



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 119 OF 2011

LOISE NDETO KIMWELL.....PLAINTIFF

VERSUS

PETER KIMONYI KIMWELI.....DEFENDANT

JUDGMENT

Introduction:

1. In the Plaintiff dated 18th May, 2011, the Plaintiff averred that the Defendant is her step-son; that in the year 1985, she gave to the Defendant Kshs. 5,080 to buy shares for her at Malili Ranch Limited and that the Plaintiff bought the said shares using the money she had given him but had the shares registered in his name.
2. According to the Plaintiff, in 1994, the Defendant admitted having had the shares unlawfully registered in his name and promised to rectify the position; that between the year 1994 to 1997, the Defendant passed all the dividends paid by Malili Ranch Limited to her and that in the year 2007, the shareholders of Malili Ranch Limited were each allocated two (2) parcels of land measuring 7.8 acres and 50 feet by 100 feet respectively. It is the Plaintiff's averment that the Defendant was allocated the said two parcels of land.
3. The Plaintiff finally averred that the Defendant is holding the shares that were registered in his name and the two parcels of land that were allocated to him on the strength of the said shares in trust for her and that the two parcels of land being Plot No. 1274 situated in Malili Ranch Limited measuring 7.8 acres and a commercial plot measuring 50 feet by 100 feet should be transferred to her.
4. In his Defence, the Defendant denied that the Plaintiff gave him Kshs. 5,080 to buy shares in Malili Ranch Limited; that in the year 2007, and being a shareholder in Malili Ranch Limited, he was allocated the two suit properties and that he has never admitted that he was holding the shares in Malili Ranch Limited in trust for the Plaintiff.

The Plaintiff's case:

5. In her evidence, the Plaintiff, PW1, informed the court that the Defendant is her step-son; that in the year 1985, she gave to the Defendant Kshs. 5,080 to buy shares for her in Malili Ranch Limited, which he did, and that the Defendant unlawfully had the shares he had purchased registered in his name.
6. It was the evidence of PW1 that in 1994, the Defendant admitted having unlawfully registered the shares he had purchased in his name instead of registering them in her name; that the Defendant paid her all the dividends that he used to collect from Malili Ranch Limited and that all the members of Malili Ranch Limited were given two parcels of land, one measuring 7.8 acres and a commercial plot measuring 50 feet by 100 feet.
7. It was the evidence of PW1 that although the Defendant agreed in writing on 5th April, 2010 that she gave him money to buy shares for her, and on which basis the Defendant was allocated two parcels of land by Malili Ranch Limited, he has refused to have the two parcels of land transferred to her. According to PW1, the Defendant has instead offered to refund her the money she gave him plus interest totaling to Kshs. 10,480.
8. PW1 informed the court that the Defendant is holding the shares in Malili Ranch Limited and the two parcels of land measuring 7.8 acres and 50 feet by 100 feet in trust for her and that he should be compelled to transfer the said shares and land.
9. The Plaintiff produced in evidence several documents, which include the letter dated 14th July, 2008, by the Amutei clan; the letter dated 5th August, 2008 by Malili Ranch Limited; the Minutes of 5th April, 2010 and the demand letter.
10. In cross-examination, PW1 stated that when he gave to the Defendant the money to buy shares for her in Malili Ranch Limited, he was in

the company of her son; that the Defendant was living in Nairobi with her son who had sustained injuries in an accident and that the Defendant had already purchased his own shares in Malili Ranch by the time she gave him money to purchase for her the shares in the same Ranch.

11. The Plaintiff's son, PW1, informed the court that in 1985, the Defendant approached the Plaintiff and told her to give him money to purchase for her shares in Malili Ranch Limited; that because he was going to Nairobi with the Defendant, the Defendant requested the Plaintiff to give him (PW2) the money to carry and that he (PW2) was given the money. According to PW2, when they arrived in Nairobi, he handed to the Defendant the money but he never bought the shares for his mother as promised.

12. PW2 informed the court that in 1994, the Defendant admitted to having unlawfully registered the shares he had bought using his mother's money and promised to have the shares registered in the Plaintiff's name. However, he never did so. It was the evidence of PW2 that although the Defendant used to pass to the Plaintiff the dividends from Malili Ranch Limited, he has refused to transfer the shares that he bought and the land that he was allocated by Malili Ranch Limited.

13. In cross-examination, PW2 stated that he attended the meeting of 5th April, 2010 in which the Defendant admitted owing the Plaintiff money that was meant for her shares; that the Defendant bought a share in Malili Ranch but had it registered in his name and that the land that Malili Ranch allocated to the Defendant on the strength of the said share should be transferred to the Plaintiff.

14. The Chairman of Mavivye Sub-location, Amutei clan, PW3, informed the court that in 1985, the Plaintiff informed him that he had given the Defendant Kshs. 5,080 to purchase for her shares in Malili Ranch Limited. PW3 stated that on 11th August, 2007, he summoned a meeting as the Chairman of Amutei clan and that after hearing both the Plaintiff and the Defendant, the Defendant admitted having been given money by the Plaintiff to buy for her shares in Malili Ranch Limited.

15. According to PW3, the Defendant admitted that it is the Plaintiff who used to receive dividends for the purchased share from Malili Ranch and that the clan resolved that the Defendant should transfer to the Plaintiff the plots that were allocated to him.

16. In cross-examination, PW3 stated that he signed the minutes of 5th April, 2010; that there was an earlier meeting in the year 2007 and that the Minutes of 5th April, 2010 captured the admission of the Defendant. According to PW3, their three meetings were held to resolve the dispute between the Plaintiff and the Defendant. It was the evidence of PW3 that the said meetings included the Chief, the District Officer and the entire clan members.

17. The Secretary of Amutei clan, PW4, informed the court that he was amongst the people who arbitrated the dispute between the Plaintiff and the Defendant on 11th August, 2007. It was the evidence of PW4 that in the said meeting, the Defendant admitted having received Kshs. 5,080 from the Plaintiff in the year 1985; that he also participated in the meeting of 25th April, 2010 where the Defendant admitted having received the money and that the clan directed the Plaintiff to surrender the membership certificate and the two parcels of land to the Plaintiff.

18. The Chairman of Malili Ranch Limited, PW5, informed the court that the company sub-divided its land and allocated the same to its members. It was the evidence of PW5 that the Defendant was member number 1341 in the company and that each member was required to pay Kshs. 5,000 to become a full member of the Ranch.

19. PW5 stated that the Defendant was allocated two parcels of land in the company, that is plot number 1274 measuring 7.8 acres and Plot No. 1914 measuring 50 feet by 100 feet. PW5 produced in evidence the register of the members of the Ranch. It was the evidence of PW5 that the Plaintiff was not a member of the Ranch and could not have therefore attended the company's Annual General Meetings.

Defence case:

20. The testimony of the Defendant, DW1, was that in 1985, the Plaintiff's son, PW2, was attacked by thugs and was injured; that he started living with the Plaintiff in Nairobi after the said attacks and that the Plaintiff used to give him money to cater for her sick son.

21. It was the evidence of DW1 that in the same year that the Plaintiff's son was injured, he bought shares in Malili Ranch Limited and that being a shareholder in the company, he was allocated two parcels of land by the company.

22. DW1 informed the court that when the Plaintiff started claiming that she had given him money to buy the shares in the company, the clan and family members decided that he should refund to her the money she was claiming she had given to him and that the amount he was supposed to refund to the Plaintiff plus interest was Kshs. 10,480.

23. DW1 stated that he agreed to refund the money to the Plaintiff as directed by the clan for the sake of peace and that the first time the dispute was discussed was in the year 2003; that the elders told him to pay the Plaintiff Kshs. 10,480 and that he bought shares both in Malili Ranch Limited and in Aimi Ma Kilungu Company.

24. In cross-examination, DW1 stated that the Plaintiff's son was admitted at Kenyatta National Hospital in 1979 after suffering head injuries; that he bought shares in Malili Ranch Limited in February, 1985 and that the shares were being sold at Kshs. 5,000. According to DW1, he lived with the Plaintiff's son between 1976 until 1986 and that the Plaintiff's son was involved in an accident in 1979. However, when he was unable to work, he went back to the village in 1986.

25. The Defendant's cousin, DW2, stated that he attended the two meetings that were called by the elders in the year 2003 and 2010 and that the elders decided that the Defendant should pay the Plaintiff a total of Kshs. 10,480. According to DW2, the payment of Kshs. 10,480 by the Defendant to the Plaintiff was to bring the family together.

Submissions:

26. The Plaintiff's advocate submitted that the Defendant has never denied receiving the said Kshs. 5,080, neither has he demonstrated that he had other shares at Malili Ranch prior to being given the Kshs. 5,080 by the Plaintiff.

27. Counsel submitted that in view of the evidence and admission by the Defendant, the Plaintiff has proved her case on a balance of probability; that the Plaintiff has demonstrated that the Defendant breached the trust she had in him by converting her share and land to himself and that the said share and land should revert to the Plaintiff.

28. The Defendant's advocate submitted that the Plaintiff and her son (PW2) gave contradicting information as to how the money was given to the Defendant. Counsel submitted that the Plaintiff failed to prove the allegations that she gave to the Defendant money to buy for her shares in Malili Ranch.

Analysis and findings:

29. The Plaintiff's case in this matter is that in 1985; she gave to the Defendant Kshs. 5,080 for the purpose of buying for her shares in Malili Ranch Limited. However, according to the Plaintiff, the Defendant purchased the said shares in his name. The shares that the Defendant purchased entitled him to two pieces of land known as Plot No. 1274 measuring 7.8 acres and a commercial plot number 1914 measuring 50 feet by 100 feet. The two parcels of land are currently registered in the name of the Defendant.

30. The Defendant, though admitting that he received money from the Plaintiff, has denied that the said money was meant for the purchase of the shares in Malili Ranch. According to the Defendant, the money he received from the Plaintiff, who is his step-mother, was for the purpose of treating the Plaintiff's son who was living with him in Nairobi.

31. Both the Plaintiff and the Defendant relied on their written statements and oral testimony. While denying that he did not receive the Kshs. 5,080 from the Plaintiff in 1985 to buy for her shares, this is what the Defendant stated in his oral evidence/testimony:

"I bought the shares in Malili Ranch in 1985... my step-mother gave me money to buy fruits for his boy who was sick in Nairobi."

32. The Defendant admitted that there was a clan meeting in the year 2003 and 2010 where he agreed to pay to the Plaintiff *"the money for peace to be there"*. According to the Defendant, it is the clan elders who told him to pay the Defendant Kshs. 10,480 to resolve the dispute.

33. In cross-examination, the Defendant stated that the Plaintiff's son had been admitted in Kenyatta National Hospital for head injuries in 1979, and that he lived with the said son since 1976 until 1987. This oral evidence by the Defendant on the circumstances under which the Plaintiff gave him money in 1985, albeit in instalments, differs from what he stated in his written statement dated 29th July, 2011 which he adopted. In the written statement, the Defendant stated as follows:

"On or about the year 1985, my step-brother, David Kimweli (a son to Loice Kimweli) was attacked by thugs and was admitted in Kenyatta National Hospital. When he was discharged, I started living with him in my house at Nairobi. It is during this time I was living with my step-brother when his mother, Loice Ndeto started to give me money to cater for her sick son. This was around June, 1985..."

34. On one hand, the Defendant says the Plaintiff's son was admitted at Kenyatta National Hospital in 1979 while on the other hand, he says the son was admitted in 1985. The contradiction on when the sick son was actually admitted in hospital clearly shows that the money that was given to the Defendant was not for a sick person.

35. If indeed, the money the Defendant received from the Plaintiff in 1985 was for her sick son, why did the Plaintiff admit to refund the money in two meetings? And was it a coincidence that he purchased the shares in Malili Ranch at the same that he was given money by the Plaintiff purportedly for her sick son?

36. Indeed, after hearing the dispute in respect to the money that the Plaintiff gave to the Defendant in 1985, the Minutes of 21st April, 2003, which were produced by both the Plaintiff and the Defendant, shows that the elders were convinced that the Plaintiff gave to the Defendant Kshs. 5,080, which is the amount of money that was required for one to be entitled to be a member of Malili Ranch.

37. The Defendant having admitted that he received money from the Plaintiff in 1985, and in the absence of evidence to show that the money the Defendant received was for the purpose of treating the Plaintiff's sick son, I find and hold that the Plaintiff has proved her case on a balance of probabilities.

38. For those reasons, I allow the Plaintiff's claim as follows:

a. A declaration be and is hereby issued that the Defendant holds shares in Malili Ranch Limited in trust for the Plaintiff; and that the said shares should be transferred to the Plaintiff.

b. A declaration be and is hereby issued that the Defendant holds Plot No. 1274 situated in Malili Ranch Limited and measuring 7.8 acres or thereabouts, and a commercial plot thereto measuring 50 feet by 100 feet, in trust for the Plaintiff, and that these two parcels of land should be transferred to the Plaintiff.

c. The Defendant to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2019.

O.A. ANGOTE

JUDGE