



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 251 OF 2004

SAID HAMADI MWASARIA.....1ST PLAINTIFF

KASSIM HEMED MWAMKWARI.....2ND PLAINTIFF

VERSUS

FATUMA OMAR ALL.....1ST DEFENDANT

ZEPHANIA NYAMWARO.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1. This suit was commenced on 19 November 2004 by way of plaint. In the plaint, the plaintiffs aver to be the registered owners of the land parcel Kwale/Ukunda/318 (Plot No.318) and the defendants are respectively said to be the owners of the land parcels Kwale/Ukunda/295 (Plots No. 295) and Kwale/Ukunda/2808 (Plot No.2808). The plaintiffs plead that they have been living on their parcel of land even before adjudication and that the extent of the boundaries are known. It is pleaded that on 25 June 2002, the District Surveyor Kwale, visited the parcels of land in issue with a view to show the parties their boundaries and it was found that the parcels of land overlap and that the map does not agree with the occupation on the ground. The plaintiffs contend that a recommendation was made, and that it was agreed, to have all the parcels of land consolidated and subdivided again, so as to comply with what is on the ground. It is pleaded that the defendants however changed their minds and no longer wish to have the consolidation and re-subdivision and the effect is that the plaintiff's land is taken partly by the 1st defendant and partly by the 2nd defendant, part of which includes the plaintiff's house. In the suit, the plaintiffs seek the following orders :-

(i) A declaration that the survey map in respect of the parcels of land known as Kwale/Ukunda/318, Kwale/Ukunda/295, and Kwale/Ukunda/2808 is faulty and needs correction.

(ii) An order of injunction restraining the 1st and 2nd defendants from demolishing, bringing down or in any manner committing an act against the plaintiff's houses and crops on the parcels of land aforesaid that would amount to eviction.

(iii) An order directing the defendants to consolidate the parcels and re-subdivide the same to agree with each partie' land on the ground.

(iv) Costs and interest.

2. The 1st and 2nd defendants filed a joint defence. It is pleaded that the Plot No. 295 is owned by the 1st defendant, Mariam Jumapili, and Ali Mwabeta Mwanachumbani Kipemba and that the Plot No. 2808 is owned by the 2nd defendant. They otherwise denied all the claims of the plaintiffs and put them to strict proof.

3. The 3rd defendant filed a defence where it pleaded that no cause of action is revealed against the 3rd defendant. It averred that its inclusion is to facilitate the implementation of any orders and sought that no costs be ordered against her.

4. PW-1 was the 2nd plaintiff. He stated that the 1st plaintiff is his elder brother. He is related to the 1st defendant as their grandmothers were sisters. He stated that the 1st and 2nd defendants are his neighbours. He testified that he has lived on the land since 1954. He thought that every person is settled on their rightful land only that the problem is with the survey map which makes the plots overlap. He stated that when

titles were issued they did a search and discovered that their plot NO. 318 has been given out to a person called Mohamed Mwachinono. They approached him and he stated that the plot does not belong to him but to his father. He thus surrendered it to the plaintiffs and transferred the land to the plaintiffs. He testified that the transfer was by way of gift, but to speed the process, a paper consideration of Kshs. 20,000/= was placed so that it may appear that they are purchasing the land. All along however, they were occupying the land. When they got title, they realised that the title does not tally with their ground occupation ; in other words, they occupied more ground than was reflected in the title. They filed suit before the Land Disputes Tribunal and an award was made. He thought that the Tribunal ruled in their favour and directed that a survey be done. The survey was done and a report prepared. His view was that the report found that every person was properly on their ground and that to solve the problem, the parcels of land need to be consolidated and subdivided afresh, according to the ground occupation. As they were finding ways to go about this, the 1st defendant placed a fence which affected their occupation. They came to court when it became apparent that they could not agree. He produced the proceedings and decision of the Land Disputes Tribunal and the report of the surveyor dated 16 September 2002. He acknowledged that before the surveyor did the report, he had tried to do so in vain, and he had several letters from the surveyor where the surveyor was giving notice to survey the land. According to him, he rightfully occupies an area measuring 54 X 32 metres but the title reads 20 X 32 metres, in other words, that the title reads less land than he occupies.

5. Cross-examined, he testified that the surveyor showed them the boundaries following the survey map, a position that they disagree with. He acknowledged having been charged and convicted with the criminal offence of tampering with survey marks. He was fined Kshs. 10,000/= which he paid. He stated that between him and the 1st defendant (Fatuma), it was him who settled on the land first. The land previously belonged to their grandfather. He stated that his father was given a portion and Fatuma's mother given her portion, and that on the ground, everyone is on their land. He denied that boundaries have been determined and fixed. He testified that the 2nd defendant became registered as proprietor of the plot No. 2808 in the year 1986. He himself got registered as proprietor of the Plot No. 318 in the year 1995 after the transfer from Mohamed Mwachinongo. Re-examined, he explained that Mwachinono gave the land back to them because he became registered as proprietor by mistake. He stated that they have houses on the Plot No. 2808 belonging to the 2nd defendant.

6. The 1st defendant in her evidence stated that she is cousin to the plaintiffs. She testified that the plaintiffs' elder brother, one Ali (now deceased) requested her mother to allow him build a house on her land and also sought to be allowed to put up a small shed for selling tomatoes. They later disagreed when the plaintiffs brought a surveyor to survey her land and the dispute was referred to the Tribunal. A surveyor later came and placed beacons but the plaintiffs removed them. They were charged and convicted. She stated that the plaintiffs have their land and that they have never agreed to consolidate and subdivide afresh. Cross-examined, she testified that the house that Ali built and the shed are on her land. She stated that what the plaintiffs have done is to add this portion to their land. She is of opinion that they want it because it is next to the road.

7. DW-2 was the 2nd defendant. He testified that he bought the Plot No. 2808 from one Mohamed Abbas in the year 1986 and he took possession. He was aware that the plaintiffs and 1st defendant have a dispute over their land and he also got involved. He called the surveyor to place beacons, which he did, but the plaintiffs removed them which led them to being charged in Kwale Criminal Case No. 571 of 2003. They were found guilty of tapering with survey marks contrary to Section 29 (a) of the Survey Act, Cap 299, Laws of Kenya. He denied any overlapping and stated that what the plaintiffs want is for the land to be beaconed according to their wishes and not following the official records.

8. With the above evidence, the defendants closed their case.

9. I invited counsel to file written submissions which they did, and I have taken account of these before arriving at my decision. It will be recalled that the plaintiffs' case is that the survey map in respect of the three parcels of land in issue is faulty and needs correction. The plaintiffs want orders to have the three parcels of land consolidated so that they can be subdivided to accord to the occupation on the ground. The position of the defendants is that the plaintiffs are occupying their land and what they want is not tenable.

10. I note that the dispute between the parties had been presented before the Land Disputes Tribunal and the Tribunal made a decision. Land Disputes Tribunals had been created by the Land Disputes Tribunal Act, Cap 303A (repealed in 2012 by the Environment and Land Court Act). The Jurisdiction of the Tribunals was set out in Section 3 of the Act which provided as follows :-

3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to—

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land,

shall be heard and determined by a Tribunal established under section 4.

11. In our case, a dispute was presented before the Msambweni Land Disputes Tribunal, being Case No. 4 of 2001. The complainant in that case was Fatuma Omari and others. It will be recalled that Fatuma Omari is the 1st defendant herein. She had sued Kassim Mwamkwari and Saida Mwasaria, who are the plaintiffs herein. I have gone through the proceedings. This is what the Tribunal partly stated in its findings:-

“As we have pointed out earlier that there is a confusion existing amongst the parcels of land No. Kwale/Ukunda/318, 295, 2808 and 303 which border each other. The portion of and which the plaintiff (Fatuma) alleges was grabbed from parcel No. Kwale/Ukunda/295 is part of land parcel No. Kwale/Ukunda/2808 while at the same time the owner of land parcel No. Kwale/Ukunda/2808 is occupying (sic) part of land parcel No. Kwale/Ukunda/295 bordering with Lunda lunga – Mombasa Highway. The owners of land Parcel No. Kwale/Ukunda/318 are also claiming part of the land No. Kwale/Ukunda/2808 to be part of their land, a fact which was proved wrong when we visited the land site. Both parties appear totally confused as they do not know

their lands so well. Similarly the owner of plot No. Kwale/Ukunda/2808 does not know his land and instead is occupying and using part of No. Kwale/Ukunda/295 which he claims to be his land. Accordingly, we have therefore established to be untrue that the defendants are occupying part of land parcel No. Kwale/Ukunda/295 but they are occupying part of land Parcel No. Kwale/Ukunda/2808. Portion of land the plaintiff claim (sic) to be part of land parcel No. Kwale/Ukunda/295 falls within Parcel No. Kwale/Ukunda/2808. That The fact that the two parties are quarrelling is that they do not know their parcels of land and secondly they do not know their common boundaries. It is our considered opinion that they should apply for the services of a land surveyor to show them their lands and common boundaries respectively. In this regard the claim by the plaintiffs that the defendants are using part of their land parcel No. Kwale/Ukunda/295 is dismissed.

12. It will be seen from the above that what the Tribunal thought was that the parties are not aware of the boundaries of their parcels of land and that they do not know their common boundaries. The Tribunal thus was of the view that a surveyor be engaged so that the parties can be shown their parcels of land and their boundaries. The Tribunal did not go any further than this and did not proceed to make any determination on ownership of the parcels of land and thus acted within its jurisdiction by referring the parties to have their boundaries surveyed and pointed out to them. The order issued by the Senior Resident Magistrate Kwale, following the award of the Tribunal was "that land surveyor was ordered and directed to act and show the plaintiff and defendants their lands and common boundaries respectively." No appeal was filed to contest this decision.

13. The District Surveyor Kwale did write to the parties on several occasions informing them of intention to fix for them their boundaries. I have seen his letters dated 14 May 2002, 16 May 2002, 23 May 2002, and 11 June 2002. In his letters, the District Surveyor vents his frustrations with the lack of cooperation by the plaintiffs to have the boundaries fixed. Nevertheless, it does appear that he did fix the boundaries on 25 February 2003 and placed beacons. These beacons were removed by the plaintiffs, who were clearly not happy with their positioning, which action led the plaintiffs to being charged in Kwale Criminal Case No. 571 of 2003 with the offence of tampering with survey marks contrary to Section 29 (a) of the Survey Act, Cap 299, Laws of Kenya. They were found guilty and fined KShs. 5,000/= each.

14. It will therefore be observed from the above, that the parties had a boundary dispute, and that the Tribunal made a finding for these boundaries to be fixed. The surveyor did fix the boundaries. It follows that the boundaries of the parcels of land in dispute are defined and known. One is only entitled to rights within the boundaries of the land that he/she owns. The plaintiffs in this case seek a consolidation and subsequent subdivision of the land so that they get title that covers the ground that they occupy. Essentially, what they are asking for is an order of consolidation and reparation. The issues herein arose during the regime of the Registered Land Act (RLA) (Cap 300) (repealed in 2012 by the Land Registration Act, 2012) and it is therefore the provisions of the Registered Land Act which apply. Are they really entitled to any order for consolidation and reparation of the land? I am not convinced.

15. Sections 25 and 26 of the RLA, in my opinion, do apply. They state as follows:-

25. Combinations and subdivisions

(1) Where contiguous parcels are owned by the same proprietor and are subject in all respects to the same rights and obligations, the Registrar, on application by the proprietor, may combine these parcels by closing the registers relating to them and opening a new register or registers in respect of the parcel or parcels resulting from the combination.

(2) Upon the application of the proprietor of a parcel for the division of his parcel into two or more parcels, the Registrar shall effect the division by closing the register relating to the parcel and opening new registers in respect of the new parcels resulting from the division, and recording in the new registers all subsisting entries appearing in the closed register:

Provided that -

(i) nothing shall be done under this section which would be inconsistent with this Act or any other written law; and

(ii) no parcel which is subject to a lease shall be subdivided.

26. Reparcellation

(1) The Registrar may, on the application of the proprietors of contiguous parcels who are desirous of changing the layout of their parcels, and with the consent in writing of all other persons in whose names any right or interest in the parcels is registered and of any cautioner, cancel the registers relating to those parcels and prepare new registers in accordance with the revised layout:

Provided that, where in the opinion of the Registrar a proposed reparation involves substantial changes of ownership which should be effected by transfers without invoking this section, he may in his discretion refuse to effect the reparation.

16. Section 25 above dealt with combinations and subdivisions. It will be seen that two or more land parcels with separate titles can be combined into one. They can also later be subdivided. However, this only applies where the two or more parcels of land are owned by the same proprietor. Section 26 dealt with reparation, that is where proprietors of contiguous parcels of land wished to change the layout of their parcels. This can only be done with the consent of the owners.

17. In our case, the parcels of land which the plaintiffs seek to combine and later subdivide are owned by different people. The plaintiffs cannot therefore obtain the order of combination and subsequent subdivision. They cannot also be availed of the order for reparation since the owners of the contiguous parcels of land are not in agreement.

18. Of course, the court has wide powers, and can order a combination and subsequent subdivision of land, if it is of opinion that the justice

of the case requires this order. I am not convinced in this instance. My view of the matter is that the plaintiffs are simply not content with the size of land that they own. They wish to have more land to be carved out of their neighbours' land. I am afraid that they have not persuaded me that they deserve this order. They have not given me any evidence of any error in the registry index map or in the manner in which the parcels of land were adjudicated to enable me exercise my discretion in their favour. Even at the Tribunal, the Tribunal found nothing wrong with the parcels of land and directed the parties to be shown their boundaries and stay within the same. The boundaries of the parcels of land are now known. The plaintiffs should confine themselves to their boundaries. If the plaintiffs wish to have more land, all they need to do is convince their neighbours to sell. They have no right to forcefully occupy their neighbours' parcels of land.

19. The long and short of the above is that I find no merit in the plaintiffs' case. It is hereby dismissed with costs to the defendants.

20. Judgment accordingly.

DATED AND DELIVERED THIS 22ND DAY OF APRIL 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA