



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 93 OF 2014 (O.S)

SARAH MORAA MORACHA.....1ST PLAINTIFF

SMART NGARE MORACHA.....2ND PLAINTIFF

VERSUS

JULIUS MORACHA MATUNDURA.....1ST DEFENDANT

ANNE ONDIEKI.....2ND DEFENDANT

JUDGMENT

1. The Plaintiffs commenced the instant suit by way of an originating summons dated 10th March 2014 filed in court on the same date. The Plaintiffs inter alia sought the following orders:

1. THAT this honourable court be pleased to make a declaration that the rights of the applicants over a portion of land being Kisii Municipality/Block II/66 are conferred by the provisions of Section 28(a) and (b) of the Land Registration act, 2012 as an overriding interest and therefore entitled to a share of the suit property.

2. That this Honourable Court be pleased to make a declaration that the registration of the 1st Respondent as a proprietor of a share of Kisii Municipality /Block II/66 was to hold in trust for the sons and the grandsons by virtue of the provisions of Section 28(a) and (b) of the Land Registration Act 2012 and any disposition without the consent of all the sons and family members is null and void.

3. That this honourable court be pleased to make a declaration that the disposition and transfer of a share of Kisii Municipality/Block II/66 from the 1st Respondent to the 2nd Respondent without lifting up/ removing the restriction imposed by court for the 1st respondent to hold in trust for the sons and grandsons was illegal, null and void.

4. That this honourable court be pleased to cancel and rescind the registration of the 2nd respondent to a share of Kisii Municipality/ Block II/66 and revert it to the 1st respondent to hold in trust for the sons and grandsons as per the court order.

5. That this honourable court do issue an order to preserve the suit property against any subdivision or alienation without the consent of the applicants.

6. That the costs of the application be provided for.

2. The originating summons was supported on the grounds set out on the body of the application and on affidavit sworn in support by Smart Ngare Moracha. Principally the Plaintiffs contended the 1st Defendant/Respondent was registered as proprietor of $\frac{1}{3}$ share of land parcel Kisii Municipality/ Block II/66 (hereafter referred to as the “**suit property**”) following succession proceedings in Kisii High Court Succession Cause No. 62 of 2009 to hold in trust for the sons and grandsons. The Plaintiffs asserted that under provisions of Section 28(a) and (b) of the Land Registration Act, 2012 the registration of the 1st Defendant/Respondent was subject to the Plaintiffs overriding interest over the suit property and the 1st Defendant/Respondent could not lawfully deal with the property to the prejudice of the Plaintiffs rights and interest over the land.

