



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 149 OF 2017**

**DAVID KIMOYE KALANI.....PLAINTIFF**

**VERSUS**

**MAILU MUTHUSI.....DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 6<sup>th</sup> August, 2014, the Plaintiff has averred that he is the registered proprietor of land known as Mavoko Town Block 3/9282 (*the suit property*); that the Defendant and his family have invaded the suit land and that the Defendant should be restrained from entering onto the suit property.
2. In his Defence and Counter-claim, the Defendant averred that it is not true that the Plaintiff is the registered proprietor of the suit land; that the suit land belonged to his grandfather, Muinde Ndulika, by virtue of the shares he owned in Lukenya Co-operative Society and that by the time his grandfather died, he had not finished paying for his shares.
3. According to the Defendant, upon the demise of their grandfather, his sons agreed to top-up the balance due to Lukenya Co-operative Society by contributing equally; that his uncle, Mbuto Muinde, was unable to raise the money towards the top-up and that he agreed with his uncle to pay up his share and would in turn get half of his share of the suit property.
4. The Defendant finally averred that upon sub-division of the suit property, he took possession of the same; that he settled on the suit property in the year 2002; that the Plaintiff does not hold a good title to the suit property and that the suit property was registered in favour of the Plaintiff fraudulently.
5. The Plaintiff, PW1, informed the court that he is the registered proprietor of parcel of land known as Mavoko Town Block 3/9282; that a Title Deed for the said land was issued in his favour on 5<sup>th</sup> May, 2011 and that he purchased the suit land, then known as Plot No. 4400, from Maithya Muthusi who was a member of Lukenya Ranching & Farming Co-operative Society.
6. It was the evidence of PW1 that when he went to erect beacons around the suit land, he found the Defendant has trespassed on the land and built some iron sheets structures thereon and that the Defendant should be evicted from the land.
7. In his evidence, the Defendant, DW1, informed the court that the suit land is his ancestral land which was owned by his grandfather, Muinde Ndulika, by virtue of being a member of Lukenya Co-operative Society; that his grandfather died in 1972 and that by the time he passed on, he had not paid up for his share.
8. DW1 informed the court that his grandfather's sons, including his father, who are seven (7) in number, agreed to top-up the balance of his late grandfather's shares; that he entered into an Agreement with one of his uncle, Mbuto Muinde, who was unable to pay for his share and that his uncle agreed to share the land with him.
9. It was the evidence of DW1 that the family shared the land that was allocated to them by the Society equally and that he thereafter settled on the land in the year 2002. According to DW1, he has developed the portion of the suit land that was allocated to him by building a permanent house thereon and that his uncle has instituted another suit being CMCC No. 1647 of 2009 over the suit land.
10. The Defendant stated that the suit land belongs to his late grandfather and not Maithya, who is his son. DW1 stated that he inherited the suit land from his father and that all the documents pertaining to the suit land are with the family. DW1 informed the court that the Plaintiff's title should be cancelled by the court.
11. DW2 stated that he is a member of Akitondo clan; that in December, 2008, a dispute arose within the family of Muinde Ndulika

involving the Plaintiff and the Defendant over the suit land and that the clan found that the suit land belonged to the Plaintiff's grandfather, Muinde Ndulika.

12. According to DW2, the clan found out that at the time of death of the Plaintiff's grandfather, he was in arrears; that one of the Plaintiff's uncle was unable to raise the share that he required to pay and that he agreed with his nephew, the Defendant, to assist in paying for his share on condition that they will share the suit land equally.

13. According to DW2, the clan agreed that the Defendant and his uncle should share the suit land equally by getting four (4) acres each and that the suit land is the Defendant's ancestral land.

14. In cross-examination, DW2 stated that the dispute that arose in the year 2008 over the suit land was between the Defendant and a lady (*and not between the Defendant and the Plaintiff*); that the Plaintiff is not a family member and that the clan resolved the dispute in favour of the Defendant.

15. The Plaintiff's advocate submitted that Maithya Muthusi was a member of Lukenya Ranching & Farming Co-operative Society Limited (*the Society*); that the said Maithya sold the suit land to the Plaintiff and that the Plaintiff produced a Certificate of Title which shows that he is the registered proprietor of the suit land.

16. Counsel submitted that the Defendant failed to produce evidence to show that the suit land belonged to his late grandfather, Muinde Ndulika and also failed to prove that the Plaintiff acquired the title to the suit land fraudulently.

17. The Defendant's advocate submitted that the Plaintiff did not produce evidence to show that he purchased the suit land from Maithya Muthusi; that the purported Title Deed was issued to the Plaintiff fraudulently and that the suit should be dismissed.

18. The Plaintiff informed the court that he purchased the suit land from one Maithya Muthusi who was member number 647 of Lukenya Ranching & Farming Co-operative Society. According to the Plaintiff, he purchased the said land vide an Agreement dated 5<sup>th</sup> October, 2009.

19. On the other hand, the Defendant's case is that the land belonged to his late grandfather; Muinde Ndulika, who died in 1972. It was the evidence of the Defendant that by the time his grandfather died, he had not paid up for his share entitling him to the suit land to Lukenya Co-operative Society Limited. That is when his seven (7) uncles agreed to contribute and pay up for the same.

20. According to the Defendant, one of his uncle, Mbuto Muinde, was unable to raise the amount that each son was to contribute towards the purchase of the share belonging to his late grandfather.

21. Neither the Plaintiff nor the Defendant produced evidence to show who between the said Muinde Ndulika and Maithya Muthusi was a shareholder at Lukenya Ranching & Farming Co-operative Society. Indeed, none of the parties called any official of the Society to testify.

22. The Plaintiff produced in evidence the Title Deed that was registered in his name after the purported purchase of the suit land. According to the said Title Deed, parcel number Mavoko Town Block 3/9282 was registered in favour of the Plaintiff on 5<sup>th</sup> March, 2011. That is the Title Deed that the Defendant is seeking to have cancelled for having been procured fraudulently.

23. Section 24(a) of the Land Registration Act provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land. Section 25 and 26 of the same Act provides that the registered owner of land has absolute rights in the said land to the exclusion of everybody else. Under the said provisions of the law, the Certificate of Title is conclusive proof of ownership of land. Such a title can only be nullified where there is evidence to show that it was obtained through fraud or mistake.

24. Having alleged that the Plaintiff procure the Title Deed that was issued to him fraudulently, the burden of proving that the said Title Deed was procured fraudulently was on the Defendant. In the case of *Central Bank of Kenya Limited vs. Trust Bank Limited & Others, 1996 eKLR*, the Court of Appeal held as follows:

***“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case.”***

25. The Defendant having not produced any evidence to show that the suit land was ever registered in favour of his grandfather, and in the absence of evidence to prove that the suit land was registered in favour of the Plaintiff fraudulently or by mistake, his Counter-claim fails.

26. Indeed, the alternative prayer by the Defendant that he is entitled to the suit land by way of adverse possession cannot succeed. I say so because other than not proving that he has been in possession and occupation of the suit land for twelve (12) years, the Title Deed produced by the Plaintiff shows that the land was registered for the first time on 24<sup>th</sup> March, 2010 (*when the register was opened*). Consequently, a period of twelve (12) years had not lapsed from the time the suit land was registered and when this suit was filed.

27. For those reasons, I dismiss the Defendant's Counter-claim dated 1<sup>st</sup> July, 2015 and allow the Plaint dated 6<sup>th</sup> August, 2014 as follows:

***a. The Defendant, his agents, sons, daughters and any other family members acting under his directions be and are hereby restrained from trespassing on land known as Mavoko Town Block 3/9282.***

*b. An order of eviction be and is hereby issued against the Defendant.*

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

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4<sup>TH</sup> DAY OF OCTOBER, 2019.**

**O.A. ANGOTE**

**JUDGE**