



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC NO. 13 OF 2019

MANYI KYULE.....PLAINTIFF

VERSUS

STEPHEN KALANGE.....DEFENDANT

JUDGEMENT

1. The Plaintiff herein suing as the administrator of the estate of Philip Kyuli Kivuti brought this suit against the Defendant vide the plaint dated 5th March, 2019 and filed in court on even and sought the following orders;

- a. An order restraining the Defendant from entering, sub-dividing and or transferring Land Title No. KITETA/KAKUSWI/399 to any other person.**
- b. An order cancelling the Defendant title and directing Makueni land Registrar to rectify the register to reflect the name of KYULE KIVUTI and/or the administrator of his estate as the registered owner of Land Title No. KITETA/KAKUSWI/399.**
- c. Cost of the suit and interests.**

2. The Plaintiff has averred in his plaint inter alia that his late father was the original owner of land title numbers Kiteta/Kakuswi/352 and 399, that on or about 18th March, 1979 his late father entered into a sale agreement with the Defendant's father, Kalange Mbai (deceased) for the sale of land title number Kiteta/Kakuswi/352 at a consideration of Kshs. 5,500/=, that during the adjudication process in the year 1980, his late father mistakenly gave a note to the adjudication officers indicating land title number Kiteta/Kakuswi/399 instead of land title number Kiteta/Kakuswi/352 which he had sold was to be transferred to the Defendant's father, that land number Kiteta/Kakuswi/399 was registered in the name of Kalange Mbai by mistake of the parties and that the Plaintiff approached Kalange Mbai (deceased), who agreed to rectify the mistake but he passed on before he could initiate the transfer process. The Plaintiff has further averred that he occupies land title number Kiteta/Kakuswi/399 while the Defendant occupies land title Kiteta/Kakuswi/352 which was the intended plot that was sold to his father.

3. The matter proceeded as undefended suit after the Defendant who entered appearance through the law firm of O. N. Makau & Mulei Advocates on 15th March, 2019 vide a memorandum of appearance dated the same date failed to file his defence.

4. The Defendant's counsel ceased to act on the 5th December, 2019 vide the chamber summons application dated 19th November, 2019 and filed in court on 20th November, 2019.

5. Having entered appearance, the Defendant was entitled to cross examine the Plaintiff and his witnesses.

6. On the 18th December, 2020 the suit was fixed for hearing on 13th April, 2021. The Defendant was served with a hearing notice on 31st March, 2021 as shown in the affidavit of service sworn on 12th April, 2021. He did not appear in court to cross examine the Plaintiff and his witnesses.

7. During the hearing, the Plaintiff, Manyi Kyule, and his four (4) witnesses, Patrick Kyalo Kyule (PW1), Patricia Kanini Kyaa (PW2), Winstellah Mbithe Muli (PW3) and Charles Mbatha Muinde (PW4) adopted their respective witness statements as their evidence in chief.

8. The Plaintiff's evidence was that he is the administrator of the estate of his late father, Kyule Kivuti, who owned land parcel number Kiteta/Kakuswi/352 and 359. He went on to say that his late father and his family occupied the latter parcel of land and that is where he was buried.

9. It was also his evidence that on or about 18th March, 1978, his late father sold land parcel number Kiteta/Kakuswi/352 to one Kalange Mbai at a cost of Kshs. 5,000/= through a sale agreement of the same date. That during the adjudication process in 1980, his late father handed over a note to the Adjudication Officers to indicate that he had sold land parcel number Kiteta/Kakuswi/399 to Kalange Mbai which was a mistake as the land that his late father sold was Kiteta/Kakuswi/352. That upon discovery of the mistake, the Plaintiff's late father approached one Kalange Mbai so that the mistake could be rectified and the latter agreed. However, that Plaintiff's father died before the mistake could be rectified. That one Kalange Mbai too died in 1995 before the mistake could be rectified.

10. The Plaintiff went on to say that they appeared before the Land Registrar Makueni who heard the parties and advised the Defendant to obtain letters of administration in respect of the estate of Kalange Mbai before transferring land parcel number Kiteta/Kakuswi/359 to the late Kyule Kivuti or his administrators. That when the Defendant petitioned for letters of administration Makueni in Succession Cause No. 110 of 2017, he (Plaintiff) objected to the confirmation of the grant. That however the succession court ordered that the grant be issued to the Defendant with a caveat that the Defendant should not interfere with the ownership of the suit land until this suit was filed in this court. That despite obtaining the grant, the Defendant has declined to transfer the suit land to the estate of the Plaintiffs father.

11. In support of his evidence, the Plaintiff produced the certificate of grant issued to him and others in Nairobi High Court Succession Cause No. 42 of 1986, land sale agreement and its english translation in respect of land parcel number Thyake 352 between Kalange Mbai and Kyule Kivuti dated 18th March, 1979, a copy of application for revocation or annulment of grant in the High Court of Kenya at Machakos Succession Cause number 355 of 2004, proceedings before the District Land Registrar Makueni held in 26th June, 2001, and a certificate of official search dated 11th September, 2004 in respect of land parcel number Kiteta/Kakuswi/399 as PEX Nos. 1, 2, 3, 4, 5 and 6 respectively.

12. The four witnesses called by the Plaintiff gave evidence in support of his claim.

13. In his written submissions, the Plaintiff's counsel framed 5 issues for determination namely;

1. Who resides and/or uses land title number Kiteta/Kakuswi/399 and for how long?
2. Whether there was a mistake in registration of the suit land?
3. Whether there was a valid sale agreement?
4. Whether the suit property should be registered in the names of Kyle Kivuti or his administrators?
5. Where does the Defendant reside?

