



Mwanzaka & another (Suing ob behalf of the Estate of Manzaka Tindi Dzengo –Deceased) v Dandasi (Environment and Land Case Civil Suit 40 of 2014) [2022] KEELC 13581 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13581 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 40 OF 2014
LL NAIKUNI, J
SEPTEMBER 27, 2022**

BETWEEN

**EMMANUEL TINDI MWANZAKA 1ST PLAINTIFF
CHIRIDO MWANZAKA TINDI 2ND PLAINTIFF
SUING OB BEHALF OF THE ESTATE OF MANZAKA TINDI DZENGO –
DECEASED**

AND

JUNGO VINDI DANDASI RESPONDENT

JUDGMENT

I. Preliminaries

1. This suit was instituted by the Plaintiff against the Defendant through filing of a Plaint on February 25, 2014. The Plaint and the Verifying Affidavit were dated February 14, 2014 respectively. Thereafter, the Plaintiff filed an amended Plaint dated February 11, 2014 and filed in court on February 22, 2014.
2. Upon being served with summons to enter appearance, the Defendant on March 18, 2014 filed a memorandum of appearance. On April 2, 2014 the Defendant filed a statement of Defendant and Counter Claim dated March 31, 2014 and other documents.
3. On October 21, 2021 all parties having fully complied with the provisions of Order 11 of the *Civil Procedure Rules, 2010* on case management, the matter was set down for hearing where the Plaintiff and Defendant summoned their witnesses who adduced evidence in court accordingly. On June 9, 2022 and they were directed to file their written submissions thereafter.



II. The Plaintiff's Case

4. From the filed pleadings the Plaintiff's claims that at all material times of this suit, they were the Legal Administrators and Representatives of the Estate of the Late Mwanzaka Tindi Dzenzo (hereinafter referred to as 'The Deceased') and the beneficial owners of all that parcel of land known as Title No KILIFI/CHANGOMBE/24 measuring approximately three decimal nought nine (3.09Ha). They claimed that the Defendant had trespassed onto the suit land since the year 1997 and in the process they had denied them access to the suit land. They further alleged that the Defendant had denied them to enjoy quiet possession to the suit land. They alleged that they had on several occasions given the Defendant warnings and orders through the area chief and the District Land Adjudication and Settlement Officer, Kilifi but the Defendant had persistently refused to comply. The Plaintiffs sought for the following orders against the Defendant:-
 - a. A declaration that the suit land is owned by Mwanzaka Tindi Dzenzo (deceased)
 - b. An eviction order against the Defendant from the suit land
 - c. Costs of this suit
 - d. Any other relief this court would deem fit to grant.
5. The Plaintiffs summoned two (2) witnesses who tendered their evidence in chief. They were cross examined and re-examined as stated herein:-

Examination in Chief of PW - 1 – Mr Joseph Mwambaji Mwanzaka by M/s Kibos Advocate.

5. He swore and testified in the Kiswahili language translated in English by the Court Assistant. He stated that he lived at the County of Kilifi. He was a holder of the national identity card bearing numbers xxxx. A copy of which was produced and marked as 'Plaintiff Exhibit - 1'. He testified being the 1st Plaintiff in this case. The suit land known as land reference numbers KILIFI/CHANGOMBE/24 was his own. It was registered in the names of Emmanuel Tindi Mwanzaka who was his father. Mr Chirindo Mwanzaka Tindi, the 2nd Plaintiff was his brother. Both of them were now deceased. He had authority to plead in this case and act on behalf of the Plaintiff. He referred to the witness statement dated the February 16, 2021 and filed in Court on February 22, 2021. He adopted it as his evidence in chief in this case.
6. He stated that he sued Mr Jungo Vindi Dandasi, the Defendant herein, for having trespassed into his land. He informed Court that he was born and together with his parents they all lived there. His testimony was that the Defendants had their land in the neighborhood land but just willfully trespassed onto their land. In a long while, the land had had a lot of court cases. From the last decision made by the Court, they were granted the land. But despite that, the Defendant had not left the suit land to date. There being no objection, he produced the following documents: -
 - a. Certificate of title deed.
 - b. The decision by Government of Kenya.
 - c. An Official Search of the suit land.

He further relied and produced all the documents contained in the Plaintiff's list of documents dated February 15, 2018, March 3, 2018 and the Plaintiff's further list of documents dated February 16, 2021 and filed in Court on February 22, 2021. He had them marked as Plaintiff Exhibits numbers. '1 to 35' respectively. That was all.



