



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

E.L.C CASE NO. 101 OF 2017

KIOKO MALEKYAPLAINTIFF

VERSUS

NZAU NGUSU..... DEFENDANT

JUDGMENT

1. By his Plaintiff dated 02/03/12 and filed in court on 09/03/12 the Plaintiff prays for judgment against the defendant for:-

(a) A declaration that the defendant holds the title to land parcels Nos. Mbooni/Mavindu/392 & Mbooni/Mavindu/3343 in trust for plaintiff and his brothers and the Land Registrar should amend the register to reflect that or in the alternative the plaintiff be registered as the owner of the land parcels Nos.Mbooni/Mavindu/392 & Mbooni/Mavindu/3343 to hold in trust for himself and his brothers.

(b) A permanent injunction restraining the defendant from alienating, selling, charging or in any way disposing the land parcels known as Title Nos. Mbooni/Mavindu/392 & Mbooni/Mavindu/3343 either by himself, servants and/or agents.

(c) Costs of the suit.

2. The Plaintiff has averred in paragraphs 3 & 4 of his plaint that at all material times, land parcel number Mbooni/Mavindu/392 and Mbooni/Mavindu/3343 rightfully belonged to him and his younger brothers before the process of adjudication was commenced. That the two land parcels initially belonged to his father as ancestral land, a position that was confirmed by the members of the clan. In paragraph 5 of the plaint, the Plaintiff has averred that during adjudication process, the Defendant fraudulently had the suit properties registered in his name.

3. The Plaintiff's claim is denied by the Defendant vide his amended statement of defence dated 18th July, 2013 and filed in court on 23rd July, 2013.

4. Hearing of the matter proceeded on the 13th December, 2018 after the Defendant who had been served with a hearing notice failed to turn up in court.

5. The Plaintiff, Kioko Malekyia and his two witnesses, Peter Munguti (PW 1) and Zakayo Masua Munguti (PW 2) adopted their undated statements filed in court on 09th March, 2012.

6. The Plaintiff's evidence was that land parcels number Mbooni/Mavindu/392 and 3343 belong to his late father. That the Defendant fraudulently had the two parcels registered in his own name. He revealed that he does not know how the Defendant obtained the title deeds. He produced three letters from the Assistant Chief dated 04/08/2011, 27/01/2010 and 25/08/2010 as P.Exhibit Nos.1, 2 and 3 respectively. He further produced record of deliberations on the clan properties and certificates of title for the two parcels as P.Exhibit Nos.4, 5(a) and (b) respectively.

7. The Plaintiff's evidence was supported by that of Peter Munguti (PW 1) and Zakayo Masua Munguti (PW2).

8. In his written submissions the Plaintiff's Counsel reviewed the statements that were adopted by the Plaintiff and his two witnesses as follows:-

That according to the Plaintiff, the Defendant holds in trust the suitland which was divided into parcels numbers Mbooni/Mavindu/392 and 3343. That the Plaintiff maintains that the Defendant was fraudulently registered as the owner during adjudication process. That the decision of the meeting of Location/Divisional Committee affirmed the Plaintiff and his brothers right to inherit their father's property. That the Defendant ignored the clan's effort and went ahead to acquire titles to the said suit

land.

The Counsel further pointed out that Zakayo (PW2) stated that he is the one who keeps the records of the clan since 1990 and that he handled complaint which the Defendant disregarded.

9. Arising from the evidence on record, the Counsel framed four (4) issues for determination. These were:-

1) Whether land parcel numbers Mbooni/Mavindu/392 and Mbooni/Mavindu/3343 constitute the rightful ancestral share belonging to the plaintiff's deceased father.

2) Whether land Parcel Numbers Mbooni/Mavindu/392 and Mbooni/Mavindu/3343 were fraudulently transferred to the defendant.

3) Whether the plaintiff and his siblings are entitled to land Parcel Numbers Mbooni/Mavindu/392 and Mbooni/Mavindu/3343.

4) Who bears the cost of this suit?

10. On the first issue, the Counsel submitted that before the adjudication process, the suitland rightfully belonged to the Plaintiff and his young brothers by dint of the same being a portion of ancestral land property apportioned to their late father. He added that the same was held in trust for the plaintiff and his young brothers by the Defendant who is their uncle and brother to their late father. That the defendant unlawfully and in breach of trust obtained the titles to the suitland and transferred it to himself without the consent of the Plaintiff and his siblings. He went on to submit that vide the minutes of the Locational/Divisional Committee held on 20/07/11, it is not in dispute that there exist land that belonged to the Plaintiff's late father which was left in custody of the Defendant to hold in trust for the rightful beneficiaries, a fact the Defendant does not dispute in the minutes which he signed to confirm his knowledge of the said portion of land.

11. On issue number 2, the Plaintiff's Counsel cited **Blacks Law Dictionary, 10th Edition** which defines fraud as,

“some deceitful practice or willful devise resorted to with intent to deprive another of his rightful or in some manner to do him an injury... with design to obtain some unjust advantage to one party, or to cause an inconvenience or loss to the other.”

12. The Counsel went on to submit that vide the official search conducted by the Plaintiff on 18/08/2011, it was discovered that the land in dispute was fraudulently registered in the name of the Defendant and titles were issued on 02/08/2011 being Mbooni/Mavindu/392 and Mbooni/Mavindu/3343. The Counsel cited **Article 40(6) of the Constitution** which states that

“the rights under Article 40 do not extend to any property that has been found to have been unlawfully acquired”.

The Counsel cited the case of **Peter Muiruri Kamau vs. Mary Mwhaki Kamau [2017] eKLR** where Kemei JG. J found acts of Defendant to have taken advantage of the Plaintiff's ill health to fraudulently transfer part of the suitland to herself to be illegal. The Counsel added that the learned judge directed the Land Registrar to cancel the title and register the Plaintiff as the sole owner of the suitland. Based on the above, the Counsel correctly submitted that the Defendant herein lacks protection of the Constitution as is enshrined under the provisions of Article 40(6) of the Constitution of Kenya, 2010 which is unprocedural acquiring of land and urged the court to find in favour of the Plaintiff

13. On the issue number 3, the Counsel submitted that the Plaintiff made it clear that he is pursuing the land on his own behalf and that of his brothers. The Counsel cited **Section 26 of the Land Registration Act, 2012** which provides that,

“a title can be cancelled if it is challenged on ground of,

a) Fraud or misrepresentation to which a person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.”

14. The Counsel submitted that the Defendant took advantage of the access he had when he held the suitland in trust for the Plaintiff and transferred it to himself. The Counsel went on to submit that under the provisions of Section 80 of the Land Registration Act, this court is empowered to order that the documents be rectified, specifically under **Section 80(2)** which states thus,

“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.”

Arising from the above, the Counsel urged the court to order cancellation of the title deeds issued to the Defendant.

15. I have read the evidence on record as well as the submissions that were filed by the Plaintiff's Counsel. It is clear to me that the evidence by the Plaintiff and his two witnesses remain uncontroverted. Even though the Defendant has averred in paragraphs 2B and 4A of his amended defence that the suitland was part of the ancestral land belonging to the Plaintiff's deceased grandfather who is also the Defendant's deceased father and that the Defendant is the bonafide owner of the suitland, there is no evidence to support these averments. What is clear is that from the minutes of Location/Divisional Committee held on 20/07/11 (P.Exhibit No.4), the suitland was found to belong to the Plaintiff's father and that it was left in the custody of the Defendant to hold in trust for the Plaintiff and his siblings. I would agree with the

Plaintiff's Counsel that the Defendant took advantage of the access he had to the suitland while holding it in trust for the Plaintiff and his siblings and transferred it to himself. His ownership of the two titles cannot hold. I am persuaded by the authority of Peter Muiruri Kamau vs. Mary Mwihaki Kamau [2017] eKLR.

16. From the evidence on record, I am persuaded that the Plaintiff has on a balance of probabilities satisfied this court he has a cause of action against the Defendant. In the circumstances, I hereby proceed to enter judgment for the Plaintiff and against the Defendant in terms of prayers (a) (b) and (c) of the plaint.

Signed, dated and delivered at **Makueni** this **16th** day of **May, 2019**.

MBOGO C. G

JUDGE

In the presence of:-

Mr. Mutia for the Plaintiff

Ms. C. Nzioka – Court Assistant

In the absence of the Defendant

MBOGO C.G, JUDGE

16/05/2019