



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 3 OF 2010

BEATRICE NTHENYA NZUKI.....PLAINTIFF

VERSUS

FRANCISCA KAMENE KIIO.....DEFENDANT

JUDGMENT

1. In his Plaintiff dated 11th January, 2010, the Plaintiff averred that her late husband, Nzuki Mweu Mulonzi, was a brother of the late John Kiiio Mulonzi, the Defendant's husband and that the Defendant's late husband was chosen by the family members of Mulonzi Mutua Mulei who had four (4) male children to be registered as trustee of a parcel of land known as Plot No. 606 at Lukenya Ranching Company Limited which was subsequently registered as Mavoko Town Block 3/2450.

2. The Plaintiff averred that the Defendant's late husband agreed in writing that the suit land belonged to the family; that the said land measuring 40 acres was to be shared amongst her husband, the late Kithome Mulonzi and the Defendant's husband and that it was agreed that each family was to get 13.3 acres of the land.

3. According to the Plaintiff, upon the death of John Kiiio, the Defendant had the land fraudulently registered in his favour; that a declaration should issue to the effect that the suit land is family property which should be shared amongst the family members and that the suit should be allowed.

4. In her Statement of Defence, the Defendant averred that the registration of the suit land in her husband's name, being a first registration, is indefeasible; that the Plaintiff cannot lay claim to the Estate of Kasimu Mulonzi; that Kasimu Mulonzi's wife sold the rights of Kasimu to her husband and that the suit should be dismissed.

5. The Plaintiff, PW1, informed the court that her late husband was a brother of the Defendant's late husband; that their father-in-law was one Mulonzi Mutua and that she is the legal administrator of the Estate of her late husband. According to PW1, other than the Defendant's late husband, her other brother-in-law was the late Kasimu Mulonzi who died in 1983.

6. PW1 stated that when the late Kasimu Mulonzi died in 1983, family members met and decided that John Kiiio Mulonzi, the Defendant's husband, be the trustee of all the property of the said Kasimu Mulonzi; that an Agreement to that effect was reduced in writing on 22nd November, 1983 and that on 13th February, 1984, another Agreement was done in which it was agreed that John Kiiio and Mulonzi Mutua Nthei would be the trustees of the property of the late Kasimu Mulonzi.

7. After the death of her husband and her father-in-law, it was the evidence of PW1 that the family members agreed that John Kiiio Mulonzi be the sole trustee of Plot No. 606; that it was also agreed that the said land was to be shared between her husband, the late Kithome Mulonzi's family and the family of John Kiiio and that the said Agreement was witnessed by herself and the Defendant.

8. PW1 stated that the registration of the suit land in the name of John Kiiio was in contravention of the Agreement of 31st July, 2004 and that the registration of the land in the name of the Defendant after the death of John Kiiio was also fraudulent.

9. In cross-examination, PW1 stated that he filed Succession Cause No. 772 of 2008 in respect of her husband's Estate; that her father-in-law died in 1983 and that the suit land belongs to the Mulonzi family.

10. PW2 informed the court that the Plaintiff and the Defendant are his neighbours; that he was the Chairman of the meeting that was convened in July, 2004; that the meeting was convened by the Defendant's late husband in respect of the suit land and that they agreed in the meeting that the land should be sub-divided amongst the three (3) households of the Mulonzi family. It was the evidence of PW2 that the suit land should be divided equally and be shared by the families of Nzuki Mweu Mulonzi, Robert Kithome Mulonzi and John Kiiio Mulonzi.

11. The Defendant, DW1, informed the court that the Plaintiff's late husband was her brother-in-law; that the suit land was transferred in her

name after the succession proceedings in respect of her husband's Estate; that the suit land belonged to her late husband; that the Plaintiff was all along aware of the succession proceedings and that the land is currently registered in her name.

12. In cross-examination, DW1 stated that her husband bought the land from Kasimu before he died and that her husband never agreed that the suit land should be sub-divided amongst three (3) houses.

13. In his submissions, the Plaintiff's advocate submitted that the Plaintiff had established that the suit land originally belonged to the Plaintiff's father-in-law; that the land was then registered in favour of Kasimu Kithome Mulonzi and that the family members agreed that the suit land should be shared among the family members which included the Plaintiff's house, Kasimu and the Defendant's husband.

14. The Plaintiff's counsel submitted that the Defendant acted fraudulently by having the suit land registered in her name and that the Plaintiff is entitled to ? of the suit land.

15. The Defendant's counsel submitted that although the Plaintiff has alleged that the Defendant fraudulently registered the suit land in her name, no particulars of fraud have been pleaded in the Plaintiff; that the Defendant did not prove the allegations of fraud as against the Plaintiff and that the Plaintiff is divested of the *locus standi* having not stated the capacity under which she has filed the suit.

16. The Plaintiff's case is that the Defendant's late husband, John Kiio Mulonzi, was chosen by the family members of the patriarch, Mulonzi Mutua Mulei, to be registered as a trustee of Plot No. 606 at Lukenya Ranching Company Limited which became to be known as Mavoko Town Block 2/2450. According to the Plaintiff, the Defendant had the suit land fraudulently registered in her name.

17. The Plaintiff produced in evidence the Grant of Letters of Administration in respect of the Estate of her late husband, Nzuki Mweu Mulonzi, which were issued on 11th May, 2009 in Machakos Succession Cause No. 772 of 2008. According to the said Letters of Administration, the Plaintiff's husband died on 10th December, 1994.

18. PW1 produced in evidence the Minutes of 31st July, 2004 showing that the family of Mulonzi had discussed "*the issue of land at Lukenya.*" The said Minutes shows that the family and the elders had agreed that "*John Mulonzi should be in charge of the share of Kasimu Mulonzi on behalf of the whole family*" the said Minutes went further to state as follows:

"Today they have agreed that the 40 acres are to be divided among themselves and the plot measuring 50ft x 100ft be sold and shared by all."

19. Although John Kiio Mulonzi was in attendance, there is no indication that he agreed with the "*Ruling of the elders*".

20. Prior to the meeting of 31st July, 2004, the family of Mulonzi purportedly met on 22nd November, 1983 where it was agreed that "*the property of Kasimu Mulonzi who died on 11th September, 1983 should be administered by John Kiio Mulonzi...*" There was yet another meeting of 13th February, 1984 where the clan of Mulonzi agreed that the "*property of Kasimu Mulonzi should be administered by Mulonzi Mutua, father of Kasimu and John Kiio Mulonzi...*"

21. My reading of the Minutes/decisions of those three (3) meetings is that the clan elders were concerned with the property of Kasimu who seem to have died way before 1983. According to the Minutes of 13th February, 1984, Kasimu Mulonzi died on 17th September, 1983 and by which time his wife had deserted the matrimonial home.

22. None of the meetings that were convened by the elders indicated that the land in Lukenya Ranching belonged to the entire family. Indeed, none of the meetings mentioned the name of the Plaintiff's husband in respect of the suit land.

23. The evidence before me shows that the suit land was registered in favour of the Defendant's husband on 24th January 2006. When the Defendant's husband died, the suit land was transferred to the Defendant by way of transmission in Succession Cause No. 106 of 2009. During the said succession proceedings, there is no indication that the Plaintiff raised any objection to the administering of the suit land by the Defendant.

24. Indeed, PW1 admitted that she has already administered the Estate of her late husband who died in 1994. While administering the Estate of her late husband, the Plaintiff did not claim ? of the suit land as belonging to her husband.

25. The above chronology of events, and the documents produced by the Plaintiff and the Defendant shows that the suit land has never belonged to the family of Mulonzi. If anything, it is the late Kasimu who seem to have had an interest in the suit land, which interest the clan elders attempted to secure in all their three (3) meetings. Indeed, the Defendant stated that the wife of the late Kasimu sold the share that Kasimu had in the suit land to her husband, thus conferring the entire interest of the suit land to her late husband.

26. Considering that the Plaintiff is not the legal representative of the late Kasimu, I am convinced that the Plaintiff's late husband, or the entire family of Mulonzi (*except Kasimu*) did not have any interest known in law in respect of the suit land. Consequently, the Plaintiff cannot allege that the suit land was fraudulently registered in the name of the Defendant.

27. For those reasons, I find that the Plaintiff has not proved her case on a balance of probability. I therefore dismiss the Plaintiff dated 11th January, 2010 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE