



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 32 of 2010

GEORGE TSUMA KANUNDU.....PLAINTIFF

VERSUS

BENSON SAFARI MWATETE.....DEFENDANT

JUDGMENT

1. The Plaintiff moved this court by way of a Plaint dated 13th April 2010 and filed on the same day. The Plaintiff is claiming for the following reliefs:

(a) An order for the rectification of the Register relating to Title Number GEDE/DABASAO/728.

(b) Costs of the suit.

2. The Plaintiff filed an amended Plaint on 13th June, 2012. The Plaintiff has averred that he is the beneficial owner of all that unregistered parcel of land situated at Magononi village within Malindi County measuring 3.5 acres. The said parcel of land is bordered to the North by the land known as Title number Gede/Dabaso/944, to the West by the land known as Title number Gede/Dabaso/34, to the East by a road and to the South by the land formerly owned by the late Safari Mwatete then known as Title number Gede/Dabaso/35.

3. The Plaintiff has further stated in his Plaint that the Defendant is the registered proprietor of the parcel of land known as Gede/Dabaso/35 and that he is the Administrator of the estate of Safari Mwatete, the initial owner of Gede/Dabaso/35.

4. According to the Plaintiff's Plaint, during the demarcation and adjudication by the department of lands and settlement, in the year 1976, the Plaintiff's land had clear boundaries that separated it from the late Safari Mwatete's land and or the Defendant's land and that each person would utilize his own individual parcel of land. In that respect, the Plaintiff planted on his land cashew nut trees and has been harvesting the same since then until now.

5. The Plaintiff has averred that his land was erroneously delineated and demarcated as part of the adjacent land owned by the late Safari Mwatete; that he was never given a notice of the completion of adjudication register to enable him commence objection proceedings and that he only discovered in the year 2003 that the total acreage of the adjacent parcel of land had overlapped into his parcel of land and one title for Gede/Dabaso/35 had been issued in the name of the late Safari Mwatete.

- 6.** The Plaintiff finally averred that the delineation and the registration of his 3.5 acres of land as being part of Title number Gede/Dabaso/728 which is a sub-division of Gede/Dabaso/35 was made by mistake.
- 7.** The Defendant was served with the Summons to Enter Appearance, the Plaint and the Verifying Affidavit on 17th April 2010 but he never entered appearance.
- 8.** The matter proceeded for formal proof before me on 21st February 2013 after being adjourned on several occasions.
- 9.** The Plaintiff, PW1, testified that Benjamin Safari Mwatete was his neighbour and that his land abuts that of Benjamin Safari Mwatete.
- 10.** He stated in his testimony that he has been in occupation of the suit property since 1974 and that during the adjudication and registration process in 1976, he was in Mombasa. When he came back from Mombasa, he found his neighbour had combined his land with his. He stated that the combined land gave rise to plot number 35 which was later sub-divided to create plot number 728, which, according to him, represented his land. The Plaintiff produced as exhibit 1 and 2 the abstract for Gede/Dabaso/35 and Gede/Dabaso/728 respectively.
- 11.** The Plaintiff also produced as exhibit number 3 the certificate of official search and the official boundary map as exhibit number 4.
- 12.** According to PW1, he has always owned plot number 728 while the Defendant has always owned the neighbouring land.
- 13.** The Plaintiff testified that the Defendant has now embarked on clearing the trees on his parcel of land. He produced in evidence photographs showing the trees that had been felled on his land as exhibit 5 a and 5 b. The Plaintiff concluded his testimony by stating that he wants the title for plot number 728 to be registered in his name.
- 14.** The Plaintiff called Martin Have Tsuma as his witness (PW2). PW 2 informed the court that he stays at Gede and that the Plaintiff was his uncle.
- 15.** PW2 testified that the Defendant who is their neighbour sub-divided what he believed to be his land in 2003. The witness testified that parcel number 728 belongs to his uncle, the Plaintiff, and that they only discovered that the land had been registered in the name of Defendant when they did a search at Kilifi Land registry in the year 2003. According to the witness, the Defendant amalgamated his land with the Plaintiff's land thus creating parcel number 35.
- 16.** The witness finally testified that him, together with the Plaintiff, were born on the suit property and that they grew up knowing that the suit property belonged to the Plaintiff.
- 17.** The Plaintiff's advocate filed his submissions on 8th April 2013. Other than reinstating the testimony by the Plaintiff and PW 2, the Plaintiff's counsel submitted that section 80(1) of the Land Registration Act No. 3 of 2012 empowers a court to order the rectification of the register by directing that the registration be cancelled if it is satisfied that the registration was obtained, made or omitted by mistake or fraud.
- 18.** According to the Plaintiff's advocate, the only occasion when a Title cannot be rectified is where the registered owner is in possession of the land and if he had acquired it for valuable consideration and had no knowledge of the mistake.
- 19.** The Plaintiff's evidence was that he has been in possession of what is otherwise now known as Gede/Dabaso/728. This evidence was not rebutted by the Defendant.

20. According to Plaintiff's exhibit 1 and 2, title number Gede/Dabaso/35 was created on 25th September 1975 and the same was closed on 18th September 2003 upon sub-division. The sub-division created parcel number Gede/Dabaso/728 and 729.
21. According to the evidence by the Plaintiff, Gede/Dabaso/728 measuring 3.57 Ha was registered in the name of the Defendant by mistake. This evidence was not controverted by the Defendant even after being served with the Plaintiff and the hearing notice. The evidence is therefore taken as admitted by the defendant.
22. The suit property was registered under the Registered, Land Act, Cap 300 (now repealed). Consequently, the applicable law is the repealed Act and not the Land Registration Act No. 3 of 2011 as submitted by the Plaintiff's advocate. Section 143 (1) of the Registered Land Act, Cap 300 (now repealed) is similar with the provisions of section 80(1) of the Land Registration Act No. 3 of 2012 except that under the repealed Act, the court could not make an order of rectification in case of a first registration.
23. Section 80 (1) of the Land Registration Act No. 3 of 2011 now allows the rectification of a title even in a case of a first registration. This departure from the provisions of section 143 (1) of the repealed Act by the drafters was after realising the difficulties that the provisions of section 143 (1) of the repealed Act put many a people in. Most people lost their parcels of land to fraudsters who would fraudulent register a parcel of land in their names and waive the provisions of section 143 (1) if taken to court.
24. The registration of Gede/Dabaso/728 was done after the sub-division of Gede/Dabaso/35 in 2003. Consequently, the said registration cannot be said to have been a first registration.
25. Parole evidence was tendered in this court to show that the registration of Gede/Dabaso/728 was done by mistake or fraudulently by the Defendant and the officials from the land adjudication department and as such an order of rectification of the register of Gede/Dabaso/728 should issue.
26. For the reasons I have given above I allow the Plaintiff's amended Plaintiff dated 8th June, 2012 as prayed.

Dated and delivered at Malindi this 28th day of **May**, 2013.

O. A. Angote
Judge