



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 191 OF 2015

GONA MABILO1ST PLAINTIFF

JULIUS GONA2ND PLAINTIFF

MESHA GONA MABILO3RD PLAINTIFF

-VERSUS-

TREVAN KATANA KAYEKA 1ST DEFENDANT

KUMASI KAWAWA BAJILA.....2ND DEFENDANT

KATANA GWAVU MWAZUMA3RD DEFENDANT

DAMA MUCHEWANI KAVUMBI4TH DEFENDANT

ANTHONY KADENGE CHUTA 5TH DEFENDANT

KARISA KIRAO MOMI 6TH DEFENDANT

JOSEPH KAINGU BAYA 7TH DEFENDANT

KAHIMDI KITSUTSU MANZI.....8TH DEFENDANT

SAMSON MANYESO KAYEKA..... 9TH DEFENDANT

ABALONE GUYO BAJILA..... 10TH DEFENDANT

KABIBI KAZUNGI NYANJE11TH DEFENDANT

LAND REGISTRAR – KILIFI12TH DEFENDANT

CHIEF LAND REGISTRAR13TH DEFENDANT

DIRECTOR OF SURVEYS, KENYA 14TH DEFENDANT

THE ATTORNEY GENERAL OF KENYA 15TH DEFENDANT

JUDGMENT

1. By their Complaint dated and filed herein on 21st October 2015, Gona Mabilo, Julius Fondo Gona and Mesha Gona Bilo (*the Plaintiffs*) pray for Judgment against the fifteen (15) Defendants herein jointly and severally for:

(a) An order compelling the 1st to 11th Defendants to surrender their title documents to the 12th Defendants for cancellation and in the alternative their title documents to be declared null and void;

(b) An order for the Defendants to pay damages to the Plaintiffs; and

(c) Costs of the suit.

2. Those prayers arise from the Plaintiffs' contention that at all times material they were the registered owners of the parcel of land known as Malindi/Marereni Msumarini/795 whose title was issued by the 12th Defendant on 5th day of October 2010.

3. The Plaintiffs aver that sometimes in the year 2014, they discovered that the 12th Defendant had issued other titles to the 1st to 11th Defendants with separate titles of land which titles fall within the Plaintiffs parcel of land. It is the Plaintiffs' case that upon realising the errors, they called upon the Defendants to correct the same but they have to-date refused and/or neglected to do so.

4. But in their joint Statement of Defence dated 27th May, 2016 and filed herein on 30th May 2016, the 1st to 11th Defendants while admitting that the Plaintiffs are the registered proprietors of the parcel of land known as Malindi/Marereni/Msumarini/795 deny that they have any interest on the said parcel of land. On the contrary, the Defendants assert they are the registered owners of the parcels of land known as Malindi/Marereni/Msumarini/365, 712, 367, 790, 789, 291, 785, 775, 774, 776 and 366 which parcels of land are distinct and separate from the parcel claimed by the Plaintiffs.

5. The 12th to 15th Defendants neither entered appearance nor did they file a response to the suit.

THE PLAINTIFFS' CASE

6. At the trial herein the Plaintiffs called a total of three (3) witnesses who testified in support of their case.

7. PW1 – Gona Mabilo is the 1st Plaintiff herein. Relying on his statement dated 24th October, 2015 as filed herein on 27th October, 2015, PW1 testified that he and the other two Plaintiffs are the registered proprietors of the parcel of land known as Malindi/Marereni/Msumarini/795. He further told the Court they had been issued with title for the suit property on 5th October, 2014 after paying the necessary fees to the 12th Defendant.

8. PW1 further told the Court that subsequently thereafter they discovered that the 1st to 11th Defendants were issued with separate titles which titles are within their parcel of land. From then on, the Plaintiffs have called upon the 12th Defendant to correct the errors and/or mistake but they have refused and neglected to do so.

9. PW1 further testified that the Defendants had wrongfully entered their said parcel of land and had started cultivating the same.

10. On cross-examination, PW1 told the Court they had brought a Surveyor to the land and that the Surveyor had told them the Defendant's parcel of land was outside their land. The Defendants have however continued to occupy the said parcel of land.

11. PW2 – Mesha Gona Mabilo is the 3rd Plaintiff and a resident of Fundisha. He reiterated that the Defendants had encroached upon and were cultivating their parcel of land.

12. On cross-examination, PW2 told the Court he was unaware that each of the Defendants had their own separate parcel numbers.

13. PW3 – Julius Fondo Gona is the 2nd Plaintiff and a resident of Fundisha. He told the Court the Defendants had invaded their land and were now cultivating thereon. He told the Court he tried to stop the Defendants but they defied him.

THE DEFENCE CASE

14. The 1st to 11th Defendants entered appearance and filed a Statement of Defence. They did not however call any evidence at the trial. The 12th to 15th Defendants neither entered appearance nor did they file any defence. This matter accordingly proceeded by way of formal proof.

ANALYSIS AND DETERMINATION

15. I have carefully perused and considered the pleadings filed herein, the testimonies of the Plaintiffs witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions placed before me by the Learned Counsel for the Plaintiffs. The Defendants neither called any witnesses nor did they file any submissions herein.

16. The three (3) Plaintiffs have instituted this suit seeking an order to compel the 1st to 11th Defendants to surrender their title documents to the 12th Defendant for cancellation. In the alternative, the Plaintiffs urge that the title documents held by the said Defendants be declared to be null and void.

17. It is the Plaintiffs' case that they are the registered proprietors of the parcel of land known as Malindi/Marereni/Msumarini/795

measuring approximately 95.27 Ha. It is further the Plaintiffs' case that following their registration as the proprietors of the suit land on 5th October 2010, they subsequently came to discover that the Land Registrar Kilifi (*the 12th Defendant*) had issued other titles to the Defendants in regard to the same parcel of land but giving them different parcel numbers as follows:

- (i) Plot No. 368 to the 1st Defendant
- (ii) Plot No. 712 to the 2nd Defendant
- (iii) Plot No. 367 to the 3rd Defendant
- (iv) Plot No. 790 to the 4th Defendant
- (v) Plot No. 789 to the 5th Defendant
- (vi) Plot No. 291 to the 6th Defendant
- (vii) Plot No. 785 to the 7th Defendant
- (viii) Plot No. 775 to the 8th Defendant
- (ix) Plot No. 774 to the 9th Defendant
- (x) Plot No. 776 to the 10th Defendant
- (xi) Plot No. 366 to the 11th Defendant

18. The Plaintiffs told the Court that upon discovering what had transpired, they called upon the 12th Defendant to correct the anomalies but the 12th Defendant had refused and/or neglected so to do. The Plaintiffs further told the Court that in purported exercise of their rights as granted under the erroneous titles in their possession, the Defendants had since invaded the Plaintiffs' land parcel No. Malindi/Marereni/Msumarini/795 and had taken over the same and commenced cultivation thereof.

19. While admitting that the Plaintiffs are the proprietors of the said parcel No. Malindi/Marereni/Msumarini/795, the Defendants deny that they have any interest on the Plaintiffs said property. On the contrary, the 1st to 11th Defendants in their joint Statement of Defence filed herein on 30th May, 2016 aver that their own parcels of land as listed by the Plaintiffs are separate and distinct from the parcel of land claimed by the Plaintiff. They accuse the Plaintiffs of being mistaken about the situation of their parcel of land.

20. In support of their case, the Plaintiffs produced a copy of a Certificate of Official Search dated 2nd August, 2018. That Certificate reveals that the Plaintiffs are the registered proprietors of the suit land.

21. By an order issued herein on 30th May 2016, the Court directed that the District Surveyor and Land Registrar do visit the suit property and ascertain if it is distinct from the parcels of land claimed by the Defendants and to file a Report within 45 days in Court. While for some unexplained reason the matter was not in Court for another two years, the said Report was eventually filed on 20th June, 2018.

22. The said Report prepared by one Zaim Zuma for the District Surveyor Malindi and Magarini reads in the relevant portion as follows:

RE: GROUND REPORT ON PLOT NUMBERS 365, 712, 367, 790, 789, 291, 785, 775, 774, 776 AND 366 WITH RELATION TO 792 AND 795

Methodology:

The boundaries of the Plot were identified by the Surveyor with the assistance from the neighbours who were present on the time of the exercise. The boundary marks were picked using a hand held GPS and plotted. As per the ground, Plot 792 and 795 is bordered by plots 735, 376, 381, 382, 785, 791 and 784 on the ground and the RIM. The area of the title was checked and tallies with the Registry Index Map. The ground acreage was found to be the same of that of the title deed.

Findings:

- According to the survey done it shows that the plots of the defendants are well situated on the ground outside plots 792 and 795.
- The claimed areas are part of Plots 792 and 795 and not individual Plots as the Defendants claiming.

23. As it turned out the Defendants did not present to this Court an alternative Survey Report disputing the findings made by the Court

appointed Surveyor. The Survey having found that the areas claimed by the Defendants were part and parcel of the Plaintiffs' parcel of land, I did not find any basis upon which the Defendants have taken over and have been cultivating the Plaintiffs' parcel of land.

24. Again given the findings made in the Survey Report there was no basis for the 12th Defendant to decline to rectify the errors that were apparent on the titles held by the Defendants.

25. It follows therefore that I am persuaded that there is merit in the Plaintiffs' case. However, while the Plaintiffs also sought an order for damages against the Defendants, no basis was laid before me for the award of the same.

26. Accordingly an order is hereby issued compelling the 1st to 11th Defendants to surrender their title documents to the 12th Defendant for cancellation forthwith. In default, the said titles as held by the Defendants shall hence be deemed as null and void.

27. The 1st to 11th Defendants are hence required within 30 days from today to grant vacant possession to the said parcel of land to the Plaintiffs.

28. The Plaintiffs shall have the costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 28TH DAY OF APRIL, 2022

In the presence of:

No appearance for the Plaintiffs

No appearance for the Defendants

Court assistant - Kendi

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J. O. OLOLA

JUDGE