Cross Examination of PW – 1 by M/s Arika Advocate: -

7. He stated never having been fully involved in the resolving of the protracted land dispute. He testified that all this time they time from the year 2014 they were living we would live elsewhere and not on the suit land. He was not sure of the acreage of the suit land. That was all.

No Re-Examination.

Examination in Chief of PW - 2 Mr Joseph Chombo Mtwana by M/s Kibos Advocate.

8. He was sworn and testified in the Kiswahili language but translated in English language by the Court Assistant. He was a holder of the National Identification card bearing numbers xxxx. From year 1977, Tindi donated land to the PEFA church. He was a fellow congregant to that Church. He knew the Defendant well. He was in court. He was claiming the suit land to be his own. He was a child then but as he grew up, he would see the Defendant had encroached onto the land which belonged to Mr Tindi. He knew there had been a land dispute between the Tindi and the Defendant. He also knew that Mr Emmanuel Tindi and his son Chirido Mwanaka upon their demise were both buried on the land. He adopted his witness statement dated January 17, 2018 and filed in Court on January 18, 2018.

Cross Examination of PW – 2 by Ms/ Arika Advocate:-

9. He held that Emmanuel Tindi was his brother. He confirmed that there was a Church on the land from the year 1977. He did not have a document on the agreement between the church and the Tindi Family. He did not have any authority document by the Church to continue supporting the Tindi Family. He was born in the year 1965. By the time of granting of the land, he had been 14 years old.
10. During the land dispute and resolving of it, he was not involved in the dispute resolving of the land. But he would be accompanying Mr Emmanuel Tindi during the hearings of the land dispute as a witness. He re affirmed knowing the Defendant well. The Church was given the land following a lease, they were given for free only on condition that they should not fell or cut any plantations such as the coconut trees. He stated being with the family solely in order to establish the truth.

Re - Examination of PW – 2 by Ms Kiboss Advocate:-

11. He would be involved in the land dispute matter as a witness. He had testified twice on the matter. The church and Tindi had entered into an agreement in January, 1977 as per the Plaintiff Exhibit No 8 Mzee Tindi gave out the land to the church voluntarily and out of his willingness. That was the close of the Plaintiff case.

III. The Defendant's Case

12. As stated above, the Defendant filed a Defence and Counter Claim against the suit filed by the Plaintiffs. While denying the contents of paragraphs 3, 4, 5, 6, and 7 of the Plaint, the Defendant held that the suit land was the subject matter of Land Appeal No 170 of 2001 (now Misc ELC No 2 of 2013 – Dandasi Mwere –Versus- Mwanzaka Tindi Dzenzo filed at the Provincial Land Appeal Tribunal at Mombasa and later on August 15, 2013 transferred to the ELC Mombasa for hearing and determination. He held that the suit land was ancestral land having been born, grown and married there. He had built houses for himself and his children and they all resided and developed it a place he called home.



He averred that the Plaintiffs never lived nor stepped foot on the suit land neither had they built any structure nor planted any tree on the suit land. He further held that the suit land belonged to his father the late Dandasi Mwere Boya who died on April 1, 2006 and was buried on the suit land. On February 9, 2009, he was issued with limited Grant Litem in Succession Cause No 296 of 2008 Mombasa.

13. He informed Court that sometimes in the year 1980 Mwanzaka Tindi Dzenzo filed an objection at the land adjudication Board but on February 7, 1984 the Land Adjudication Board dismissed the said complaint. He held that the issuance of the title to the suit land to the Plaintiff was wrong, illegal and/or fraudulent, based on two (2) particulars namely:
 - a. Obtaining the title was fraud and without the permission and/or consent from the original owner and/or family members.
 - b. There was no valid transfer having duly signed by the original owner – Dandasi Mwere Baya) and/or his family members.
14. From the Counter Claim he sought for:-
 - a. A declaration that the transfer of the suit land from its original owner – Dandasi Mwere Baya to the Plaintiff was wrongful illegal and/or fraudulent and the same should be cancelled and registered in the name of the Defendant as the rightful legal owner and cost of the Counter Claim.

The Defendant summoned two (2) witnesses who adduced the following evidence in chief, They were cross examined and re-examined accordingly.

Examination in Chief of DW - 1 – Mr Jundo Vindi Dandasi by M/s Arika Advocate.

15. He was sworn and testified in English language. He is a holder of the national identity card bearing numbers xxxx. He remembered recording and signing his witness statement dated April 30, 2015 and filed May 20, 2015. It was adopted and admitted in Defence – Exhibit No 2. He produced the List of documents item numbers 1 to 30 dated February 12, 2018. There being no objection they were produced and marked as Defendant Exhibits 1 to 30. He urged the court to give him back his land. He need to be issued with the title deed and other ownership documents. He was in occupation of the suit land. He had never been there from the time of his birth. They used it for cultivation. He informed Court that all his family had lived on the land, They died and buried there. Emmanuel Tindi had sued them. The Tindi family had the title deed. It was a title deed for Plot No 24. The land was adjudicate in the year 1978. The land was 18 acres.

Cross Examination of DW – 1 by M/s Kiboss Advocate:-

16. There were several cases pertaining to this land from the year 1979. It started from the Land Adjudication Committee, the Land Adjudication Arbitration Board, the Provincial Land Adjudication Appeals Committee and then an Appeal before the Minister for Lands & Settlement. He confirmed that the Minister decided the land belonged to Emmanuel Tindi. He was not aware of that proceedings but he would remember a case before the tribunal. He refuted that the land belonged to Emmanuel Tindi.
17. He was not aware when Emmanuel Tindi took the land. He did not know of this decision. Apart from this case, he was not aware of any other case on the suit land. He held that there was nothing to adjudicate on here in this court. He had never done any case before ELC with Emmanuel. He lived alone on the suit land. The Church was at the boundary. He stated and affirmed that Mr Emmanuel Tindi used fraudulent means to have obtained the title deed to the suit land. He stated that he knew



this for a fact as when he was asked by the Magistrate to explain how he acquired the title deed, he was unable to answer. It was later on that he saw Tindi with a title deed. He was born in the year 1953. In that area they lived as a clan. It was a clan land. That is all.

Re - Examination of DW – 1 by M/s Arika Advocate: -

18. The Tindi have never been on the land. They are a few kilometers away. I do not know how they acquired the title deed. The church is on the boundary. That is all.

Examination in Chief of DW – 2 Samuel Dxuya Banda – by M/s Arika Advocate

He was sworn and testified in Kiswahili language. He was a holder of the national Identity card bearing numbers xxxx. He recorded and adopted the 'DW - 2' witness statements dated April 30, 2015. He had been a neighbor at the suit land for many years. He knew the Defendant, Mr Jungo Vindi Dandasi for a long time and as the owners to the suit property. He testified that the Tindi family lived very far away. That was all.

Cross examination of DW – 2 by M/s Kiboss Advocate

19. He knew the Defendant, Mr Jungo Vindi Dandasi well. He knew the Tindi family as neighbors. He was certain that the suit land was not theirs.

He knew that there had been several cases concerning this land though he never attended any of them as he had always been on duty. He did not know how Mr Tindi acquired the title to the land. He committed fraud to have attained the title deed. They have been saying it.

Re- Examination of DW – 2 by M/s Arika: -

Nil.

Taking that the third witness for the Defendant was deceased, the Defence closed their case.

IV. Submissions

20. On June 9, 2022 upon the close of their cases, the parties who were all present in court were directed to file their written submissions pursuant to that they all complied and the Honorable Court reserved a date to render its judgment thereof.

A. Written submissions by the Plaintiff

21. On June 9, 2022, the Learned Counsel for the Plaintiff's the Law firm of M/s HN Njiru Advocate filed their written submissions dated June 8, 2022. M/s Kiboss Advocate submitted that by providing the background of this case. The Learned Counsel further submitted under the following issues.
22. Firstly, she held that the Plaintiffs were the bona fide and lawfully registered owners of the suit property. To support her submissions on this issue, the Learned Counsel relied on the evidence adduced by PW - 1 – who testified being the son of the Late Mwanzaka Tindi Dzenzo and he together with Chirondo Mwanzaka Tindi were the legal representatives of the estate of the deceased. That it was Chirondo Mwanzaka Tindi together with the late Emanuel Tindi Mwnazaka were issued with grant of Letters of administration on July 6, 2011 and the same was confirmed on April 16, 2012 – upon the demise of Emmanuel Tindi Mwanzaka, PW-1 was issued with Letters of Administration Ad Litem on March 25, 2012 which was confirmed on March 31, 2022 PW-1 testified that the suit property belonged to his father one Mwanza Tindi Dzenzo who inherited it from his grandfather a member of the Mwanzaka Tindi Clan. He testified that his father was the registered owner of the suit property. He produced a copy of the title deed dated August 8, 2013 marked as Plaintiff Exhibit No 7 as proof of ownership.



