



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO.161 OF 2015**

**JAMES MUTUKU NTHENGE (*Suing in his capacity as Administrator Ad litem*)**

***of the Estate of ESTHER MUMBUA NTHENGE (deceased) ..... PLAINTIFF***

**VERSUS**

**TITUS MUIA NTHENGE.....DEFENDANT**

**JUDGMENT**

1. In the Plaint dated 19<sup>th</sup> May, 2015, the Plaintiff (*deceased*) averred that she is the owner of a parcel of land known as Machakos/Kangundo/2262 and 2264 (*the suit properties*); that the suit properties were sub-divided and are currently registered in the names of her two sons one of whom is the Defendant and that the Defendant had the suit land fraudulently registered in his names.
2. It is the Plaintiff's case that the two titles that were issued to the Defendant and his brother being parcels of land known as Machakos/Kangundo/2262 and 2264 be merged into one and registered in her name.
3. The Plaint was amended on 29<sup>th</sup> December, 2017.
4. In his Defence, the Defendant averred that prior to the year 1994, the suit land was part of the Government Settlement Scheme that was not allocated to any particular individual although Nathan and Esther Nthenge had settled on the land; that during surveying, the late Esther Nthenge requested that the land be registered in his name and that of his brother and that when James Mutuku Nthenge raised a complaint with the Adjudication and Settlement Office, the dispute was settled in his favour.
5. The Plaintiff (PW1) informed the court that he is the second born child of the original Plaintiff who has since died; that the Defendant is his brother and that he later discovered that the Defendant had caused parcels of land number 2262 and 2264 to be registered into the Defendant's name and his name respectively.
6. It was the evidence of PW1 that the Defendant colluded with the surveyors and had their mother's land transferred to him; that when the clan summoned the Defendant, he refused to honour the summons and that it is her mother who was the owner of the land when the adjudication commenced. According to PW1, the entire family of the late Esther constitutes seven (7) children and that the land should be consolidated for re-distribution.
7. PW2 informed the court that the Plaintiff is his neighbour; that it was during the process of opening up a road on the suit land that they discovered that the Defendant had fraudulently caused his mother's land to be sub-divided into two portions and that the Defendant snubbed all the meetings that were called to resolve the dispute. According to PW2, the late Esther was the sole owner of the two suit properties.
8. The Chairman of Aombe clan, PW3, informed the court that the Defendant refused to attend the meetings that were called to resolve the dispute between him and his late mother and that the late Esther was the sole owner of the suit land.
9. The Defendant informed the court that during the adjudication, her late mother informed the committee that she wanted her portion of land sub-divided into two portions; that the land was to be registered in his name and that of his brother (*the Plaintiff*) and that she gave her identity card to the Adjudication Committee members. It was the evidence of DW1 that they are seven (7) children in their family.
10. The Defendant's other brother, DW2, stated he is the first born in the family; that he has settled on his land in Mitamboni; that his late mother informed him about the sub-division of the land into two in the year 1990 and that the Plaintiff and the Defendant agreed that the two portions should be registered in their respective names.
11. The Defendant's sister, DW3, stated that her mother informed her that she wanted the suit land divided into two; that the land was sub-divided in 1994 and that it is the Plaintiff who incited their late mother to sue the Defendant.

12. The member of the Adjudication Committee, DW4, informed the court that they commenced the adjudication process in respect to the suit land in the year 1994; that they found Esther on the land alone and that she called her daughter Martha (DW3) whereafter she told the committee that she wanted her land sub-divided into two portions.
13. It was the evidence of DW4 that Esther informed them that the rest of the children had been given land in other places and that the committee recorded the two as owners of the two portions of land.
14. The Machakos Land Adjudication and Settlement Officer, DW5, informed the court that according to the records they hold, the two suit properties are registered in the names of the Plaintiff and the Defendant respectively; that during the adjudication process, the two portions were registered in the names of the Plaintiff and the Defendant and that the demarcation of the land was done in 1982.
15. DW5 stated that there was no objection that was raised by the late Esther or the Plaintiff.
16. The Plaintiff submitted that the Constitution dictates that all children are beneficiaries to the property of their parents; that the two suit properties should be amalgamated so that all the children of Esther are provided for and that the suit should be allowed.
17. The Defendant submitted that the Land Adjudication Act provides clear guidelines and the process of adjudication; that the process that was followed in the adjudication of the suit land has not been challenged and that no evidence has been produced to show that the two title documents were issued fraudulently or by misrepresentation.
18. This suit was commenced by the late Esther Mumbua Nthenge, who is the mother of the current Plaintiff and the Defendant. She however died before the matter could be heard and was substituted by the current Plaintiff.
19. Both the Plaintiff and the Defendant are agreeable that the suit land initially belonged to their late mother. The evidence by the Plaintiff is that the Defendant misled the demarcation officers during the adjudication process and had the suit land sub-divided into two portions. According to the Plaintiff, the two properties were then registered in his favour (PW1) and in favour of the Defendant. It is the case of the Plaintiff that the said registration was fraudulent and should be cancelled.
20. The Defendant on the other hand informed the court that the land was sub-divided into two portions by the demarcation officers during adjudication with the consent of their late mother; that all his other siblings have other parcels of land and that the process of adjudication was never challenged pursuant to the provisions of the Land Adjudication Act.
21. The evidence before me shows that there was a dispute between the Plaintiff and the Defendant being claim number P/No. 2262 in 1994. According to the summons of the Adjudication Committee dated 10<sup>th</sup> July, 1994, it is the Plaintiff herein who had lodged the complaint with the committee. It would appear that the said complaint was never prosecuted by the Plaintiff or his mother.
22. The Adjudication process went on as scheduled. On 16<sup>th</sup> November, 2010, parcel number Machakos/Kangundo/2264 was registered in favour of the Plaintiff while the Defendant was registered as the proprietor of parcel of land number 2262. The Title Deeds for the two parcels were issued on 28<sup>th</sup> November, 2014.
23. It is trite that under Section 26(1) of the Land Registration Act, a title to land can only be defected if it is proved that the same was acquired fraudulently or by misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The burden of proving those elements lies with the Plaintiff.
24. Although the Plaintiff stated that the actions of the Defendant to have the suit land sub-divided into two portions has the effect of disinheriting the other siblings, none of the siblings of the late Esther testified to that effect. To the contrary, the first born of Esther, DW2, and his sister, DW3, informed the court that the other children of Esther have land in other areas.
25. The evidence of the then Land Committee member, DW4, was that it was Esther who agreed that the suit land be registered in favour of her two sons, the Plaintiff and the Defendant. Considering that Esther never filed objection proceedings since 1994 as required under the law, I am satisfied that indeed she is the one who authorized the sub-division of the suit land into two and the registration of the same in the names of the Plaintiff and the Defendant. If any differences arose subsequently between the late Esther and the Defendant, that cannot be a reason to have the Title Deeds cancelled.
26. The Plaintiff has therefore been unable to prove that the Defendant had the suit land registered in his favour fraudulently or by misrepresentation. Consequently, I dismiss the suit. Being a dispute between family members, I shall not award any costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2018.**

**O.A. ANGOTE**

**JUDGE**