



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 218 OF 2018

TSADZA TSUMA.....1ST PLAINTIFF
NYAMVULA TSUMA.....2ND PLAINTIFF
RIZIKI TSUMA.....3RD PLAINTIFF
NJIRA TSUMA.....4TH PLAINTIFF

-VERSUS-

REGISTRAR OF LANDS KILIFI.....1ST DEFENDANT
SAID WASHE GURO.....2ND DEFENDANT
TINGA TSIMBA.....3RD DEFENDANT
COUNTY GOVERNMENT OF KILIFI.....4TH DEFENDANT

JUDGMENT

BACKGROUND

1. By their Complaint dated and filed herein on 4th December 2018, Tsadza Tsuma, Nyamvula Tsuma, Riziki Tsuma and Njira Tsuma (*hereinafter "the Plaintiffs"*) pray for Judgment to be entered against the four Defendants for:

(a) *The Registrar of Titles Kilifi to revoke title number Mgumopatsa/Mazeras/545 and then register it under the Plaintiffs names; and*

(b) *Costs and interest at Court rates.*

2. The Plaintiffs' claim arises from their contention that they are the beneficiaries of the estate of the late Tsuma Washe who was the proprietor of suit premises. The Plaintiffs accuse the 2nd and 3rd Defendants of fraudulently causing the 1st and 4th Defendants to register the said parcel of land in their name.

3. Those prayers are opposed by the Registrar of Lands, Kilifi (*the 1st Defendant*). In a Statement of Defence dated and filed herein on 26th March, 2019 by the Honourable the Attorney General, the 1st Defendant avers that the suit as filed does not disclose any reasonable cause of action as against the 1st Defendant and urges the Court to dismiss the same for being incompetent, bad in law and an abuse of the Court process.

4. The 1st Defendant further denies that the Plaintiffs are the administrators of the estate of the late Tsuma Washe and invites the Plaintiffs to strict proof.

5. Said Guro and Tinga Tsimba sued herein as the 2nd and 3rd Defendants respectively neither entered appearance nor did they file a Statement of Defence.

6. The County Government of Kilifi (*the 4th Defendant*) was initially opposed to the prayers sought by the Plaintiffs. In a Statement of Defence dated and filed on 20th September 2019, the County Government admitted that there were disputes regarding Plot No. 545 wherein the 2nd and 3rd Defendants had accused the 4th Defendant of refusing to compensate them after the adjudication process led to in certain irregularities as referred to in Paragraph 8 of the Plaintiff.

7. The 4th Defendant further asserted that it had noted from its records that the 2nd and 3rd Defendants went ahead and sub-divided the suit property without the approval of its predecessor, the County Council of Kilifi.

8. By an order made herein on 30th September 2019, the suit was referred to Court Annexed Mediation. A Mediator's Report dated 17th January, 2020 was subsequently filed in Court on 27th January, 2020 and was adopted as an order of the Court on 20th July, 2020. By the said Mediation Agreement, the Plaintiffs and the 4th Defendant agreed as follows:

1. That noting that the Plaintiffs have obtained interlocutory Judgment against the 2nd and 3rd Defendants herein namely Said Guro Washe and Tinga Tsimba respectively;

2. That after deliberations on the claim by the Plaintiffs to ownership of property known as Mgumopatsa/Mazeras/545 the suit property herein the County Government of Kilifi, the 4th Defendant herein hereby declares it no longer has any vested pecuniary or proprietary interest in the suit property.

3. That in view of the above, the 4th Defendant hereby cedes its interest as a registered co-owner of the suit property to the Plaintiffs herein and are in agreement that the Plaintiffs to be registered as administrators of the suit property in accordance with the grant issued in Mombasa High Court Succession Cause which grant was issued to the Plaintiffs;

4. That the Plaintiffs to proceed with the claim against any remaining party in the suit.

9. That being the case, the suit was subsequently set down for hearing as between the Plaintiffs on one side and the 1st, 2nd and 3rd Defendants on the other hand.

THE PLAINTIFFS' CASE

10. In support of their case, the Plaintiffs called a total of 4 witnesses who testified at the trial.

11. PW1 – Tsadza Tsuma is the 1st Plaintiff and a resident of Uwanja Wa Ndege. Relying on her statement dated and filed herein on 4th December, 2018, PW1 told the Court that they are the beneficiaries of the estate of the late Tsuma Washe.

12. PW1 testified that after obtaining a confirmed grant for the estate, the Plaintiffs who are widows of the deceased moved to the Kilifi Lands Office seeking for the title for the suit property to be transferred to their name. To their surprise, they discovered that there had been a number of irregularities and that the deceased's name did not feature on the title. PW1 told the Court it is then they discovered that the 2nd Defendant Said Guro Washe who is a younger brother of the deceased had presented himself as the son to the deceased and claimed the ownership of the suit property together with the 3rd Defendant.

13. PW2 – Nyamvula Tsuma is the 2nd Plaintiff and also a resident of Uwanja Wa Ndege. She told the Court that the deceased was also her husband and that the 2nd Defendant took their land while pretending to advise them on how to take ownership of the same.

14. PW3 – Riziki Tsuma is the 3rd Plaintiff and one of the widows of the late Tsuma Washe. She told the Court that when their husband died, the 2nd Defendant came in to help them. He later turned against the widows and sold the land. The Plaintiffs only learnt of this when they saw buildings being constructed on the land.

15. PW4 – Njira Tsuma is the 4th Plaintiff and also a resident of Uwanja Wa Ndege. She reiterated the evidence of her co-wives and told the Court their husband's land was sold by the 2nd Defendant who was a brother to the husband.

THE DEFENCE CASE

16. The 1st Defendant called one witness in support of their case while the 2nd and 3rd Defendants did not participate in these proceedings.

17. DW1 – Boaz Oketch Ndege Juma is the Land Registrar Kilifi. Relying on his Statement filed herein on 4th March, 2021, DW1 told the Court that the parcel of land known as Mgumopatsa/Mazeras/545 measures approximately 24.91 Ha and that the same was allocated to the County Council of Kilifi, Tinga Tsimba Benyae and Said Washe Gumo through a land adjudication process conducted on 8th March, 1993.

18. DW1 testified that from the records held at their office, two objections were filed to the adjudication process by both Tinga Tsimba (*the 3rd Defendant*) and Said Washe Guro (*the 2nd Defendant*). A determination was subsequently made in favour of the two after which the title register was opened on 5th March, 2005 in the name so the County Council of Kilifi, as well as the 2nd and 3rd Defendant.

19. DW1 further told the Court that on 20th November 2009, the suit land Mgumopatsa/Mazeras/545 was partitioned into four portions being

Mgumopatsa/Mazeras/1146 measuring 4.7 Ha, Mgumopatsa/Mazeras/1147 measuring 6.8 Ha, Mgumopatsa/ Mazeras/1148 measuring 0.00 Ha. and Mgumopatsa/Mazeras/1149 measuring 12.09 Ha.

20. DW1 told the Court that following the sub-divisions, portion No. 1147 was given to the 2nd Defendant, portion No. 1148 to Tinga Tsimba Benyae while portions Nos. 1146 and 1149 were given to the County Council of Kilifi. DW1 further testified that land portion No. 1147 belonging to the 2nd Defendant was on 4th January, 2010 further sub-divided into three portions being Mgumopatsa/Mazeras/1452, 1453 and 1454 which portions were thereafter transferred to third parties.

21. DW1 further testified that parcel No. 1149 registered in the name of the County Council of Kilifi was on 14th August, 2012 sub-divided into six portions being portion Nos. 1168 to 1173. The sub-divisions were transferred on diverse dates to various individuals by the Council. The portion number 1146 measuring 4.7 Ha. however remains in the name of the County Council.

ANALYSIS AND DETERMINATION

22. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial. I have equally perused and considered the rival submissions filed herein by both the Plaintiffs who were acting in person on the one side as well as the 1st Defendant. The 2nd and 3rd Defendants neither entered appearance nor did they take part in the proceedings herein.

23. By their Plaint dated and filed herein on 4th December 2018, the four Plaintiffs in their capacity as the widows and beneficiaries of the estate of the late Tsuma Washe have urged the Court to enter Judgment against the four Defendants herein and to have the title for land parcel number Mgumopatsa/Mazeras/545 revoked and that the same be instead registered in their names.

24. All the four Plaintiffs testified herein that they reside at Uwanja Wa Ndege and that the said parcel of land Mgumopatsa/Mazeras/545 belonged to their husband who from a perusal of a Grant of Letters of Administration Intestate issued to the Plaintiffs and produced herein, passed away on 28th October, 1993.

25. It was the Plaintiffs' case that the 2nd, 3rd and 4th Defendants had through fraud and misrepresentation caused the 1st Defendant herein to register the said parcel of land which belonged to their husband into the names of the said 2nd, 3rd and 4th Defendants.

26. As it turned out, the 2nd and 3rd Defendants never took part in these proceedings. On its part, the County Government of Kilifi (*the 4th Defendant*) entered appearance and conceded to a request to have this matter referred to mediation. From the Mediation Report prepared and dated 17th January, 2020 by the Court-appointed Mediator Ruth Chepkemboi Lutta, the 4th Defendant agreed to cede its interest as a registered co-owner of the suit property to the Plaintiffs and were further in agreement that the Plaintiffs be registered as administrators of the suit property in accordance with the Grant of Letters of Administration issued to the Plaintiffs on 24th November, 2017 in Mombasa High Court Succession Cause No. 154 of 2011.