14. In respect of the first issue, the Plaintiff's counsel placed reliance on the proceedings (PEX NAO. 5) before the Land Registrar where evidence was that the Plaintiff and his extended family reside on the suit land.

15. On whether there was a mistake in the registration of the suit land, the counsel submitted that the evidence adduced before court showed that the Plaintiff's late father sold land parcel number Kiteta/Kakuswi/352 to the late father of the Defendant herein. The counsel went on to submit that the sale agreement was clear on the issue and that the mix up occurred during the adjudication process when the Plaintiff's late father gave the wrong parcel number 399 to Kalange Mbai for registration.

16. On whether the suit property should be registered in the names of Kyule Kivuti or his administrators, the counsel submitted that the Plaintiff has sued in his capacity as the administrator of his late father's estate. The counsel pointed out that both Kyule Kivuti and Kalange Mbai had agreed to rectify the mistake that occurred in respect of the suit property but unfortunately, the two passed on before they could have the mistake rectified. The counsel cited section 80(1) of the Land Registration Act under which the court may order rectification of the register by directing that any registration be cancelled or amended if it is satisfied that such registration was obtained, made or omitted by fraud or mistake. The counsel relied on the case of **Mary Ruguru Njoroge –Vs- John Samuel Gathuma Mbugu [2014] eKLR** as well as the case of **Rachel Nyambura Muraya –Vs- Margaret Withera Njihia [2015] eKLR**.

17. Arising from the above, the counsel submitted that there was a mistake or error as the transfer of the suit land did not tally with the sale agreement.

18. On the issue of where the Defendant resides, the counsel submitted that from the evidence on record, the Defendant does not reside on the suit land.

19. Having read the evidence on record and the submissions filed by the counsel for the Plaintiff, I am of the view that the only issues for determination are;

- a. Whether there was a mistake in registration of land parcel number Kiteta/Kakuswi/399.
- b. Whether land parcel number Kiteta/Kakuswi/399 should be registered in the names of Kyule Kivuti or his administrators.

20. I will address the two issues together. Firstly, I would agree with the submissions of the Plaintiff's counsel that from the evidence on record, it is clear that Kyule Kivuti and Kalange Mbai entered into sale agreement (PEX No. 2) in respect of land parcel number Thyake 352. The proceedings before the District Land Registrar (PEX No. 4) further show that the parcel of land that Kyule Kivuti sold to Kalange Mbai was 352. The evidence further shows that Kyule Mbai mistakenly handed a document in respect of land parcel number Kiteta/Kakuswi/399 to the Land Adjudication Officers and that's how Kalange Mbai was registered as the owner. There is evidence to show

that Kyule Kivuti and Kalange had agreed to rectify the mistake but the two died before they could effect the change.

21. Is such a mistake as observed hereinabove rectifiable? Section 80(1) of the Land Registration Act No. 3 of 2012 provides: -

“Subject to subsection (2), the court may Order rectification of the registrar by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

22. At Section 80(2) of the same Act, it is provided as follows;

“The register shall not be rectified to effect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

23. From the evidence on record, it is clear that Kalange Mbai was registered as the proprietor of land parcel number Kiteta/Kakuswi/399 by mistake which he had knowledge of and hence his agreement to rectify the mistake. It is also worth noting that despite having been registered as the proprietor of the said land parcel number Kiteta/Kakuswi/399 neither Kalange Mbai nor his successors in title live in the said land.

24. In the case of Mary Ruguru Njoroge –Vs- Hon. The Attorney General (Supra) referred to me by the Plaintiff’s counsel, the court held thus;

“The court too has powers to order the rectification of the title or register in appropriate circumstances. The court will under Section 80(1) of the Land Registration Act order the cancellation or amendment of an entry or any registration when it is satisfied that the registration was obtained made or omitted by fraud or mistake. Registration under the said Section, in my view, refer to and includes a title or entry in the register or on the title itself. It is however upto the party seeking rectification to prove to the court’s satisfaction that there has been fraud or a mistake in the registration. In my view, the mistake referred to under section 80(1) includes both a slip like a typographical error and a substantive mistake like the registration of a wrong or erroneous name. in equity, the court also has powers to rectify in suitable circumstances any written instrument to conform with the agreement between the parties, where the instrument, by mistake, does not express the agreement and the mistake justifies the intervention of the court.”

25. I fully associate myself with the authority and come to the conclusion that the title in respect of land parcel number Kiteta/Kakuswi/399 ought to be cancelled and the same be registered in the name of Kyule Kivuti and/or the administrator of his estate.

26. Being satisfied that the Plaintiff has on a balance of probabilities a cause of action against the Defendant, I hereby proceed to enter judgement for him and against the Defendant as hereunder;

a. An order restraining the Defendant from entering, sub-dividing and or transferring Land Title No. KITETA/KAKUSWI/399 to any other person.

b. An order cancelling the Defendant title and directing Makueni land Registrar to rectify the register to reflect the name of KYULE KIVUTI and/or the administrator of his estate as the registered owner of Land Title No. KITETA/KAKUSWI/399.

c. Cost of the suit and interests.

SIGNED, DATED AND DELIVERED VIA EMAIL AT MAKUENI THIS 24TH DAY OF JUNE, 2021

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MBOGO C.G.

JUDGE

Court Assistant: Mr. G. Kwemboi.