



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO.165 OF 2017

JAMES NYAMAI MUIA

DANIEL MAINGI MUIA

OBADIAH MUIINDE MUIA.....PLAINTIFFS

=VERSUS=

NZIOKA NZENGE..... DEFENDANT

JUDGMENT

1. By their plaint dated 20/05/2015 and filed in court on 22/05/15, the Plaintiff's pray for judgement against the Defendant for: -

(a) A permanent injunction restraining the defendant either by himself and/or his authorized agents, relatives and/servants from interfering with the Plaintiff's quiet possession and enjoyment and use of their land NO. MBITINI/NGETHA/128.

(b) The title of the plot NO. MBITININI NGETHA/128 in the names of the defendant to be cancelled and registered into the Plaintiff's name.

(c) Alternatively, an order that the plaintiffs has acquired prescriptive rights over the land PARCEL NO. MBITINI/NGETHA/128 by adverse possession.

(d) Cost of this suit.

(e) Any other and/or further relief that this Honourable court may deem fit and just to grant in the circumstances.

2. The Plaintiffs have averred in paragraphs 3 and 5 of their plaint that at all material times to this suit they have been in occupation and possession of the parcel of land known as plot No.Mbitini/Ng'etha/128 measuring 0.39 ha valued at .15 million as long as they can remember, that the aforesaid land was surveyed in their mother's name, Emma Mwelu Muia but the Defendant fraudulently had the land registered in his name, particulars of the fraud are:-

(i) Fraudulently concealing to the land officers that the plaintiffs and their family have all along been in possession of the suit land.

(ii) Failing to alert the plaintiffs and/or the family members that he was about to have their land registered into his name.

(iii) The defendant fraudulently changed his name from NZIOKA NZUMA to NZIOKA NZENG'E.

(iv) The defendant fraudulently using the Plaintiff's family name yet he is not related to the plaintiffs.

(v) Registering the land in the name NZIOKA NZENG'E.

3. The Defendant though served on the 15th May, 2015 with summons to enter appearance and file his defence failed to do so as can be seen from the affidavit of service sworn at Machakos on 27th August, 2015 and filed in court on 28th August, 2015.

4. This matter therefore proceeded as undefended suit as against the Defendant.

5. On 24th July, 2019 the 1st Plaintiff informed the court that the 2nd and the 3rd Plaintiffs died in December, 2018 and 26th June, 2019 respectively. He thus survived the two co-Plaintiffs.

6. During the hearing on 30th October, 2019 the 1st Plaintiff adopted his recorded statement dated 22nd May, 2015 as his evidence. He told the court that Daniel Mainga Muia and Obadiah Muinde Muia are his younger brothers and that the two are deceased. He was soon thereafter stood down so that he could have a document in Kamba language translated into English language before he could produce it in evidence. Hearing was adjourned to 05th December, 2019 when he produced an agreement in Kamba language and its translation as P.exhibit No.1 and 2 respectively upon which he rested his case.

7. In his written submissions, the Plaintiff framed four (4) issues for determination. These were: -

(a) Whether the Plaintiff has a prima facie case.

(b) Whether there is an existing trust.

(c) Whether the Defendant acquired land fraudulently and

(d) Whether there is adverse trust.

8. In my view, only issues number (b) and (c) are relevant in this case.

9. On whether or not there is an existing trust, the Plaintiff submitted that it would be right to state that the suitland is ancestral land under customary law.

10. On whether or not the Defendant acquired the suit land fraudulently, the Plaintiff submitted that the Land Registration Act does not define fraud and therefore recourse must be had to other sources of law. He referred to **The Black's law Dictionary** which defines fraud as follows: -

“Fraud consists of some deceitful practice or willful devise, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other.”

He however did not indicate which edition of Black's Law Dictionary that he lifted the definition from. However, the definition will suffice for the purpose of this judgement.

11. The Plaintiff further relied on the case of **Arthi Highway Developers Ltd vs. West End Butchery Ltd & Others in Nairobi Civil Appeal No.246 of 2013** where the Court of Appeal referred to the case of **Dr. Joseph Arap Ngok vs. Justice Moiwo Ole Keiwua & 5 others in Nairobi Civil Appeal No.60 of 1997** where the Court categorically declared that: -

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity to title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy,”

The Plaintiff also cited **Section 26(1) of the Land Registration Act** provides: -

“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.”

12. Arising from the above, the Plaintiff submitted that the Defendant did not consider the rights of the persons living on the suitland when he took out title belonging to their land. He went on to submit that the Defendant also concealed information when applying for the title and as such, he did not acquire the suitland rightfully. The Plaintiff was of the view that the name of the Defendant should therefore be cancelled and eventually the land be registered under the name of the Plaintiff.

13. In his recorded statement which he adopted as his evidence, the Plaintiff has stated that his family has all along been in possession and occupation of land parcel number Mbitini/Ng'etha/128. He also states that he does not know any one by the name of Nzioka Nzenge and termed the Defendant as a fraud as he is known by the name of Nzioka Nzuma and not the alleged Nzioka Nzenge. He further states that he does not understand why the Defendant has never claimed the land for all those years that the Plaintiffs have stayed on it. He went on to

state that the Defendant after being issued with a new identity card became interested in the suitland. According to him, the Defendant is not his relative and wondered how the latter could have ended up having the title to the Plaintiff's family land.

14. From the English translation (D.Exhibit No.2) of the document in Kamba language (D.Exhibit No.1) that the 1st Plaintiff produced in evidence, it is indicated at paragraph 3 of the said document as follows:-

“Kituku Mbuku has 5 cows and 1 bull. This was because Kinyae's brother to Nzenge was accidentally killed by daughter of Kyulusi. Nzenge was paid 5 cows and 1 bull. To the other half Nzenge was given a piece of land at Kituku Kituku.”

15. From the above, it seems to me that there was some form of compensation in terms of livestock and a parcel of land between the persons named in the document. The Plaintiff did not endeavor to explain whether or not the land mentioned in his document is the same land that he claims herein. Secondly, the Plaintiff did not produce any documentary evidence to show that land parcel number Mbitini/Ngetha/128 is registered in the name for the Defendant. I am therefore unable to tell whether or not the Defendant fraudulently registered the suitland in his name. Even though the averments in the Plaintiff's plaint have not been controverted by the Defendant, I am not satisfied that the Plaintiff has made out his case against the Defendant.

16. The upshot of the foregoing is that the Plaintiff has not satisfied this Court on a balance of probabilities that he has a cause of action against the Defendant. I, therefore, proceed to dismiss his suit against the Defendant with no orders as to costs.

Signed, dated and delivered at Makueni this 18th day of May, 2020 in open court in the absence of the Plaintiff who had been notified about the delivery of judgement vide the letter dated 28th April, 2020.

MBOGO C. G.,

JUDGE.

Court Assistant - Mr. Kwemboi

MBOGO C. G. (JUDGE),

18/05/2020.