



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC NO.1227 OF 2016

ANNE MORAA MICHIRAPLAINTIFF

VERSUS

PETERSON MANYEGA MICHIRA.....1ST DEFENDANT

WILFRED NYASENDE MICHIRA2ND DEFENDANT

J U D G M E N T

Introduction and background

1. The Plaintiff instituted the present suit vide a plaint dated 3rd August 2000 which was subsequently amended on 15th August 2002. The plaintiff's claim was that the defendants who were her step sons had in or about June 2000 entered onto her land parcel Nyansiongo/70 "**the suit property**" and unlawfully purported to subdivide the same into three portions without her consent. The plaintiff prayed for judgment against the defendants jointly and severally for : -

(a) A temporary injunction restraining the defendants' their agents and/or servants from further or in any way howsoever interfering with the plaintiff's parcels of land No.Nyansiongo/70 until final determination of this suit.

(b) An order of eviction evicting the defendants from the plaintiff's land parcel No. Nyansiongo/70.

(c) Damages for loss of user and acts of waste committed on the land.

(d) Costs of the suit.

(e) Interest on (c) and (d) above

2. The defendants filed a defence and counter claim on 4th May 2001. The defendants averred that the suit land belonged to their deceased father and that each of the three houses of their late father was entitled to a share of the suit land. The defendants further averred the transfer of the suit land to the plaintiff after the death of their deceased father was fraudulent. They asserted that they were in occupation of the suit land as of right as beneficiaries. The defendants prayed for the cancellation of the title issued in the plaintiff's name and for the reversion of the title to the name of the deceased.

Evidence of the parties

3. The suit was part heard before Okong'o, J before whom the plaintiff (PW1) testified on 11th June 2015. Further hearing proceeded before me and the plaintiff called 2 additional witnesses, while the 1st defendant testified as DW1, the Assistant Director, Land Adjudication and Settlement based at Nyansiongo and the Land Registrar, Nyamira testified as DW2 and DW3 respectively.

4. The plaintiff in her evidence, explained that her late husband Ambrose Michora Misaro ("Michira") had 3 wives and she was the 3rd wife. Each of the wives had been allocated land at Mwamosioma.

5. The plaintiff stated her land was **Central Kitutu Mwabundusi /424** while the other co-wives parcels of land were **Central Kituru/Mwabundusi /424** and **426**. She stated her husband was allocated land parcel **Nyansiongo Settlement Scheme/70** which was registered in his name. The plaintiff stated that in 1999 her husband took her to the Land Control Board and consent to transfer the suit

property to her was given. She stated her plot 424 was sold by her husband to enable him to repay the loan. She stated the plot was sold to Charles Agwenyi Maranga and she now had no land at Mwabundusi. She stated that the defendants started laying claim to the suit land after her husband's death.

6. In cross examination the plaintiff said she could not remember when plot No.424 was sold or for how much it was sold. Although she stated the proceeds were used to pay off the loan for the settlement land, she did not know how much loan was then outstanding or the amount paid. The plaintiff stated that she and her late husband attended the Land Control Board meeting. She did not however have any transfer instrument executed by her husband in her favour. The plaintiff explained that the defendants moved into the suit property following her husband's death and have constructed their homes thereon and reside on the land.

7. PW2 Marisela Mora Mosoima was a sister in law of the plaintiff. It was her evidence that the defendants moved into the suit property after the death of the plaintiff's husband and they have continued to occupy and reside on the land ever since. The witness stated several of Ambrose Michira's children from his other 2 wives reside on the suit land.

8. PW3 Nickson Ondimu Mogeni was a neighbor of the plaintiff and the owner of land parcel No.72. He stated that on 2nd March 1999 he found Ambrose Michira and his wife Anne at Nyansiongo D.O's office where a Land Control Board meeting was taking place and that Michira informed him that he wanted to transfer his land to the plaintiff's name. He stated further that Ambrose Muchira died later that year in December 1999. PW3 further testified that as at the time the plaintiff's husband died the defendants had not started residing on the suit land. He stated they settled in the land later and have continued to reside thereon with their families.

9. The 1st defendant testified as DW1 and stated that the plaintiff was his step mother and was his father's 3rd wife. He stated his mother Nyamisa Michira who was his father's 1st wife died in 1954 and left 3 sons and 2 daughters. He stated his eldest brother died but Alex Makori who was the 2nd born was alive and that he resided on the suit property. The 1st defendant stated that he moved to the suit property. The suit property in 1965 when he was in standard five (5). He stated that when his father got land in the scheme, he and his siblings moved there. He stated his father's 2nd wife Mocheche Michira did not move to the scheme land and she was left at the ancestral land **Central Kitutu /Mwabundusi** 425. He stated the plaintiff's house had been allocated land parcel **Central Kitutu/Mwabundusi /424** while his mother's house got land parcel Central **Kitutu /Mwabundisi /426**.

10. DW1 stated the scheme land was allocated in 1965 and was on loan and that at the time of his death, his father had not fully paid the loan. DW1 stated as at 1982 when he married he was residing on the suit land and todate continues to reside thereon. His brother Alex Makori equally resided on the land together with his children, his wife having died in 1986.

11. The 1st defendant stated that after his father's death he paid the outstanding loan. He produced payment receipts (**DEX6**) for Kshs2,000/=, Kshs621/=, Kshs533/= and Ksh.2,692/65 on account of loan repayment for plot No.70 Nyansiongo Settlement Scheme. The 1st defendant further stated a discharge of charge from the Settlement Fund Trustees was issued on 1st August 2000 after full payment was made. The Director of land adjudication issued a clearance certificate on 20th July 2000 ("DEX3").

12. The 1st defendant further in his evidence stated that during the year 1999 his father had lost his sight and doubted that he had attended the land control board meeting he was alleged to have attended. The witness stated that the suit land had physically been subdivided on the ground into portions of 7 acres, 15 acres and 15 acres for the 1st, 2nd and 3rd houses respectively. The 1st defendant was emphatic that the suit land ought to be subdivided among the 3 houses since the land was owned by their father and belonged to the family.

13. In cross examination the witness admitted that each of their father's wives houses were allocated land at the ancestral home. He denied the plaintiff's house's land parcel 424 was sold in 1982 to pay the loan for the suit land. He stated that the loan had not been repaid in 1986 when his father was registered as owner of the suit land. He maintained he had been on the suit land from 1965 and it was not true that he forcibly entered the land in 2000. He stated he had no knowledge that his father and the plaintiffs attended any land control board meeting. The 1st defendant stated the plaintiff obtained title irregularly as the charge in favour of the settlement fund Trustees had not been discharged. He stated at the time the plaintiff filed suit in August 2000, his father was still the registered owner of the suit land.

14. DW2 Esther Ongweno was the Assistant Director Land Adjudication and Settlement, Nyansiongo . She confirmed Msira Misera was allocated land parcel Nyansiongo Settlement Scheme/70 on 30th June 1965 and that the Settlement Fund Trustees took a charge over the land. A change of name to Ambose Misera Miseroa from Misira Misera was approved on 12th August 1986. She affirmed the Settlement Fund Trustees loan was cleared in March 2000 and a discharge and transfer document was prepared on 1st August 2000. She made reference to the abstract of title showing Michira Misaro was registered on 16th January 1986 and observed that such a registration could not have been effected before a discharge was issued by the Settlement Fund Trustees. She stated the discharge for plot No.70 was issued on 1st August 2000 and consequently said the registration done in 1986 was a mistake.

15. In cross examination the witness stated the Settlement Fund Trustees was the initial registered owner of Land parcel No.70 and stated that the land could only be transferred after the discharge of charge. She maintained that as per the records the loan was cleared in 2000 and it was only then that the charge could be discharged.

16. DW3 Charles Mutua was the Land Registrar Nyamira County . He produced a copy of the register for land parcel Nyansiongo settlement Scheme /70 which showed the land is presently registered in the name of Anne Mora Michira, the plaintiff herein . The register showed it was opened on 21st May 1982 and the SFT was the 1st registered owner. A charge in favor of SFT is noted under part C of the Encumbrances Section registered on the same date. The Land Registrar noted that the 2nd entry was done on 16th January 1986 infavour of Michira Misaro . He stated there was no instrument of transfer to Misera Misaro in the Land Registry . He stated entries 2 and 5 were in his opinion irregular as they should not have been made when the SFT loan was still outstanding as no discharge of the charge had been registered. He observed that as the register showed the property was still encumbered with the SFT charge which had not been

discharged the entries made were irregular and should be cancelled and expunged from the register.

Submissions analysis and determination

17. The parties filed final closing submission on closure of the trial. I have reviewed the pleadings and the evidence and I have considered the submissions made by the parties. The following issues emerge for determination: -

(i) Whether the late Ambrose Muchira Misaro was validly and lawfully registered as the owner of the suit land?

(ii) Whether there was any valid and lawful transfer of the suit land to the plaintiff?

(iii) Whether the plaintiff is entitled to the reliefs sought in the plaint.

(iv) What orders/reliefs should the court make?

