



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

ELC NO. 599 OF 2012

BENSON NZAU KIAMBAPLAINTIFF

(Suing as the Administrator of the Estate

of the late Onesmus Kiamba Nzau)

VERSUS

DAVID MUTHAMA MALONZA.....DEFENDANT

JUDGMENT

BACKGROUND

The history of this matter is that a suit was filed before the Chief Magistrate's Court Machakos on 19/8/11 whereby defendant herein had sued Syokimau Farm Ltd as 1st defendant and Onesmus Kiamba Nzau as 2nd defendant. This matter was heard ex-parte and a decree was issued against defendant. The then plaintiff was praying for orders that:

- 1) A declaration that the plaintiff is the lawful owner of Land Parcel L.R. No. 12715/125
- 2) An order to the Registrar of titles Nairobi that the names of the 2nd defendant ONESMUM KIAMBA NZAU be cancelled and the Suitland L.R. 12715/125 be transferred by the 1st Defendant to the plaintiff and in default the court's executive officer does execute a transfer and all relevant documents to effect the aforesaid transfer to the plaintiff.
- 3) An order of permanent injunction be issued against the defendants their servants, agents and/or employees or any person claiming interest through the defendants from entering into, remaining on alienating, charging or in any manner whatsoever interfering with the Suitland L.R. No. 12715/125.
- 4) Costs of this suit
- 5) Any other relief that this court deems fit to grant.

The present plaintiff is the administrator of the estate of Onesmus Kiamba Nzau. He learnt that his father's land is the one that was being sold yet his father the said Onesmus Kiamba Nzau died many years ago.

After reporting the purported fraud in various forums, plaintiff filed this suit on 12/9/12.

PLEADINGS

Plaintiff pleads that he is the administrator of the estate of Onesmus Kiamba Nzau who died on 6/8/01.

Prior to the death of the said Onesmus Kiamba Nzau he was a member and shareholder of Syokimau Farm Ltd (hereinafter "the Company"). The company was the proprietor of a huge parcel of land known as L.R. No. 7149/11/R within Mavoko Township which is within the Nairobi Metropolitan area. The said parcel was subsequently sub-divided and the late Onesmus Kiamba Nzau was allocated Plot No. 81 during the balloting for the parcels of land given to shareholders.

Plaintiff filed an application dated 19/8/11 to serve the suit documents by way of substituted service through a local daily. This was allowed on 20/9/12. Plaintiff had also filed the usual application praying for a temporary injunction. It appears that this is the application which was initially served vide substituted service and orders were given on 9/5/13 where it was ordered that:

- 1) THAT the Defendant by himself, his servants or agents, and or any other party claiming title under him or otherwise connected with him howsoever be and is hereby restrained from entering into, alienating or in any other way interfering with parcel L.R. No. 12715/125 pending the hearing and determination of the suit.
- 2) THAT the original file in Machakos Chief Magistrate Court's Civil Case No. 652 of 2011 be availed to this court as an exhibit in this case.
- 3) THAT cost of the application shall be in the cause.

Thereafter, plaintiff's counsel realized that Summons to enter appearance were not issued and he applied for the reissue. A Return of Service dated 23/3/2014, confirms that Summons to enter appearance were eventually served through the Standard Newspaper.

However, defendant did not enter appearance or file any defence. The trial hence proceeded ex-parte.

EVIDENCE

During the trial, PW1 testified to the effect that he is a son of Onesmus Kiamba Nzau who died on 6/8/2001. Plaintiff relied on his statement and supporting documents dated 12/9/12. The documents were produced as exhibits 1-9. Plaintiff's evidence is that his father passed away on 6/8/2001. Deceased had been a member of syokimau Farm limited and had been allocated land parcel number L.R.12715/125. On 16/8/2013, plaintiff learnt that there were people who were attempting to possess the land of his father. While following up on the matter, he learnt that there was an imposter who was holding himself as plaintiff's father. When plaintiff reported the matter to the police at Athi River police station, he learnt that defendant herein had presented a court decree issued in Machakos CMCC No. 652 of 2011 which decree had purportedly vested the suit property to him. From there, plaintiff perused the Machakos court file and confirmed that indeed the proceedings had taken place. Plaintiff avers that the proceedings in the lower court were irregular as his father died many years ago in 2001.

DETERMINATION

Having gone through all the material evidence presented before this court, it is clear that Onesmus Kiamba Nzau died a long time ago in 2001 yet he is the one who was sued in the Chief Magistrate's court case No.652 of 2011 in Machakos. It is quite apparent that someone was fronting himself as Onesmus Kiamba Nzau. In the plaintiff's bundle of documents, there is exhibit 9, a letter dated 17/8/12 where Kimani Kiarie & Associates is writing to Wagara Koyyoko & Co. Advocates regarding the issue of existence of two Title Deeds. In the letter it is being suggested that the affected parties were at liberty to take up appropriate steps at Lands Office and with the Police as there were two title deeds that had

surfaced in respect of the suit land.

It is rather surprising that someone who had an advocate, who also had a court decree (from Chief Magistrate's Court, Machakos) did not pursue his claim before this court at any one time. No pleadings were ever filed by defendant here in. The logical conclusion to make is that defendant was aware of his fraudulent schemes. It is quite apparent that the purported transaction which occurred between defendant herein and the defendant in the Chief Magistrate's case were but sheer fraudulent schemes.

It follows then that the proceedings, judgment and the decree before the Chief Magistrate's Court are null and void in view of the fact that Onesmus was not alive during the lifespan of the Machakos case.

CONCLUSION

I find that on a balance of Probability, Plaintiff has proved his claim and I proceed to make the following orders:-

- 1) A permanent injunction do issue, restraining the Defendant/Respondent by himself, his servants, agents and or any other party claiming title under him or otherwise connected with him howsoever from entering into, alienating or in any other way interfering with parcel No. L.R. 12715/125.**
- 2) A declaration is hereby issued that the proceedings, judgment and decree in Machakos Chief Magistrate's Courts Civil Case No. 652 of 2011 are all a nullity *ab initio* and of no legal effect whatsoever, and that the Defendant/Respondent has no right whatsoever over the suit property.**
- 3) The claim for general damages is disallowed.**
- 4) Defendant is condemned to pay costs of the suit.**

DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2017

HON. L.N. MBUGUA

ELC JUDGE

IN THE PRESENCE OF:-

Mumia H/B for Wasanga for Plaintiff