



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC NO. 73 OF 2019

SAULO NZYOKA MULILI.....PLAINTIFF

VERSUS

STEPHEN KASIA NZYOKA.....1ST DEFENDANT

MAKUENI DISTRICT LAND REGISTRAR.....2ND DEFENDANT

JUDGEMENT

1. Saulo Nzyoka Mulili (Plaintiff) suing as the legal representative of the estate of Nzyoka Mulili brought this suit against the Defendants vide the plaint dated 3rd October, 2019 and filed in court on even date wherein he sought the following orders;

a) A permanent injunction order restraining/stopping the 1st Defendant by himself, his agents, servants or any other person acting through the Defendant's instructions from caveating, disposing, parting and/or selling in whole or part thereof of the deceased parcel of land known as OKIA/MUKUYUNI/1213 measuring 3.71 Ha registered in Plaintiff's name.

b) An order directing the 2nd Defendant to unconditionally lift/withdraw the caution registered by the 1st Defenant on the deceased parcel of land known as OKIA/MUKUYUNI/1213 measuring 3.71 Ha registered in Plaintiff's name and further to effect subdivision of the land into two equal halves for the two deceased's households in the names of Saulo Nzyoka Mulili and Kitungwa Nzyoka.

c) Costs and interests of the suit.

2. The Plaintiff has averred in his plaint *inter alia* that he is a step brother of the 1st Defendant and that they are sons of Nzyoka Mulili who died in 1983 leaving behind two wives and the entire parcel of land known as Okia/Mukuyuni/1213 measuring 3.71 Ha situated in Makueni County whereof he is the administrator, that the deceased's entire parcel of land number Okia/Mukuyuni/1213 is registered in his name in trust on behalf of the estate of the deceased which comprises the two households, that the 1st Defendant, without any color of right has illegally sold portions of the said deceased's land to third parties before its subdivision to the deceased's two households and has registered a caution on the entire land causing its subdivision difficult by the Plaintiff/Administrator who is the registered trustee, that the third parties have trespassed and illegally started farming works unabated and that unless the Defendants are ordered to withdraw the caution and the 1st Defendant is restrained by a permanent injunction order, he will proceed with their illegal sales and development on the deceased entire land, that the third parties shall continue trespassing on the subject unabated, waste it and frustrate the fair distribution of it and the Plaintiff together with the entire estate of the deceased will suffer irreparable loss and damage as a result.

3. The Plaintiff's claim is denied by the 1st Defendant vide his amended defence dated 19th February, 2020 and filed in court on even date.

4. He has averred *inter alia* that if any succession cause was filed, the same was without requisite consent of the family of the 1st Defendant hence it was done unprocedurally and fraudulently and any consequential orders are a nullity *ab initio* particulars of fraud being;

a) Obtaining a death certificate on 30th November, 2010 yet the original National identity card of the late Nzyoka Mulili was in the custody of the 1st Defendant.

b) The legitimate death certificate was lawfully issued to the 1st Defendant in the year 2018 after surrender of the said original identity card of the late Nzyoka Mulili.

- c) Filling application for letters of administration intestate to the estate of Nzyoka Mulili discreetly and without consent of the 1st Defendants family.**
- d) Procuring title deed of the suit property in his name on 27th July 2007 without the requisite authority of an administrator.**
- e) Misrepresenting the acreage of the suit property as 3.71 Ha yet the actual acreage was over 5 Ha.**
- f) Attempting to subdivide and transfer the suit property to 3rd parties without lawful authority.**
- g) If the title deed issued in the name of the Plaintiff in 2007, it would have been suoerflous (sic) to file the succession cause no. 889/2011 unless the succession application was done to camouflage and conceal the illegally obtained title deed. Documents filed on 1st November, 2019.**

5. The 1st Defendant went on to aver that the Plaintiff has already sold the portion of his late mother's land and wants to share the portion that belongs to the 1st Defendant's mother and hence his decision to lodge the caution, that he cannot withdraw the caution the reason being that the Plaintiff shall get advantage of disposing the whole land leaving the 1st Defendant's mother without any land to settle on and that title deed number Okia/Mukuyuni/1213 issued to the Plaintiff be cancelled and the same registered in their late father's name so that they can follow the estate jointly. He prayed that the Plaintiff's suit against him be dismissed with costs.

6. In rejoinder, the Plaintiff filed a reply to the 1st Defendant's defence dated 14th November, 2019 where he reiterated his averments in his plaint.

7. The 2nd Defendant though served on 5th March, 2020 via the office of the Attorney General, did not enter appearance nor file defence. Affidavit of service upon the Attorney General sworn by Peter Njue Mugoh, a licenced process server, at Nairobi on 6th March, 2020 was filed in court on 9th March, 2020.

8. Hearing of the Plaintiff's case commenced on the 20th April, 2021 wherein he adopted his statement dated 3rd October, 2019. He went on to produce 6 (six) documents in his 1st set of documents as PEX Nos. 1 to 6 respectively. He also produced three (3) documents in the second set of documents as PEX Nos. 7 to 9.

9. Briefly, the Plaintiff's evidence was that his late father who died on 6th December, 1983 was married to two wives. That the deceased owned land parcel number Okia/Mukuyuni/1213 measuring 3.71 hectares of which it is now registered in his name in trust on behalf of the estate of the deceased. That the 1st Defendant who is his step brother and, therefore, a beneficiary of the deceased's estate has illegally sold portions of the land to third parties without the consent of the estate and before its subdivision to the deceased's two households and that 1st Defendant has registered a caution on the entire land causing subdivision difficult for him as the registered trustee. It was also his evidence that the third parties who have illegally bought parts of the suit land have trespassed and illegally started farming works unabated.

10. In his evidence in cross examination, the Plaintiff reiterated that his deceased father had two wives. He said that he did not include the name of Mama Kitungwa Nzioka in the succession cause.

11. In his evidence in re-examination, the Plaintiff told the court that the succession cause has not been set aside.

12. The Plaintiff called Patrick Ndunga Ndonge (PW1), Samuel Kaloki Nzyoka (PW2) and Fredrick Mwanthi Kaloki (PW3) who gave evidence in his support.

13. Ndonge's (PW1) evidence in cross examination was that no one has barred the 1st Defendant from inheriting a portion of his late father's land. He agreed that land parcels number 1215 and 1216 have a caution.

14. Nzyoka's (PW2) evidence in cross examination was that he and the 1st Defendant uprooted the sisal plants that the Plaintiff planted.

15. Hearing of the 1st Defendant's case commenced on 9th June, 2021. He adopted his statement dated 19th February, 2020 as his evidence. He went on to produce 8 documents in his list of documents dated 19th February, 2020 as DEX Nos. 1 to 8 respectively.

16. The 1st Defendant's evidence was that his late father sub-divided land parcel number Makueni/Mukuyuni/1213 amongst his two wives. That in 1973, one Ntheketha Masala attempted to interfere with land parcel number Makueni/Mukuyuni/1213 leading to several suits being filed in court. That on 19th January, 2006, he lodged caution in respect of land parcel numbers Makueni/Mukuyuni/1215 and 1216 registered in the name of one Nthaketha Masala and his brother, James Ilevé. That the Plaintiff illegally and fraudulently assumed legal representation of the estate of the late Nzyoka Mulili.

17. The 1st Defendant's evidence in cross examination was that he lodged caution in respect of parcel and numbers Makueni/Mukuyuni/1215, 1216, 1806 and 1213. He disclosed that he lodged a caution in respect of land parcel number 1213 because the Plaintiff acquired it fraudulently and/or illegally. He said that he has never filed any case over the said parcel of land and nor was he involved in the succession cause. He went on to say that despite having the certificate of death in respect of his father, he did not report to the police that the Plaintiff had filed a succession cause. He said that the Plaintiff got a copy of certificate of death in 2010 while he got his

in 2018. He also said that there were no proceedings before the Land Registrar prior lodging of the caution.

18. The 1st Defendant called Peter Mwau Mavuthi (DW1), Gabriel Mulei Ithia (DW2) and Kitungwa Nzyoka Mulili (DW3) as his witnesses. The three witnesses adopted their respective statements filed herein as their evidence was in support of 1st Defendant's case.

19. Mavuthi's (DW1) evidence in cross examination was that the 1st Defendant lodged a caution in respect of land parcel number 1213 because the Plaintiff intended to sub divide it.

20. Kitungwa's (DW3) evidence in cross examination was that she is the second wife of her late husband and that her husband sub divided land parcel number 1213 into two portions and allocated each portion to his two wives. She said that she would like the sub division to remain as it was done by her late husband.

21. In their written submissions, the counsel on record for the Plaintiff identified two issues for determination namely;

i) Whether proper caution is rightfully placed, lodged?

ii) Whether the Plaintiff is entitled to an order of permanent injunction.

22. On whether the caution was rightfully lodged, the Plaintiff's counsel submitted that although the 1st Defendant contention is that he lodged the caution against the subject suit property on the grounds that the Plaintiff unlawfully acquired ownership and/or title deed, he admitted in cross examination that he did not file summons for revocation of grant in respect of the estate of his late father. The counsel went on to submit that the caution lodged by the 1st Defendant is only meant to delay the distribution of the estate of deceased in favour of the dependants left behind. The counsel pointed out that no sufficient evidence has been adduced by the 1st Defendant's to support the allegation that the Plaintiff illegally and/or fraudulently purported legal representation of the estate of his late father.

23. It was further submitted that even though the 1st Defendant challenged the validity of the certificate of death issued to the Plaintiff (emphasis are mine), no criminal charges were preferred against him. The counsel was of the view that there was no sufficient and/or valid reasons for lodging of the caution and hence the same should be lifted.

24. On whether the Plaintiff is entitled to an order of permanent injunction, the counsel submitted that the Plaintiff has satisfied the three principles set out in the case of Giella -Vs- Cassman Brown & Co. Ltd [1973] EA 358. The counsel further relied in the case of Pius Kipchirchir Kogo -Vs- Frank Kimeli Tena [2018] eKLR where the term "irreparable injury" was defined. The counsel urged the court to enter judgment in favour of the Plaintiff.

25. On the other hand, the 1st Defendant in his submissions reviewed his evidence and that of his witnesses and submitted that he had adduced sufficient evidence to show that the Plaintiff's suit is an attempt to disinherit the beneficiaries of the estate of the late Nzyoka Mulili. He urged the court to find the Plaintiff action as fraudulent and that the Plaintiff's suit should be dismissed with costs. Further, he urged that title deeds Makueni/Mukuyuni/1215, 1216 and 1806 which are illegal sub divisions of Makueni/Mukuyuni/1213 be cancelled and/or revoked and the 2nd Defendant be directed to reinstate Makueni/Mukuyuni/1213 to its original status.

26. Having read the evidence on record and the rival submissions filed by the parties herein, I am of the view that the issues for determination are as set out by the counsel for the Plaintiff.

27. On whether the caution in respect of land parcel number Okia/Mukuyuni/1213 was rightfully lodged, it is clear from the evidence on record that the 1st Defendant did not file summons for revocation of the grant that was issued to the Plaintiff herein in respect of the suit property. Until and unless the grant is revoked by the appropriate court, there is nothing to suggest that the Plaintiff fraudulently registered the suit land in his name. Even though the 1st Defendant has pleaded that the Plaintiff had the suit property registered in his name by means of fraud, he has not proved the said particulars of fraud. It should be noted that parties are bound by their pleadings and the 1st Defendant cannot be heard to seek to have title deed issued to the Plaintiff in respect of the suit property cancelled as there is no such prayer in his amended defence. I am inclined to agree with the Plaintiff's counsel that there was no basis for lodging the caution in respect of the suit property. The caution must therefore be lifted and/or withdrawn.

28. On whether the Plaintiff is entitled to an order of permanent injunction, from the evidence on record, the Plaintiff claims that the 1st Defendant has sold portions of land parcel Okia/Mukuyuni/1213 to third parties. The Plaintiff did not disclose who the third parties were. In my view, he is out to seek a permanent injunctive orders against them without affording them the chance to be heard. The evidence adduced by the Plaintiff regarding alleged sale of portions of the suit property by the 1st Defendant is tenuous and it cannot be the basis for granting permanent injunction against the 1st Defendant. Suffice it to say, the prayer for an order of permanent injunction against the Defendants must fail.

29. Arising from the above, my finding is that the claim against the Defendants partially succeeds and in the circumstances, I hereby proceed to enter judgement for the Plaintiff and against the two Defendants as hereunder: -

a) An order is hereby issued directing the 2nd Defendant to unconditionally lift/withdraw the caution registered by the 1st Defendant on the deceased land parcel number Okia/Mukuyuni/1213 measuring 3.71 hectares registered in the Plaintiff's name and to effect registration of the said land into two (2) equal portions or halves for the two deceased's households in the name of Saulo Nzyoka Mulili and Kitungwa Nzyoka.

b) Each party shall bear their own costs.

Signed, dated in open court at Makueni this **10th** day of **September, 2021**.

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MBOGO C.G.

JUDGE

IN THE PRESENCE OF: -

Court Assistant - Mr. G. Kwemboi.

M/s Kyalo holding brief for Ms Onsembe for the Plaintiff.

1st Defendant

AND IN THE ABSENCE OF: -

The Plaintiff.