27. The Land Registrar Kilifi County (*the 1st Defendant*) did not however take part in the mediation proceedings. Acting through the office of the Honourable the Attorney General, the 1st Defendant called one witness who testified herein and produced the records in their possession in regard to the disputed parcel of land.

28. In support of their case, the Plaintiffs produced a copy of a letter dated 20th April, 1993 written by the deceased Tsuma Washe Kajiwe and addressed to the County Council of Kilifi. The said letter reads in brief.

RE: PLOT NO. 545/UWANJA WA NDEGE

I am the resident of Uwanja Wa ndege Rabai, where I have stayed for a period of more than (20) twenty years.

I shall therefore be grateful if you will kindly allow me to be the registered owner of the Plot No. 545/Uwanja wa Ndege Trading Centre.

I am claiming for the portion where I stay and dig.

Your cooperation (sic) to this regards will be high appreciated.

Signed.

29. I was unable to find any evidence that the request by the deceased was responded to by the 4th Defendant's predecessor in title either in the affirmative or at all. That being the case, it would appear to me that as at the time of his death on 28th October, 1993, the deceased was not yet the registered proprietor of the suit property and his claim thereto remained merely aspirational.

30. From the material placed before me, it was apparent that the registration of the 2nd, 3rd and 4th Defendants resulted from an adjudication process conducted in the Mgumo Patsa/Mazeras Adjudication area. While the 2nd and 3rd Defendants did not testify herein, it was apparent from the evidence of the sole defence witness Boaz Okech Ndiege (DW1) that their registration as co-owners of the land resulted from a determination made in their favour in March, 1993 after they lodged objections to the adjudication process pursuant to the Land Adjudication Act, Cap 284 of the Laws of Kenya.

31. As at the time of the said allocation on 8th March, 1993, the Plaintiffs husband was alive and well as demonstrated by the fact that he wrote the letter dated 20th April, 1993 a month after the process was completed seeking to be allocated a portion of the land. There was no evidence placed before me to demonstrate that the Plaintiffs husband did lodge any objection to the adjudication process within the timelines provided under the said Cap. 284 or at all.

32. It was also evident that following the adjudication process, the register for the parcel of land known as Mgumopatsa/Mazeras /545 was opened on 5th March, 2005. A perusal of the Green Card produced by the Plaintiffs themselves in evidence reveals that the said title was closed and thus ceased to exist on 20th November, 2009 when the same was partitioned into four portions namely Mgumo Patsa/Mazeras 1146, 1147, 1148 and 1149. Title Deeds were subsequently issued for Mugumo Patsa/Mazeras/1146 and 1149 in the name of the 4th Defendant while portion numbers 1147 and 1148 went to the 2nd and 3rd Defendants.

33. That being the case, as at the time the Plaintiffs instituted the present suit on 4th December, 2018, the title Mgumopatsa/Mazeras/545 had not been in existence for some nine (9) years. By asking this Court to revoke the said title No. Mgumopatsa/Mzeras/545, in the names of the 2nd, 3rd and 4th Defendants and to instead have their names inserted as the proprietors thereof, the Plaintiffs are asking this Court to do the impossible. They have brought litigation in respect of a parcel of land that does not exist and the suit before me is therefore misconceived and incompetent.

34. Finally, by the Mediation Report filed herein on 27th January, 2020, the 4th Defendant agreed to cede its interest as a registered co-owner of the suit property to the Plaintiffs. It was however clear from the evidence of DW1 that while parcel numbers Mugumopatsa/Mazeras/1146 and 1149 had been registered in the name of the 4th Defendant, the 6th Defendant had on 4th August, 2012 sub-divided parcel number 1149 into six (6) portions being Portion Nos. 1168 to 1173. Those sub-divisions were subsequently transferred to different individuals by the 4th Defendants predecessor – the County Council of Kilifi. Those individuals have not been made parties herein and the Court cannot make any adverse findings on the said portions as to do so would amount to condemning the owners unheard.

35. At any rate, it was also clear to me that any land held by the 4th Defendant County Government is public land within the meaning of **Article 62(2) of the Constitution**. Such land under our laws is to be administered on behalf of the County Government by the National Land Commission. That being the case, and while it is clear that land parcel number Mugumopatsa/Mazeras/1146 still remains in the name of the 4th Defendant, it was evident that the 4th Defendant could not deal with the same in the manner they purported to do in the Mediation Report. In my view, it was only the National Land Commission which could dispose of the land in the manner proposed in the Report.

36. The upshot is that the Plaintiffs case must fail. I dismiss the same with no order as to the costs.

Judgment dated, signed and delivered virtually at Nyeri via Microsoft Teams this 28th April, 2022.

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendants

Court assistant – Kendi

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J. O. Olola

JUDGE