



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO.32 OF 2018

DOMINIC KATUA NDWOTA.....PLAINTIFF

-VERSUS

MONICA KAVESU NDWOTA ...DEFENDANT

J U D G E M E N T

1. The Plaintiff herein commenced this suit on the 30th April, 2018 by way of a plaint dated 25th April, 2018 in which he seeks judgement for the Defendant for: -

i. Permanent injunction restraining the Defendant by herself, her agents, servants, relatives, family, friends or any body acting under the Defendants instructions from encroaching, wasting, damaging, trespassing, erecting any structure and/or claiming or in any way interfering with the Plaintiffs land.

ii. To annul and/or nullify the intended title deed issued to the Defendant.

iii. Any other or further orders this court may deem fit to grant.

iv. The Defendant do meet the cost of this suit.

2. He has averred in paragraphs 3, 4, 5 and 7 of his plaint that at all material times to this suit, his father was the owner of all that parcel of land situated in Konza Malili, that in the year 2009 his father allocated the land in question to him with instructions to establish his home on it, that in the year 2010 the Plaintiff built a home on the land and lived in peace until August, 2015 when the Defendant instructed her servants and/or agents to erect a semi structured kiosk on the land without the knowledge and/or awareness of the Plaintiff and that in early 2018 after the death of the Plaintiff's father, the Defendant through false allegations had title deed number Konza North B2 Malili 557 issued to her thus becoming the sole registered owner of the land.

3. The Plaintiff's claim is denied by the Defendant vide her statement of defence dated 18th May, 2018 and filed in court on 21st May, 2018.

4. In paragraphs 5, 6, 7, 8 and 9 of her defence the Defendant has averred that Ndwota Kiamba remained seriously sick and at times he would become unconscious from 2008 until when he passed on 18th August, 2017, that Ndwota Kiamba at his state could not be able to coordinate property (sic), was unable to talk fluently and he was out of his mind and/or unsound since 2008 to 2017 so that the issue of allocating the suitland to the Plaintiff is denied, that she built a house in the suitland after Ndwota Kiamba subdivided it into two equal shares for the 1st Defendant and one Mary Kamanthe Ndwota and that the sub-division was done on 11th July, 2013, that she built the house on the portion meant for one Mary Kamanthe Ndwota and that the suitland was transferred to her on 18th April, 2016.

5. During the hearing of the Plaintiff's case, he adopted his statement recorded on 02nd November, 2018 as his evidence. He went on to produce the three (3) documents in his list of documents dated 02nd November, 2018 as P.Exhibit Nos.1, 2 and 3 respectively. The three documents were a will (P.Exhibit No.1) by the Plaintiff's father and its translation (P.Exhibit No.2) as well as a letter that showed how the suitland was balloted for as Malili number 671 with Ndwota Kiamba as the shareholder (P.Exhibit No.3).

6. A perusal of the aforementioned statement dated 02nd November, 2018 and filed in court on 06th November, 2018 was recorded by one Onesmus Kasuki Ndwota who was not called to testify. As such, the Plaintiff can only rely on his undated statement filed in court on 30th April, 2018.

7. Briefly the Plaintiff's evidence in chief was that in the year 2009, his late father, Ndwota Kiamba allocated him his share of land at Konza

Malili. That the Defendant was also shown her land. That upon the demise of his father on 18th August, 2017, the Defendant started to threaten him while promising to sell his land. That in the year 2018, the Plaintiff realized that the Defendant had been registered as the owner of the suit land.

8. The Plaintiff's evidence in cross-examination by Mr. Masaku who held brief for Mr. Onguti for the Defendant was that he and the Defendant are son and mother. He said that the suitland was initially allotted to his late father. That on 23rd May, 2004 his father wrote a will that showed that the land was to be subdivided amongst his sons. He said that he had nothing to show that the will (P.Exhibit No.1) was written by his father. He said that the four children of his father were each allocated their own parcels of land while his father was still alive. On being shown a change of member No.1399 (D.Exhibit No.1) the Plaintiff said that the same was transferred from his late father to the Defendant on 03rd June, 2016 during which period he said that his late father was of unsound mind. He said that title deed for Konza North Block 2 Malili number 557 was issued to the Defendant on 29th April, 2017, a week after his father's death. On being shown certificate of death number 469019 (D.Exhibit No.3) the Plaintiff stated that it showed that his father passed on 17th August, 2017. He said that he demolished a semi-permanent structure that the Defendant constructed on the suitland in August, 2015.

9. On the other hand, the Defendant in her evidence adopted her statement dated 31st July, 2019. She went on to produce a receipt from Malili Ranch Ltd dated 03rd June, 2016, a copy of title deed for Konza North Block 2 (Malili)/557 and a copy of certificate of death for one Ndwota Kiamba in her list of documents filed in court on 10th June, 2019 as D.Exhibit Nos 1, 2 and 3 respectively.

10. Briefly the Defendants' evidence was that she is the wife of the late Ndwota Kiamba and mother to the Plaintiff. That her late husband was a member number 1399 of Malili Ranch limited and was allocated two (2) properties being agricultural plot No.671 and commercial plot No.401.

11. That on 03rd June, 2016, the late Ndwota Kiamba transferred his shares in both properties to her leading to her being issued with title deeds. That the suit property was given a new number at the Lands Registry namely Konza North/Konza North Block 2(Malili)/557.

12. She denied the allegation that her late husband transferred the suit property to the Plaintiff. She pointed out that since the transfer of the suit property was done during the lifetime of her late husband on 03rd June, 2016, the issue of succession does not arise as her late husband died on 17th August, 2017.

13. Her evidence in cross-examination was that her late husband was not so sick as to be unable to know what was happening. She said that she took advantage of her late husband's sickness to change ownership of the suitland in her name. However in re-examination, the Plaintiff denied having taken advantage of her husband's sickness.

14. In his written submissions, the Plaintiff urged the court to find that he had proved his case on a balance of probabilities and proceed to grant the prayers sought in his plaint.

15. On the other hand, the Defendant's Counsel framed four (4) issues for determination namely;

a. Whether the Plaintiff has the locus to bring this suit?

b. Whether there was fraud by the Defendant in procuring the title to KONZA NORTH/KONZA NORTH BLOCK 2(MALILI)/557 on the part of the Defendant which would lead to the subsequent cancellation of the title issued to the Defendant.

c. Whether the order of permanent injunction as prayed in the plaint can be issued?

d. Who bears the costs of the suit?

16. In answer to the four issues, the Counsel submitted that since the Plaintiff is saying that the suitland should have remained in the name of the deceased and same transferred to him, then he ought to have obtained letters of administration ad litem (*emphasis are mine*) to enable him sue on behalf of his deceased father. The Counsel added that the pleadings filed in this matter are incompetent since the Plaintiff lacks the requisite power to bring the suit on behalf of a deceased person and hence the same should be struck out.

17. The Counsel further submitted that it is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above balance of probabilities. The Counsel pointed out the issue of fraud and the particulars of it have not been set down in the plaint. The Counsel was of the view that although it is admitted in the defence by the Defendant that the deceased was not feeling well, during the hearing the Defendant explained that the deceased had lucid movements and the change of name was done when the deceased was having his right mind.

18. Having evaluated the evidence on record and having considered the submissions by the Plaintiff and the Defendant's Counsel, I would agree with the latter the Plaintiff has no locus standi to file this suit in the absence of letters of administration ad litem. That alone is sufficient ground to strike his suit against the Defendant. Secondly, the Plaintiff is by implication alluding that the Defendant obtained title documents to Konza/Konza North Block 2 (Malili)557 by means of fraud. He ought to have pleaded fraud in his plaint and particularized the aspects of fraud. The Plaintiff having failed to do so, he cannot be heard to challenge the title document held by the Defendant. It follows therefore that the prayers that the Plaintiff has sought in his plaint cannot be granted.

19. The upshot of the foregoing is that the Plaintiff has failed to prove his case against the Defendant on a balance of probabilities. In the circumstances, I hereby proceed to dismiss his suit with costs to the Defendant. It is so ordered.

Signed, Dated and Delivered at Makueni via email this 26th day of May, 2020.

MBOGO C. G.,

JUDGE.

Mr. G. Kwemboi – Court Assistant