3. The plaintiffs/Applicants averred that the 1st Defendant had irregularly and unlawfully disposed of the suit property to the 2nd Defendant/Respondent without the Plaintiffs consent or authority contrary to the provisions of Section 28(a) and (b) of the Land Registration Act, 2012. The Plaintiffs/Applicants thus contended the disposition of the $\frac{1}{3}$ share interest in the sit land to the 2nd Defendant/Respondent was in disregard of the order granted in the succession cause and further offended the provisions of Section 28 (a) and (b) of the Land Registration Act, 2012. The Plaintiffs/Applicants consequently sought the nullification and cancellation of the title issued to the 2nd Defendant/Respondent contending the same was irregularly and unlawfully processed in the 2nd Defendant's favour by the 1st Defendant.
4. The affidavit sworn in support of the originating summons by Smart Ngare Moracha reiterated the grounds set out on the face of the application. The deponent affirmed the 1st Defendant was his biological father and annexed copies of the proceedings in Kisii High Court Succession Cause including the certificate of confirmation of grant and the abstract of title (green card) in respect of land parcel Kisii Municipality/Block 11/66. It was the deponent's position that the disposition by the 1st Respondent of the suit property to the 2nd Respondent was unlawful as it was contrary to the order of the court in the succession cause constituting the 1st Respondent a trustee for the sons and grandsons in regard to the suit property.
5. Both the 1st and 2nd Respondents swore replying affidavits dated 14th March 2014 in opposition to the originating summons. The 1st Respondent deponed that he and one William Onkoba Matundura were appointed administrators of the estate of Teresia Nyanhero Matundura in the High Court Succession Cause No. 62 of 2009. The 1st Respondent further deponed that a certificate of confirmation of grant was issued in the Succession Cause on 17th December 2012 and that land parcel Kisii Town/Block 11/66 ($\frac{1}{3}$ share) was awarded to him to hold in trust for his sons and grandsons. He further deponed that he with the consent and approval of his sons sold and transferred the $\frac{1}{3}$ share interest in land parcel Kisii Town/Block 11/66 to the 2nd Respondent to whom the title has been transferred and registered. The 1st Respondent maintained the 1st Applicant had no interest in the suit property as the same was not a matrimonial property. Further the 1st Respondent averred that the Applicants suit constituted an abuse of the court process and was barred by reason of Section 93 of the Law of Succession Act, Cap 160 Laws of Kenya.
6. The 2nd Respondent in her replying affidavit to the originating summons deponed that the 1st Respondent as one of the administrators of the estate of one Teresia Nyanhero Matundura approached her and informed her he was desirous of disposing the $\frac{1}{3}$ share of LR No. Kisii Town/Block 11/66 that had been awarded to him. The 2nd Respondent stated she entered into a sale agreement with the 1st Respondent to purchase the suit property for the consideration of Kshs.2, 000, 000/= as per the agreement dated 31st January 2013 ("AOI"). The sale transaction was completed and the 2nd Respondent was duly registered as the owner of the property. The 2nd Respondent averred she was a bonafide purchaser of the suit property and contended that she hold an indeasible title to the property.
7. The originating summons was heard by way of oral testimony and both Plaintiffs and both Defendants testified in support of and in opposition to the summons.
8. PW1 Sarah Moraa Moracha in her testimony stated that the 1st Respondent was her husband with whom they had been blessed with 5 children who are now all adults. The witness essentially reiterated the contents of the affidavit in support of the originating summons which was summed up in her witness statement dated 10th March 2014 which she adopted as her evidence before the court. It was PW1's evidence that her husband (1st Respondent) was following succession proceedings in Kisii High Court Succession Cause No. 62 of 2009 awarded $\frac{1}{3}$ share of LR No. Kisii Municipality/Block 11/66 to hold in trust for their sons and grandsons. The witness stated that the 1st Respondent in breach of his duties and obligations as such trustee sold and transferred the property to the 2nd Respondent without any consent from the beneficiaries and/or the family. The 1st Plaintiff/Applicant thus sought the annulment of the transfer of the suit property in favour of the 2nd Respondent and the restoration of the same to the beneficiaries.
9. In cross examination PW1 stated that of their 3 sons only one of them was married and only had 3 daughters and no sons. She admitted there were no grandsons. She stated further that one of the sons, Boniface Onsongo had as at the time she filed suit not attained the age of majority. The witness denied the sons had granted the 1st Respondent consent and/or authority to sell the suit property.
10. PW2 testified that he was the son of the 1st Respondent. He adopted his filed witness statement as his evidence. He stated his father was to hold the suit property as trustee for his sons and grandsons. He denied that he signed the consent dated 5th April 2013 and stated that his signature on the document must be a forgery. He however said he had not made any report to the police relating to the forgery claims.
11. The 1st Respondent testified as DW1. He stated the suit property was initially owned by 3 people namely Siro Mogaka, Sospeter Moindi and Johnson Matundura. He testified that his deceased father Johnson Matundura held $\frac{1}{3}$ share in the property which was transferred to him following succession. He stated this was the share he sold and transferred to the 2nd Respondent, Anne Ondiek. The witness relied on the contents of the replying affidavit he swore in opposition to the originating summons dated 14th March 2014 and on the documents annexed thereto. The witness stated he discussed with his sons before he sold the $\frac{1}{3}$ share to the 2nd Respondent and that the sons agreed and gave him the authority to sell. He said the sons signed a consent as per letter dated 5th April 2013 ("DEX6"). The witness further testified that the sons had subsequently sought to renege from the consent but the consent was upheld in the succession case vide a ruling delivered by Hon. Lady Justice Sitati on 6th March 2014. ("DEX7"). The witness maintained his sons had voluntarily given their consent for the sale of the property and that he had lawfully sold the property to the 2nd defendant.
12. In cross examination DW1 admitted he was to hold the land in trust for his sons and grandsons as per the certificate of confirmation of grant issued in the succession cause. He denied he abused the trust as he insisted the sons agreed to the sale. He stated he had no grandsons as at the time the transaction was conducted.
13. DW2 Anne Ondiek the 2nd Respondent in the suit testified that she purchased $\frac{1}{3}$ share of land parcel Kisii Municipality/Block 11/66

from the 1st Respondent. The 2nd Respondent relied on the contents of her replying affidavit sworn on 14th March 2014 and the bundle of documents annexed thereto in her evidence. She maintained that she followed due process in purchasing the property. She stated the 1st Respondent as the administrator of his deceased father's estate had authority to deal with the property. The witness stated that the 1st Respondent was holding the $\frac{1}{3}$ share of the suit property in trust for his sons and grandsons. The sons consented to the sale and hence there was no impediment to the sale. She stated she paid Kshs.2 million for the property.

14. The parties filed their final written submissions following the conclusion of the trial. The Plaintiffs' submissions were filed on 14th April 2019 while the Respondents' submissions were filed on 27th August 2019. I have reviewed and considered the pleadings, the oral evidence and the submissions by the parties and the following stand out for determination:

(i) Whether the Plaintiffs had the requisite locus standi to initiate the instant originating summons?

(ii) Whether the 1st Respondent had the authority of the beneficiaries of the trust/subject to which he held $\frac{1}{3}$ share of L.R No. Kisii Municipality/Block 11/66 to sell the property to the 2nd Respondent?

(iii) What reliefs and/or orders should the court grant in the present suit?

Locus standi of the 1st plaintiff

15. On the pleadings and the evidence adduced by the parties there is no dispute that the 1st Plaintiff was the wife of the 1st Respondent of many years though the evidence was that they have been estranged since the 1990s and they were not living together. The 1st Plaintiff and the 1st Respondent are not formally divorced nonetheless. Both the 1st Plaintiff and the 1st Respondent were blessed with 4, if not 5 children. The 1st Plaintiff stated the children were 5 while the 1st Respondent asserted they were 4. What was not disputed was that there were 3 sons out of their relationship and the 2nd Plaintiff was the 2nd born son. Also not disputed was the fact that as at the time the suit was filed the couple did not have any grandsons. This is relevant because the 1st Respondent was granted $\frac{1}{3}$ share of the suit property in the succession cause to hold in trust for the sons and the grandsons.

16. On the issue whether or not the Plaintiffs had the locus standi to institute these proceedings, it is necessary to revert to the grant of confirmation of grant issued in Kisii High Court Succession Cause No. 62 of 2009. Both the Plaintiffs and the Defendants exhibited the Certificate of Confirmation of Grant dated 17th December 2012 in regard to the estate of Theresa Nyanchiru Matundura (deceased). As per the distribution schedule appended to the certificate of confirmation the 1st Respondent was awarded $\frac{1}{3}$ share of LR. No. Kisii Town/Block 11/66 that belonged to the deceased to hold in trust for his sons and grandsons.

17. The 1st Plaintiff as per the Certificate of Confirmation of Grant was not a beneficiary either directly and/or under the trust created. The 2nd Plaintiff however being a son of the 1st Defendant/Respondent was a beneficiary under the trust. The 1st Plaintiff had no interest in the suit property and in my view did not have locus standi to institute the present suit in regard to the suit property. The 2nd Plaintiff being a beneficiary under the trust had a valid interest over the suit property and had the *locus standi* to bring the present suit.

Whether the 1st Respondent had authority to deal with the suit Property?

18. The main issue of contestation in this matter was whether the 1st Respondent having been constituted a trustee on behalf of his sons and grandsons in regard to the suit property, he had obtained their authority/sanction before he sold the property to the 2nd Respondent. The 1st Respondent maintained he obtained the consent and sanction of his sons to sell the property. The 2nd Plaintiff for his part insisted he never signed the letter of consent dated 5th April 2013 relied upon by the 1st Respondent in carrying out the sale transaction. The 2nd Plaintiff asserted the signature on the document ascribed to him was a forgery. The contents of the said letter were as follows:

MR. ISAIC ISABOKE MORACHA

SMART NGARE MORACHA

ONSONGO MATUNDURA MORACHA

c/o P.O Box 310 – 40200

KISII

5TH APRIL 2013

THE DISTRICT LAND REGISTRAR

KISII CENTRAL LAND REGISTRY

P.O BOX

KISII

DEAR SIR/MADAM,

RE: CONSENT TO TRANSFER

LR NO. KISII TOWN/BLOCK II/66 (1/3 SHARE THEREOF)

We, the undersigned, are the sons of one Julius Moracha Matundura, who is the registered proprietor to LR NO. KISII TOWN/BLOCK II/66 (1/3 SHARE THEREOF), located within Kisii Town.

We write to confirm that our father herein entered into a land sale agreement with one Mrs. Anne Ondieki, whereby our father has sold the 1/3 share, over and in respect of the subject parcel of land

In the premises, we the undersigned, do not have any objection to the portion of land herein, that is, the 1/3 share thereof, being transferred and registered in the name of the purchaser.

We shall appreciate your valuable assistance.

Yours faithfully.

SIGNED

MR. ISAIC ISABOKE MORACHA

SIGNED

SMART NGARE MORACHA

SIGNED

ONSONGO MATUNDURA MORACHA

19. As per the letter the 3 sons of the 1st Respondent were according their consent to the transfer of 1/3 share of the suit property to Anne Ondieki with whom the 1st Respondent had entered into a sale agreement. The Land Registrar apparently acting on this consent proceeded to effect the transfer of the suit property to the 2nd Respondent.

20. The Plaintiffs in the present matter appeared to be content by alleging fraud or forgery on the part of the 1st Defendant/Respondent in transferring the suit property to the 2nd Respondent. **Was forgery proved on the part of the 1st Defendant/Respondent?** In the evidence adduced the 2nd Plaintiff stated that he signed documents by thumb printing and could not sign at all. He stated he left school at standard 2. The record however shows that the 2nd Plaintiff on 15th April 2015 signed an affidavit in support of the Notice of Motion of even date seeking directions on the originating summons. Although the 2nd Plaintiff further in his evidence stated he had not reported any forgery claims to the police there is evidence notably as per the ruling delivered by Sitati, J on 6th March 2014 at paragraphs 13 and 14 that such a report was made by the 2nd Plaintiff vide **OB 16/6/26/6/13** at Kisii Police Station. The 1st Respondent affirmed in his evidence that indeed such report was made to the CID in 2013 but he was not found culpable and/or charged with any criminal offence.

21. The Plaintiffs had further hinged their challenge on the consent on the fact that one Onsongo Matundura Moracha who was shown as having executed the consent was a minor. The Plaintiffs submitted Onsongo Matundura was only 12 years as at the time he was alleged to have signed the consent. The Plaintiffs argued that since he was a minor he could not give a valid consent. The Defendants for their part submitted that Onsongo Matundura was not a party to the proceedings and that the Plaintiffs could not purport to represent him unless they had complied with order 32 Rule 1 of the Civil Procedure Rules which requires that a minor be represented by a “**next friend**” who should further sign a written authority in case the suit is instituted through an advocate for his name to be used as a next friend of an infant.

22. I am in agreement with the defendants counsel’s submission that the plaintiffs could not have purported to represent the interests of a minor in the instant suit without complying with the law. Besides at the time the suit was heard as from 11th June 2019 Onsongo Matundura who was said to have been born on 28th March 2001 had attained the age of majority. **If he had any issue with the consent why he was not called to testify? And still why was Isaac Isaboke Moracha, the 2nd plaintiff’s elder brother who also signed the consent not called to testify?**

23. The burden to prove that the letter of authority/consent exhibited as “**DEX6**” was a forgery lay with the 2nd plaintiff who alleged that it was a forgery. Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya outlines who bears the burden of proof and I set out the provisions hereunder:-

Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he

asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

24. Allegations of fraud and /or forgery are serious allegations as criminal imputation is implied. The standard of proof where fraud or forgery is alleged has to be at a higher pedestal than mere proof on balance of probability. In the case of *Virani T/a Kisumu Beach Resort – Vs- Phoenix of East Africa Ltd (2004) 2 KLR 269* the court of Appeal held :-

“Fraud is a serious quasi -criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegations”.

25. The 2nd plaintiff in the present matter merely alleged forgery of the letter giving the 1st defendant /respondent consent/authority to transfer the suit land. Without more, the allegation remained just a mere allegation. The allegation perhaps could be buttressed if a forensic expert’s report was obtained and/or if the other persons who were alleged to have signed the consent were called as witnesses. I agree with the observations expressed by **Mativo, J** in the case of *Hellen Wangari Wangechi –vs- Carumera Muthoni Gathua (2015) eKLR* where he stated:-

“--the starting point is that whoever desired any court to give a judgment as to any legal right liability, dependant on the existence of fact which he asserts, must prove that those facts exists. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person”.

26. Having regard to the evidence adduced by the plaintiff, I am not satisfied the plaintiffs proved the impugned letter of authority/consent was forged. In the premises I hold and find that the 1st defendant /respondent had the authority /consent to transfer the suit property to the 2nd defendant/respondent. Having come to the conclusion that the 1st defendant/respondent had the mandate and authority to deal with the 1/3 share of the suit property it follows that the sale of the property to the 2nd defendants/respondent cannot be impugned.

27. The 2nd defendant/respondent acted on the representation made to her by the 1st respondent that he had authority to sell the suit property. The certificate of confirmation of grant clearly showed he was awarded 1/3 share of L.R No. Kisii Town/block11/66 albeit to hold in trust for his sons and grandsons. One of the sons **Isaac Isaboke Moracha** was a witness to the sale agreement dated 31st January 2013 and was shown to have signed the letter giving the 1st Respondent authority to sell. The letter of authority/consent by the sons dated 5th April 2013 satisfied to discharge the obligation of the 1st defendant/respondent as a trustee. In those circumstances the 2nd defendant/respondent was a bona fide purchaser for value without any notice of any defect in title and would be entitled to the protection of the law. To the extent that no evidence of collusion between the 1st defendant/respondent and the 2nd defendant /respondent is demonstrated, even it was found the 1st respondent had acted without authority, the 2nd defendant/respondent could properly have invoked the protection afforded to a purchaser under section 93 of the Law of Succession Act Cap 160 Laws of Kenya.

28. For the reasons that I have discussed herein-above it must have become evident that the plaintiffs

29. Suit is unsustainable. It is my determination therefore that the plaintiffs have failed to prove their suit on a balance of probabilities and I accordingly order the same dismissed.

30. Costs are at the discretion of the court and having regard to the attendant circumstances and considering the relationship of the parties, I direct that each party bear their own costs of the suit.

31. It is so ordered.

JUDGMENT DATED AND SIGNED AT NAKURU THIS 9th DAY OF OCTOBER 2019.

J M MUTUNGI

JUDGE

JUDGMENT DELIVERED AT KISII THIS 18th DAY OF OCTOBER 2019.

J ONYANGO

JUDGE