6(c), the name of the clan was not indicated, the attendees of the clan meeting were also not indicated and moreover, there was no indication of any deliberations being held. That she was not aware when the land at Nguu was sold even though the clan resolutions specified that the Defendant should relocate from the suit property and go live at the Nguu land. She again confirmed that her grandfather had one wife even though PEX No. 7 indicated that the 1st Plaintiff was the wife of her grandfather. That even at the time of late application for registration of death per PEX No. 7 dated 13th July, 2000, a death certificate was already in existence having been issued on 12th May, 1999. That even though she could authoritatively state that the 1st Plaintiff married her grandmother under Kamba customary law, she did not know exactly when they got married.

7. The 1st Plaintiff was duly sworn and she adopted her statement dated 7th March 2019. In her evidence in chief, she stated that she was married to one Marisela Nditiva Mukusyo in a woman-to-woman Kamba customary marriage popularly known as "Iweto". That the suit property, LR. No. Makueni/Kako/197, originally belonged to Mukusyo Mulwa. That she was not aware how the Defendant became the registered proprietor of the suit property as she was not involved in the process. That she was not involved in Machakos HCSC No. 210 of 1999. That she could not remember the year she got married to Marisela but it was before the 2nd Plaintiff's mother, Ndeve, died. That she has been living in the suit property since the time she got married and that she gave birth to eight children during her marriage. That she resides in a portion of the suit property which was shown to her by Marisela but that portion was not transferred to her. She prayed for judgment in accordance with her Pleint.

8. In cross-examination, she restated that she was married to Marisela in the 1980s. That her dowry was paid by Marisela while in the company of elders. That she married Marisela after the death of Marisela's husband, Mukusyo. That Mukusyo had only two children, Bridgit Ndeve and Veronicah Mulundi. That one Kyalie (twin brother to Mukusyo) appointed Peter Nguli to make a follow up of her title deed for the suit property but unfortunately, Peter died before he could deliver the said title deed. That she was not involved in Machakos HCSC No. 210 of 1999. That she did not file any papers in the Machakos succession proceedings. That the signature in the supporting affidavit to the summons for revocation of grant was not hers and neither did she know who had signed. That she did not sell any portion of the suit property to Peter Nguli. That she recalled having a meeting at the Defendant's home when it was resolved that the purchase price paid by Peter Nguli for a portion of the suit property be refunded and that it was the Defendant's son who refunded the money. That she did not agree with the procedure followed by the Defendant before she obtained the title for the suit property. That she claimed for her portion of the suit property through Marisela.

9. The Plaintiff's witness was Benjamin Kisavi Munyao (PW1). In his evidence in chief, he adopted his statement filed in court on 15th October, 2019. He stated that he was familiar with the parties herein. That LR. No. Makueni/Kako/197 originally belonged to Mukusyo Mulwa. That following the demise of Mukusyo, a land dispute ensued between the Defendant and the 1st Plaintiff. That a clan meeting thereafter decided that the Defendant should relocate to the Nguu land which belonged to Mukusyo and a notice issued to her. That the Defendant never relocated. That he had only heard of the Nguu land but he had not seen it. That according to the Ethanga clan, a married woman cannot inherit her father's land. That he was not the clan chairman when the said resolution was passed but he is currently the clan chairman. That he has custody of the clan records. That both the Defendant and the 1st Plaintiff reside in the suit property. That the 1st Plaintiff has a right to get a share of the suit property.

10. In cross-examination, PW1 stated that he did not remember when the 1st Plaintiff married Nditiva Mukusyo. That at the time the resolution to relocate the Defendant was being passed, the Ethanga clan did not indicate the attendance of members present. Neither was the Defendant's name indicated in the clan minutes. That the minutes did not bear any signature, stamp or name of the author. That the 1st Plaintiff sold a portion of the suit property to Peter Nguli. That he was not in the meeting that was convened so that money could be refunded to Peter Nguli but he was present when it was resolved that the money be refunded. That the Defendant was living on the suit property when Nditiva Mukusyo died. That the Defendant had the right to reside in the land. That he was present at a meeting when the 1st Plaintiff

indicated that she was the one who sold a portion of the suit property to Peter Nguli.

11. In re-examination, PW1 stated that a portion of the suit property was sold by Kyalie so that the 1st Plaintiff could get money to obtain a title deed. Lastly, he stated that the sale was reversed after the Defendant's son repaid the purchase price and that portion is currently owned by the Defendant's son. The Plaintiffs closed their case at this point.