The Counsel stated that PW - 1 further testified that in the year 1977 his father – deceased being the bona fide owner of the suit property vide an agreement dated January, 1977 – Plaintiff Exhibit No 16 gave a portion of it to PEFA church where the church was currently constructed. He held that the Defendant – Ndandaso Mwere transferred into the suit property in the year 1977 and had remained there even after several attempts to evict his from there were made.

23. She observed that the Plaintiff and the Defendant were embroiled in a long legal tussle over ownership of the suit property since the year 1977 until the 1985 when the Minister of Lands in appeal case No 671/1985 heard and determined the suit in favour of the Plaintiff ordering the land to be registered in the names of the Plaintiff. According to the Counsel the award was adopted in Kaloleni Magistrate Court Case No 30 of 2001.
24. Being aggrieved by the said decision, the Defendant preferred an appeal Land Dispute Appeal Case No 170 of 2001. Taking that by then the tribunals had been disbanded the case was transferred to the Environment & land Court as ELC (Mombasa) Case No 2/2013. The ELC noted that an appeal had not been filed and proceeded to close the case. The Defendant, through DW-1 produced the said court order marked as Defendant Exhibit No 36 – DW-1 confirmed not being aware of any appeal filed against the decision of the Ministers of Lands. Thus, as such the award adopted in Kaloleni Court as final judgment stood unchallenged, meaning the suit land was registered in the name of the deceased on August 8, 2013. The Learned Counsel relied on the provisions of Section 24, 25 (i) and 26 of the Land Registration Act No 3 of 2012.

Secondly, the Learned Counsel submitted that the Defendants were trespassers onto the suit property and they ought to be evicted from it.

25. To advance its argument the Learned Counsel relied on the decisions of 'Telkom Kenya Limited – Versus- County Government of Murang'a (2019) eKLR and Clerk and Lindsell on Torts 16th Edition Paragraphs 23-01 on the definitions on the terms 'Trespass' and Continued 'Trespass' and a described under the Trespass Act Cap 403. She concluded that the Defendants having trespassed in the suit property had denied the Plaintiff's right to use it as well as the right to quiet possession.
26. Thirdly, the Learned Counsel argued that the Counter Claim filed on February 11, 2014 by the Defendants was defective and ought to be struck out. She held that it had no verifying affidavit contrary to the Provisions of Order 7 Rule 5 (a) and Order 4 Rule 1(2) of the Civil Procedure Rules, 2010.
27. To buttress on this point, the Learned Counsel relied on the decision of 'Prisca Onnyango Ojwang & Another – Versus - Henry Ojwang Nyabende (2018) eKLR where the court held: 'That the Defendant is actually the Plaintiff in the Counterclaim. That a Defendant filing a Counterclaim is required to file a verifying affidavit at the time the counterclaim is filed, in the same way a Plaintiff is required to have his plaint accompanied with a verifying affidavit at the state of filing. That where a claim is commenced through a Plaint or counterclaim filed without an accompanying verifying affidavit in accordance with Order 4 Rule 1 (2) of the Civil Procedure Rules then such a claim is improperly before the court and is liable to be struck out on the court's own motion or on being moved by a Party to the Proceedings.'
28. Thus the Learned Counsel urged court to strike out the Defendant's Counterclaim. Finally, the Learned Counsel submitted that the Plaintiff was entitled to the prayers sought from the filed pleadings. She argued that the Plaintiff had established having a Prima Facie case being the registered and absolute owner to the suit property and that the Defendants were wrongful and illegal occupying the suit land, the Plaintiff was entitled to costs and interest of this suit having incurred expenses in prosecuting this matter. She prayed the orders sought be granted while dismissing the Counter Claim by the Defendants.



B. The Written Submissions by Defendants

29. On April 1, 2022, the Learned Counsel for the Defendants the Law firm of Messrs Asige Keverenge and Anyanzwa Advocates filed their written submissions dated March 29, 2022. M/s Arika Advocate commenced by providing court with the detailed background of the case. The Learned Counsel further submitted under the following four (4) broad issues. These were.

Firstly, the suit land was ancestral land. She held that from the evidence of DW - 1, he had been in occupation of the suit land measuring 18 acres since he was born and as a family they had been living and using it for cultivation. They had been buried there. On cross examination DW-1 stated that Emmanuel Tindi Mwanzaka used fraudulent means to obtain the title deed and that he had never been on the land.

