



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO.139 OF 2017

(Formerly Machakos Hcc No.133 of 2012)

JOHN NUSU MWAMANZIPLAINTIFF

VERSUS

JAMES MALEVE MAIYUKU..... 1ST DEFENDANT

THE HON. ATTORNEY GENERAL2ND DEFENDANT

JUDGEMENT

1. On the 25th April, 2012 the Plaintiff herein filed this suit against the Defendants and sought judgement against the two for: -

(a) A declaration that the 1st defendant was wrongfully and unlawfully registered as a proprietor of land parcel No.Ithumula/Ikanga/1585, that the 1st defendant holds Land title No.Ithumula/Ikanga/1585 in trust for the plaintiff and the register be accordingly rectified to indicate the plaintiff as the registered proprietor thereof.

(b) Costs of this suit.

(c) Any other just relief.

2. The Plaintiff has averred in paragraphs 6, 8, 9, 10 and 12 of his plaint that during land adjudication process, the land parcel number Ithumula/Ikanga/1585 in Mutomo District had a dispute as to its ownership between one Mwamanzi Musembi now deceased and whom the Plaintiff is the administrator of the deceased's estate and the 1st Defendant which dispute was resolved in favour of the deceased, that the 1st Defendant failed to appeal to the Minister of Lands and Settlement within sixty (60) days aforesaid and the decision of the Land Adjudication and Settlement Office took effect, that when registration was opened up in Ithumula Registration Section, land parcel number Ithumula/Ikanga/1585 was registered in the name of James Maleve Maiyuku, the 1st Defendant herein, who had lost the land case before the Land Adjudication Officer, that therefore the registration of Land parcel number Ithumula/Ikanga/1585 in the name of the 1st Defendant was unlawful, wrongful and amounted to misrepresentation of the determination of the Land Adjudication Officer as to ownership of the said parcel of land and that the Plaintiff's claim against the defendants jointly and severally is for a declaration that the 1st Defendant holds title No.Ithumula/Ikanga/1585 in trust for the Plaintiff and the register be accordingly rectified to read the name of the Plaintiff in place of the 1st Defendant.

3. The 1st Defendant though served on 22nd November, 2012 with summons to enter appearance and to file his defence failed to do so and consequently interlocutory judgement was entered against him upon request by the Plaintiff's Counsel dated 28th November, 2014 and filed in court on 01st December, 2014.

4. The 2nd Defendant denies the Plaintiff's claim via his statement of defence dated 13th February, 2013 and filed in court 22nd February, 2013.

5. Hearing of the Plaintiff's case commenced on the 03rd October, 2019. The Plaintiff adopted his witness statement filed in court on 25th April, 2012 as his evidence in chief. He went on to produce 15 documents in his list of documents dated 24th April, 2012 as P.Exhibit Nos.1 to 15 respectively.

6. The 15 documents are judgement in civil suit No.60 of 2010, letter from the Ministry of Lands dated 15th April, 2009, certificate of official search for land parcel number Ithumula/Ikanga/1585, letter from Attorney General dated 7th July, 2010, letter from the Ministry of Lands dated 27th November, 2008, letter dated 17th November, 2008 by Nusu Mwamanzi addressed to Land Adjudication & Settlement

Department, Memorandum of appearance for 1st Defendant in suit No.60/2010, 1st Defendant statement of defence in RMCC 60/2010, memorandum of appearance for 2nd Defendant in suit No.60/2020, 2nd Defendant's statement of defence in suit No.60/2010, plaint for suit No.60/2010, notice of intention to sue the Attorney General dated 07th July, 2010, proceedings and ruling on objection proceedings by the Land Adjudication and Settlement Officer, Grant of Letters of administration intestate and letter dated 29th October, 2009.

7. Briefly the Plaintiff's evidence was that he is the son of Mwamanzi Musembi who passed on leaving behind his property which included a parcel of land in Ikanga location. The Plaintiff said that he obtained letters of administration to enable him pursue the issue of wrongful and unlawful registration of land parcel number Ithumula/Ikanga/1585 in the name of the 1st Defendant. According to him the 1st Defendant and his late father had a case during the land adjudication process in Ithumula Adjudication Section. That during the objection stage, the suitland was awarded to his late father. That the 1st Defendant never appealed to the Minister and as such ownership of the suitland vested in his late father.