18. There is no dispute that Ambrose Michira Misaro (deceased) who was the plaintiff's husband and father of the defendants was allocated land parcel Nyansiongo settlement Scheme/70 by the settlement Fund Trustees (SFT) against which the SFT registered a charge. The abstract of Title (green Card) and copy of search certificate dated 6th January 2000 show the SFT charge was registered against the property on 21st May 1982 the same day the SFT was registered as the proprietor. From the evidence it is not clear how Michira Misaro got to be registered as proprietor of the suit land on 16th January 1986.

19. The Land Registrar (DW3) in his evidence stated in their records they had no instrument of transfer that was utilized to effect that transaction. There is irrefutable evidence that the suit property was then charged to the SFT, the charge having been registered on 21st March 1982. Unless that charge was discharged no valid transfer of the land could have been effected. Although the plaintiff stated her husband sold land parcel central **Kitutu/Mwabudusi /424** which had been allocated to her household in 1982 to pay the SFT loan for plot No.70, there was no evidence adduced to demonstrate that any payment was made to SFT. Infact the evidence that was availed was that as at 2000 the SFT loan had not been cleared and that it was after the 1st defendant had made payment that a clearance was issued and discharge of charge dated 1st August 2000 issued.

20. On the basis of the evidence I am satisfied that the registration of Michira Misaro as the owner of the suit plot on 16th January 1986 was not regularly procured and was not therefore valid. The registration could not have been properly obtained when the charge in favour of SFT was still subsisting. In the premises it is my determination that the registration of Ambrose Muchira Misaro as owner of the suit land on 16th January 1986 was not valid or lawful. The registration was of no legal effect.

21. Having answered the first issue in the negative it follows that the registration of the plaintiff as the owner of the suit property flowing from the ownership of her late husband equally could not be valid. If her husband was not validly registered as the owner, he could not effect a valid transfer in favour of the plaintiff. What I have observed notwithstanding, the transfer to the plaintiff raises several unanswered issues. Firstly, whether there was a formal transfer executed by the plaintiff's late husband in favour of the plaintiff. None was exhibited. Secondly, whether infact the land control board issued any consent for the transaction. There was no formal letter of consent exhibited and the minutes of the Land Control Board exhibited were not signed. It is noteworthy that the Land Registrar in his evidences stated they did not hold any instruments of transfer in their records. It is therefore not clear whether the deceased husband had executed a transfer in favour of the plaintiff before he died in December 1999. In the absence of such crucial documents, I am not prepared to hold the plaintiff has discharged her burden of proof that indeed her late husband had voluntarily transferred the suit property to her.

22. I find the evidence of the defendants probable that they were indeed residing on portions of the suit property by the time their father died and that it was also quite probable that the plaintiff was employing unconventional means to wrestle the suit property from forming part of her deceased husband's estate upon his death. I have taken note of the fact that the 3 ancestral properties **Central Kitutu /Mwabundusi/424, 425 and 426** were fairly small compared to the suit property and clearly the household of the plaintiff, if the suit property was decreed to the plaintiff, would have ended up with a disproportionate share of the deceased estate. The ancestral land parcels 424,425 and 426 were 1.6 Ha, 1.3 Ha and 1.0 Ha respectively while plot No.70 (suit property) was 10.7 Ha which clearly shows the variance in size.

Conclusion and decision

23. As discussed above I am not satisfied the transaction in favour of the plaintiff was valid and for the reason that the transfer to her deceased husband was invalid, he could not effect a valid transfer to the plaintiff. In the premises it is my determination that entries Nos. 2 to 5 effected against the register of land parcel Nyansiongo Settlement Scheme/70 were irregular and invalid and I order and direct that the same be cancelled and expunged from the record. The suit property should be reverted to the Settlement Fund Trustees (SFT) to await the registration of the discharge of charge dated 1st August 2000. The deceased to be deemed as having died intestate and consequently land parcel Nyansiongo Settlement /70 will form part of his assets in intestacy to be administered in accordance with the Law of Succession Act Cap 160 Laws of Kenya.

24. For the reasons I have outlined and discussed above I find the plaintiff has failed to prove her case on a balance of probabilities and I order the suit dismissed. The defendants counterclaim succeeds to the extent that I have held the transfer of the suit property to the plaintiff to have been invalid and the cancellation of entries 2 to 5 made on the register at the Lands office. The parties are advised to pursue succession proceedings in regard to the estate of the deceased. As I have taken cognizance that this matter involves close family members, I direct that each party bears their own costs of the suit.

25. Orders accordingly.

Judgment dated at Nakuru electronically this 20th Day of May 2020

J M MUTUNGI

JUDGE