



REPUBLIC OF KENYA

High Court at Malindi

Civil Suit 56 of 2012

KARISA MADUMBO MWENIPLAINTIFF

VERSUS

KAVUMBI KITSAO CHENGO

KITSAO KARISA MWAHOME

FESTUS MASHA MWENIDEFENDANTS

RULING

1. The Complaint in this matter was filed on 30th November, 2012. It alleges that the Defendants have decided to bury the deceased on the suit property belonging to the Plaintiff without his permission. It further alleges that sometimes this year, the deceased person trespassed on the Plaintiff's land and the Plaintiff wrote to him to desist from doing so. The main prayer sought in the suit is for a permanent injunction to issue against the Defendants, their agents and/or servants from burying the body of Benson Kahindi Baya on Plot No. Kaloleni/Chalani/111.

2. As invariably happens in this court, the Complaint was filed contemporaneously with an application dated 29th November, 2012. The main order sought in that application was that pending the hearing and determination of the application, a temporary injunction order do issue to the Defendants, their servants and agents from burying the body of Benson Kahindi Baya (the deceased) on plot No. Kaloleni/Chalani/111. The said application was premised on the following two grounds:

(a) That the Plaintiff is the owner of the suit premises and the Defendants have decided to bury the deceased on the Plaintiff's land without his permission.

(b) That if the court does not stop the Defendants from doing so the Plaintiff shall suffer irreparable harm and loss as he does not want his land to be turned into a graveyard.

3. The application is further supported by the affidavit of the Plaintiff/Applicant sworn on 29th November, 2012. The essential elements in the depositions are as follows:

4. That he is the owner of plot No. Kaloleni/Chalani/111 measuring approximately 8.8ha. That he got the land through a rigorous case process starting from the Kaloleni District Land Disputes Tribunal up to the Kaloleni Resident Magistrate's Court through land award case Number 3 of 2010.

5. The Plaintiff swears that in the Land Disputes Tribunal case, Benson Kahindi Baya, the deceased, was

the Defendant and that the said Benson Kahindi Baya lost the case and he was given leave by the Tribunal to appeal against the award. The Plaintiff admits that indeed the deceased filed an appeal but he later withdrew the same.

6. According to the Plaintiff, the suit property is registered in the name of Baya Mungwana who was the father of the deceased. He states that the said Baya Mungwana (also deceased) was appointed by his family as a trustee thus the registration of the title in his name. He asserts that the said Baya Mungwana was his brother and that it was him, the Plaintiff, who had been fighting for the suit property. The Plaintiff has annexed the Title Deed for the suit property on his supporting Affidavit.

7. The Plaintiff completes his averments by stating that the deceased died on 24th November, 2012 and his body is at the Coast Provincial General Hospital's Mortuary; that he has always been cultivating the suit property; that the deceased trespassed on it and put up a structure; and that he had instructed his advocates to file a suit to remove the said Benson Kahindi Baya from the suit premises before he died on 24th November, 2012. He finally deposes that he had learnt from the Defendants that they were planning to remove the body of the deceased from the mortuary and bury the same on his plot without his permission.

8. The application was filed under a certificate of urgency and the same was argued before me *ex-parte* on 30th November, 2012. I certified the application urgent and granted the applicant a temporary order of injunction for ten days barring the Defendants from burying the body of Benson Kahindi Baya on plot No. Kaloleni/Chalani/111. The application was fixed for hearing *inter-partes* on 6th December, 2012.

9. When the matter came up for *inter-partes* hearing on 6th December, 2012, the Defendant's advocate informed the court that she was ready to proceed with the hearing of the application. However, the Plaintiff's advocate was not ready to argue his application because he needed more time and the leave of the court to file a Further Affidavit in response to the Defendant's Replying Affidavit. The court granted the applicant leave to file and serve his Further Affidavit and adjourned the matter for hearing to the following day.

10. The 3rd Defendant, Festus Mwashwa Mweri swore a Replying Affidavit in response to the Plaintiff's application and stated as follows:

11. That the suit property belongs to the late Baya Mungwana who was the father of the deceased; that the deceased did not participate neither was he invited or notified of the Land Dispute Tribunal's proceedings. The 3rd Defendant further deposed that the deceased was aggrieved by the decision of the Tribunal and consequently filed an appeal with the Provincial Land Dispute Appeal Board No. 11 of 2010; that the Board informed all the parties to maintain status quo pending the hearing of the appeal; that later on, all the parties in the filed appeal were informed that the Board no longer had mandate to hear appeals and that they were awaiting the Chief Justice's directions to have the file transferred to this Honourable court.

12. The 3rd Defendant finally deposed that the deceased and his family have been living on the suit property for their entire lives and they do not have any other alternative place to bury the deceased and that the plaintiff does not live on the suit property.

13. Mr. Lughanje, Counsel for the applicant, submitted that Mr. Baya Mungwana (now deceased), the father of the deceased, was allowed by the family to be registered as the proprietor of the suit property as a trustee. A dispute over the suit property arose and case number 20 of 2008 was filed at the Kaloleni District Land Dispute Tribunal. Counsel referred the court to annexure KM 1a and 1b which are the proceedings and the award of the Tribunal. The said award, according to annexure 1b was adopted by the Kaloleni Resident Magistrate on 16th March, 2010.

14. According to the Plaintiff's advocate, the deceased was sued at the Kaloleni District Lands Disputes Tribunal on behalf of his late father, Baya Mungwana, who was the registered owner of the suit property

and the Tribunal ruled in favor of the Plaintiff. The deceased was given a choice to appeal against the decision of the Tribunal which he did.

15. The advocate submitted that the said appeal was withdrawn by the deceased by way of an agreement which has been marked as annexure “KM III”. The award of the Tribunal, counsel urged, has never been set aside and consequently the Defendants are bound by it. Counsel admitted that with the repeal of the Land Disputes Tribunal Act, No. 18 of 1990, all the pending appeals will have to be dealt by this court. However, parties have to move this court appropriately and not in the manner that the Defendants were suggesting.

16. Counsel finally submitted that the Plaintiff is using the suit property and that the Defendant is a trespasser on the Plaintiff's land. The deceased was informed vide a letter dated 3rd October, 2012 to desist from staying on the Plaintiff's land but he died before a suit for eviction could be filed by the Plaintiff. Consequently, it was argued, the deceased should be buried elsewhere and not on the suit property.

17. In response to the Plaintiff's advocate's submissions, Ms. Njuguna, Counsel for the Defendants submitted that the Plaintiff had not proved the elements of “trust” over the suit property. The deceased's father, counsel urged, was the sole proprietor of the suit property and therefore the issue of him holding the property in trust for the family does not arise. The Defendant's counsel submitted that the proceedings at Kaloleni District Land Disputes Tribunal took place in one day and that the deceased who was the Defendant in the said proceedings never participated.

18. Counsel further argued that the Plaintiff does not have locus to file this suit because he has not shown how he owns the suit property. Consequently, it was argued, the Plaintiff cannot suffer irreparable harm as pleaded in ground number 2 of his application when he is not the owner of the suit property. The only proof of ownership of the suit property is the title deed which shows the owner to be the deceased's father and not the Plaintiff. This status of ownership has not been changed at lands office notwithstanding the Tribunal's award. On those grounds, it was submitted, the Plaintiff's application should be dismissed with hefty costs for not meeting the criteria set out in the **Giella vs Cassman Brown Case**.

19. I have carefully considered the Plaintiff's and the Defendant's advocates' submissions, the Notice of Motion dated 29th November, 2012, together with the Supporting Affidavit and the Defendant's Replying Affidavit.

20. My task in this application is to determine on the material before me whether the applicant has established a *prima facie* case with a probability of success to warrant the grant of a temporary injunction pending the hearing and determination of the suit.

21. A *prima facie* case was defined in the case of **Mrao Ltd Vs First American Bank of Kenya & 20 others (2003) KLR 123** as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the letter.”

