



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 3 OF 2010 (OS)

N K G.....PLAINTIFF

=VERSUS=

1. M N K

2.M W W

3. T N K

4. L N G

5. J W K

6. H N N

7. B N

8. NI W M

9. S C K

10. E M.....DEFENDANTS

J U D G E M E N T

1. The Plaintiff filed the current Originating Summons on 13th January 2010. The 1st Defendant is his wife while the other Defendants are his children.
2. In the Originating Summons, the Plaintiff has raised the following issues for determination
 - a. ***THAT the Plaintiff/Applicant settled long ago in Mpeketoni within Lamu District and acquired three parcels of land namely; LAMU/LAKE KENYATTA/[Particulars withheld], LAMU/LAKE KENYATTA/[Particulars withheld] and LAMU/LAKE KENYATTA [Particulars withheld].***
 - b. ***THAT the Plaintiff/Applicant registered land parcel no. LAMU/LAKE KENYATTA/[Particulars withheld] in the name of M N K, the 1st Defendant, who is his wife.***
 - c. ***THAT the Plaintiff/Applicant is medically confirmed to be suffering from a kidney disease of a benign right kidney renal cyst in his abdomen.***
 - d. ***THAT the Plaintiff/Applicant has been medically advised to relocate from hot climate to cold***

- climate to recover and/or arrest the deteriorating condition of the growth of the renal cyst and live where medical services fitting the Plaintiff's medical condition are available.*
- e. ***THAT the Plaintiff/Applicant who has given out and distributed to his daughters and sons the other two (2) parcels land has a right to dispose of and/or sell land parcel NO. LAMU/LAKE KENYATTA/Particulars withheld] in order to obtain finance to enable the Plaintiff/Applicant to relocate from Mpeketoni to up country in cold climate and acquire another land for settlement.***
 - f. ***THAT the Plaintiff/Applicant having distributed and given out parcel land NO. LAMU/LAKE KENYATTA [Particulars withheld] to all his daughters and LAMU/LAKE KENYATTA/[Particulars withheld] to all his two sons one who is a minor be allowed to dispose of LAMU/LAKE KENYATTA [Particulars withheld].***
 - g. ***THAT the Defendants/Respondents have no right to stop the Plaintiff/Applicant from disposing of and/or selling his own property to relocate and acquire another land elsewhere in a cold climate place due to his health condition as advised by medical experts.***
3. The Originating Summons is supported by the Plaintiff's affidavit. The Plaintiff has deponed that he acquired three (3) parcels of land which he duly developed by farming. The parcels of land referred to by the Plaintiff are:-
- (a) Lamu/Lake Kenyatta/[Particulars withheld]
 - (b) Lamu/Lake Kenyatta/[Particulars withheld]
 - (c) Lamu/Lake Kenyatta/[Particulars withheld]
4. The Plaintiff has deponed that Lamu/Lake Kenyatta/[Particulars Withheld] is registered in the name of his wife, the 1st Defendant; that he has distributed his other two parcels of land being Lamu/Lake Kenyatta/[Particulars Withheld] to all his daughters and Lamu/Lake Kenyatta [Particulars withheld] to his two sons, the 9th defendants and E G K who is serving a jail term.
5. It is the Plaintiff's deposition that he is suffering from a kidney disease and that after the tests and scanning, the ultra sound report revealed that he has a benign right renal cyst measuring 2.8 cm which was detected on 7th April 1988 and it has been growing rapidly.
6. As a result of the said benign renal cyst, he was advised by his doctor to relocate to a cold place with cold climate; that due to the hot climate, his aorta has continued being affected and that he had agreed with his wife in 2008 for them to relocate from Mpeketoni and find a new home in Central Province upon selling one of the parcel of land being LAMU/LAKE KENYATTA/[Particular withheld].
7. The Plaintiff has further deponed that after agreeing with the 1st Defendant to relocate, the 1st Defendant later on colluded with her daughters and her son, the 9th Defendant and they have prevented him from selling Lamu/Lake Kenyatta/[Particular withheld] while his health is deteriorating and that he does not have any other source of income to enable him relocate and acquire another land in a cold place; that the Defendants do not have a reasonable cause or justification to obstruct him from selling the said parcel of land since he has already distributed to his daughters and sons other parcels of land that he has a right to sell his land to enable him relocate.
8. The Defendants were duly served. The firm of Nyakoe Macharia & Co. Advocates entered appearance on their behalf on 1st February 2010. The Defendants did not file a Replying Affidavit.
9. On 11th July 2010, Omondi J directed that the Originating Summons should proceed by way of Affidavit evidence and the Plaintiff was to adduce further evidence by way of viva voce evidence.
10. The matter came up for hearing on 11th July 2011 on which date the Plaintiff (PW1) and T A T (PW2) testified.
11. The Plaintiff (PW1) reiterated the averments of his Supporting Affidavit which I have reproduced above. He produced as exhibit number 1a, b and c copies of the title in respect of Lamu/lake Kenyatta/[Particulars withheld], Lamu Lake Kenyatta/[Particular withheld] and Lamu/Lake