12. The Defendant, Veronicah Mulundi Mulwa was duly sworn. She adopted her statement dated 13th September, 2019 as her evidence in chief. She also produced a list of documents of even date containing nine documents which was marked DEX Nos. 1 – 9 respectively. She stated that she knew the 1st Plaintiff. That the 1st Plaintiff married Marisela Nditiva in a year she could not recall. That Marisela Nditiva was her mother. That the suit property originally belonged to Mukusyo Mulwa but she now has the title deed. That she went to the area chief, Wote location, who gave her a letter to enable her to acquire the title deed. That she took the chief's letter to the High Court at Machakos upon which she was issued with a grant to enable her to acquire the title deed. That the land dispute was brought about recently by the 2nd Plaintiff who wanted to get a share of the suit property. That she did not acquire the title deed fraudulently. That there was a time when the 1st Plaintiff sued her at a court in Machakos and that the court ruled in her favour. That Ndeve's children never used to visit the suit property and only appeared for purposes of claiming a share of the property. That the 1st Plaintiff sold a portion of the suit property but it was later resolved to refund the purchase price. That it was her son, Peter Mulwa, who refunded the purchase price. That she resides in the suit property together with her children and the 1st Plaintiff.

13. In cross-examination, the Defendant stated that she was not married to the 1st Plaintiff. She stated that she did not have any court document to show that the court had confirmed that the suit property was hers. That she did not include the 1st Plaintiff as one of the beneficiaries when she filed the succession case at Machakos. That Ndeve's husband, John Kinyatta, did not sign any consent to confirm that he had no claim over the Mukusyo's estate and neither did any of his children. Lastly, she stated that she had not given the Plaintiffs a portion of the land.

14. The only witness for the Defence was one Mutiso Nzovi (DW1). He was duly sworn and he adopted his statement dated 13th September, 2019 as his evidence in chief. In cross-examination he stated that he did not know exactly when the suit property was bequeathed to the Defendant by her late father. That he did not know the parcel number but he knew the bequeathing took place at Mbumbuni. At this stage the Defence closed its case.

15. Both parties duly filed their respective submissions in accordance with the directions issued on 30th November, 2020. On behalf of the Plaintiffs, the following were the issues they identified for determination:

i) Whether this Court has jurisdiction to determine the suit?

ii) Whether the Plaintiffs have legal capacity to bring the suit?

iii) Whether the transfer of land parcel number Makueni/Kako/197 was fraudulent, illegal and void and if so whether the same ought to be revoked?

16. While answering the first question, the Plaintiffs submitted that under Section 13(2) of the Environment and Land Court Act No. 19 of 2011, this Court is vested with jurisdiction to hear and determine all disputes relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and any other dispute relating to environment and land. For that reason, it is submitted that this Court has power to issue the declarations sought in addition to issuing orders to revoke the title deed issued to the Defendant and to rectify the land register accordingly.

17. On the Plaintiffs' legal capacity to bring the suit, the Plaintiffs submit that they obtained a certificate of special limited grant *ad litem* dated 6th March, 2019 issued in Makueni SPMSC No. 30 of 2019. That at the time of issuance of the above special limited grant, the grant of letters of administration that was issued to the Defendant in Machakos HCSC No. 210 of 1999 had already been revoked by the High Court on 1st September, 2016 for failure to apply for confirmation within one year of issuance. That the said High Court order of 1st September, 2016 was set aside vide another High Court order issued on 10th July, 2019. Thus, the Plaintiffs submit that the special limited grant was not void because nothing stood in the way of its issuance at the time of its making.

18. On the last issue, the Plaintiffs submit at length that they are beneficiaries of the estate of the late Mukusyo Mulwa but the Defendant fraudulently disinherited them of their respective shares of the suit property after failing to disclose the existence of other beneficiaries while making the petition for grant of representation in Machakos HCSC No. 210 of 1999. In support of this ground, they relied on the following authorities:

1) **Lukas Kiliku Ndolo & Anor -Vs- David Musyoka & 4 others [2017] eKLR;**

2) **In the Estate of Anthony Mutonga Ndolo (Deceased) [2019] eKLR;**

3) **In the Matter of the Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR;**

4) **Mburu Wainaina & Anor -Vs- John Wainaina Njuguna [2019] eKLR;** and

5) **Monica Jesang Katam -Vs- Jackson Chepkwony & Anor [2011] eKLR.**

19. The Defendant adopted a similar approach in identifying the issues for determination herein. On the jurisdiction of this Court to determine the dispute, the Defendant submitted that under Section 13(2) of the Environment and Land Court Act, succession matters do not fall under the ambit of this Court. That this Court is being called upon to determine if the Plaintiffs are beneficiaries to the estate the late Mukusyo Mulwa and if the grant of letters of administration intestate issued to the Defendant was fraudulently obtained. On this point of submission, the Defendant relied on the case of **PLR -Vs- JNR & Anor [2013] eKLR**. That the order for cancellation of the title deed issued to the Defendant and rectification of the land register accordingly can be done by the Succession Court when it is established that a fraud or illegality was committed. The Defendant relied on the case of **Madison Moroko Nyamweya -Vs- Benard Magara Maroko & Anor [2016] eKLR**.

20. On the legal capacity of the Plaintiffs to file this suit, the Defendant submitted that the order for revocation of the grant was issued erroneously and after noting the said error, the High Court proceeded to review the order for revocation. That the said error does not validate the special grant issued to the Plaintiffs. Hence, the special grant was null and void.

21. On whether the title of the suit property was fraudulently transferred, the Defendant submitted that the transfer was effected after confirmation of grant of representation. Therefore, the Defendant fully complied with Section 55 of the Law of Succession Act before the transfer of title. Hence, the title deed is valid. For those reasons, the Defendant prayed for the suit to be dismissed with costs.

22. From the pleadings and the evidence of the parties, I shall adopt these facts as common ground: -

*i) **That** LR. No. Makueni/Kako/197 originally belonged to the late Mukusyo Mulwa before his death on 15th May, 1977;*

*ii) **That** the late Mukusyo Mulwa had one wife, Marisela Nditiva, and two daughters, Bridgit Ndeve and Veronica Mulundi;*

*iii) **That** Bridgit Ndeve (deceased) left behind 13 children, one of them being Catherine Ndulu Mulemba;*

*iv) **That** Nthambi Mang'a was married to Marisela Nditiva under a woman-to-woman marriage under Kamba customary law and she has been living on the suit property since then;*

*v) **That** the Defendant obtained grant of representation intestate in respect of the estate of the late Mukusyo Mulwa in Machakos HCSC No. 210 of 1999 and the said grant was confirmed on 17th March, 2000;*

*vi) **That** the grant of representation issued to the Defendant was revoked by the Machakos High Court on 1st September, 2016 before being subsequently reinstated on 10th July, 2019;*

*vii) **That** the Defendant caused the transfer of LR. No. Makueni/Kako/197 into her name and a title deed was issued to her on 19th June, 2000;*

*viii) **That** prior to filing this suit, the Plaintiffs obtained a special limited grant dated 6th March, 2019 that was issued in Makueni SPMSC No. 30 of 2019.*

23. In my view, the issues arising for determination are as follows: -

*i) **Whether the Plaintiffs had legal capacity to file this suit?***

*ii) **Whether the transmission of the suit property to the Defendant was fraudulent in the light of the certificate of confirmation of grant dated 17th March, 2000?***

24. In my perusal of the pleadings, I noted that the Plaintiff was filed on 8th March, 2019. Prior to its filing the Plaintiffs had applied for a special limited grant in Makueni SPMSC No. 30 of 2019 and the certificate thereof was duly issued on 6th March, 2019. The certificate was produced as PEX No. 8. At the time of filing this suit, the Defendant's grant of representation had been revoked per the order of the High Court dated 1st September, 2016 in Machakos HCSC No. 210 of 1999 which was also produced as PEX 4(b). The said Order was thereafter set aside vide the High Court Order of 10th July, 2019 in the same proceedings and effectively reinstated the certificate of confirmation of grant dated 17th March, 2000.

25. As far as the special limited grant goes, it was issued at a point in time when there was no court order which recognized the Defendant as having a grant of representation to the estate of the late Mukusyo Mulwa. The subordinate court did not have a court order standing in the way of issuing a special limited grant to the Plaintiffs as the only prevailing court order with legal effect was the one dated 1st September, 2016. The ensuing special limited grant was thus valid and regular for purposes of filing this suit. The long and short of it is that the Plaintiffs had capacity to institute these proceedings.

