



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 25 'B' OF 2017

BERNARD MUSYIMI MBWELI.....PLAINTIFF

VERSUS

MUSEE MBWELI NGAO.....1ST DEFENDANT

THE DIRECTOR OF LAND

ADJUDICATION & SETTLEMENT.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

JUDGEMENT

BACKGROUND

The plaintiff filed this suit against all the three defendants jointly and severally for the following orders:

- 1. A declaration that the plaintiff is the bona fide owner of land parcel no. Mwingi/Kanyaa/546 situated in Nzauni Sub-location and hence the purported transfer was and is invalid, illegal and fraudulent.**
- 2. Declaration that the 1st defendant registration as owner of parcel no. Mwingi/Kanyaa/3898 can only be in law in trust of the plaintiff hence the title deed ought to be cancelled.**
- 3. An order that parcel No. Mwingi/Kanyaa/3898 and Mwingi/Kanyaa/3899 are part of parcel No. Mwingi/Kanyaa/546 and Land Registrar Mwingi to rectify the register in favour of the plaintiff.**
- 4. An order directed at the 2nd and 3rd defendant's nullifying parcels Nos. Mwingi/Kanyaa/3898 and Mwingi/Kanyaa/3899 in and reverting the ownership to the plaintiff with the 1st defendant, signing any transfer of the aforesaid land in favour of the plaintiff.**
- 5. Any other relief in favour of the plaintiff.**

In paragraph 5 of the plaint herein, the plaintiff averred that at all material times he was the registered owner of land reference No. Mwingi/Kanyaa/546 situated at Nzauni Sub-location, Mwingi West Sub-county, Kitui County measuring approximately three (3) acres. The plaintiff further averred that he acquired the suit property after he bought it from one Mwala Kilungu in the year 1975 and that he has been in occupation of the same since then. The plaintiff also stated that on or about 2016, he visited the 2nd defendant's offices situated at Mwingi to inquire why his title deed was showing low acreage only to discover that after adjudication the 1st defendant through collusion with the 2nd defendant, his servants, agents, and/or employees subdivided his land parcel No. Mwingi/Kanyaa/546 into two portions namely Mwingi/Kanyaa/3898 and Mwingi/Kanyaa/3899. The plaintiff further averred that the said subdivision and transfer were unlawful and fraudulent and sets out particulars of fraud and illegality. In a statement of defence dated 28th August, 2017 and filed on 9th September, 2017 the 2nd and 3rd defendants denied the plaintiff's claim and all particulars of fraud and/or illegalities alleged thereof. The 2nd and 3rd defendants also filed a list of witnesses and a list of objection proceedings No. 97/87 parcel No. 546 MR No. AN 378708 Kanyaa Adjudication Section on 29/07/2017, the plaintiff made a request for interlocutory judgement against the 1st and 2nd defendants for failing to enter appearance and file defence within the stipulated period. On 29/8/2017 the Deputy Registrar of this Honourable court allowed the request and enter interlocutory judgement in favour of the plaintiff as against the 2nd and 3rd defendant. On 28/9/2017 the 2nd and 3rd

defendants filed a Notice of Motion under Order 10 Rule 8 CPA and Section 30 (2) (c) of the Government Proceedings Act seeking to set aside the interlocutory judgment entered on 29/8/2017. When that application came up for hearing on 9/10/2017, the same was allowed by consent of the counsels appearing for the plaintiff and the 2nd and 3rd defendants. When this case came up for hearing on 15/5/2018, and having satisfied itself that the defendants were all served with the hearing Notice, the court directed the case to proceed exparte.

PLAINTIFF'S CASE

The plaintiff in his sworn testimony stated that she bought the suit property on 28/7/1975 from one Mwala Kilangu. He produced an agreement in kikamba dialect which was translated into English by one Joel Kinyua advocate on 4/05/2017.

The plaintiff also referred to his witness statement filed in court on 9th May, 2017 which was adopted in evidence. The plaintiff stated that during the adjudication process, the land was registered in his favour but the same land was excused and given another number before being registered in the name of the 1st defendant who is his brother. He realised the fraud after he obtained his title. He then instructed his lawyer who wrote a demand letter to the Hon. Attorney General who wrote a reply. Both letters were produced in evidence.

The plaintiff want the two title deeds in respect of parcel no. Mwingi/Kanyaa/3898 and Mwingi/Kanyaa/3899 cancelled and the land reverted to the original No. Mwingi/Kanyaa/546. The plaintiff is also seeking costs of this suit.

PW2 was Joseph Muli who was the secretary who drew the sale agreement on 28/07/1975. He said that the purchase price was about Kshs.30,000/=. He said that the plaintiff bought the suit property before the adjudication process began three years later in 1978.

DEFENDANT'S CASE

The defendant did not tender any evidence as there was no attendance during the hearing date.

ANALYSIS AND DECISION

The plaintiff proceeded in this case exparte and called one witness in support of his claim. In his evidence, the plaintiff bought the suit property on 28th July, 1975 long before the adjudication process began. The plaintiff stated that during the adjudication process, the entire suit property measuring approximately 3 acres was registered in his name. Thereafter he went to wait for the title deed. It was not until 2016 when he discovered that his title deed was showing low acreage and went to inquire from the Director of Land Adjudication & Settlement Officer (2nd defendant) at Mwingi. It was then that he found out a web of fraudulent collusion between the 1st defendant and the 2nd defendant and/or employees subdivided the suit land into two parcels No. Mwingi/Kanyaa/3898 and Mwingi/Kanyaa/3899. The 2nd and 3rd defendant filed defence and a list of proceedings of objection No. 97/87 in respect of parcel No. 546 N.R No. AN 378708 Kanyaa Section Migwani location.

The nature of objection was sub-division. The plaintiff was indicated as Bernard Musyimi Mbweti represented by his wife Sisilia Kavane Musyimi while the defendant were given as Masaa Mbweti and Musee Mbweti represented by his wife Elizabeth Mumbee Musee. The plaintiff who was represented by his wife was sworn and stated that they wanted to have the suit property sub-divided into three portions. The defendants Masaa Mbweti and Musee Mbweti who was represented by his wife Elizabeth Mumbee Musee agreed with the request by the plaintiff and the Adjudication Officer allowed the objection for sub-division of parcel No. Mwingi/kanyaa/546 into three portions. Section 26 of the Land Adjudication Act Cap. 284 states as follows:

“26 (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of adjudication register is published object to the adjudication officer in writing saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under sub-section (1) of this Section, and after such further consultation and inquiries as he thinks fit he shall determine the objection”

Again under Section 29 of the said Act, the law states as follows;

“29 (1) Any person who is aggrieved by the determination of an objection under Section 26 of this Act may within sixty days after the date of the determination, appeal against the determination to the Minister by;

(a) Delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

When the plaintiff through his wife one Sisilia Kavane Musyimi raised an objection for subdivision of the suit property being objection No. 97/87, the defendant through his wife Elizabeth Mumbee Musee did not oppose the objection. Wherefore the Land Adjudication and Settlement Officer allowed the objection subdividing the suit property No. Mwingi/Kanyaa/546 into three portions.

The plaintiff has not appealed to the decision by the Land Adjudication and Settlement Officer as required under Section 29 of the Land Adjudication Act Cap.284 Laws of Kenya. The plaintiff has not also made any complaint to the police against his wife Sisilia Kavane Musyimi that she did not have his instructions to file the objection 97/87 which gave rise to the subdivision of the suit property. The plaintiff

has not even sued his wife as a party in these proceedings who had filed the objection on his behalf.

Before a party moves to the ELC for any orders, he should have exhausted the procedural mechanisms provided under the Land Consolidation Act which are also similar in all respect with those in the Land Adjudication Act Cap. 283 and 284 respectively. If the plaintiff was aggrieved by the decision of the adjudication officer at the objection level, he should have appealed to the Minister within sixty (60) days from the date of that decision. Failing to avail himself before the Minister in exercise of his statutory right, the adjudication register shall be final as indicated in Section 27 of the Land Consolidation Act Cap. 283 which states as follows;

“After the expiration of sixty days from the date of the certificate mentioned in Section 25 or on the determination of all objections in accordance with Section 26, of this Act, whichever shall be later, the adjudication register shall be final.”

As such the issues being raised by the plaintiff in this case are issues that ought to have been raised in Appeal to the Minister before the Adjudication Register was made final. I therefore find and hold that the issues being raised now ought to have been before the Minister or the Judicial Review Court before the expiry of the sixty days appeal period.

In the upshot I find this suit misconceived and an abuse of the due process. Consequently, I dismiss this suit with no order as to costs.

Read, Delivered and Signed in the open court this 17th day of October, 2018.

E. C. Cheron

ELC JUDGE

In the presence of:

1. Mr. Faruq holding brief Nzili for Plaintiff