- Kenyatta/[Particular withheld] respectively.
12. T A T (PW2) informed the court that he is a Radiographer with twenty one years' experience.
 13. PW2 testified that he examined the Plaintiff and discovered that the Plaintiff had a renal cyst on the right kidney and which required proper treatment; that the condition is aggravated by heat and may result in the removal of the kidney unless he moves to a cold area.
 14. The matter was adjourned at the instance of the Plaintiff's advocate who sought for time to call Dr. Mugo to testify.
 15. The matter went into a lull until 25th February 2012 when the Plaintiff filed a notice to act in person. He fixed the matter for hearing and served the 1st Defendant with a hearing notice of 17th July 2013.
 16. On 17th July 2013, the Plaintiff informed the court that he wished to rely on the evidence and affidavit on record.
 17. The Plaintiff has annexed on his Supporting Affidavit Title Deeds for Lamu/Lake Kenyatta/[Particulars withheld].
 18. The said parcels of land are registered in the names of the 1st Defendant and the Plaintiff respectively.
 19. The Plaintiff has also annexed a referral letter dated 15th August, 2008 by doctor Mugo who confirmed in writing that after conducting an ultra sound on the Plaintiff on 8th August 2009, he found that the benign right renal cyst which measured 2.8 cm as at 7th April 1998 had increased in size up to 4.7 cm due to the warm weather in Lamu. The doctor strongly suggested that the Plaintiff should relocate to a place with cold climate where the growth may be mitigated and where medical services fitting his medical condition are available.
 20. The Plaintiff's evidence and documents have not been controverted by the Defendants.
 21. The Defendants did not file a Replying Affidavit to show why they are opposed to the Plaintiff selling Lamu/Lake Kenyatta/[Particulars withheld] to enable him relocate and buy another land in a cold place as advised by his doctor.
 22. The Defendants' attitude and action can only amount to people who are not interested in the welfare of the plaintiff who went out of his way to acquire the three parcels of land and has had two of the parcels of land distributed amongst them.
 23. In the circumstances of this case, and considering that the Plaintiff requires urgent medical attention and to relocate to a place with cold climate, and considering that Lamu/Lake Kenyatta/[Particulars withheld] is registered in favour of the Plaintiff, I shall allow the Plaintiff's Origination Summons date 12th January 2010 in the following terms.

(a) The Plaintiff be and is hereby allowed by this court to sell land parcel number Lamu/Kenyatta/[Particulars withheld] in order to obtain finances to enable him relocate from Mpeketoni, Lamu to a cold place.

(b) The Land Control Board of the area in which Lamu/Lake Kenyatta/[Particulars withheld] is situated to grant the Plaintiff the consent to transfer Lamu/Lake Kenyatta/[Particulars withheld] notwithstanding the objection by the defendants to the said sale.

(c) Each Party to bear his or her own costs.

Dated and Delivered in Malindi this 31st day of July, 2013

O. A. Angote

Judge