Secondly the Learned Counsel argued that the Plaintiffs had never developed nor planted any trees on it

30. The Learned Counsel averred that from the testimony of DW - 2 who had been the Defendants neighbor for many years he was aware that it was the Defendant who was the owner of the suit land and that Emmanuel Tindi Mwanzaka had lived far off hence the land never belonged to him as alleged. He testified that Emmanuel Tindi Mwanzaka committed fraud to have attained the title deed.

Thirdly, the Learned Counsel refuted the allegations that the Defendants had trespassed onto the suit land since 1997 as alleged in Paragraph 4 of the Plaint. She contended that the Plaintiffs having had knowledge of the alleged trespass or illegalities since the year 1997, they could not purport to file suit in whatever capacity against the Defendants more than fourteen (14) years thereafter.

Fourthly, in view of the above facts, Counsel submitted that the suit insisted by the Plaintiff was statute barred by reasons of the Provision of Section 7 of the Limitation Act Cap 22.

31. She further held that the 1st Plaintiff Joseph Mwambazi Mwanzaka lacked the 'Locus standi' to file the case. The 1st Plaintiff testified that Emmanuel Tindi Mwanzaka (now deceased) was his father. She averred that he could not prosecute the case without having a grant of Letters of Administration by virtue of the Provision of Order 24 Rule 3 (1) of the Civil Procedure Rules and Sections 82 of the Laws of Succession Cap 160.

To buttress her point, she relied on the decision of 'Daniel Mbaka Obuti – Versus - Erick Kasuku Ogweno and Another (2018) eKLR' where court held:-

' It is trite law that without having taken out grant of Letters of Administration of Defendant could not lay any claim to any assets of his deceased mother. It is the grant of letter of administration that gives authority and 'locus standi' to a person to institute any proceedings touching and relating to a deceased estate'

She further cited the case of 'Rajesh Prafixan Chundasama – Versus - Sailesh Pranjira Chadasama (2014) eKLR' where the Court of Appeal state:-

' A Litigant is clothed with Locus Standi upon obtaining a limited or full grant of Letters of Administration in cases of Intestation Succession. In Otieno –Versus- Ougo (Supra) this court stated thus – an administrator is not entitled to bring any action as Administrator before he has taken out letters of Administration. If he does the action is incompetent as of the date of inception.'

In conclusion, the Learned Counsel urged court to dismiss the plaintiff's case with costs to the Defendants.



V. Analysis and determination

32. The Honorable Court has carefully assessed all the filed pleadings by both the Plaintiffs and the Defendants being the Amended Plaintiff statement of Defendant and Counter Claim, the oral and written evidence adduced by the witnesses, the written submissions, the cited authorities relevant provision of the Constitution of Kenya 2010 and statute.

For the Honorable Court to arrive at an informed fair, just, reasonable and equitable judgment, it has framed the following salient four (4) issues for its determination. These are:-

- a. Whether the Plaintiffs are the duly and legal registered owners to the suit land with the indefeasible title interest and rights over it or was it an ancestral land.
- b. Whether the Defendant had trespassed onto the suit land from the year 1997 as alleged and if so should eviction orders ensue.
- c. Whether the parties were entitled to the relief sought based on the following factors:-
 - i. Did the Plaintiff have Locus Standi to institute the case against the Defendant.
 - ii. Was the title deed held by the Plaintiff fraudulently acquired as alleged by the Defendant.
 - iii. Was the suit statutory barred by dint of Section 7 of the Limitation Action Act Cap 22.
 - iv. Was the Counter Claim filed on February 11, 2014 by the Defendant Defective and out to be struck out.
- d. Who will bear the costs of the suit?

Brief Facts

33. Before embarking on the indepth analysis of the above framed issues it's significant that this Honorable Court extrapolated on the brief facts of this case first and foremost. From the filed pleadings, it was stated that the Plaintiffs were the legal representatives of the estate of the late Mwanzaka Tindi Dzengo (Deceased) and they brought the suit on behalf of the estate of the deceased after lawfully obtained Grant Letters of Administration. The Plaintiff claims that the deceased was the registered owner to the suit property having inherited it from his grandfather a member of the Mwanzaka Tindi clan. They were the holders of 'the prima facie' Certificate of title deed to the suit land which though the Defendant claimed was fraudulently acquired. The Plaintiff hold that from the year 1997 the Defendant encroached and trespassed onto the land and started construction. They want to evict the Defendant from suit land and had remained there despite several attempts to evict him. They held that the land dispute had become a subject of proceedings before the Land Adjudication Committee, the Land Arbitration Board the Minister of Lands & Settlement – Appeal and this court whereby all the decisions had been in favour of the deceased.

On the other hand, the Defendant holds that the suit land was ancestral land and that the Plaintiff had never lived, or make any structure on it nor planted any trees on it. He holds that the family lived on the land from the year 1997 and his father the late Dandasi Mwere Baya who died on April 1, 2006 was buried there and so was his wife. They had constructed structures there and planted coconut trees. The Defendant filed a counter claim seeking to be declared as the Legal owner to the land. That is adequate on the facts of the case.



34. Now turning to the issues under this sub-heading. It is now well established that the legal ownership of land is well founded under the provisions of the law. All said and done, this court underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of the Constitution of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of Section 7 of the Land Act No 6 of 2012 provides the said methods as follows:

S 7 Title to land may be acquired through:-

- i. Allocations;
- ii. Land Adjudication process;
- iii. Compulsory acquisition;
- iv. Prescription;
- v. Settlement programs;
- vi. Transmissions;
- vii. Transfers;
- viii. Long term leases exceeding Twenty one years created out private land; or
- ix. Any other manner prescribed in the Act of Parliament.

In this case, the Plaintiff held it acquired his land from an allocation and/or land adjudication process. There is a Certificate of Title Deed issued on August 8, 2013 in the names of Mwanazaka Tindi Dzenzo under the Land Registration Act, No 3 of 2012. Thus, the effect of the Registration of Lands is founded in the provisions of Section 24 of 'The Land Registration Act' which provides as follows:-

' Subject to this Act – The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenances thereto and;

35. To advance on this legal preposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case Lease is deemed to be the 'prima facie' evidence of the stated registration. The Certificate of Lease held by the land owner is protected under the Provisions of Law- Sections 25 (1) and 26 (1) of 'The Land Registration Act No 3 of 2012 provides as follows:-

' The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever'

This fact is strengthened by the following decisions - 'ELC (Nku) No 272 of 2015 (OS) – Masek Ole Timukoi & 3 others – Versus- Kenya Grain Growers Ltd & 2 others' and 'ELC (Chuka) No 110 of 2017 –



M'Mbaoni M'Thaara – Versus- James Mbaka. And in Civil Appeal 60 of 1992 – ‘Dr. Joseph MK Arap Ngok – Versus- Justice Moiwo Ole Keiwua’ where courts has held that:-

‘It is trite law that land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.’

Nonetheless, the main bone of contestation in this suit are three (3) fold, namely:- a). The Plaintiff assertion that they were being the bona fide and absolute registered owners to the suit land b). based on this legal position, therefore the Defendant had trespassed on it thus need to be evicted c). the allegations meted by the Defendant in their Counter Claim that the Plaintiff illegally and through fraudulent means acquired the Certificate of Title Deed.

36. In order for this Honorable Court to effectively deal with the afore stated three (3) issues, I wish to cite the provisions of Section 26 (1) of the Land Registration Act Verbatim:-

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.’

In the case of Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No 2 of 2016 (2018) eKLR - clearly spells out the purpose of above provisions of Section 26 (1) (b) is to protect the real title holders from being deprived of their title by subsequent transactions. However, where the Certificate of Title or in this case Lease is doubtful suspect or obtained by fraud or forgery un procedurally, illegally or corrupt means or by mistake or omission as envisaged under the above Provision of Section 26 (1) of Land Registration Act, the Provisions of Section 80 (1) & (2) of Land Registration Act for the cancellation and rectification of the title comes to play – ‘Peter Njoroge Nganga – Versus - Kenya Reinsurance Corporal Limited & Others’ ELC (Kjd) No 204 of 2017.’

37. In the instant case, and from the evidence adduced, the suit land from the copy of the title deed produced and marked as Plaintiff Exhibit No indicated the certificate of title deed to the suit land measuring 3.09 Ha (Approximately acres) was registered and issued on August 8, 2014 in the names of Mwanzaka Tindi Dzenzo – the deceased. It is noted from the certificate of death issued by the Registrar of Births and Deaths on January 28, 2003 the deceased died on July 28, 2002 which was eleven (11) years prior to the certificate of title deed being issued to him in his name. ideally, one would have expected the title deed to have been issued in the names of the Legal Administrators – Emmanuel Tindi Mwanzaka and Chirindo Mwanzaka Tindi based on the Grant Letters of Administration they held dated March 26, 2012 and Certificate of Confirmation of the Grant dated April 16, 2012 and upon their demise into the names of Joseph Mwambaji Mwanzaka – PW1 who were issued Letters of



Administration Ad Litem on March 25, 2012 and confirmed on March 31, 2022 both produced as Plaintiff Exhibit No 8 and 9 respectively.

Indeed the Defendant in the Counterclaim has alleged that under Paragraph 11 of the Defence and Counter Claim this:-

' The Defendant avers that the transfer and issuance of the title deed in respect of the suit land to the Plaintiff is wrong, illegal and/or fraudulently obtained'.

Although the Defendant has provided the particulars of the alleged fraud as being:-

- a. Obtaining title deed by fraud and without the permission and/or consent from the original owner and/or his family members
- b. Obtaining title deed to the suit land without a valid transfer having duly signed by the Original owner and/or his family.

The alleged fraud was never challenged nor proved as required by law, as provided for under the Provision of Section 107 of the *Evidence Act* Cap 80. He who alleged muse proof. The Defendant failed to produce any tangible evidence such as investigation report or complaint lodged at the Criminal Investigation office for that matter. From the quick inferences alluded to in the particulars cited above the Defendant is questioning the process of obtaining the title deed whereby its assumed the title deed had been registered in the names of the Defendants before being assumably transferred to the Plaintiffs. He had also held it was an ancestral land. Apart from having their parents buried on the land, there is nothing to demonstrate that the land was conferred to the Defendant. It's not in doubt that they had occupied it from the year 1977 and even planted coconut trees and caused some construction but two issues do arise. Firstly, the Defendant has not made a claim of title to the suit land under Land Adverse possession by moving this court under an Originating Summon as provided for under Order 37 Rule (7) of the Civil Procedure Rules, 2010 having lived on the land continuously and uninterruptedly for over 12 years as envisaged by law. The legal maxim of 'Equity does not end the indolent comes in here to play'.

38. Secondly, it is not lost as it is instructive that this matter has been a subject of protracted litigation before the Land Adjudication Committee, Land Arbitration and the Minister of Lands thus the sequence of the time has been interrupted accordingly by operation of law. Apparently, the decision before all these adjudication process were all in favour of the Plaintiff. When the matter was referred before this Court, following the disbanding of the adjudication tribunals, the Court noted that an appeal had never been filed and proceeded to close the file and the Defendant produced the said Court Order as Defendant Exhibit No 36. For these reasons adduced herein, therefore, this court is fully satisfied that the suit property is legally registered in the names of the Plaintiffs.

Issue No (b) Whether the Defendant had trespassed onto the suit land from the year 1997 as alleged and if so should eviction orders ensue.

39. Under this sub-heading the Learned Counsel for the Plaintiff herein in her submissions extensively and wisely so elaborated in the definition and the legal connotation on the concept of 'Trespass' and 'Continued Trespass' as now reproduced herein below:-

According to the 10th Edition of the Black Law Dictionary Trespass is defined as follows:-

' An unlawful act committed against the person or property of another especially wrongful entry on another's real property.



Clark Lindsell on tort 18th Edition on Page 923 defines trespass as 'Any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason'

Continued Trespass is defined as

' A trespass in the nature of a permanent invasion on another's rights such as a sign that overlaps another's property's.

Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.

40. Under the Provisions of the Trespass Act Cap 403, Trespass is described as 'Any person who without reasonable excuse enters or remains upon or erects any structure on or cultivates or tills or grazes stock or permits stock to be on the private land without the consent of the occupier thereof shall be guilty of an offence. Further in Clark & Lindsell on Tort 16th Edition Paragraph 23-01 It states that :- day to day as long as the trespass continues'

In the instant case, it's not in dispute as the same has been pleaded and evidence adduced during the hearing that the Defendants entered into the suit land way back in the year 1997 to 1985. According to him, he alleges that the suit land was ancestral where he was born there and the same being a property of the clan hence it was ancestral land. He alleged that his father and mother were buried there when they died. They planted several coconut trees there and constructed permanent structures.

41. From these facts there is no doubt that the Defendant had been in continuance occupation of the land from the year 1977. Secondly, it's instructive to note that the land has been marred by a series of land dispute before the land Adjudication dispute resolving statutory created entities being the Land Adjudication Committee, Land Arbitration Committed, Provincial Appeals Board and the Minister of Land and Settlement. At all these levels the record indicates that the decision being in favour of the Plaintiffs. Clearly, there is no was the Defendant would have dared make a claim to the land under the Land Adverse Possession as he never certified the required Legal requirements – having lived there continuously and uninterruptedly for over twelve (12) years as clearly this sequence got broken by the protracted legal land dispute.
42. Besides, the Defendant entered the suit land without the consent authority and knowledge of Mwanaka Tindi Dzenge – the deceased and hence based on the fact that the Defendant has failed to prove ownership to the land the only conclusion is to aver that the acts by the Defendant was illegal, unfair and wrongful.

Its not in doubt that customary law is also a source of law in Kenya. However, the provisions of Article 2 (4) of the Constitution of Kenya holds that:-

' Any law, including customary law, that is inconsistent with this constitution is void to the extent of the inconsistencies and any act or omission in contravention of this constitution is invalid'.

The claim of the land as being from ancestral land is unfounded in law against the existence well established statutes and the Constitution of Kenya which specifically govern land law in this country. This assertion is loose as it is not anchored on any statute and therefore it must fail.

Hence this court concluded the Defendant has trespassed on to the Plaintiff's land.



The argument by the Defendant, thought admitting the fact that he may has trespassed but avers that the Plaintiff had always known that fact from the year 1977 he could not purport to file this suit in whatsoever capacity against him more that fourteen 14 years thereafter. He argued that the suit by the Plaintiff was statute barred by dint of Section 7 of the Limitation of Action Act Cap 22 which provided that:-

' An action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right of action accrued to him or if first accrued to some person through whom he claims to that person'

43. In that instant case this argument does not apply as indicated this is a land dispute that had been protracted for all these period between the Plaintiffs and the Defendants. From the filed Counter Claim which facts to be accompanied with a verifying affidavit as required by law order 4 Rule 1(2) and Order 7 Rule 5 (a) of the Civil Procedure Rules, never emphatically provide particulars to prima facie justify the ownership of the land by the Defendant as required by law;

ISSUE (c) Who will bear the costs of the suit?

44. The issue of Costs is at the discretion of Court. Costs means what a party is awarded at the conclusion of any legal action, process and proceedings in any litigation. The proviso under the provision of Section 27 (1) of the Civil Procedure Rules, 2010 provides that costs follow the event. By events, it mean the result of the result of the cause of action, proceedings and process of a litigation. In this case the Plaintiffs have succeeded in their case and therefore the Defendant should to bear the costs of the suit.

VI. Conclusion and Disposition

45. In the long run having caused an indepth analysis to all the framed issues herein above, the Honorable Court is satisfied that the Plaintiffs have been able to successfully establish their case on preponderance of probability as pleaded in the Amended plant. For that reason, the court proceeds to make the following orders.
- a. That Judgment be and is hereby entered in favour of the Plaintiffs herein with costs.
 - b. That a declaration be and is hereby made to the effect that all that parcel of land known as Land reference Number KILIFI/CHANGOMBE/24 be and is owned by Mwanzaka Tindi Dzenzo.
 - c. That the land registrar kilifi be and is hereby directed to register all that parcel of Land known as KILIFI/CHANGOMBE/24 in the names of the duly appointed Legal Administrator of the Estate of the late Mwanzaka Tindi Dzenzo for further administration and management of the said estate in accordance to the provisions of Section 82(1) of the Laws of Succession Act Cap 160.
 - d. That an order be and is hereby made for the eviction of the Defendant from the suit land within the next ninety (90) days from this date in accordance to the provisions of Section 152 E (1) & (2) (a), (b), (c) & (d) of the Land Act No 12 of 2012.
 - e. That the Defendant to bear the costs of this suit.

IT IS SO ORDERED ACCORDINGLY

JUDGMENT DELIEVERD, SIGNED & DATED AT MOMBASA ON 27TH DAY OF SEPTEMBER 2022



HON. JUSTICE (MR.) L.L. NAIKUNI, JUDGE

ENVIRONMENT & LAND COURT

MOMBASA

In the presence of:

- a. Mr. Buko and Mr. Omar, the Court Assistants.
- b. Mr. Bryan Mutugi Advocate holding brief for M/s. Kiboss Advocate for the Plaintiffs. _____
- c. Mr. Borona Advocate holding brief for M/s Arika Advocate for the Defendant