22. I will also determine whether, even if such a case exists, the applicant has proved that he will suffer loss that is incapable of compensation by an award of damages. If in doubt about the two principles, I will decide on a balance of convenience. These are the well known principles in the celebrated case of **Giella vs Cassman Brown (1973) EA 358**.

23. I will start by answering the question as to whether a trust can be created over land which has been registered under the Registered Land Act, Cap 300 (now repealed). According to the Plaintiff, Baya Mungwana, the deceased's father was appointed by the Plaintiff's family as a trustee for him (the Plaintiff) and his brothers. The Plaintiff states in his Supporting Affidavit that the said Baya Mungwana was his

brother and was holding the title which is registered in his name as a trustee. Ms Njuguna, counsel for the Defendants disagreed with this position. She held the view that there was no indication on the title that Baya Mungwana, the registered proprietor of the suit property held the same as a trustee. He was the absolute owner of the suit property and the Plaintiff had no *locus standi* to question the said title.

24. The classification of land in Kenya is inherited from colonial times when there was crown land, private land and native reserves. After independence, all land that was designated as crown land became “government land” as defined in the Government Lands Act, Cap 280 (now repealed) and the native reserves became “trust land” under the Trust Land Act, Cap 281.

25. All land held as “trust land” under the Trust Land Act is supposed to be held in trust for the community. The conversion process of community land is contained in sections 27 and 28 of the RLA.

26. The number of people who would be allowed to be registered as absolute proprietors over land which was identified as community land was through the doctrine of primogeniture, meaning that the property had to be registered in the name of one person in trust for the rest of the community or family.

27. I understand Ms. Njuguna's argument to mean that unless a registered owner is described as a trustee in the instrument of acquisition of land, there can be no trust and the land cannot be said to be held in trust and because Baya Mungwana is not described as a trustee in the instrument of title in this case, he cannot be said to hold the suit property in trust for the Plaintiff or for other family members.

28. I am not in agreement with this argument. Sections 28 and 126 of the Registered Land Act, Cap 300 contemplate the holding of land in trust. Title Deeds (not certificates of Leases) issued under Registered Land Act, cap 300 (RLA) are issued after the process of individualization of the customary land tenure, that is, land adjudication and or consolidation.

29. Section 126 of the RLA provides that there is no need to indicate in the register that one is a trustee but the principle of trust can be inferred from the circumstances of the case. The section does not exclude recognition of a trust provided that it can be established by way of testimony. If this was not the case, the absolute proprietors in the country side would disinherit their brothers, sisters and other family members without the said family members having any recourse in law.

30. The principle which was set down by the cases of **Esironyo Vs Esironyo, Selah Obiero Vs Orego Opiyo and Belinda Murai & others Vs Amos Wainaina** that not only are customary rights and interests extinguished, but customary law is also extinguished by the fact of registration of land under RLA has been held to be bad law by subsequent judgments of the High Court and the Court of Appeal.

31. The current legal position, which I entirely agree with, is that registration of title under RLA is a creation of the law and one must look into the circumstances surrounding each case as well as customary law and practice in force surrounding the registration of the title in question to determine whether a trust was envisaged. The Court of Appeal in **Kanyi Vs Muthiora (1984) KLR 712** stated as follows:

“Section 143 of the Registered Land Act did not apply as there was no question of rectification of the register but a transfer by a trustee to a beneficial owner. The registration of the suit land in the name of Kanyi under the Registered Land Act did not extinguish Nyakobi’s rights under the Kikuyu customary law, Kanyi was not relieved from her duty or obligation to which she was a trustee to Muthiora’s land..”

32. It is therefore legally sound, if proven, for the Plaintiff to allege that the suit property was registered in the name of the late as a trustee. The Plaintiff therefore has the locus standi in this matter notwithstanding the fact that he is not the registered owner of the suit property.

33. The Plaintiff wholly relied on the decision of the Kaloleni District Lands Disputes Tribunal to lay his claim on the suit property. I have perused the said proceedings and the award and without going into the merits or demerits of the same observe as follows:

34. The said dispute, according to the proceedings that have been annexed on the Plaintiff's supporting Affidavit as annexure KMI(a), was between the Plaintiff in the present suit and Benson Kahindi Baya, now deceased. It is not in dispute that the said Benson Kahindi Baya was the son of Baya Mungwana, the registered proprietor of the suit property. According to the Plaintiff, the person who should have been the Defendant in the dispute at the Tribunal should have been Baya Mungwana but for his death.

35. There was no explanation as to why the Plaintiff decided to file a dispute as against the said Benson Kahindi Baya before he could take out the letters of administration in respect to the registered parcel of land which was registered in the name of his father. The pertinent question however, is whether the Kaloleni District Land Disputes Tribunal declared the plaintiff as the owner of the suit property to enable him assert, as he is doing in the present suit, that the suit property exclusively belongs to him.

36. The first witness at the Tribunal was one Karisa Madumbo who claimed to be testifying on behalf of one Muramba wa Thoya, his great grandfather. When he was asked by one of the members of the Tribunal why the suit property had been registered in the name of Baya Mungwana, he stated that he, together with the other grandsons of Baya Mungwana, had agreed that the property be registered in his name on behalf of the clan members.

37. Upon hearing the other witnesses, the Tribunal made the following award.

“Finally the court has declared Karisa Madumbo Mweni (the Plaintiff) the rightful owner of the land in dispute and therefore awarded him the land with his four clan members”

This award was adopted by the Kaloleni Resident Magistrate on 16th March, 2010 and the deceased appealed to the Provincial Land Appeals Committee on 24th February 2010 (way before the adoption of the same by the court).

38. The 3rd Defendant has annexed on his Replying Affidavit the Memorandum of Appeal filed at the Provincial Land Appeals Committee on 24th February 2010. He has also annexed a letter from Coast Provincial Commissioner dated 25th February 2010, a day after the filing of the appeal. In the letter, the deceased was informed that the appeal had been received and the parties were advised to maintain the status quo of the land until the appeal is heard and determined. The appeal has not been heard due to the repeal of the Land Disputes Tribunal Act, No. 18 of 190 by the Environment and Land Court Act, No. 19 of 2011.

39. It is clear from the Tribunal's findings, which findings have never been set aside, that the suit property was awarded to the plaintiff with his four clan members. The deceased was the Plaintiff's brother and he is part of the four clan members. He is not a stranger neither is he a trespasser as claimed by the Plaintiff. He has been staying in the suit property all along as admitted by the Plaintiff in his Further Affidavit and by his counsel. Indeed, using the Plaintiff's own argument, the Tribunal's decision only allowed him to hold the suit property in trust for the rest of the clan.

40. Even if it was to be held that the Tribunal had awarded the suit property to the plaintiff absolutely and to the exclusion of the deceased, the said decision by virtue of the letter dated 25th February 2010 by the Provincial Commissioner on behalf of the Appeals Committee was stayed. The Plaintiff was advised to maintain the status quo pending the hearing of the appeal. It is not the fault of the deceased or the Defendants in this case that the appeal has not been prosecuted to date.

41. In the circumstances I find and hold that the Plaintiff has not established a *prima facie* case to warrant the granting of injunctive orders as prayed in the application.

42. In any event, and considering that the deceased has always lived on the suit property which is registered in his father's name, the balance of convenience tilts in favor of the Defendants. The Plaintiff shall not suffer any damage considering that he does not live on the suit property. It is the Defendants who shall be immensely prejudiced in the event that the deceased's body remains at the Hospital's

mortuary pending the hearing of this suit.

43. I have a clear mind in making my finding against the applicant and in favour of the Respondents; and I will for the reasons given above, dismiss the plaintiff's application dated 29th November, 2012 with costs.

Delivered and dated at Malindi this 10th day of **December, 2012.**

O. A. Angote
JUDGE