



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO.169 OF 2017

JOHN MAKAI MUTHAMI.....PLAINTIFF

VERSUS

MBULWA MUTHIANI WAEMA.....DEFENDANT

JUDGEMENT

1. By his plaint dated 31/8/2010 and filed in court on even date, the Plaintiff prays for judgement against the Defendant for:-

a) A declaration that the Plaintiff is the sole proprietor of the whole land parcel known as Nzau/Nziu/223.

b) An order directing the Land Registrar Makueni to transfer the Defendant's share in land title no. Nzau/Nziu/227 to the Plaintiff.

c) Costs of the suit plus interest.

2. The Plaintiff's claim is denied by the Defendant vide her defence dated 17/9/2010 and filed in court on even date.

3. On the 5/12/2017 case was fixed for hearing on 6/3/2018 but come the hearing date, the Plaintiff sought for and was granted the last adjournment whereupon hearing was fixed for 3/5/2018. This was on account of the indisposition of the Plaintiff's counsel as well as the Plaintiff's failure to serve the Defendant with a hearing notice.

4. On the 3/5/2018, hearing proceeded in the absence of the Defendant and her advocate. The two had been served with a hearing notice for the said date as can be seen from the affidavit of service filed in court on 27/4/2018.

5. The Plaintiff adopted his two witness statements dated 5/12/2016 and 4/12/2017 respectively as his evidence. He also produced his 13 documents in his two lists of documents dated 5/12/2016 and 4/12/2017 as PEX Nos. 1 to 18 respectively.

6. His evidence was that he is the administrator of the estate of Daniel Muthami Mutyambwii who died on the 10/8/2011. That this suit was initially filed by Daniel Muthami Mutyambwii (*hereinafter referred to as the deceased*) against the Defendant herein. That land parcel number Nzau/Nziu/223 is ancestral and was acquired by one Loki who is his fore grandfather. He said that his late father and Muthiani Waema inherited separate parcels of Loki family land. That on 31/8/1974 the suit land was registered under the Registered Land Act in the joint names of one Muthiani Waema whose estate is represented by the Defendant herein and the deceased herein. The Plaintiff terms the act of registration of joint ownership as fraudulent since Muthiani Waema had his own parcel of land. The Plaintiff said that upon being substituted as the Plaintiff on 2/7/2013, he established that letters of administration had been issued to the Defendant in Machakos High Court Succession Cause no. 68 of 1992. He said that he filed an application to revoke the grant that was confirmed in the said Succession Cause no. 68 of 1992 on 20/1/2012 and the High Court ruled in his favour.

7. The Plaintiff called Paul Muteti Mutuku (PW1) as his sole witness. The witness told the court that he is the chairman of their clan known as Loki family. He went on to say that in the 18th Century, their fore grandfather, Loki, acquired a large tract of land within Nziu Location. That the said land was subsequently inherited by his family members who shared it amongst themselves before the adjudication process began.

8. That during the land adjudication which started in 1988, one Muthiani Waema wrongly caused his name to be included as joint owner of the parcel of land owned by Muthami Mutyambwii. He said that Muthiani Waema has his share of land under the house of Waema which is part of the Loki family and that the said Muthiani Waema and his family have never used Muthami Mutyambwii's land which was registered as title number Nzau/Nziu/223.

9. In his written submissions the Plaintiff's counsel cited Article 40(1) of the Constitution which provide; "**that subject to Article 65, every**

person has the right to either individually or in association with others, to acquire and own property of any description and in any part of Kenya.” The counsel went on to correctly submit that the rights under Article 40 do not extend to any property that has been found to have been unlawfully acquired. The counsel further cited section 26(1) (a) and (b) of the Land Registration Act which provides the grounds upon which the certificate and title of a proprietor can be challenged. He also cited section 80(1) of the same Act which gives the court the discretion to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

10. The counsel went to cite the case of *Elmbukara Ltd Vs Alice Waithira Kimani and 2 others [2017] eKLR* where the court adopted with approval the reasoning of Court of Appeal in *Munyu Maina Vs Hiram Gathiha Maina [2013]eKLR*. In the latter case, the Court of Appeal stated thus;

“When a registered proprietor’s root of title is under challenge, it is not sufficient for the registered proprietor to produce the instrument of title as proof of ownership. The court stated that in such circumstances, the registered proprietor must go beyond the instrument of title and prove the legality of how he acquired the title.”

11. Arising from aforementioned authority, the Plaintiff’s counsel submitted that the Plaintiff has proved beyond reasonable doubt that his father was the bonafide owner of all that land registered as Nzau/Nziu/223 having inherited the same from his fore grandfather Loki. The counsel added that the Defendant herein has not tabled any proof before this court of how Muthiani Waema came to be the joint owner of the aforementioned land. The counsel went on to submit that the Defendant has not specifically denied the particulars of fraud attributed to Muthiani Waema in the plaint and the same remain unrebutted and uncontroverted. The counsel further submitted that the Plaintiff has proved on a balance of probability that the registration by Muthiani Waema was obtained by fraud.

12. I have read the evidence on record as well as the submissions filed by the counsel for the Plaintiff. I have also looked at the averments in paragraphs 10 of the plaint and 5 of the defence and I do note that there is no evidence to support what the Defendant has pleaded in his defence. In the said paragraph 5 of the defence, it is averred as follows;

As regards paragraph 10 of the plant the Defendant denies its contents and states that after parcel Nzau/Nziu/223 was shared with the agreement of both parents of the parties it was registered in the joint names as common tenants in equal shares. Each party occupied his portion. The Defendant’s husband preserved his portion of land for grazing and cultivating only. The Plaintiff occupies his share.

13. I am in agreement with the Plaintiff’s counsel that the Defendant ought to have proved the legality of how he came to be the joint owner of the suit land as was held in the Court of Appeal’s decision that was referred to me.

14. Based on the evidence before me, I am satisfied that the Muthiani Waema Kalumo had his name fraudulently registered as a joint owner of the suit land during the adjudication process. Suffice it to say the Plaintiff has satisfied this court that he has a cause of action against the Defendant. In the circumstances, I hereby proceed to enter judgement for the Plaintiff and against the Defendant in terms of prayers (a), (b) and (c) of the plaint.

It is so ordered.

Signed, Dated and Delivered at Makueni this 25th Day of October, 2018.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF:

Mr. Nduva Kitonga for the Plaintiff

No appearance for the Defendant

Mr. Kwemboi Court Assistant

MBOGO C.G, JUDGE

25/10/2018