



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 25 OF 2014

BEATRICE MUNYIVA GABRIEL.....1ST PLAINTIFF

ANTONY MUSYOKA.....2ND PLAINTIFF

JOSEPH SYENGO.....3RD PLAINTIFF

STELLA MWENDE.....4TH PLAINTIFF

ROSE NDUKU.....5TH PLAINTIFF

BRIGID MUNEE.....6TH PLAINTIFF

DENNIS MUTHOKA.....7TH PLAINTIFF

VERSUS

CATHERINE WAMBUI KAWALA.....1ST DEFENDANT

LAND REGISTRAR KITUI.....2ND DEFENDANT

THE ATTORNEY GENERAL3RD DEFENDANT

JUDGMENT

1. The Plaintiffs' claim is captured in their Complaint dated 25th March, 2014, which was amended on 5th February, 2017. In the said Complaint, the Plaintiffs averred that parcel of land known as Nzambani/Kyanika/2484 (*the suit land*) was initially registered in favour of their father, Gabriel Kawala Musyoka; that in the year 2006, the 1st Defendant secretly had the suit land transferred in her name and that they were all born on the suit land and they all live on the said land.

2. The Plaintiffs have prayed for the rectification of the register by removing the name of the 1st Defendant and replacing it with that of Beatrice Munyiva Gabriel to hold it in trust of the Plaintiffs.

3. In her Defence, the 1st Defendant denied that the Plaintiffs reside on the suit land; that she is the wife to Gabriel Kawala Musyoka and that the suit land was lawfully transferred to her by the late Gabriel Kawala in the year 2006 for her absolute use and occupation to the exclusion of the Plaintiffs.

4. The 1st Defendant finally averred that the Plaintiffs have their own share of land that was bequeathed to them by their late father being plot number 2 within Kyuluni Market and that the suit should be dismissed with costs.

5. The 1st Plaintiff, PW1, informed the court that their late mother and father resided on the suit land; that herself and her siblings were born on the suit land and that in the course of her lifetime, her mother extensively developed the suit land by building four (4) self-contained houses.

6. PW1 stated that the 1st Defendant neither lived on the suit land nor developed the same and that the land was mysteriously transferred from their father to the 1st Defendant. PW1 informed the court that plot number 2 is registered in the name of their grandfather and that they do not reside on the said land.

7. In cross-examination, PW1 stated that his father bought the land in Nzambani (*the suit land*) in 1988; that her grandfather gave to her mother plot number 2, Kyuluni and that they realised that the suit land was registered in favour of the 1st Defendant after the death of their father.

8. The 1st Defendant, DW1, informed the court that she is the second wife of the late Gabriel Kawala; that she was married to Mr. Kawala in the year 2000 and that the deceased's first wife died in the year 1999. According to DW1, her late husband, who is the father of the Plaintiffs, had several parcels of land including two commercial plots being Plot Nos. 2 Kyuluni Market and Nzambani/Kyanika/2484; that the family of the first wife lived on parcel number 2484 while she lived on Plot No. 2 and that the late Gabriel bought Plot No. 2 from his father-in-law, the first wife's father.

9. It was the evidence of DW1 that in the year 2005, he later husband gave to her parcel number 2484 in place of Plot No. 2 after his father-in-law declined to transfer Plot No. 2 to him and that the Plaintiffs are entitled to Plot No. 2 which is in the name of their grandfather.

10. In cross-examination, DW1 stated the she has never lived on the suit land; that it is the first family which lives on the suit land todate and that her late husband informed her that he had purchased Plot No. 2. According to DW1, the purchase of Plot No. 2 by her late husband was vide an oral Agreement.

11. DW2, informed the court that he was a member of Kitui Land Control board and that he knew the late Gabriel Kawala for many years. It was the evidence of DW1 that in the year 2005, the late Kawala and his wife presented themselves before the Land Control Board and that the Board gave him the consent to transfer the suit land to the 1st Defendant.

12. In cross-examination, DW2 stated that the late Kawala did not appear before the Land Control Board with his family and that he did not have the Minutes of the Board in his possession.

13. The Plaintiffs' advocate submitted that Section 28 of the Registered Land Act (*repealed*) provides that trusts are overriding interests which can defeat registration; that the Plaintiffs were raised on the suit land and that the court should allow the Plaintiff.

14. The Defendants' advocate submitted that the late Gabriel Kawala transferred the suit land to his wife, the 1st Defendant; that the Plaintiffs evicted the 1st Defendant from Plot No. 2 Kyuluni and that the children of a surviving parent cannot dictate to him on what they want. Both counsels relied on several authorities which I have considered.

15. It is not in dispute that the late Gabriel Kawala, who is the Plaintiffs' father, married the 1st Defendant as his second wife on 24th August, 2002. It is also not in dispute that during the lifetime of the late Gabriel, he lived on Plot No. 2 Kyuluni Market while the Plaintiffs and their mother lived on parcel number Nzambani/Kyanika/2484.

16. Although the 1st Defendant informed the court that her late husband purchased Plot No. 2 Kyuluni Market from his father-in-law (*the 1st wife's father*), there was no evidence of the sale. It was the evidence of the 1st Defendant that when her husband's father-in-law declined to transfer to him Plot No. 2 Kyuluni Market, he decided to transfer to her the suit land in the year 2005.

17. The evidence which emerged show that it was the act of being evicted from Plot No. 2 Kyuluni Market by his father-in-law that made the deceased, probably out of anger, to transfer the suit land to the 1st Defendant. Indeed, despite the said transfer, the Plaintiffs continued living on the suit land during the lifetime of their father who died in the year 2012.

18. Considering that the suit land was formally transferred to the 1st Defendant in the year 2006, by the late Gabriel who allowed his children (*the Plaintiffs*) to continue living on the suit land, the late Gabriel must have intended the 1st Defendant to hold the suit land in trust for the children of both the 1st and the 2nd house. If his intention was to disinherit the Plaintiffs altogether, then he would not have allowed them to continue living on the suit land.

19. Indeed, the 1st Defendant admitted in evidence that she has never lived on the suit land. Instead, she continued living on Plot No 2 Kyuluni Market until the year 2012 when her husband died. That is when her husband's father-in-law evicted her from the land.

20. The proprietorship of Plot No. 2 Kyuluni Market never passed to the late Gabriel. Consequently, it will be legally absurd to state that the Plaintiffs own the said plot. To the contrary, having been born and lived on the suit land, the Plaintiffs are entitled to the said land just as the 1st Defendant and her children are entitled to it.

21. Although Section 28 of the Registered Land Act (*repealed*) provides that the rights of a proprietor shall not be defeated, the same Section states that such rights shall not be taken to relieve a proprietor from any duty which he is subject as a trustee. That is what the 1st Defendant is, a trustee.

22. For those reasons, I allow the Plaintiffs' Plaintiff dated 25th March, 2014 in the following terms:

a. The 1st Defendant, Catherine Wambui Kawala, is holding the Title Deed in respect of parcel of land known as Nzambani/Kyanika/2484 on her own behalf and in trust for the Plaintiffs.

b. A permanent injunction be and is hereby issued, against the 1st Defendant either by herself, agent, servant, and or nominee from transferring, sub-dividing, transmitting or in any way, other than in the manner specified in (a) above, with parcel of land

known as Nzambani/Kyanika/2484.

c. Each party to bear his/her own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25TH DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE