



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 37 OF 2016

MUIA MUSYOKA (*Suing as the Administrator of the Estate of MUSYOKA*)

KANGULE MUMO (*deceased*).....**PLAINTIFF**

VERSUS

JOHN KASYONI MAKENZI ALIAS JOHN MAKENZI MAILU...1ST DEFENDANT

PETER MUTUNE.....**2ND DEFENDANT**

JUDGMENT

1. In the Plaintiff dated 3rd June, 2016, the Plaintiff is seeking for the following orders:

- a. An order of cancellation and/or revocation of Title Number Mavoko Town Block 3/4398 and instead order that the same be consolidated with Mavoko Town Block 3/2200.**
- b. A permanent injunction be issued restraining the 2nd Defendant from in any way dealing, disposing, leasing or interfering with Mavoko Town Block 3/4398.**
- c. General damages for loss of user of Mavoko Town Block 3/4398 from May, 2010 upto date.**
- d. Costs and interest.**
- e. The Defendants to pay the costs of the suit.**

2. The Plaintiff's claim is predicated on the allegation that Musyoka Kangule Mumo (*the deceased*) was a member and shareholder of Lukenya Ranching and Farming Co-operative Society Limited (*the Society*); that on 21st February, 1991, the deceased was allocated forty (40) acres of land by the Society and that on 18th September, 2006, the deceased was issued with a Title Deed for Mavoko Town Block 3/2200 measuring 25 acres instead of 40 acres.

3. The Plaintiff averred in the Plaintiff that on inquiry, he was informed that the 2nd Defendant had purchased 15 acres of the suit land from the 1st Defendant; that the 1st Defendant has never owned the suit property and that the alleged sale of 15 acres by the 1st Defendant to the 2nd Defendant was illegal and therefore null and void.

4. In his Defence, the 1st Defendant averred that the deceased's rightful share of the suit property was 25 acres which was allotted to him by the Society. According to the 1st Defendant, the portion of land that was sold to the 2nd Defendant is the only ancestral land of Kangule Mumo and not Musyoka Kangule Mumo.

5. In the Amended Defence, the 2nd Defendant averred that he has never had any land dispute with the Plaintiff's parents in respect of the suit property; that there are clear boundaries in respect to the land belonging to the two and that he has been in continuous occupation and use of the land parcel number Mavoko Town Block 3/4398 for more than twelve (12) years.

6. In his ultimate prayers, the 2nd Defendant has sought for a declaration that he is an adverse possessor of land parcel number Mavoko Town Block 3/4398 and for a permanent injunction restraining the Plaintiff from taking over the suit property.

