



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 47 OF 2017

MWELU MUIA MUINDE (Suing as the administratrix of the estate of the late

MUIA MUINDE ILIA A.K.A WELIA)..... PLAINTIFF

VERSUS

CHIZI CHITSUNYA MAGONGO.....1ST DEFENDANT

THE LAND REGISTRAR, KWALE COUNTY REGISTRY.....2ND DEFENDANT

THE ATTORNEY GENERAL..... 3RD DEFENDANT

JUDGMENT

(Suit by plaintiff seeking to have title held by 1st defendant cancelled; plaintiff filing suit as legal representative of a deceased person; evidence demonstrating that the land was subjected to the land adjudication process and adjudicated in favour of the deceased; 1st defendant obtaining title after the demise of the deceased; clear that title of the 1st defendant was procured through fraud; judgment entered for the plaintiff)

1. This suit was commenced through a plaint which was filed on 21 February 2017. The plaintiff has filed this suit on behalf of the estate of Muia Muinde Ilia (also known as Welia) (the deceased) and on behalf of his dependants. It is her case that the land parcel Kwale/Kidomaya/128 was the property of the deceased and that the deceased was the bona fide registered owner. She has contended that on 20 March 2006, the 1st defendant colluded with the 2nd defendant (the Land Registrar, Kwale) and was fraudulently issued with a title deed to the suit property. The plaintiff has pleaded that the 1st defendant cohabited with the deceased on a small portion of the property while the rest was occupied by one Justus Gateti Kageenu and Ngome Mwachupa Mkala who had purchased an interest in the property from the deceased. In her particulars of fraud, she has pleaded inter alia that the 2nd defendant failed to maintain proper records for the suit land; the 2nd defendant issued the 1st defendant with a title without the 1st defendant holding any grant of letters of administration; that title was issued to the 1st defendant before transmission; that there was collusion to remove the records reflecting the deceased as the real owner of the suit property; and that they dealt with the property without following due process of the law. The plaintiff thus wishes to have the title of the 1st defendant cancelled and in place thereof the name of the deceased be entered in the register as proprietor of the suit land.

2. The 1st defendant filed defence where she pleaded inter alia that she is the one who was married to the deceased and that the plaintiff was long divorced from the deceased before she (the defendant) married him. She pleaded that the suit land was purchased by her and her late husband, and that the plaintiff has never set foot on it. She has pleaded that the case has been maliciously instigated and she has denied all particulars of fraud. She has further pleaded that the suit is time barred, instituted 15 years after the death of the deceased.

3. In her evidence, the plaintiff testified inter alia that the deceased was married to her and that they had over 10 children together. She stated that they lived together till his death in the year 2001. She testified that he worked as a tractor driver in Baba Dogo and was buried in Kasalani, Mombasa, at his brother's (Muasya) place and not on the suit land which is in Kwale. She testified that the 1st defendant was secretly living with her husband and she only came to know about this at the time of his burial. She stated that she sold 9 sacks of beans to enable her husband purchase the suit land. She testified that there were three of her children's houses on the suit land. She was not aware that the 1st defendant had obtained title to the suit land. She was not aware that her husband had sold the land during his lifetime and she did not know any of her neighbours. She stated that her husband was not buried on the suit land because the 1st defendant was living in it. Cross-examined, she testified that she got married to the deceased under Kamba customary law. She did not know who sold the suit land to her husband. She testified that her husband was buried in Nairobi because there were no means to bring him to the suit land, though when pressed, she stated that he was buried in Kibuyuni in Kwale at his brother's home. She also stated in cross-examination that she knew that her husband was living with another woman and she got annoyed and left to go and live with her children. Her husband was not supporting

her and she was doing casual jobs to support the children. Two of her children went to live with their father and they were buried at Kibuyuni. Between the years 2001 and 2014 she was living in Korogocho (Nairobi) and did not visit the land. She has five surviving children and none live on the suit land.

4. PW-2 was Justus Gateti Kageeni. He is a retired Certified Public Accountant. He testified that from the year 1982, he purchased several pieces of land. He stated that he purchased half of the suit land from the deceased and the plaintiff, and took possession. He stated that he confirmed ownership from the Land Adjudication Officer and the Adjudication Register showed that the deceased was the owner. He testified that the 1st defendant came to the suit land around the year 2002 after Mr. Muia had died. This was not surprising to him because he was aware that he had two wives. At the beginning, the 1st defendant was willing to subdivide the land to him but she later reneged. He declined an offer of 10 acres that was given to him. He stated that he was eventually chased out of the land in the year 2010 by the 1st defendant. He was aware that she has title to the land though he did not know how she acquired it. Cross-examined, he testified that he purchased the land in the year 1992. He acknowledged that he did not produce any record and had no sale agreement. He stated that at the time of sale, the deceased was living on the suit land with the 1st defendant and one of his sons from the first house. He stated that at some point the 1st defendant took her to the Land Control Board for consent but the land was not subdivided because she could not pay the survey fees. He stated that he got hold of the title deed to the land but it got lost and a duplicate of it had to be issued. All this was while the plaintiff was upcountry. He also registered a caveat on the land.

5. PW-3 was Ngome Mwachupa Mkala. He testified that he purchased 4 ½ acres of the suit land from the deceased on 20 August 1996. He paid for the land and he stated that he lives on it. He did not know whether the deceased got title to the land. He testified that the deceased lived on this land with his family and that the 1st defendant was his wife. He mentioned that she was present when the deceased sold the land to him and had no objection. After the demise of Mr. Muia, she stated that the 1st defendant sold another portion to him. Cross-examined on where the sale agreement was, he stated that he gave it to the plaintiff's advocate. He deemed the plaintiff as the wife of the deceased though he stated that she later relocated. At the time of sale, the plaintiff was not present, as according to him, he was in Ukambani. He testified that they had an agreement that the 1st defendant would issue him with title to what he purchased but she later changed her mind. He stated that the 1st defendant sold her a further 4 ½ acres. He acknowledged that his sale had no consent from the Land Control Board (LCB).

6. PW-4 was Arthur Musau Sua, the Kwale Land Adjudication and Settlement Officer. He had the records for the suit land. He testified that the land was first allocated to Muia Muinde (the deceased) on 26 November 1979. A group known as Kiambu Women, who had an interest in the land lodged a complaint. The dispute was heard and the land given to the Group. The deceased filed an appeal which he succeeded and a certificate was issued that the land belongs to him. He produced the rough book of the land adjudication records and the certificate of finality of land adjudication. He testified that the 1st defendant's name does not appear in their records. Cross-examined, he stated that the land was trust land and that the deceased was picked as he was the one in occupation. He testified that the name of the deceased ought to appear in the search as proprietor. He asserted that the adjudication records were forwarded in the name of the deceased though he acknowledged that he had not availed the records sent to the Chief Land Registrar.

7. With the above evidence, the plaintiff closed her case.

8. The 1st defendant in her evidence testified inter alia that the deceased was her husband and that they lived together in Kibuyuni in Shimba Hills with her mother in law and his brothers. Her husband was living in Kigombere at the time working as a tractor driver. She had issues with her mother in law when twins she had sired died, and the mother in law declined to have them buried in Kibuyuni. She buried her children in another person's land and went to look for her husband in Kigombere. Her husband was however a drunkard and she moved to her home in Mamba. She later decided to look for her own land. It is then that she came across this land and she paid for it using money given by her father. She settled in the land and her husband brought her other children from another woman. Five years later, her husband came to settle on the land with her. He mentioned to her that when he dies, he should be buried in Kibuyuni and not on her land (the suit land).

9. In 2002, she got title in her name after being assisted by her brother in law Mr. Muasya, PW-2 and PW-3. They however took away the title deed and when asked about its whereabouts, they stated that it is lost. A new title deed was then issued to her. She testified that she has not sold the land to PW-2 or PW-3. She stated that PW-3 was claiming part of the land due to a debt that her husband owed him for alcohol consumed from him. She contended that she does not know the plaintiff and has never met her. She averred that she (plaintiff) had abandoned the children and had gone back to her parents. She denied obtaining title by way of fraud. Cross-examined, she stated that it is her husband who became registered as proprietor of the land, because in those days, one needed to have property registered in the name of the husband. There was a small chit written which was in the name of her husband. She acknowledged that she got title in her name after the death of her husband. She testified that her husband has some other land in Ukambani but which she has not been given a share upon his death.

10. With the above evidence, the 1st defendant closed her case.

11. The 2nd defendant produced a copy of the Green Card and caution and closed its case.

12. Counsel were invited to file written submissions, and I have taken note of the submissions of Mr. Apollo Muinde for the plaintiff, Ms. Farida Jadi for the 1st defendant, and Mr. Emmanuel Makuto for the 2nd and 3rd defendants. I have also gone through the various authorities that they cited in their submissions and internalised them despite not specifically quoting any of them.

13. The plaintiff's case in a nutshell is that the suit land was owned by the deceased and therefore the 1st defendant obtained title in her name through fraud. It is common ground that the title issued to the 1st defendant was issued after the demise of Mr. Muia Muinde. In presenting her case, the 1st defendant advanced the theory that it was her who purchased the land using money given to her by her father owing to the problems that she was encountering in her married home. She however conceded that the name written in the records was that of her husband. The evidence presented by PW-4, the Land Adjudication Officer, is that their records reflect that this land was under adjudication.

There was a dispute over who ought to be recognised as the first owner of the land between the deceased and a Women Group. This dispute was resolved through the adjudication dispute resolution mechanism and it was resolved that the land be adjudicated to the deceased. The plaintiff did not feature anywhere at the time the dispute over adjudication was being determined.

14. In presenting her case, the 1st defendant did not adduce any evidence to contradict that which was tendered by the Land Adjudication Officer. Despite Ms. Jadi, learned counsel for the 1st defendant, in her submissions, casting doubts on the authenticity of the land adjudication records that were presented, on my part, I have absolutely no reason to doubt the evidence of PW-4, and no reason to doubt the records that he produced, which demonstrate that the suit land was adjudicated in favour of the deceased and not the 1st defendant. It follows that if the land was adjudicated to the deceased, then it is the name of the deceased which ought to have been registered as the first proprietor of the land, and not that of the 1st defendant. I further observe that the 1st defendant did not produce any records to demonstrate how the land came to be registered in her name. If the land was adjudicated to the deceased, how did the 1st defendant manage to get title in her name? This in my view, could only have been procured through fraud. The fact that the 1st defendant came to be registered as proprietor after the demise of the deceased is very telling indeed.

15. I have also taken note of the further submissions of Ms. Jadi, learned counsel, that the plaintiff has no locus, as her marriage to the deceased is doubtful. That to me, has no basis in the nature of the suit before me. The case here has been brought for the benefit of the estate of the deceased. What the plaintiff needs to demonstrate in such instance is that she is the legal representative of the deceased. This was done through the exhibition of a grant of letters of administration. One does not need to prove marriage in order to represent the estate of a deceased person, and in the circumstances before me I am persuaded that the plaintiff has capacity, not by virtue of marriage, but by the fact that she is the legal representative of the estate of the deceased. I have already mentioned that counsel in her submissions attacked the evidence of PW-4 and I have already given reasons why I see nothing to give me the suggestion that the evidence of PW-4 is wanting. There was the issue of limitation that was brought up in the pleadings, but the plaintiff explained that she was not aware of the fraud until much later before filing suit. She is thus covered under Section 26 of the Limitation of Actions Act, Cap 22, Laws of Kenya, which inter alia provides that in case of fraud, the period of limitation starts running after the discovery of the fraud. The 1st defendant certainly did not demonstrate that the fact of her registration was well known to the plaintiff 12 years prior to her filing this suit and I am therefore unable to hold that this suit is time barred.

16. From the foregoing, it is my finding that the suit land was adjudicated to the deceased. It is therefore the deceased who ought to have been registered as proprietor of the suit land and not the plaintiff. The plaintiff has not given a credible explanation of how she came to be registered as proprietor after the death of the deceased and it is therefore my finding that her registration could only have been procured through fraud or some sort of misrepresentation or mistake. Under Section 26 of the Land Registration Act, 2012, a title that has been procured fraudulently, or through misrepresentation or mistake, is liable to be cancelled. Given my holding above, I have no option but to proceed to order the cancellation of the title of the 1st defendant. I further order that the register be rectified so as to read the name of the deceased as proprietor. The land will thereafter be subjected to the usual process of succession following the Law of Succession Act, Cap 160, Laws of Kenya.

17. For the avoidance of doubt, I have not made any orders in favour of PW-2 or PW-3 who claim to be purchasers of a portion of the suit land. What I have held is that the plaintiff has proved that the suit land ought to form part of the estate of the deceased. The land will need to be distributed, as I have mentioned above, in line with the succession law of the country.

18. The only issue left is costs. I order that the plaintiff's costs be paid jointly and/or severally by the 1st and 2nd defendant. I say so because I do not think that the 1st defendant could have managed to have herself registered as proprietor without some sort of collusion from the Land Registrar or officers working in that office, and the 2nd defendant cannot therefore escape culpability.

19. Judgment accordingly.

DATED and delivered this 16th day of APRIL 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA