



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 95 OF 2013

ANTHONY MWENGA MAVUA.....PLAINTIFF

VERSUS

PIUS MUTUA MWENGA.....DEFENDANT

JUDGMENT

1. Vide a letter dated 24th June, 2021, the Defendant's advocate informed this court that the Plaintiff died on 19th June, 2021. The Defendant's advocate annexed on his letter a copy of the burial permit which shows that indeed the Plaintiff died on 19th June, 2021. Considering that by the time the Plaintiff died this matter was pending the delivery of this Judgment, the need for substitution of the Plaintiff before the delivery of the Judgment does not arise.

2. By an Amended Plaint dated 18th December, 2014, the *Plaintiff (now deceased)* averred that the Defendant is the registered proprietor of parcels of land known as Mitaboni/Mutituni/1753 and Athi River/Athi River/Block 1/1235 (*the suit properties*) and that he (*the Plaintiff*) acquired the suit properties for consideration.

3. The Plaintiff further averred that upon acquisition of the suit properties, he caused the same to be registered in the name of the Defendant during adjudication; that the Defendant was registered as the proprietor of the suit properties on the understanding that he shall hold the same as a trustee for him and that as a trustee, the Defendant was required to transfer the land back to him on demand.

4. In the amended Plaint, the Plaintiff is seeking for the following orders:

a. An order of declaration that the Plaintiff is the rightful owner of Land Titles No. Mitaboni/Mutituni/1753 and Athi River/Athi River/Block 1/1235.

b. An order directing the Defendant to transfer land titles No. Mitaboni/Mutituni/1753 and Athi River/Athi River/Block 1/1235 to the Plaintiff and in default the same be transferred by the Deputy Registrar to the Plaintiff.

c. Costs of the suit.

5. In his Statement of Defence, the Defendant averred he is the registered proprietor of the suit properties; that their family home stands on parcel of land number Mitaboni/Mutituni/1753 where he has lived with his mother and siblings and that it is his mother and himself who solely raised the funds for the purchase of the said land.

The Plaintiff's case:

6. Anthony Mwenga Mavua, PW1, informed the court that he owns parcels of land numbers Mitaboni/Mutituni/1753 and Athi River/Athi River/Block 1/1235 and that he acquired the said parcels of land while working as a Pharmacist in Kilifi and Malindi until 1994 when he retired.

7. According to PW1, the parcels of land did not have plot numbers when he acquired the same in 1971; that he has a house which he built on Mitaboni/Mutituni/1753 and that he lived on the said parcel of land with his wife and children wherever he travelled from Kilifi.

8. It was the testimony of PW1 that he also lived with his family on plot number 2173 which is a business premises and not part of this case; that the Defendant is his first born son and that he was the one who instructed the Land Adjudication Officer to have the two suit properties registered in the Defendant's name as trustee.

9. PW1 informed the court that the suit properties do not belong to the Defendant; that in 1971, he purchased three shares for the Athi River land from the Co-operative Society; that he had the Defendant registered as a trustee for the said land and that the Defendant was minor then. According to PW1, the Defendant and the husband to his daughter, who is an MCA, messed up with all his documents including the share documents.

10. It was the evidence of PW1 that the Defendant, being a trustee, cannot deal with the suit properties without his authority; that his wife whom he had married in 1956 died but was buried on parcel number 1753 without his knowledge and that his late wife had filed a divorce cause before her death after being influenced by their daughter to sue him.

11. According to PW1, his wife was buried on Plot No. 1753 which has 400 coffee trees, ten grade cattle and a house which he built; that he had lived on the land until 1978 when he relocated to Kilifi; that even after being transferred to Kilifi, he used to visit the suit properties and that parcel number 1753 remained his home.

12. PW1 stated that he lived in the house standing on parcel number 1753 until 2013 when his daughter's husband served him with a letter stating that he should not enter into the house; that his witnesses have been threatened not to come and give evidence and that he is entitled to the two suit properties.