26. The Defendant submitted that the special limited grant was void. I do not agree. On the voidness of an act or an order, I am led in my conclusion above by the finding of Lord Denning in **Macfoy -Vs- United Africa Co Ltd [1961] 3 All ER 1169** at page 1172 where he stated as follows: -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be

so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse... But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void.”

27. As far as I am aware, the special limited grant has not been set aside by the court which issued it and it remains in force. This is not the court with competent jurisdiction from which an order to set aside the special limited grant may be sought. This brings me to the second issue.

28. The Plaintiffs have contended vigorously that they ought to get a share of the suit property. They have expounded extensively that they are dependants of the late Mukusyo Mulwa under the meaning of Section 29 of the Law of Succession Act Cap 160 Laws of Kenya. They have alluded to evidence which indicates that there was material non-disclosure of facts by the Defendant when she was petitioning for grant of representation in Machakos HCSC No. 210 of 1999. That the Defendant misrepresented facts in the supporting affidavit to her petition. What baffles me most however is why to date, the Plaintiffs have not applied for revocation of grant when that option seems most feasible.

29. The preponderance of evidence by the Plaintiffs shows enough cause for revocation of grant. Section 76 of the Law of Succession Act outlines various grounds which if proved, will lead to revocation of grant. However, as it stands, the subsequent transmission of the suit property to the Defendant was legal since it was done with the application of a lawfully obtained grant which has never been revoked. This court cannot descend into an inquiry as to faultiness of the grant of representation that was issued to the Defendant by the Succession Court. I say so because then this court would have to answer questions such as whether indeed the Plaintiffs are beneficiaries who were willfully left out in the petition by the Defendant.

30. Consequently, I am in agreement with rendition of Justice L.N. Waithaka in PLR -Vs- JNR & Anor [2013] eKLR cited by the Defendant wherein it was aptly stated as follows: -

“Section 2 (1) of the Law of Succession Act provides that the provisions therein applied to all cases of intestate or testamentary succession to the estates of deceased persons and to the administration of estates of those persons. An estate means the free property of a deceased person that is the property of which that person was legally competent free to dispose during his lifetime, and in respect of which his interest has not been terminated by his death. It is clear that at the time of his death the deceased was free to deal with the suit property as he wished, the same not having been legally transferred to a third party including the 1st Defendant.

In addition, in order to determine the suit, this court would be required to determine questions of validity of the wills and whether the Plaintiff is a beneficiary of the deceased's estate and therefore entitled to his estate. The property and the issues to be determined in the suit fall under the realm of the Law of Succession Act. The Environment and Land Court is a special court established under Article 162 (2) (b) and Section 4 (1) of the Environment and Land Court Act No. 9 of 2011 and it is meant to deal with matters concerning the environment and the use and occupation of and title to land. However, matters of ownership and entitlement to a deceased person's property, including land are governed by the Law of Succession Act and are to be determined by the Family Court. Thus by virtue of Section 2 (1) of the said Act, this court lacks jurisdiction to determine the same.”

31. For that reason, I decline to impute the particulars of fraud as pleaded by Plaintiffs to the Defendant who was legally registered as proprietor of the suit property after presenting a valid certificate of confirmed grant to the Land Registrar. Consequently, it is my view that the final orders sought in the plaint can only be granted by the High Court which issued the certificate of confirmed grant to the Defendant. On this finding, I draw guidance from the case of Santuzza Bilioti alias Mei Santuzza (Deceased) -Vs- Giancarlo Falasconi [2014] eKLR where the learned Judge held as follows: -

“This cannot be the case as the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased's property is being fraudulently taken away by no-beneficiaries such as where the property is being sold before a grant is confirmed.”

32. The above position on the approachability of the Succession Court for cancellation of a title deed has been endorsed severally. A case in point is Munyasya Mulili & 3 Others -Vs- Sammy Muteti Mulili [2017] eKLR where the High Court held as follows: -

“On the second issue as regards this Court's jurisdiction as a succession court to revoke title, this court has wide inherent powers in succession matters to make such orders as may be expedient, to ensure that the ends of justice are met and prevent abuse of court process by parties under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.”

33. The upshot of this case is that this Court is bereft of jurisdiction to hear the dispute which arises from an impugned certificate of confirmation of grant. In the result, the suit is hereby dismissed. Each party shall bear its own costs considering that this is a family dispute over the estate of the late Mukusyo Mulwa.

Signed, dated and delivered at Makueni via email this 11th day of May, 2021.

MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi