



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 865 OF 2014

NTIRIKIMO OLE MATIPEI.....1ST PLAINTIFF

TAIKO GISA.....2ND PLAINTIFF

VERSUS

LASOI ENE MATIPEI.....1ST DEFENDANT

MATAYO TAMAI MASIKONDE.....2ND DEFENDANT

JUDGMENT

The Plaintiffs brought this suit on 1st July, 2014 seeking a declaration that they are the bona fide beneficiaries of the estate of the late Matipei Lankoi (hereinafter referred to as “the deceased”). The Plaintiffs also sought an order compelling the Defendants to subdivide all that parcel of land known as Kajiado/Mailua/1194 (hereinafter referred to as “the suit property”) into three (3) equal portions and to have two of the portions registered in their names as the owners thereof. The Plaintiffs averred that the 1st Plaintiff was a son of the deceased, the 1st defendant, a widow of the deceased while the 2nd Plaintiff and the 2nd defendant were grandsons of the deceased. The Plaintiffs averred that the deceased died intestate on or about 1982 and was survived by three (3) widows including the 1st Defendant. The Plaintiffs averred that the 1st Plaintiff was a son of one of the deceased’s widows, Ntakinda Ene Matipei while the 2nd Plaintiff was a grandson of the other widow of the deceased, Napante Ene Matipei. The Plaintiffs averred that the 1st Plaintiff’s mother, Ntakinda Ene Matipei and the 2nd Plaintiff’s grandmother, Napante Ene Matipei were both deceased.

The Plaintiffs averred that Matipei Lankoi (the deceased) owned among others the suit property. The Plaintiffs averred that the deceased was a member of Mailua Group Ranch and that the suit property was allocated to him by the said Group Ranch but he died before he was issued with a title deed for the property. The Plaintiffs averred that in 2004, Mailua Group Ranch (hereinafter referred to only as “the Ranch”) transferred and registered the suit property in the name of the 1st Defendant as the surviving widow of the deceased to hold in trust for other members of the deceased’s family.

The plaintiffs averred that without the knowledge of the other members of the deceased’s family, the 1st Defendant fraudulently transferred the suit property to the 2nd Defendant who thereafter sub-divided the same into two (2) portions namely, Kajiado/Mailua/3059 (hereinafter referred to only as “Plot No. 3059”) and Kajiado/Mailua/3060 (hereinafter referred to only as “Plot No. 3060”). The Plaintiffs averred that they were the bona fide beneficiaries and heirs of the estate of the deceased and were entitled to two thirds (2/3) of the suit property being the shares of the deceased’s two (2) deceased widows.

The Defendants were served with summons to enter appearance and they neither entered appearance nor filed statements of defence. When the suit came up for hearing on 6th February, 2018, the Plaintiffs’ advocate Dr. Momanyi informed the Court that 1st Plaintiff and the 1st Defendant had died during the pendency of the suit and that he wished to proceed with the suit by the 2nd Plaintiff only as against the 2nd Defendant. The 2nd Plaintiff gave evidence and called one witness. In his evidence, he adopted his witness statement that was filed in court on 1st July, 2014 together with the plaint. The 2nd Plaintiff’s witness was Dickson Kampata Gisa (PW 2). PW 2 also adopted his witness statement filed in court on 1st July, 2014 together with the plaint.

In their witness statements, the 2nd Plaintiff and PW 2 reiterated what the Plaintiffs had pleaded in their plaint which I have highlighted at the beginning of this judgment. The 2nd plaintiff produced in evidence as exhibits copies of the register for the suit property and the register for Plot No. 3059. The 2nd Plaintiff also produced the Registry Index Map for Mailua Adjudication Section. At the request of the court, the 2nd Plaintiff also produced the certificates of official search for Plot No. 3059 and Plot No. 3060 both dated 21st February, 2018. After the close of evidence, the 2nd Plaintiff’s advocate told the court that he wished to rely entirely on the evidence on record.

I have considered the Plaintiffs case as pleaded in the plaint and the evidence that was tendered by the 2nd Plaintiff in proof thereof. As I

have mentioned earlier, the 1st Plaintiff died while the suit was pending and he was not substituted. This judgment is therefore limited to the 2nd Plaintiff's claim. The 2nd Plaintiff's claim was grounded on the allegation that he was a beneficiary and heir of the estate of the deceased and that the 1st Plaintiff held the suit property in trust for him among others. Although the suit was not defended, the 2nd Plaintiff still had the burden of proving his case. The 2nd Plaintiff did not place any evidence before the court showing that the deceased was a member of Mailua Group Ranch ("the Ranch"). There was also no evidence showing that the deceased had been allocated the suit property by the Ranch. The 2nd Plaintiff did not also demonstrate that he was an heir or a beneficiary of the deceased's estate. No evidence was placed before the court concerning the administration of the estate of the deceased. In particular, the court was not told whether an administrator had been appointed in respect of the estate and whether the beneficiaries and their shares in the estate had been ascertained. In the absence of such evidence, the 2nd Plaintiff's claim that he was a beneficiary of the estate of the deceased had no basis. In any event, the 2nd Plaintiff could only claim his share in the estate of the deceased from the administrators of the estate. In the absence of any evidence that the 2nd Defendant was the administrator of the estate of the deceased, the 2nd Plaintiff's claim against him in relation to the estate of the deceased was a nonstarter.

The 2nd Plaintiff's claim was also based on customary trust. Trust must be pleaded and proved. The 2nd Plaintiff claimed that the suit property was registered in the name of the 1st Defendant to hold in trust for her and the other members of the family of the deceased, the 2nd Plaintiff included. Since the 1st Defendant is deceased and was not substituted, the court cannot make any finding against her. The 2nd Plaintiff's claim based on trust must fail in the circumstances.

The upshot of the foregoing is that the 2nd Plaintiff's claim is not proved. Even if I had found the case to have been proved, I would have had difficulty in granting the reliefs sought. The first prayer in the plaint seeks a declaration that the Plaintiffs are the beneficiaries and heirs of the estate of the deceased. This court has no jurisdiction to determine the heirs and beneficiaries of an estate of a deceased person. The prayer sought could not therefore have been granted by the court. The Plaintiffs also sought an order for the subdivision of the suit property into three (3) equal portions. The evidence placed before me shows that the suit property is no longer in existence. The register of the property was closed on 5th December, 2011 upon subdivision which created Plot No. 3059 and Plot No. 3060. The certificate of official search on Plot No. 3059 that was produced in evidence by the 2nd Plaintiff shows that the plot was transferred to a third party, George Ndula Meritei on 25th February, 2015. This plot is not in the name of any of the defendants. In the circumstances, the prayer sought with respect to the suit property cannot be granted as it does not exist.

In conclusion, it is my finding that the 2nd Plaintiff's claim has no merit. The same is dismissed accordingly. Since the suit was not defended, there shall be no orders as to costs.

Delivered and Dated at Nairobi this 15th day of November 2018

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Kimani h/b for Mr. Momanyi for the Plaintiffs

No appearance for the Defendants

Catherine - Court Assistant