



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 11A OF 2017

KYENGO MAITHA PLAINTIFF

VERSUS

PATRICIA NDUKI LAZARUS 1ST DEFENDANT

STEPHEN WAMBUA 2ND DEFENDANT

MWONGELA LAZARUS 3RD DEFENDANT

CELINA LAZARUS4TH DEFENDANT

MICHAEL LAZARUS5TH DEFENDANT

JAMES MAITHA.....6TH DEFENDANT

JUDGEMENT

1) By his plaint dated 26th January, 2017 and filed in court on the 27th January, 2017 the Plaintiff prays for judgment against the Defendants jointly and severally for:-

a) A declaration that land parcel no. Makueni /Kilome/510 is solely and legally owned by the Plaintiff.

b) An eviction order against the Defendants over land parcel no. Makueni/Kilome/510.

c) A permanent injunction restraining the Defendants either by themselves, their servants, relatives and/or agents from trespassing into and/or interfering with Land Parcel no. Makueni/Kilome/510.

d) Costs and interest of the suit.

2) The claim is denied by the Defendants in their joint statement of defence dated 26th July, 2017 and filed in court on even date.

3) During the hearing which took place on the 27th February, 2018 the Plaintiff adopted his statement dated 26th January, 2017. He also produced his documents in his list of documents dated 26th January, 2017 and filed in court on the 27th January, 2017 as PEX Nos. 1 to 17 respectively. He went on to produce four (4) other documents in his further list of documents dated 9th October, 2017 as PEX Nos. 18 to 21.

- 4) His evidence was that he is the sole legal and registered owner of land parcel number Makueni/Kilome/510. He said that the late Lazarus Mutua Musyoka was the son of his late brother. He added that he was the one who took care of his nephew and later gave him temporary use of the said Makueni/Kilome/510. That he also advised the late Lazarus to buy his own land. That the latter died while he and the Defendants herein were in the process of vacating the Plaintiff's land parcel number Makueni/Kilome/510.
- 5) The Plaintiff has accused the Defendants of unlawfully, intentionally and without colour of right of cutting down his trees, digging terraces, grazing, putting up structures and carrying out other acts of waste and destruction on the land without his consent.
- 6) He pointed out that he neither sold his land to the Defendants nor to their father.
- 7) In his further statement, the Plaintiff told the court that land parcel number Makueni/Kilome/510 was registered in his name by his uncle, one Kithyoko, and that no family member questioned Kithyoko nor did they file any complaint with Ministry of Lands and Survey.
- 8) The Plaintiff's evidence in cross-examination was that title deed to land parcel Makueni/Kilome/510 was issued to him on the 15th April, 2015. He said that the land initially belonged to one Kithyoko who received him as well as one Kasive Maitha and Mbula Maitha after they were evicted from Major Joyce's farm in 1940. He said that apart from the title deed, he had nothing to show that the land in question was given to him by Kithyoko Kyende. He said that Mutua Maitha who is his brother was received together with his wife in plot number 507. That he and others did not initially settle in plot number 510. He said that he wrote several letters to the late Lazarus and could not tell why the letter (PEX No. 5) that he wrote in 1981 looks new. Regarding the minutes marked as PEX no. 15, the Plaintiff told the court that he would not call one Douglas M. Kauwa and George who prepared and confirmed the minutes respectively as his witnesses. The Plaintiff went on to say that the late Lazarus replied to some of his letters. He revealed that the Lazarus who is the father of the 2nd to the 5th Defendants died on 28/11/2013 way before he (Plaintiff) acquired the title deed. He said that he was aware that the Defendants have built permanent houses on the suit land since the 1970s. According to him, the late Lazarus was taken to him in 1970 and that the issues they discussed with Lazarus's uncle centered on the latter's circumcision, education and his future prospects amongst others. He revealed that he did not object to the burial of Lazarus and his mother in the suit land. The reason that he gave for his non objection was that it was because he had by then withdrawn his consent for them to continue staying on the land. He said that he did not object to Lazarus building permanent houses because Lazarus had not indicated that he would not move out of the land in question. He disagreed with Mr. Nzioki's suggestion that plot number 510 was family land and that he waited for Lazarus to die before he could obtain a title deed. He further revealed that there were no boundaries on the suit land and denied that he co-owned the land with the family of Lazarus Maitha.
- 9) The Plaintiff's evidence in re-examination was that Mutua Maitha was received in plot number 507 after being expelled from Major Joyce's farm. He said that he did not write his letters to Lazarus with an eye to this case.
- 10) The 1st and the 6th Defendants testified on behalf of their co-defendants. They also called James Maitha (DW1) as their witness.
- 11) The 1st Defendant adopted her statement filed in court on the 6th November, 2017 as her evidence. In summary, she said that plot number 510 belongs to her family and that she and her children have resided on it since 1983. She said that there was no dispute touching on the land when her husband was alive. She went on to say that the Plaintiff and her late husband subdivided the land into two (2) portions and that this was done while she was still married to Lazarus. She said that since the suit property was family land, they did not see the need to approach survey department for title deed. It was also the 1st Defendant's evidence that prior to 2016, the Plaintiff had not invited her and her co-Defendants to discuss about the suit land. She said that when the Plaintiff served her and her co-Defendants with a letter to vacate the suit land, they sought the clan's intervention and denied having ever seen the numerous letters that the Plaintiff produced in evidence. It was also her evidence that her husband and the Plaintiff planted sisal boundary on the suit land that it is still in existence. She said that Kyengo holds the title to the suit land on behalf of the family and pointed out that they have built permanent houses on it since 1983.
- 12) Her evidence in cross-examination by Mrs Nzau for the Plaintiff was that she did not have the history of how the suit land was acquired. She said that the land was subdivided in the year 2007 and that the people who planted sisal plants on the boundary included her children and that the subdivision was done by the Plaintiff himself since her husband was away. She said that she did not know the size of the two parcels. She went on to say that she did not complain to the lands officers after she learnt that the Plaintiff had a title deed to the land. She said that she did not know how her husband came to be on the suit land but she pointed out

that he was born on it. She admitted that her son by the name of Mwangela uprooted sisal plants that the Plaintiff had planted near her house. She said that the Plaintiff had extended the boundary by moving it near her house. She said that she has 3 houses and other structures on plot number 510. She denied having ever dug terraces on the plot in question but asserted that she makes use of the trees that are in her portion of land.

13) Her evidence in re-examination was that her husband was not present when the subdivision of the land took place as he was away on duty. She said that he was however represented by his children. She said that she only makes use of the trees in her portion of land and that the sisal plants were uprooted after the Plaintiff moved the boundary. She said that terraces were in place by the time she got married to Lazarus.

14) James Maitha who is the 6th Defendant herein adopted his statement filed in court on 20th September, 2017 as his evidence. It was to the effect that his grandfather is a brother to the Plaintiff herein. According to him, plot number 510 was initially allocated to one Mbula Maitha who was the mother of his grandfather as well as the Plaintiff. The 6th Defendant went on to say that Mbula Maitha was a sister to Kithyoko Kyende and that the latter was the one who allocated the land to her. The 6th Defendant revealed that he learnt about the land allocation from Mbula. He said that in 1975, the family entrusted the Plaintiff to acquire title deed on behalf of the family. He further said that the family did this despite the fact that Mbula was still alive. He went on to say that the suit land was subdivided in the year 2007 and that it was the Plaintiff himself who approached his father with the offer of subdivision. He said that he and his brothers participated in the subdivision exercise while the Plaintiff had his two (2) workers. He added that they marked the boundary and planted sisal plants on it. He said that the Plaintiff started to threaten the Defendants to vacate the suit land in 2016 after he acquired a title deed to the land. He revealed that the letters said to have been written to his father were never served upon him while he was alive and that he himself first saw the letters in question when he was served with summons. According to him, the Plaintiff's title deed was not meant to exclude Mutua's family from the land and asked the court to dismiss the Plaintiff's suit with costs.

15) His evidence in cross-examination by Mrs Nzau for the Plaintiff was that it was his grandmother who told him how their family left Major Joyce's farm before settling on the suit land. He said that the Plaintiff and the Defendants share the same homestead. He said that he did not participate in the meeting that empowered the Plaintiff to hold the land in trust for the family. He said that the terraces were done by his father.

16) His evidence in re-examination by Mr. Nzioki was that it was his grandmother who chose the Plaintiff to hold the title on behalf of the family.

17) Stephen Mutuku Mbau (DW1) in his evidence in chief adopted his statement filed in court on the 6th November, 2017 as his evidence. It is to the effect that the Plaintiff and the Defendant are his neighbours and clansmen. That they all reside in plot number 510 which was initially owned by one Kyithioko Kyende who was the brother of one Mbula Maitha. That Mbula was the mother of Kyengo Maitha. According to him, Kyithyoko allocated land to Mbula who proceeded to build a home on it. He said that Mbula had other children apart from Mutua Maitha and Kyengo Maitha. That Mutua and Kyengo married and built their houses on the land. That when Mutua died, he left his family which includes Nzioki Lazarus. That when the land was surveyed in 1975, Mbula decided to register it in the name of Kyengo since it had been decided that Kyengo was to hold the land on behalf of the family. He revealed that the practice then was to have one of the family members registered in trust for the other members. He revealed that on a day that he could not remember, he saw Lazarus and two of his children planting sisal plants on the land. That Lazarus's home though built near that of Kyengo, is distinct from the latter. That there was no dispute over the land when Lazarus was alive.

18) Stephen's (DW1) evidence in cross-examination was that Mbula was the one who was allocated the land.

19) In her submissions, the Plaintiff's counsel framed the following issues for determination:-

1. What is the applicable law on registered land.

2. Whether the Plaintiff's ownership was obtained by fraudulent means as claimed by the Defendants.

3. Whether the Plaintiff holds the suit property in trust for the Defendants.

4. Whether the Plaintiff is entitled to the orders sought.

20) Regarding the first issue the counsel submitted that the applicable law is the Land Registration Act, 2012 and proceeded to cite sections 24 to 29 of the Act. She quoted the case of *Obiero V Opiyo (1972) EA 222* which affirmed absolutism of the rights of a registered proprietor and pointed out the same applies herein for the Plaintiff. She also cited the case of *Esiroyo Vs Esiroyo [1973] EA 388*.

21) On the second issue, the counsel submitted that there was no evidence to show that the Plaintiff obtained title deed through deceit, trick or dishonest means.

22) On whether or not the Plaintiff holds the title in trust, the counsel submitted that the Plaintiff explained how he came to be registered as the proprietor of the suit land and as such, he does not hold the same in trust of the Defendants. .

23) The counsel concluded by urging the court to grant the Plaintiff the orders sought in his plaint. There were no submissions by the Defendants.

24) Having evaluated the evidence on record as well as the submissions, it is a fact that both the Plaintiff and the Defendants reside on the suit land. It is also not in dispute that the Defendants have built permanent houses on the suit land even though the Plaintiff says that they did so with his permission.

25) The Plaintiff admits that Lazarus who is the husband of the first Defendant and father to the other Defendants grew up on the suit land. Nowhere in his evidence did the Plaintiff inform the court that he had a discussion with Lazarus when he was alive with a view to causing him to move out of the suit land. The Plaintiff's conduct clearly shows that he held in trust for the Defendants. He did not bother to find out from Lazarus why he never replied to any of his letters. In my view, those letters were written by the Plaintiff with an eye to this case. Even though the Plaintiff is the registered proprietor of the suit land, I do believe the Defendants that from the circumstances and the evidence on record, he holds it in trust for them. The husband of the first Defendant and father of the rest of the Defendants built permanent houses on the suit land without the Plaintiff raising a finger.

26) I found the Defendants credible and candid witnesses as opposed to the Plaintiff who in my view is a liar.

27) The upshot of the foregoing is that the Plaintiff has not satisfied this court that he has a cause of action against the Defendants. His claim must therefore fail. In the circumstances, I dismiss the Plaintiff's suit with costs to the Defendants.

It is so ordered.

SIGNED, DATED and DELIVERED at MAKUENI this 20TH day of DECEMBER, 2018.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF :

Mr. Kioko holding brief for Mr. Nzau for the Plaintiff

Mr. Hassan holding brief for Mr. Nzioki for the Defendant

Mr. Kwemboi - Court Assistant

MBOGO C.G, JUDGE

20/12/2018



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