



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT MAKUENI

ELC CASE NO. 17 OF 2018

NDAMBUKI MUTULE MUTWELELI.....APPLICANT

VERSUS

LAZARUS MUTHIANI NGOLOTA..... 1ST RESPONDENT

MULEI MULAVU 2ND RESPONDENT

DISTRICT SURVEYOR, MAKUENI COUNTY..... 3RD RESPONDENT

JUDGEMENT

1. Through an Originating Summons dated 28/02/2018, the Applicant seeks the following orders;

a) That an order do issue compelling the MAKUENI DISTRICT SURVEYOR to visit L.R NZAUI/KALAMBA/615 and NZAUI/KALAMBA/269 to confirm that the parcel of land is 6.5 Ha and rectify the register to read 6.5 Ha so as to amend the title to read 6.5 Ha.

b) That an order of permanent injunction do issues prohibiting the 1st and 2nd Respondents from transferring, the use of or in any other manner denying or interfering with land parcels L.R NZAUI/KALAMBA/615 and NZAUI/KALAMBA/269 until the summons are heard and determined.

c) That costs be borne by the Respondent in any event.

2. The Originating Summons was supported by an affidavit sworn by the Applicant on the same day. His case is that Nzaui/Kalamba/615 and 269 (*suit lands*) were owned by his father who passed on before the land was surveyed and adjudicated. During the adjudication process, he trusted his late brother Muthiani Mutule to share the land fairly but his late brother allocated the larger chunk to himself i.e. parcel No. 269 which is 10.0Ha. The Applicant was given parcel No. 615 which is 3.0Ha. After complaining about the unequal division, his late brother agreed to cede 3.5Ha from his portion in order to equalize the shares and they held a meeting with the elders in 1988 where the agreement was formalized. They proceeded to plant sisals to mark the boundaries and a memorandum was prepared to that effect.

3. Further, he deposed that the 1st and 2nd Respondents are administrators of his late brother's estate *vide* Makueni High Court Succession Cause No. 17 of 2017 and he is apprehensive that if the grant is confirmed, he will lose his portion of 3.5Ha.

4. The Originating Summons was opposed through a replying affidavit sworn by the 1st Respondent on 09/05/2018 and his further affidavit sworn on 23/05/2018. He deposed that he had authority to swear the affidavits on behalf of the 2nd Respondent.

5. He deposed that since 1976, the Applicant never lodged a caution against parcel 269 to prove that he had an interest in the land. He denied the alleged meeting of elders and deposed that if there was any meeting, it was for the purpose of asserting duress, undue influence and coercion to allocate the suit property to the Applicant. It was also his deposition that the agreement tendered before the Court was null and void *ab initio* for want of execution.

6. Directions were given that the suit be canvassed by way of *viva voce* evidence.

7. The Applicant adopted his statement dated 07/03/2019 as his evidence in chief where he reiterated his case as per the Originating Summons. He then produced search certificates for parcels 269 and 615 as P.Exhibits 1 & 2 respectively. Minutes of the meeting held on 08/09/1988 in Kamba and English translation were produced as P.Exhibit 3, a letter dated 18/09/2014 was P.Exhibit 4 and another one dated 28/02/2016 was P.Exhibit 5.

8. On cross examination, he said he was at home when surveying of the area began but could not remember which year it was. He said he was an adult and was prepared to point out his land but his late brother assured him that he would get the land. He did not know the parcel number of the land in question or the size of his land. He said that there was an agreement between him and his late brother to enlist the help of the elders in sub division of the land. He agreed that they did not thumb print the agreement.

9. Joel Mbevi Kimuyu (PW1) adopted his statement dated 07/03/2019 as his evidence in chief where he recalled that in 1988, he was the chairman of Euani clan. He was invited for a meeting at the home of Ndambuki Mutule to deliberate on the matter of family land. The meeting had been convened by the Applicant and Muthiani Mutule who are step-brothers. They were the only surviving sons in their respective families. The two informed the elders that they had shared the family land into two equal portions and wanted the elders to witness the sub division. The elders were shown the boundary and the first sisal plants were planted.

10. On cross examination, he said that the meeting was properly constituted since he found the two at the meeting. Their respective children were not invited and did not attend the meeting. There were clan by laws but he had left them at home. He said that he had no interest in the land but agreed that he had bought land from the Applicant before this suit was filed. He said that in those days, people never saw the need to sign or thumbprint minutes. He was aware that he was supposed to be non-partisan when arbitrating disputes. He denied having discriminated against the family of Muthiani. He was aware that it was wrong to interfere with a boundary fixed by Surveyors without notifying the Land Registrar.

11. Ngotha Nthali (PW2) also adopted his statement dated 07/03/2019 as his evidence in chief. His evidence was similar to that of PW1.

12. On cross examination, he said that he attended the meeting as a family member and Muthiani slaughtered a goat for them. They did not sign the minutes because it was not usual to sign or thumb print at that time. He denied that the minutes were cooked.

13. The Applicant closed his case at that juncture.

14. The 1st Respondent adopted his statement dated 17/05/2019 in which he stated that the ancestral land owned by the late Mutule Mutweleli could not be traced in the records at the land registry since it never existed in terms of acreage, locality and ownership. He denied that the Applicant entrusted the late Muthiani with adjudication of his land. He stated that when the adjudication process started, the late Muthiani sent his son to Kalawa to inform the Applicant but the Applicant never showed up.

15. Consequently, the late Muthiani asked the Applicant's wife to take up the role of adjudication. Further, he stated that the clan elders intimidated his grandfather, trespassed and forcefully altered the boundary. He also stated that PW1 had some interest in grabbing the land hence the reason that the Applicant gave him a portion out of parcel 615.

