



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. CASE NO. 34 OF 2010 (O.S)

WILLIAM KIILU MBUVI.....1ST PLAINTIFF

TABITHA MUMBUA.....2ND PLAINTIFF

ROSE MUEKE.....3RD PLAINTIFF

MUUNDE MBUVI4TH PLAINTIFF

VERSUS

PETER NZYOKA MBUVI1ST DEFENDANT

MUANGE MUTISO.....2ND DEFENDANT

JUDGMENT

1. In the Originating Summons dated 12th February, 2010, the Plaintiffs are seeking for the determination of the following questions:

a. Whether parcel number Makueni/Kivani/357 belonged to the parties mother (Grace Mueke Mbuvi).

b. Whether the beneficiaries of Grace Mueke Mbuvi (deceased) are entitled to inherit land parcel number Makueni/Kivani/357.

2. The Originating Summons is premised on the grounds that so far as the transfer of the suit land was effected on 30th June, 2005 and a Title Deed issued on 21st April, 2009, the purported transfer is null and void because the rightful owner had died on 15th October, 1983; that the 1st Defendant caused the fraudulent transfer of the suit land with intend to defraud the Plaintiffs of their inheritance and that the suit land is registered in favour of the 1st Defendant as trustee for the Plaintiffs' benefit.

3. Although the Defendants were served with the Originating Summons, they did not file a Replying Affidavit.

4. The Originating Summons proceeded by any of *viva voce* evidence.

5. The 1st Plaintiff, PW1, informed the court that the 1st Defendant is his brother; that the 2nd Defendant

is a friend to the 2nd Defendant; that the other Plaintiffs are his brothers and that the 1st Defendant has sold a portion of the suit land to the 2nd Defendant.

6. According to the 1st Plaintiff, his father was the original owner of a bigger parcel of land and that before he died, he divided his land amongst his two wives.

7. It was the evidence of PW1 that in the year 1973, he accompanied his mother to the Land Adjudication office to have her name entered in the register as the sole proprietor of land parcel number Makueni/Kivani/357 and that in 2011, he learnt that the 1st Defendant had sold the land.

8. According to the Plaintiff, the 1st Defendant used to work with the Land Adjudication and that he fraudulently had the land registered in his name.

9. PW1 informed the court that he was born on the suit land in 1945 and that he has a permanent house on the land.

10. The 1st Plaintiff's wife, PW2, informed the court that they have a permanent house on the suit land; that the family has known all along that the suit land is registered in the name of her mother-in-law and that the land was unlawfully registered in the name of the 1st Defendant.

11. The 2nd Plaintiff stated that the 1st Defendant is his brother and that the suit land belonged to their late mother.

12. It was the evidence of PW3 that the 1st Defendant had the suit land fraudulently registered in his favour.

13. The Plaintiff's counsel submitted that Grace Mueke Mbuvi, who is the mother of PW1 and PW3 died in the year 1983; that the 1st Defendant did not produce evidence to show how the land passed to him and that the 1st Defendant took advantage of his position to have the land registered in his name.

14. The Plaintiffs are asking this court to determine the question of whether the suit property belonged to their late mother, and if so, if the beneficiaries of their late mother are entitled to the suit land.

15. The copy of the register and certificate of official search shows that the register in respect to the suit land was opened on 30th June, 2005. On 21st April, 2009, a Title Deed was issued in favour of the 1st Defendant.

16. Although the evidence of PW1 was that her mother's name was entered in the register in respect to the suit land during the adjudication process in 1973, the copy of the adjudication register was never produced in evidence.

17. Having claimed that the suit land was registered in favour of her late mother in 1973, it was incumbent for the Plaintiffs to produce evidence to that effect. Pursuant to the provision of Section 107 of the Evidence Act, whoever desires any court to give Judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exists.

18. Considering that under Section 27 of the Registered Land Act, the registration of a person as the proprietor of land rests in that person the absolute ownership of that land, it is the person claiming that such a title was obtained fraudulently or that the same is being held in trust, that should prove such an allegation. In the case of *Peter Kamau Njau vs. Emmanuel Charo Tinga (2016) eKLR*, the Court of Appeal held as follows:-

***“It was, with respect, a grave misdirection on the part of the learned judge to burden the Appellant to prove that the Ngaruiya's title to the original property was regularly obtained.*”**

Fraud must be pleaded with a great degree of particularity and to be proved by evidence on a standard heavier than on a balance of probabilities generally applied in civil matters... The learned judge was clearly misled by the statement of this court sitting at Nyeri in Munyu Maina (supra) in the passage reproduced earlier, which, in effect erroneously suggests that a document of title is worthless without further supporting evidence... In absence of evidence in rebuttal, it was in grave error for the learned Judge to impeach the Appellant's title in the manner he did..."

19. In the absence of evidence to show that the 1st Defendant procured the Title Deed in respect to the suit land fraudulently or mistake or that he is holding the said title in trust for the Plaintiffs, I find that the Plaintiffs have not proved their case to the required standards, notwithstanding the fact the suit is undefended.

20. For those reasons, I dismiss the Originating Summons dated 12th February, 2010 with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JUNE, 2017.

O.A. ANGOTE

JUDGE