8. The Plaintiff was not cross-examined by the Counsel for the 2nd Defendant and nor was there evidence to the contrary.

9. In his submissions, the Plaintiff's Counsel submitted that the Plaintiff had produced documents which clearly show that land parcel number Ithumula/Ikanga/1585 was wrongfully registered in the name of the 1st Defendant contrary to the award in the objection proceedings. The Counsel pointed out that since there was no appeal against the award, the register ought to be rectified in line with Section 26 of the Land Registration Act.

10. The Counsel cited Section 80 of the same which empowers the court to rectify, cancel or amend the register of land if the registration was obtained, made or omitted by fraud and/or mistake. The Counsel relied on the case of **Elijah Makeri Nyangwra vs. Stephen Mungai Njuguna & another [2013] eKLR**.

11. On the 29th November, 2017, the Plaintiff's Counsel filed a statement of issues dated 20th September, 2017. The issues were: -

1) Did land parcel No.Ithumula/Ikanga/1585 have a dispute as to ownership between MWANIA MUSEMBI and JAMES MALEVE MAIYUKU during Land Adjudication?

2) Was the dispute resolved in favour of Mwanzi Musembi?

3) Did James Maleve Maiyuku appeal against the decision of The Land Adjudication Officer to the Minister for Lands?

4) Was James Maleve Maiyuku wrongfully registered as the proprietor of land parcel No.Ithumula/Ikanga/1585?

5) Who ought to have been registered as the Proprietor of land parcel No.Ithumula/Ikanga/1585?

6) What orders are to be made in respect of costs?

12. Amongst the documents produced by the Plaintiff are the letter dated 15th April, 2009 (P.Exhibit No.2) which appears to confirm that there was no implementation of the objection lodged in respect of land parcel number 1585 Ithumula/Ikanga Registration Section. The other document is a certificate of official search dated 05th October, 2009 (P.exhibit No.3) which shows that land parcel number Ithumula/Ikanga/1585 was registered in the names of James Maleve Muyuku on 27th July, 2007 and title deed issued on 16th April, 2009. The other letter is dated 27th November, 2008 (P.Exhibit No.2) from the Ministry of Lands which acknowledges registration of land parcel number 1585 in the name of Maleve Maiyuku contrary to the objection proceedings. There is also objection proceedings No.12 (P.Exhibit No.13) which shows that the Land Adjudication Officer allowed the objection filed by one Mwamanzi Musembi against James Maleve Maiyuku.

13. From the documentary evidence laid before me, there is no doubt that there was a dispute over land parcel number Ithumula/Ikanga/1585 between Mwamanzi Musembi and James Maleve Maiyuku during land adjudication. It is also clear that the dispute was resolved in favour of Mwamanzi Musembi and James Maleve Maiyuku did not appeal against the award of the Land Adjudication Officer. That being the case, it follows therefore that Mwamanzi Musembi ought to have been registered as the proprietor of the said Land parcel number Ithumula/Ikanga/1585.

14. **Section 26(1) of the Land Registration Act No.3 of 2012** provides as follows: -

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

Section 80 of the same Act provides for rectification of the register by an order of court. It provides as follows: -

“80. Rectification by order of Court

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

15. The only inference that I can draw based on the evidence before me, is that title number Ithumula/Ikanga/1585 was acquired and registered in the name of the 1st Defendant illegally and/or unprocedurally. It is therefore open to challenge under Section 26 of the Land Registration.

16. The two defendants herein had no made authority to so register the suitland in the name of the 1st Defendant. Therefore, the register would also require rectification so as to reflect the award in objection proceedings No.12 LCCM.

17. The upshot of the foregoing is that I am satisfied that the Plaintiff has a cause of action against the defendants. I therefore proceed to enter judgment in his favour and against the two defendants jointly and severally as hereunder: -

(a) It is hereby declared that the 1st Defendant was wrongfully and unlawfully registered as a proprietor of land parcel No.Ithumula/Ikanga/1585, and that the 1st Defendant holds Land title No.Ithumula/Ikanga/1585 in trust for the Plaintiff and the register be accordingly rectified to indicate the Plaintiff as the registered proprietor thereof.

(b) Costs of this suit.

Signed, Dated and Delivered at Makueni via email this 21st day of May, 2020.

MBOGO C. G.,

JUDGE.

Mr. G. Kwemboi – Court Assistant