16. On cross examination, he said that he was born in 1965 and the adjudication process in their area began in 1970 to 1974. He agreed being underage at the time but said that he was an adult when Muthiani and the Applicant allegedly agreed to share land. He was not privy to the agreement and did not attend the meeting of 08/09/1988. He agreed that he had not produced evidence to show that Muthiani was coerced to give the Applicant 3.9 acres.

17. Mulavu Muthiani (DW1) also adopted his statement filed on 20/05/2019 as his evidence in chief. He stated that he is the first son of the late Muthiani Mutule and that the so called ancestral land was nonexistent since they grazed their animals and farmed anywhere. When adjudication started, everyone took the land size that was enough for their families. Further, he stated that when adjudication started in 1969, his late father sent him to call the Applicant and he walked for 60 kilometers to and fro but the Applicant refused to show up for the process. Consequently, his late father instructed the Applicant's spouse to take up the adjudication role.

18. He also stated that after adjudication, the Adjudicators invited complaints but the Applicant had not complained by the time the process was closed in 1974.

19. On cross examination, he agreed that all of them resided in the area before adjudication was done. He was not present when the late Muthiani and the Applicant agreed that the former would stand in for the latter during the adjudication process. He agreed that he had not produced evidence to show that Muthiani was coerced to share land with the Applicant.

20. The Respondents closed their case at that juncture after which the parties filed their submissions as directed.

21. The Applicant identified the following as the issues for determination;

a) Whether there was communication between the Applicant and his late brother Mutule to have 3.5 Ha excised out of land parcel No. L.R Nzaui/Kalamba/615 and that the same be allocated to the Applicant.

b) Whether the late Mutule was coerced into agreeing to allocate the Applicant an additional 3.5 Ha from his land.

c) Whether the Applicant is entitled to the orders sought herein.

22. On the first issue, the Applicant submitted that the two suit lands which are unequal in size were initially unsurveyed and owned by the late Ndambuki Mutule Muuo and that the two brothers agreed to equalize the portions. He contends that the 1st Respondent and his witness are not in a position to deny the existence of the communication between the two brothers since they were not privy to it.

23. On the second issue, he submitted that the 1st Respondent did not discharge his burden of proving that the late Mutule was coerced into

agreeing to have 3.5 Ha excised out of his portion. He relied on **Re B (2008) UKHL 35** where Lord Hoffman expressed himself as follows with regard to burden of proof;

“...if a legal rule requires a fact to be proved (a fact in issue), a judge of jury must decide whether or not it happened. There is no room of finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the Tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he discharges it, a value of 1 is returned and the fact is treated as having happened.”

24. On the third issue, it was his submission that he has proved his case on a balance of probability.

25. The Respondent's submitted that PW1 was conflicted and could not arbitrate the process impartially as he had bought a portion from the Applicant's parcel 615.

26. They also submitted that the suit lacks merit because the Applicant informed the Court that he does not know the acreage of the suit lands.

27. Relying on section 21(1) of the Land Registration Act 2012, the Respondents submitted that the Applicant and clan elders committed an offence by interfering with the boundary features of parcel No. 269.

28. Having looked at the pleadings, the evidence and rival submissions, it is my considered view that the only issue for determination is whether the Applicant has proved his case on a balance of probabilities.

29. The Respondents have denied the existence of ancestral land owned by their grandfather but I find it incredible that the old man died without possessing any land. On which land did he raise his sons taking into consideration that under African Customary land tenure system, the land was communal with community members enjoying land user rights. DW1 agreed that all of them resided in the area before adjudication was done. There is actually no dispute that the Applicant and the late Muthiani Mutule are his children. The land history could of course not be traced back to the grandfather because he died pre land adjudication, consolidation and registration. I am convinced that the suit lands were part of the unsurveyed land that was owned by the Applicant's father.

30. On the other hand, the Applicant produced minutes and called witnesses to confirm that there was an agreement to equalize the land between him and his late brother. The search certificates confirm that the suit lands are not equal. From the evidence, the elders' role was to witness an agreement which had already been reached and not to arbitrate. Accordingly, the fact that PW1 had bought land from the Applicant does not diminish his capacity as a witness. Further, it is my considered view that non execution of the agreement is not fatal as PW1 and 2 testified on its contents and they were present when it was made.

31. The 1st Respondent agreed that he was not privy to the agreement and that he had not adduced any evidence to prove coercion or undue influence. Accordingly, the allegation of coercion, duress and undue influence remains just that, an allegation. Further, even if the agreement was nonexistent, I see no justification as to why the heirs of the late Muthiani should end up with a bigger portion of ancestral land. As correctly submitted by the Applicant, the standard of proof in civil cases is met if the proposition is more likely to be true than not true.

32. From the evidence adduced, the Applicant's version carries the higher probability and as such, he has proved his case to the required standard.

33. As for the offence complained about by the Respondents, they had the option of taking it to the relevant authorities for investigation.

34. The upshot of the foregoing is that I hereby proceed to enter judgement for the Applicant and against the Respondents as hereunder: -

a) That an order is hereby issued compelling the MAKUENI DISTRICT SURVEYOR to visit L.R NZAUI/KALAMBA/615 and NZAUI/KALAMBA/269 to confirm that the parcel of land is 6.5 Ha and rectify the register to read 6.5 Ha so as to amend the title to read 6.5 Ha.

b) That costs be borne by the Respondent.

Signed, dated and delivered at Makueni via email this 26th day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi