



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC NO. 47 OF 2013

DAVID MUTISYA MUMO..... PLAINTIFF

VERSUS

ESTHER MBAIKA..... DEFENDANT

JUDGMENT

1. By an amended Plaint dated 18th February, 1999, the Plaintiff, now deceased but substituted, sought for the following reliefs:

- a. A declaration that parcel known as Mavoko Township/Block 2/112 and 8 are his properties.*
- b. Transfer of the same to him.*
- c. In the alternative, rectification of the register be done in his favour.*
- d. General damages.*
- e. Costs and interest.*
- f. Any other relief.*

2. The Plaintiff's claim is premised on the pleaded facts that, the plaintiff being a shareholder of Mitaboni Katani Co. Ltd, a land buying company, was entitled to be allotted 70 acres of land and be issued with title deeds for 50 acres and 20 acres.

3. The Plaintiff averred that in 1986, on the date of allotment of plot numbers by ballot, he appointed the Defendant who is his daughter in law to represent him in the exercise.

4. In 1994, he discovered that the Defendant deceitfully and wrongfully managed to have the title deeds registered in her names.

5. In the alternative, the Plaintiff pleads that the Defendant may have been registered as the owner of the suit property by mistake as she was not entitled nor had any legal right over them. In the further alternative, the Plaintiff averred that the registration may have been procured by the Defendant fraudulently or via false misrepresentation.

6. The Defendant denied the Plaintiffs' claim and filed a Defence dated 17th March, 1995.

7. Other than impugning the Plaintiff's advocate's conduct, the Defendant pleaded that via **Nairobi HCCC No. 6660/1992, herself vs Mitaboni Katani Co. Ltd**, she had the two title deeds in respect to the suit lands delivered to her and that the decree in that suit is undisturbed to date by either the plaintiff or Mitaboni Katani Co. Ltd.

8. The Defendant averred that the suit was instigated by the Plaintiff's advocate and that the ownership of the suit land was determined and the matter rested vide a final decree of 17th May, 1994, and thus the matter is *res judicata*.

9. The Plaintiff's case was set and narrated by Joseph Mutua Muinde who substituted the deceased Plaintiff. PW1 produced receipts of shares that were issued to the deceased Plaintiff and the copies of the title of the suit land. PW1 testified that the Defendant was instructed by the deceased to go and pick title deeds of the suit land on his behalf but instead got herself registered as the owner.

10. In cross-examination, PW1 said he was not present when the Defendant was registered as the owner.

11. PW2 was called to testify for the Plaintiff. PW2 said he was the chairman of Mitaboni Katani Co. Ltd and that he had a register of the members of the company who had shares. He produced the cash book which he said was a register of the members.

12. In cross-examination, PW2 said he did not have anything to show that he was the chairman of Mitaboni Katani Co. Ltd. He also stated that there was nothing to show that the cash book was the register of Mitaboni Katani Co. Ltd members nor was he the author of the same.

13. In her defence, the Defendant narrated how the shares which gave birth to the two parcels of land were bought on behalf of her husband who was in Uganda by her father in law, the deceased Plaintiff. DW1 informed the court that she had filed Nairobi HCCC 6660 of 1992 to get her ownership vindicated and the title documents released to her.

14. According to DW1, the Plaintiff knew of the existence of the suit but never joined the same to safeguard his interest. DW1 informed the court that there are decrees in the said suit and same have never been challenged by either the Plaintiff or Mitaboni Katani Co. Ltd. The preliminary and final decrees were produced as exhibits.

15. The parties agreed to put in written submissions which they filed and exchanged. I have considered the said submissions.

16. After going through the pleadings, proceedings/testimony adduced and the submissions, the court finds that the case turns on the following issues;

a. Whether failure to plead particulars of deceitfulness, mistake, fraud or false misrepresentation is fatal to the Plaintiff's claim.

b. Whether Plaintiff has proved his case on a balance of probabilities?

c. What is the order as to costs?

17. It is trite law that he who avers must prove. **Order 2 Rule 10** of the **Civil Procedure Rules**, formerly **Order VI Rule 8**, requires particulars of misrepresentation, fraud etc to be specifically pleaded. In the initial Plaintiff, the Plaintiff never set out the particulars of the alleged fraud, mistake or misrepresentation, thus breaching the aforesaid provisions of the law and the cited authorities. However, the Plaintiff pleaded the particulars of fraud in the amended Plaintiff dated 18th February, 1999.

18. The Plaintiff's case is based on two witnesses who testified as PW1 and PW2. It is unfortunate that the original Plaintiff died before giving his side of the story. PW1 stated that the Defendant went and misrepresented herself and got registered as the owner of the suit lands. That testimony by PW1 is

hearsay. PW1 agreed that he never witnessed the same.

19. PW2 never produced a authenticated register of the Mitaboni Katani Co. Ltd. PW2 only produced a cash book which never proved anything in support of the Plaintiff's case.

20. The evidence on record did not prove the Plaintiff's claim on a balance of probabilities. The defence on the other hand proved through credible evidence that the deceased bought shares for the Defendant's husband. The Defendant was then registered as the owner of the land. She was entitled to be so registered. She had given the deceased Plaintiff Kshs. 6,000/= for the shares.

21. The deceased Plaintiff failed to enjoin Nairobi HCCC. 6660/1994 nor challenge the decrees which gave the Defendant the titles to the suit land. He did not even sue Mitaboni Katani Co. Ltd which transferred the suit lands to the Defendant.

22. The two decrees in Nairobi HCCC. No. 6660 of 1992 are still undisturbed. In the case of **United Insurance Co. Ltd vs L.M. Wambua Nairobi HCCC.1472/00**, the court held that **"a judgment is conclusive between parties and their privies and conclusive against all the world of its existence, date and legal consequences unless it has been set aside or amended"** (Refer also to volume 26 of **Halsbury Laws of England (4th Edition 91979) at page 273**).

23. The upshot is that there was no prove of fraud or misrepresentation or mistake in the registration of the Defendant as the owner of the suit land.

24. Finally, as far as the decrees in HCCC.6660/1992 are undisturbed, the same vindicate the Defendant's right to the suit land as the registered owner. The end result is that the Plaintiff's suit is dismissed with costs.

It is so ordered.

Dated and Delivered at Machakos this 27TH day of JANUARY 2017.

O. A. ANGOTE

JUDGE