13. In cross-examination, PW1 stated that in Mutituni, he has Plot No. 2173 which is registered in his name and has a commercial building which had a bar that was operated by his late wife; that he is the one who built a house on parcel of land number 1753 which measures 9 acres and that it is only after he reported the issue of harassment to the police that he was allowed to reside on Plot No. 2173-Mutituni.

14. According to PW1, the valuation of parcel of land number 1753 was carried out in 1970; that the land was adjudicated in 1977 and that he purchased the land in 1967 although he does not have supporting documents to that effect having been denied access to the house. It was the evidence of PW1 that he was present during the adjudication of the Mutituni land in 1968 and that the Defendant was a minor at that time having been born between 1958/59.

15. According to PW1, he is the one who gave oral instructions to the adjudication officer who found him on the land to have the name of the Defendant indicated as a trustee of the land; that he was not in good terms with his wife who is deceased and that it was not true that parcel number 1753 was purchased by his wife. PW1 testified that none of the suit properties is ancestral land and that he was not involved during the processing of the title documents.

16. According to PW1, he was not involved in the burial of his wife; that he filed a suit in the lower court in CMCC No. 996 of 2015 to stop the burial of his wife but the Defendant and his siblings stole the body and buried her on parcel number 1753 without his knowledge. According to PW1, he was the one who was supposed to point out where his wife was to be buried.

17. PW1 stated that he wanted to sell Plot No. 2173 in Mutituni to be able to finance his treatment; that the search for Plot No. 1235 shows that the Defendant was the registered owner but the same was acquired corruptly by the Defendant and that although he purchased shares for the said land, the Defendant, assisted by the late MCA who was the husband to his daughter Mukami, grabbed the land through fraud.

The Defendant's case:

18. Pius Mutua Mwenga, DW1, stated that he lives on parcel number 1753 Mitaboni/Mutituni; that parcel number 1235 was in respect of his membership in Katelembo Athiani Muputi Farming & Ranching Society Limited where he has one share and that he balloted for the suit land which was allocated to him.

19. According to DW1, he owns parcel of land Athi River Block 1/1235; that he balloted for the land in 1990 when PW1 was in Kilifi and that he also owns parcel of land number Mitaboni/Mutituni/1753. According to DW1, during adjudication, his mother had already purchased the land parcel number 1753 in 1965; that PW1 went to Kilifi in 1978 and that his mother was the only nurse in Mutituni market while PW1 was unemployed and could not purchase the suit land.

20. It was the evidence of DW1 that demarcation of parcel number 1753 was done in 1984 when he was 26 years old whereby his mother recorded the land in his name; that he has the original title which was issued in 2008 and that PW1 left for Kilifi in 1978 and returned in 2013 and started demanding for parcel number Mutituni/1753. According to DW1, when his mother died in 2015, PW1 was living on Mutituni Plot No. 2173 up to date and that the plot has residential houses.

21. According to DW1, his mother was buried on parcel number 1753 which has the matrimonial home; that he owns Mitaboni/Mutituni/1753 which is registered in his name and that he has never been a trustee as alleged by the Plaintiff. DW1 stated that PW1 has a history of selling land with a view of rendering the family homeless and that the intention of PW1 is to sell all the land and return to Kilifi where he has another wife with four children.

22. Joseph Maithya, DW2, testified that PW1 is his brother; that parcel of land number 1753 in Mutituni and Athi River were purchased by Jedida Mwenga, the wife to PW1 in 1970s' and that PW1 was not working then. According to DW2, PW1 left for Kilifi in 1978; that PW1 was in Kilifi in 1984 during the adjudication of parcel number 1753 and that it was PW1's wife who suggested that the land be registered in the name of his son, the Defendant.

23. According to DW2, the Athi River land belongs to DW1 since he purchased it; that PW1 has sold so many parcels of land including their family land and that the two suit properties belong to the Defendant.

24. Mathews Kinyanjui Mwenge, DW3, stated that PW1 and DW1 are his father and brother respectively; that parcel of land number

Mutituni 1753 was purchased by his late mother Jedida; that it was Jedida who said that the land be registered in the name of the Defendant and that his father, PW1, was not around in 1984.

25. It was the evidence of DW3 that they are the ones living in the house at Mutituni and that the parcel of land at Athi River belongs to the Defendant who purchased it. DW3 informed the court that it is not true that the Plaintiff instructed the registration of the land to be in the name of the Defendant as trustee and that the Plaintiff wants to grab and sell the land which belongs to his brother.

26. DW3 stated that the Plaintiff and his mother were not in good terms when the Plaintiff went to Kilifi in 1978; that they still live on parcel of land number 1753 in Mutituni; that the Plaintiff does not live on the land and that it his mother who purchased the land.

27. According to DW4, it took them one (1) year before they could bury their mother on the parcel of land number 1753 since the Plaintiff had refused their mother to be buried on the land and that the Plaintiff is very troublesome who wanted to kill them using arrows. In cross-examination, DW4 stated that parcel of land number 1753 was purchased when he was already an adult and that it is her mother who developed the land.

The Plaintiff's submissions:

28. It was submitted by counsel for the Plaintiff that the Plaintiff produced in evidence a government valuation letter dated 15th April, 1971 for the family house in respect of parcel of land number Mitaboni/Mutituni/1753; that the valuation was to enable the Plaintiff get a house allowance from the government and that the Defendant did not tender any evidence to show from whom his mother purchased the parcel of land from and at what costs.

29. Counsel submitted that the parcel of land in Mutituni was acquired and developed by the Plaintiff and his wife; that there is sufficient evidence to show that the Plaintiff contributed directly and indirectly to the purchase of the land and that the Defendant did not acquire parcel of land Mitaboni/Mutituni/1753 for consideration but to hold in trust for the entire family, including his siblings.

30. As regards parcel of land known as Athi River/Athi River/Block 1/1235, it was submitted that the same is held by the Defendant in trust for the family; that there is no documentary evidence to support the claim that the parcel of land was acquired by funds contributed by his mother and that he balloted for the land in 1990.

The Defendant's submissions:

31. In response, counsel for the Defendant submitted that parcel of land number Mitaboni/Mutituni 1753 is owned by the Defendant; that the land was not ancestral land; that the Plaintiff did not produce a copy of the Sale Agreement to show from whom he purchased the land from and that the Plaintiff's evidence was not corroborated by the evidence of other witnesses or any document at all.

32. According to the Defendant's counsel, DW2 explained sufficiently how the parcel of land was acquired by the Defendant's mother and that the Plaintiff did not tender any evidence to prove that the Defendant owns the suit properties and holds the titles in trust for him. Reliance was placed on the case of *Mumo vs. Makau [2002] 1EA*.

33. It was submitted that the Plaintiff did not plead customary law trust in his pleadings as required by the law or particulars of trust or customary trust; that parties are bound by their pleadings and that the Plaintiff has not proved his case.

Analysis and findings:

34. The only issue for determination in this matter is who between the Plaintiff (*deceased*) and the Defendant are entitled in law to parcels of land known Mitaboni/Mutituni/1753 and Athi River/Athi River/Block 1/1235 (*the suit properties*).

35. The Plaintiff's case is that he is the one who acquired the two suit properties by purchase, and that upon the said acquisition of the suit properties, he caused the same to be registered in the name of the Defendant; that the Defendant was registered as the proprietor of the suit properties on the understanding that he shall hold the same as a trustee for him and that as a trustee, the Defendant was required to transfer the land back to him on demand.

36. According to the Plaintiff, when he purchased parcel number Mitaboni/Mutituni/1753 in 1971, the land had not been adjudicated and that he built his matrimonial house on the land as per the valuation letter dated 15th April, 1971 which he produced in evidence. It was the evidence of the Plaintiff that he lived in the said house and also on parcel of land 2173 in Mutituni.

37. According to the evidence of the Plaintiff, he was employed as a pharmacist and was deployed to Kilifi in 1978 where he worked until 1994 when he retired. It was his evidence that he used to visit his home which is situated on parcel number 1753, and that he is the one who instructed the Land Adjudication Officer to register the said land in favour of the Defendant to hold the same in trust for him.

38. The Defendant's case is that the demarcation of parcel number 1753 was done in 1984 when he was 26 years old whereby his mother recorded the land in his name; that he has the original title which was issued in 2008 and that PW1 left for Kilifi in 1978 and returned in 2013 and started demanding for parcel number Mutituni/1753.

39. It was the evidence of the Defendant and his witnesses, including the Plaintiff's brother, that it is the Plaintiff's wife who bought the suit land while working as a nurse in Mutituni market and that when the adjudication process was undertaken in 1984, she had the suit land registered in favour of the Defendant. All along, the Plaintiff was in Kilifi with his second wife and children.

40. DW1 informed the court that his mother was buried on parcel number 1753 which has the matrimonial home; that he owns Mitaboni/Mutituni/1753 which is registered in his name and that he has never been a trustee as alleged by the Plaintiff. DW1 stated that PW1 has a history of selling land with a view of rendering the family homeless and that the intention of PW1 is to sell all the land and return to Kilifi where he has another wife with four (4) children.

41. In respect to parcel of land number Athi River/Athi River Block 1/1235, it was the evidence of the Plaintiff that he owned a share in a Co-operative Society and that the Defendant was registered as the owner of land in trust. On the other hand, the Defendant informed the court that he was a member of Katelembo Athiani Muputi Farming & Ranching Society and that he balloted for the said land in 1990.

42. The evidence before the court shows that the Defendant was registered as the owner of parcel of land known as Mitaboni/Mutituni/1753 on 23rd October, 2008. Although the Plaintiff claimed that he is the one who purchased the suit property, he did not produce evidence to show when he purchased the said land and from whom.

43. Indeed, the evidence by the Plaintiff himself shows that he was not in employment until the year 1978 when he was employed and deployed to Kilifi where he worked until he retired in the year 1994. By the time the Plaintiff was employed, his late wife was already running a clinic at Mutituni market.

44. The evidence by the Defendant that it is his mother who purchased parcel of land number Mitaboni/Mutituni/1753 and had the same registered in his favour during the adjudication process in 1984 is believable. I say so because the Defendant's mother was already running a clinic in Mutituni town by the time the Plaintiff was employed in 1978. Furthermore, having moved to Kilifi in 1978 and married a second wife, the Plaintiff seemed to have lost interest in respect to his first family which was residing in Mutituni.

45. Although the Plaintiff claimed that he was a member of a Co-operative Society and that he had a share in the said Co-operative, and that he allowed the Co-operative Society to register the Defendant as the owner of the land known as Athi River/Athi River Block 1/235, he did not produce in evidence any document to show that he was such a member.

46. The Defendant on the other hand produced in evidence the original membership card for Katelembo Athiani Muputi Farming & Ranching Society Limited which was issued to him. According to the Defendant, being a member, he balloted for the land in 1990 and was allocated Athi River/Athi River Block 1/235. A Title Deed was then issued in his favour on 29th March, 2011.

47. Although the Plaintiff's case was that the Defendant held the two properties as a trustee, no evidence was led to show how and under what circumstances that trust was created. Indeed, the evidence before me shows that the Plaintiff was in Kilifi in 1984 during the adjudication of parcel of land number Mitaboni/Mutituni/1753 and in 1990 when the Defendant balloted for parcel of land known as Athi River/Athi River Block 1/235.

48. The two parcels of land were acquired by the Defendant's late mother and the Defendant himself respectively. On the basis of the evidence that was adduced, the Plaintiff only resurfaced from Kilifi after his retirement and way after the suit properties had been registered in favour of the Defendant.

49. For those reasons, it is my finding that the Plaintiff (*posthumously*) did not prove his case on a balance of probabilities. The Plaintiff's suit is dismissed. This being a dispute between a father and a son, I will not award costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021.

O. A. ANGOTE

JUDGE