



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 77 OF 2010

MUDIGO KUWANGA.....PLAINTIFF

=VERSUS=

NGUMBAO KAZUNGU..... 1ST DEFENDANT

KITSAO KAZUNGU.....2ND DEFENDANT

R U L I N G

1. The Application before me is dated 6th March, 2012 brought under Section 1A, 1B, 3, 3A and Order 2 Rule 15 of the Civil Procedure Rules. In the Application, the Plaintiff/Applicant is seeking for the following reliefs:
 - a. **THAT this Honourable Court be pleased strike out and or dismiss the Defendant's Amended Defence and Judgment be entered for the Plaintiff as prayed for in the Plaint.**
 - b. **THAT costs of the Application be provided for.**
2. The Application is premised on the grounds that the Defence is bad in law as it does not disclose any reasonable defence in law; that the Defence is scandalous, frivolous or vexatious and otherwise an abuse of the court process and that the issues and matters raised in the Defendants' Amended Defence regarding the suit property were fully and finally determined in other tribunals.
3. The Application is supported by the affidavit of the Plaintiff who has deponed that plot number Kilifi/Kinani/233 is his family's land and that he is registered as the proprietor in common with the late Kahindi, Kakenga and Rogo Mure.
4. According to the Plaintiff, the Land Adjudication Committee awarded the suit property to Kahindi Mure on 19th December 1978; that in 1979, the Defendants' father was charged in the District Magistrate's Court in Criminal suit number 494 of 1979 for trespass and was convicted on his own plea of guilty and that no appeal was filed.
5. The Plaintiff further deponed that the Defendants' father, Kazungu Muzhuga filed Mombasa RMCC No. 16 of 1986 seeking to set aside the award of the panel of elders which suit was dismissed; that the court in RMCC No. 16 of 1986 held that the suit property having been registered under the Registered Land Act could not be challenged; that the Defendants' father together with his children moved out of the suit property until 15th November 2005 when the Defendants went back to the suit property and thereafter filed Mombasa HCCC No. 180 of 2007 (now Malindi HCCC No. 142 of 2010).
6. The Plaintiff finally deponed that the Defendants are trespassers and should be evicted and that the issues raised in the Defence are *res judicata*.

7. The Defendants filed their Grounds of Opposition on 21st June 2012 and stated that the Application is misconceived, bad in law and an abuse of the court process; that this suit with Mombasa HCCC No. 180 of 2007 was consolidated to form HCCC No.142 of 2010; that the Plaintiff's title to Plot Number Kilifi/Kinani/233 was not a first registration and that the "litigation process" referred to by the Plaintiff preceded the adjudication process which culminated in the registration of the suit property in the name of the defendants' father's name.
8. The Plaintiff's and the Defendants' advocates made oral submissions on 11th June, 2013. I have considered the said submissions.
9. The Defendants in this matter sued the Plaintiff herein in Mombasa HCCC No. 180 of 2007. In the said suit, the Defendants herein are seeking for the cancellation of the title which is in the name of the Plaintiffs herein.
10. Mombasa HCCC No.180 of 2007 was forwarded to this court and allocated a new number, to wit, Malindi HCCC No.142 of 2010. An Application by the Defendants in HCCC NO. 142 of 2010 (the Plaintiff herein) was made to have the suit (HCCC No. 142 of 2010) stayed pending the hearing and determination of this suit.
11. Omondi J heard the Application for the stay of HCCC No.142 of 2010 and allowed the Application on 9th December 2011. Consequently HCCC No. 142 of 2010 was stayed pending the hearing and determination of this suit.
12. The Plaintiff now wants the Defendants' Defence herein to be struck out for being *res judicata* and because it does not disclose a reasonable defence known in law.
13. The effect of the order that the Plaintiff herein is seeking will be to have the Plaintiff in HCCC No.142 of 2010 to be struck out too because HCCC No.142 of 2010 was stayed pending the outcome of the current suit. The issues raised by the Plaintiffs in HCCC No. 142 of 2010 are the same issues that the Defence and Counter Claim has raised in this suit.
14. Each party in the two suits is claiming to be the legitimate owner of the suit property which is currently registered in the names of the Plaintiff and other persons as tenants in common. Has the issue of the ownership of the suit property been determined by a court of competent jurisdiction?
15. According to annexure "MWK2", the Plaintiff's father, Kahindi Mure, sued the Defendants' father in the Land Adjudication Committee case number 22/78/79 claiming for the whole of parcel number 233 within Kinani Adjudication section.
16. On 19th December 1978, the Panel of Elders awarded the suit property to the Plaintiff's father plus costs of Kshs.15.
17. The Defendants' father was subsequently charged in the District Magistrate's Court in Criminal Suit Number 494 of 1979 in which he pleaded guilty. It is not clear from "MWK3" what the Defendants' father was accused of, but from the facts which were read by the prosecutor, the Defendants' father refused to vacate the suit land thus the criminal case. The Defendants' father was fined Kshs.400 and in default, he was to serve 2 months E.M.P.E in lieu of imprisonment.
18. The Defendants' father then filed Mombasa RMCC No. 16 of 1986. According to the Ruling by the Principal Magistrate, S.O. Oguk, of 9th October 1987, the Defendants' father challenged the decision of the panel of elders regarding the suit property.
19. While dismissing the Defendants father's Application, the learned Magistrate held as :

"It follows from the above, that the panel of elders had no jurisdiction to entertain the dispute that the Applicant/Plaintiff referred to them. Their decision is a nullity. If the Applicant wants to challenge the registration of the said parcel of land, and he has an uphill task in this matter, since these are first registration, then he must institute the matter before the appropriate court of law having jurisdiction to entertain the matter. In the result, I dismiss this application and hold that the award of the panel of elders is a nullity. The parties to remain as they were before the matter was referred to the panel of elders in 1982."

20. The Ruling by the Principal Magistrate is a contradiction. What was before the magistrate was a Notice of Motion "challenging the decision of the panel of elders regarding the parcel of land in dispute, which decision was filed before the court on the 20th May 1987." The suit in the lower court was filed in 1986 and the learned magistrate was referring to a decision that was filed in his

- court in 1987.
21. The other contradiction in the decision of the learned magistrate is the fact that he dismissed the Defendants' father's application challenging the decision of the panel of elders but in the same breath found and held that the decision of the elders was a nullity, and that the Defendants' father was to challenge the Plaintiff's father in a court with jurisdiction.
 22. Having gone through the decision of the panel of elders dated 19th December 1978 and the Ruling by the learned Magistrate in RMCC No. 16 of 1986, I am of the view that the issue of ownership of the suit property was not conclusively dealt with as argued by the Applicant. The Defence and Counter Claim cannot be said to be *Res Judicata*.
 23. Justice will be better served if the parties in this matter can be heard on merit. The Plaintiff will be at liberty to rely on the decision of the panel of elders and the learned magistrate to prove his case.
 24. In the circumstances and for the reasons I have given above, I dismiss the Plaintiff's Application dated 6th March 2012 with costs.

Dated and Delivered in Malindi this 18th day of **July**, 2013.

O. A. Angote

Judge