



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 82 OF 2014

MICHAEL WAMBUA MUSYOKA (*Suing as the administrator of the Estate of KILOKO MITAA (deceased)*).....**PLAINTIFF**

VERSUS

DAVID WACHIRA KAGUNDA.....**DEFENDANT**

JUDGMENT

1. In the Plaint dated 3rd September, 2013 and filed on 4th September, 2013, the Plaintiff averred that before the demise of Kiloko Mitaa (deceased), the late Kiloko Mitaa was a shareholder of Drumvale Farmers Co-operative Society Limited (*the Society*); that the late Mitaa was posthumously allotted and registered as the proprietor of land known as Mavoko Town Block 12/268 (*the suit property*) and that on 11th January, 1999, the Defendant fraudulently had himself registered as the owner of the suit land.
2. In his Defence, the Defendant averred that the Plaintiff is not the legal representative of the Estate of the late Kiloko Mitaa; that it is true that Kiloko Mitaa was a member and a shareholder of four (4) shares in the Society and that on 29th June, 1993, the late Kiloko Mitaa sold and transferred to him the four (4) shares that he held in Drumvale Farmers Co-operative Society Limited for Kshs. 65,000.
3. The Plaintiff, PW1, informed the court that he is one of the beneficiaries of the Estate of the late Kiloko Mitaa, who was his grandmother; that he applied and obtained Limited Grant of Letters of Administration Ad Litem and that one of the Assets belonging to the late Kiloko Mitaa is Mavoko Town Block 12/268 (*the suit property*).
4. The evidence of PW1 was that the late Mitaa was a member of Drumvale Farmers Co-operative Society Limited and that the late Ms. Mitaa was posthumously registered as the proprietor of the suit land on 11th January, 1999, by virtue of her shareholding in Drumvale.
5. PW1 informed the court that when he conducted an official search for land known as Mavoko Town Block 12/268, he discovered that the same had been registered in favour of the Defendant in 1999 and that there was no consent of the Land Control Board before the suit land was registered in favour of the Defendant.
6. The evidence of PW1 was that her late grandmother had five children and that one of his uncles, Gideon, objected to the Letters of Administration been issued to him. Out of the five children, PW1 informed the court that it is only Monica and Gideon who are alive.
7. In cross-examination, PW1 stated that he saw the Agreement dated 29th June, 1993 purportedly between the late Mitaa and the Defendant for the first time when it was filed in court; that he was not sure if Ms. Mitaa is the one who signed the said Agreement and that the Defendant had the suit land fraudulently registered in his favour.
8. The Assistant Commissioner for Co-operative Development, PW2, informed the court that Drumvale Farmers Co-operative Society Limited is under liquidation; that he was appointed the official Liquidator of the Society in September, 2009 and the members of the Society were entitled to two parcels of land, one (1) acre in Nairobi and five (5) acres either in Mavoko Town Block 12 or Athi River/Athi River Block 5.
9. PW2 informed the court that by the time he took over as a Liquidator, some members had title documents and that he is the one who authored the letter dated 27th June, 2017.
10. According to PW2, the late Kiloko Mitaa was member number 402 in the Society; that the late Kiloko Mitaa was allocated plot number 268 in Mavoko Town and that the land in Mavoko was sub-divided in 1995.
11. It was the evidence of PW2 that in 1993, the Mavoko land had not been sub-divided by the Society, meaning that one could only transfer

his shares and not the land. According to PW2, he was not aware of the Agreement between the late Kiloko and the Defendant dated 29th June, 1993 and that he was not aware that Kiloko sold her shares or land to the Defendant in 1993.

12. PW2 stated that if the late Kiloko had sold her shares in the Society in 1993, then the said transaction should have been minuted by the Society's officials and reflected in the register.

13. The Defendant, DW1, informed the court that his brother purchased the suit land on his behalf from Gideon Mitaa in 1993; that it is his brother who signed the Agreement dated 29th June, 1993 and that what he purchased from Mitaa were the shares in Drumvale Farmers Co-operative Society Limited.

14. According to the Defendant, having purchased the shares belonging to Kiloko Mitaa, the suit land was transferred to him in 1999 and that he is currently the registered proprietor of the suit land.

15. In cross-examination, DW1 stated that he never met the late Kiloko Mitaa; that he met her son Gideon Mitaa and that he gave to his brother to sign the Agreement of 29th June, 1993.

16. Gideon Mitaa, DW2, informed the court that the Plaintiff is his nephew; that Kiloko Mitaa was his mother and that it is her mother who transferred her shares to the Defendant. DW2 stated that after her late mother sold her shares to the Defendant, he did a letter to the Society and requested the Society to transfer the said shares to the Defendant. According to DW2, the Agreement of 29th June, 1993 was signed by the Defendant's brother, her late mother, himself and Nelson; that her mother sold the shares and not the land and that the second Agreement was in respect of the Commission.

17. DW2 stated that after her mother sold the shares to the Defendant, they surrendered the share certificate to Drumvale Limited together with the Agreement; that the suit land was transferred to the Defendant lawfully and that the Plaintiff is not the Administrator of the Estate of her mother.

18. In cross-examination, DW2 informed the court that when his mother died, she was over 80 years old; that she was illiterate and that the Agreement was signed in Nairobi.

19. DW3 stated that he represented his brother, the Defendant, during the negotiations and purchase of the shares that the late Kiloko held in Drumvale; that he signed the Agreement on behalf of his brother and that Nelson and Gideon were the witnesses. According to DW3, they surrendered the share certificate while getting the title to Drumvale Farmers & Co-operative Society Limited.

Submissions:

20. The Plaintiff's advocate submitted that under Article 40 of the Constitution and Section 26 of the Land Registration Act, it is only a title that is acquired lawfully that is protected; that Kiloko Mitaa died in the year 1994; that the Defendant was registered as the proprietor of the suit land on 11th January, 1999 and that the Plaintiff had proved that the late Kiloko Mitaa never sold the suit land.

21. The Defendant having not signed any Agreement, the Plaintiff's advocate submitted that he did not comply with the provisions of Section 3(3) of the Law of Contract Act; that the documents that the late Mitaa purportedly signed are voidable and that in any event, Drumvale Farmers Co-operative Society Limited should have been involved in the transaction.

22. On his part, the Defendant's advocate submitted that the late Mitaa relinquished her shares and interest in Drumvale Farmers Co-operative Society Limited to the Defendant; that the Agreement of Sale is twenty (20) years old and that the provisions of Section 96 of the Evidence Act is applicable.

23. Counsel submitted that the inferences, assumptions and suspicions which are void of any substantive material are not the kind of evidence a court of law can rely on in matters pertaining to fraud; that no evidence was tendered by the Plaintiff to demonstrate that the sale transaction did not take place and that the issue of the Land Control Board consent was not pleaded in the Plaintiff.

24. The Defendant's counsel submitted that the suit is time barred by dint of Section 7 of the Limitation of Actions Act, the cause of action having arisen in June, 1993.

Analysis and findings:

25. The evidence before me shows that on 21st August, 2013, the Plaintiff obtained Limited Grant of Letters of Administration Ad Litem of the Estate of Kiloko Mitaa who died on 2nd September, 1994. The said Letters of Administration was issued by the court in Machakos High Court Succession Cause No. 575 of 2013.

26. The Plaintiff's case in this matter is that he is one of the beneficiaries of the Estate of the late Kiloko Mitaa; that the late Kiloko Mitaa was a member of Drumvale Farmers Co-operative Society Limited and that by virtue of the said membership, she was entitled to a parcel of land known as Mavoko Town Block 12/268. The said land is currently registered in favour of the Defendant.

27. From the evidence and pleadings, the issues for determination are as follows:

“a. Did the late Kiloko Mitaa relinquish her shares in Drumvale Society to the Defendant;

b. Was the Defendant legally and procedurally registered as the proprietor of a parcel of land known as Mavoko Town Block 12/268.

28. It is not in dispute that the late Kiloko Mitaa was Member No. 402 in Drumvale Farmers Co-operative Society Limited. According to the official Liquidator of the Society, PW2, the Society allocated to all its members land in Mavoko Town Block 12 measuring 5 acres each in 1995 and that before the year 1995, one could only sell his share and not land. Indeed, the Defendant's case is that she bought the four (4) shares belonging to the late Kiloko Mitaa in 1993, way before the Mavoko Town Block 12 was sub-divided and allocated to the Society's members.

29. The confirmation that parcel number Mavoko Town Block 12/268 was allocated to the late Kiloko is found in the letter dated 27th June, 2013 by the Liquidator of the Society. In the said letter, the Liquidator informed the District Land Registrar, Machakos as follows:

“RE: LAND PARCEL – MAVOKO TOWN BLOCK 12/268

This is to inform you that the above parcel of land was allocated to the late Kiloko Mitaa M/No. 402, by the Society.”

30. The evidence of PW2 was that by the time he was writing the letter dated 27th June, 2013, the register of Drumvale Society showed that the late Kiloko was still the owner. PW2 produced an extract of the register of Drumvale Farmers Co-operative Society. The said register shows that parcel number 268 was allocated to member number 432 who is shown to be Kiloko Mitaa of national identity card number 6267665/69. The extract of the register was certified on 12th September, 2011.

31. The Defendant produced in evidence an undated letter purportedly signed by the late Kiloko and addressed to Drumvale Farmers Co-operative Society Limited. In the said letter, it is purported that the late Kiloko Mitaa had agreed to sell her share No. 402 – the one without a plot. The letter does not however state when the said share was sold and to whom.

32. The Agreement that the Defendant is relying on to show that he purchased the four shares from the late Kiloko is dated 29th June, 1993. The said Agreement was entered into between the Defendant's brother, DW2, and Kiloko Mitaa.

33. The Agreement further shows that the consideration that was paid for the said shares was Kshs. 65,000. The Defendant, or his brother, DW2, did not inform the court the mode of payment of Kshs. 65,000, which was a substantial amount of money in 1993. Furthermore, the said Agreement was never submitted to Drumvale Farmers Co-operative Society Limited to enable the Society effect changes of ownership of share No. 402 in its register.

34. The Defendant did not inform this court why he never had the records held at Drumvale changed if at all he purchased the shares from the late Kiloko in 1993. The Defendant did not also produce a copy of the share certificate that was handed to him by Ms. Kiloko after purportedly selling her share to him. The lack of proof of the effort that the Defendant made to have the register changed to indicate his membership discredits the Defendant's evidence that he bought the share belonging to the late Kiloko in 1993 before she died in 1994. Indeed, the copy of the share certificate No. 3257 dated 21st June, 1990 produced by the Defendant shows that said share to be in the name of the late Kiloko. PW2 further confirmed that the register of Drumvale Farmers Co-operative Society Limited still shows that the said share and parcel number 268 is in her name.

35. I have perused the certified copy of the register (Green card) of parcel of land known as Mavoko Town Block 12/268. The said Green card shows that the same was registered in the name of the Government on 5th September, 1999. The title was then registered in favour of Kiloko Mitaa on 11th January, 1999. On the same day, the parcel of land was transferred to the 1st Defendant.

36. The land having been registered in favour of Kiloko Mitaa on 11th January, 1999, it could not have been transferred to the 1st Defendant on the same day without a formal transfer signed by Kiloko. Indeed, the entry of Kiloko Mitaa as the proprietor of the suit land posthumously shows that as at 11th January, 1999, the register of the Drumvale Farmers Co-operative Society Limited still reflected her as the owner of the land.

37. The documents before this court shows that the late Kiloko never sold her shares to the Defendant in 1993. Indeed, the Defendant never signed the Agreement of 29th June, 1993. Instead, it is his brother who purportedly signed the said Agreement. Having not produced a Power of Attorney, the Agreement of 29th June, 1993, is so far as the suit land is concerned, is null and void.

38. Having found that the suit land was allocated to the late Kiloko posthumously by the Society, and the said title have been registered in favour of the late Kiloko, the same could not have passed to the Defendant without a formal Transfer document duly signed by the Administrator of the Estate of Ms. Kiloko. The purported transfer of the title for parcel of land known as Mavoko Town Block 12/268 was therefore fraudulent and should be cancelled by this court.

39. Although the Defendant's advocate submitted that the Plaintiff's suit is time barred, he never raised that issue in the Defence. Indeed, the issue of the suit being time barred was raised for the first time by the Defendant in the written submissions. Having not pleaded the issue in his Defence or by way of a Preliminary Objection, the Defendant cannot allege in the submissions that the suit land is time barred.

40. In any event, the Plaintiff pleaded in the Complaint that it was in the course of identifying the assets of the deceased that he discovered that the Defendant was registered as the proprietor of the suit land on 11th January, 1999. Section 26(a) of the Limitation of Actions Act provides as follows:

“Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

41. In his evidence in chief, the Plaintiff, PW1, stated as follows:

“When I did a search, I realized that the land had been registered in the name of the Defendant. I have a copy of the Green card which I produced as PEXB3.”

42. The Green card that the Plaintiff produced shows that the same was certified as a true copy of the original by the Land Registrar, Machakos, on 2nd July, 2013. That is the date that the Plaintiff realized that the suit land was no longer registered in the name of his grandmother. Consequently, the cause of action for fraud commenced on 2nd July, 2013 and not earlier. The Plaintiff’s suit was therefore filed before the lapse of twelve (12) years.

43. For those reasons, I allow the Plaintiff’s Plaint dated 3rd September, 2013 as follows:

a. A declaration that the substitution of the name of Kiloko Mitaa (deceased) with that of the Defendant as proprietor of title number Mavoko Town Block 12/268 and the subsequent sub-division of the title were wrongful and/or fraudulent and thus null and void be and is hereby issued.

b. A permanent injunction to restrain the Defendant whether by himself or through his servants and/or agents or others whomsoever from alienating, charging, selling or in any other manner dealing with the titles numbered Mavoko Town Block 12/5309 to 5325 created by the sub-division of title number Mavoko Town Block 12/268 or from laying claims over the said titles be and is hereby issued.

c. An order directing the Defendant to return the title numbers Mavoko Town Block 12/5309 to 5325 to the Land Registrar for cancellation and directing the land Registrar Machakos to effect rectification of the register and reinstate the original owner as proprietor of the several sub-divided titles be and is hereby issued.

d. Costs of the suit to be paid by the Defendant.

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

O.A. ANGOTE

JUDGE