7. In his evidence, the Plaintiff, PW1, informed the court that he is one of the administrators of the Estate of Musyoka Kangule Mumo, together with Joel Muendo Musyoka who has since died; that his late father was a member and shareholder of Lukenya Ranching and Farming Co-operative Society Limited (*the Society*) and that his late father was allocated 40 acres of land by the Society on 21st February, 1999.
8. According to PW1, when the Title Deed was issued to his late father, it showed that he was entitled to 25 acres and that he later discovered that a portion of his father's land measuring 15 acres had been allocated to one Peter Mutune who is not related to them. It was the evidence of PW1 that parcel number Mavoko Town Block 3/4398 which was allocated to Peter Mutune was a portion of his father's land.
9. PW1 informed the court that the Society excised a portion of the deceased's land without the deceased's consent; that Peter Mutune bought the excised land from one Beth Munyanye and that the said Susan Munanie lodged a protest in Succession Cause No. 616 of 2005 which was dismissed on 27th November, 2014 by the court.
10. In cross-examination, PW1 stated that he did not know the year that the 2nd Defendant bought the suit property and that he realized that the 2nd Defendant had built a house on the suit property and was rearing cattle and drilled a borehole.
11. According to PW1, the suit land was in the name of his father when the 2nd Defendant purchased it; that Beth Munyanye Mailu is his step-mother while Julius Matheka Mailu is the 1st Defendant's brother and that Mwalika Wa Kithuka is his uncle.
12. PW1 denied that the family sold one (1) acre of the suit property to Peter Mutune to cater for the funeral expenses of his late father. PW1 produced several documents in evidence which I shall refer to later.
13. PW2 informed the court that the Plaintiff is his brother; that their late father, Musyoka Kangule Mumo, was a member of the Society and that he was allocated 40 acres by the Society by virtue of the said membership.
14. PW2 stated that when they went to collect the Title Deed for the suit land, they discovered that 15 acres of land had been excised from the suit property; that in Succession Cause No. 616 of 2005, the court decreed that the excised portion of land belonged to their father and that it is the 1st Defendant who transferred the 15 acres to the 2nd Defendant.
15. In cross-examination, PW2 stated that the 2nd Defendant has built his house on a different parcel of land; that he has fenced the 15 acres that was hived off from their father's land and that parcel numbers 2200 and 4398 belong to their late father.
16. PW2 disputed the assertion that the 40 acres of land was sub-divided between his late father and uncle and stated that the whole land belonged to his late father.
17. The 1st Defendant, DW1, stated that he is the son of the late Mailu Kangule Mumo, who had two wives, that is Munyiva Mailu and Beth Munanie Mailu; that the Plaintiff's late father, Musyoka Kangule Mumo, was his uncle and that the subject parcel of land was their ancestral land.
18. According to DW1, the whole land belonged to their grandfather, the late Kangule Mumo, who sub-divided it during his life time and gifted it to his two wives and sons and that it is her mother, Beth Munanie Mailu and her step-son Julius Matheka Mailu, who sold the land which had been gifted to her by her late husband.
19. According to DW1, the Title Deed that was obtained in the name of the late Musyoka Kangule Mumo was obtained fraudulently because the land in question was ancestral. According to DW1, the 2nd Defendant bought the disputed parcel of land from his step-mother in the year 1999 and that he has been in occupation of the said land since then.
20. In cross-examination, DW1 admitted that he filed an objection in the Succession case and that his objection was dismissed by the court. According to DW1, the entire land measured 65 acres. It was the evidence of DW1 that the 65 acres parcel of land was sub-divided by the clan amongst three families - that is his father, the Plaintiff's father and his grandfather and that the Plaintiff's father was allocated 25 acres.
21. The 2nd Defendant, DW2, informed the court that parcel of land number Mavoko Town Block 3/4398 is owned by him and his young brother, Paul Kavatha; that they bought 10 acres of the land from Beth Munanie Mailu and her son, Julius Matheka Mailu (*deceased*) and that they later on bought three (3) more acres of land and then 2 acres.
22. In addition to the 15 acres that they bought, DW2 stated that there was an additional one (1) acre of the land that they bought "*for burial purpose*" and that they bought the land for Kshs. 320,000 which they fully paid.
23. DW2 testified that they have been utilizing the suit land since the year 1999 without any interruption from anyone and that the land they bought does not belong to the Plaintiff's father's Estate.
24. In cross-examination, DW2 stated that he was issued with a Title Deed on 5th May, 2010; that the land initially belonged to the late Kangule Mumo, the Plaintiff's grandfather, and that the entire family signed the Agreement of Sale.
25. The young brother of the 2nd Defendant, DW3, informed the court that although parcel of land number Mavoko Town Block 3/4398 is registered in the name of the 2nd Defendant, the same is jointly owned by him and the 2nd Defendant. According to DW3, they have planted

trees and built a home on the suit land and that they have occupied the suit land since the year 2000. According to DW3, the land was sold to the two of them in 1999 by Beth Munyanye Mailu.

26. Beth Munyanye Mailu, DW4, informed the court that the Plaintiff is the son to his late brother-in-law; that the 1st Defendant is his step-son and that his late husband, Mailu Kangule, was a beneficiary of the suit property which is ancestral land.

27. According to DW4, the suit land belonged to Kangule Mumo, who was the father of his late husband; that it is the Plaintiff's father who used to pay for shares to the Society on behalf of the family and that after the death of Kangule Mumo, the clan sub-divided the land amongst the families of Mailu Kangule and Musyoka Kangule who are both deceased.

28. It was the evidence of DW4 that each of the two families got 27½ acres with the remaining 10 acres going to the patriarch, Kangule Mumo. According to DW4, she sold her husband's share of the land to the 2nd Defendant herein.

29. The Plaintiff's advocate submitted that none of the Defence witnesses adduced evidence of ownership of the suit land, or of having attended the Land Control Board before transferring the suit property to the 2nd Defendant.

30. The 2nd Defendant's advocate submitted that the 2nd Defendant produced copies of Sale Agreements to confirm that he bought the land in issue; that there was no evidence to show that the 2nd Defendant obtained the Title Deed fraudulently and that in any event, the 2nd Defendant has shown that he has been in occupation of the suit land since 1999.

31. The Plaintiff's claim in this matter is that his late father, Musyoka Kangule Mumo, was a member of Lukenya Ranching and Farming Co-operative Society Limited, and as such, was allocated a parcel of land measuring 40 acres. The Plaintiff produced in evidence the Letter of Allotment from the Society dated 21st February, 1991 which shows that the late Musyoka Kangule was allocated 40 acres of Plot No. 322 by the Society.

32. According to the Letter of Allotment produced by the Plaintiff, the late Musyoka Kangule was member No. 345 in the Society. It was the evidence of PW1 that when the Title Deed in respect of his father's share was issued, they discovered that parcel of land known as Mavoko Town Block 3/2200 only measured 10.12 Ha (22.5 acres) instead of 40 acres which their father was entitled to. To support this allegation, the Plaintiff produced in evidence the Title Deed for parcel number Mavoko Town Block 3/2200 which was issued on 18th September, 2006.

33. The Plaintiff also produced a search showing the registered owner of land known as Mavoko Town Block 3/4398 measuring 6.07 Ha (15.25 acres) to be Peter Mutune, the 2nd Defendant. According to the Plaintiff, the land registered in favour of the 2nd Defendant was fraudulently excised from their father's land and the same was transferred to the 2nd Defendant by the 1st Defendant and his step-mother, Beth Munyanye Mailu.

34. The Plaintiff produced in evidence the Ruling dated 27th November, 2014 in Machakos Succession Cause No. 616 of 2005. In the said case, the 1st Defendant sought to have the Title Deed in respect of land known as Mavoko Town Block 3/2200 sub-divided so that he could be allocated 6¼ acres, 6¼ acres to his brother Julius Matheka Mailu and 12½ acres to David Mailu.

35. According to the Ruling of the court, the 1st Defendant herein informed the court that his grandfather Kangule Mumo, was a member of the Society; that when he was unable to pay for his shares, he invited two of his sons - his father and the Plaintiff's father, to settle the claim and that his grandfather was eventually allocated 65 acres.

36. The 1st Plaintiff further informed the court that after his grandfather was allocated the 65 acres, the said land was sub-divided into three portions, with the Plaintiff's father getting 25½ acres, his grandfather getting 10 acres and his father got 5 acres.

37. Indeed, the very allotment letter that the Plaintiff is relying on was also produced in Machakos High Court Succession Cause No. 616 of 2005. After hearing the dispute, the court declined to have the 40 acres of land sub-divided as suggested by the Objector (*the 1st Defendant herein*). In its Ruling, the court held as follows:

“15. Evidence was adduced of an allotment letter from Lukenya Ranching and Farming Co-operative Society Limited dated 1991 in the name of Musyoka Kangule. Had the land belonged to three persons then it would have expressly stated. No evidence was adduced to prove joint ownership of the parcel of land.

18. From the foregoing, it is apparent that the consent of the Applicant was not necessary.”

38. It is obvious that from the above Ruling, the attempt by the 1st Defendant, who is the step-son of Beth Munyanye, to have land measuring 40 acres sub-divided amongst three (3) families did not succeed. The court affirmed that the 40 acres belonged to the Plaintiff's father alone.

39. Indeed, in the Certificate of Confirmation dated 5th February, 2003, the High Court decreed that parcel of land known as Mavoko Town Block 3/2200 measuring 40 acres belong to the Estate of the late Musyoka Kangule Mumo. That is the certificate that the 1st Defendant attempted to set aside without success.

40. The court having decreed that the Plaintiff's father was entitled to 40 acres, the Title Deed for parcel number 2200 should have read 40 acres. The claim by the Defendants that they are entitled to 15 acres of the said land was dealt with by the court in High Court Succession Cause No. 616 of 2005. Consequently, any other argument by the Defendants is contrary to the well-known principles of litigation, that a

court of concurrent jurisdiction cannot override the decision of another court if the issues in dispute are the same, and between the same parties.

41. If indeed the 2nd Defendant purchased the suit land in 1999, which portion was part of the land that was allocated to the Plaintiff's late father by the Society, then their only recourse would have been in the Succession Cause. Considering that the Title Deed in respect of Mavoko Town Block 3/4398 forms part of the land that was hived from the Plaintiff's father's land, and the High Court having decreed that the Plaintiff's father's land measuring 40 acres was his alone, the Title Deed for Mavoko Town Block 3/4398 is a nullity.

42. Indeed, by the time the 1st Defendant and Beth Munyanye Mailu purported to sell land measuring 15 acres in 1999 to the 2nd Defendant, the said land was in the name of the Plaintiff's father. In fact, the two had no capacity to sale a portion of the 40 acres that was allocated to the Plaintiff's father until a fresh Letter of Allotment could be allocated by the Society to them. That sale, therefore, was a nullity *ab initio*.

43. The 2nd Defendant has stated that he is entitled to the suit land because he has occupied it since 1999. Section 7 of the Limitation of Actions Act provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

44. The Plaintiff's right of action accrued on the date the 2nd Defendant obtained his Title Deed. That is the date that time started running for the purpose of applying to court for cancellation of the same. The Title Deed having been issued to the 2nd Defendant for parcel of land known as Mavoko Town Block 3/4398 on 8th February, 2010, a period of twelve (12) years had not lapsed as at the time this suit was filed.

45. In any event, the Plaintiff informed the court that all along, they were waiting to be issued with a Title Deed for parcel of land known as Mavoko Town Block 3/2200 measuring 40 acres. They only discovered that the Title Deed for parcel number 2200 was reading 10.12 Ha when the same was issued to them on 18th September, 2006.

46. Even if time was to start running from 18th September, 2006, a period of twelve (12) years had not lapsed when they filed the current suit.

47. The analysis of the evidence before me shows that the Defendants procured the Title Deed in respect of parcel of land known as Mavoko Town Block 3/4398 fraudulently. In fact, the issue of the entire land measuring 40 acres belonging to the Plaintiff's grandfather was not proved by the Defendant in this case and in Machakos High Court Succession Cause No. 616 of 2005.

48. For those reasons, I dismiss the 2nd Defendant's Counter-claim with costs and allow the Plaintiff's Plaint dated 3rd June, 2016 as follows:

a. An order of cancellation and/or revocation of Title Number Mavoko Town Block 3/4398 be and is hereby issued and instead an order is issued that the same be consolidated with Mavoko Town Block 3/2200.

b. A permanent injunction be and is hereby issued restraining the 2nd Defendant from in any way dealing, disposing, leasing or interfering with Mavoko Town Block 3/4398.

c. The Defendants to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7TH DAY OF FEBRUARY, 2020.

O.A. ANGOTE

JUDGE