



**Mwavuo v Ziro & 4 others (Environment & Land Case 157 of 2014)
[2022] KEELC 13772 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 157 OF 2014
MAO ODENY, J
OCTOBER 24, 2022**

BETWEEN

FELIX NGALA MWAVUO PLAINTIFF

AND

EVANSON MPATHE ZIRO 1ST DEFENDANT

ABDALLA NASSIR ABDALLA 2ND DEFENDANT

AMINA HADII ABDULREHMAN 3RD DEFENDANT

SWALEH NASSIR ABDALLA 4TH DEFENDANT

KARISA MUMBA KANINA 5TH DEFENDANT

JUDGMENT

1. By a Plaint dated August 19, 2014 and amended on January 4, 2017 the Plaintiff herein sued the Defendants jointly and severally seeking the following orders; -
 1. A permanent injunction restraining the defendants, their agents, employees, heirs, legal representatives, servants or any other person acting on their behalf from constructing, dealing with, depositing building materials, trespassing upon, selling and/or interfering in any manner whatsoever in the plaintiff's portion of land situated at Thalatha Meli in Malindi; coupled with eviction order.
 2. An order of ejectment therefrom, so that the defendants restore at their cost the land to its original state before trespass.



Plaintiff's Case

2. PW1 Felix Ngala Mwavuo adopted his Witness Statement and stated that he is the beneficial and original owner of a portion of land at 'Thalatha Meli' which his grandfather cleared, cultivated, developed and utilised during his lifetime.
3. It was PW1's evidence that before the death of his grandfather, he bequeathed him the suit land in 1989 of which he has been cultivating and in occupation of without interruption or interference from the 1st Defendant or any other person. PW1 also stated that the Defendant is his brother in law.
4. PW1 also stated that the 2nd to 5th Defendants are his cousins who sold the suit property to the 1st Defendant and was informed that some people were laying water pipes on the land which he later discovered that it was the 1st Defendant.
5. Mr Mwavuo testified that he had seen the Sale Agreement between the Defendants in respect of the suit property and for the trees which neither discloses the price of the trees nor where the trees are.
6. On cross examination by Mr Shujaa, he stated that his grandfather used to cultivate the suit land and that the 1st Defendant did not buy the land from his grandfather called Katana Mumba. It was PW1's testimony that his uncles never cultivated the suit land and that Nassir Abadalla family are their clan members who have a parcel of land near the suit land.
7. PW2 Joshua Katana Kazungu adopted his written statement and stated that Medza Tunga and his children were already cultivating the land by the time he moved in 1959.
8. PW3 Josphat Katana Mwaringa adopted his written statement and confirmed that they are neighbours to the Plaintiff and that the suit land belongs to Mumba Kanina and he does not know the family of Nassir Abdalla.
9. On cross examination, he stated that the land belonged to Mumba Kanina who planted trees and were cultivating the land.

Defendant's Case

10. DW1 Evanson Mpathe Ziro the 1st Defendant adopted his statement and produced the List of Documents as his evidence. It stated that he owns the suit land which he bought from Abdel Nasser on 11th December 2012 and the suit plot had coconut and mango trees at the time of the purchase.
11. DW1 also stated that he got a call that there was a dispute on the trees whereby he paid Kshs. 20,000 to Karisa Mumba Kanina. On cross examination by Mr Kimani, he stated that he was neither born in Kijiwetanga nor resides there but he is aware that the suit land is in Kijiwetanga area.
12. It was DW1's testimony that he bought the land while Mr Nasser was already deceased but he was represented by his brother Moris Ziro and that the plot had a dispute with Coast Development Authority which plot is occupied by squatters. Further that the seller had no title as the plot was an unsurveyed plot.
13. DW2 Abdalla Nassir adopted his written statement and stated that the land originally belonged to Karisa Chai who sold the same to his late mother Amina therefore the suit land does not belong to the Plaintiff.
14. On cross examination by Mr Kimani he stated that his late mother Amina bought the land from Karisa Chai but he neither had the evidence of sale nor witnessed the transaction. He also stated that he signed the sale agreement but they did not indicate that his mother Amina had bought the land from Karisa



chai. Further, that they were still following up on the issue of title deed for the suit land from the Coast Development Authority.

15. DW3 Henry Kalume adopted his written statement and stated that he is the one who drafted agreement for sale of the coconut and mango trees in his capacity as a village elder and also witnessed the payment of Kshs. 20,000/=.
16. On cross examination, he stated that he had witnessed the sale agreement as a village elder and that the plot was not indicated but the land for the Nassir family was mentioned.

Plaintiff's Submissions

17. Counsel for the Plaintiff submitted that the three exhibits produced by the Defendant are inadmissible for nonpayment of stamp duty and urged the court to reject or expunge the documents from the court record.
18. Mr Kimani further submitted that there was no evidence to show that Amina Hadii had bought land from Karisa Chai nor evidence showing that Amina had allowed the Plaintiff's grandfather, grandmother or uncle to work on the suit land and plant permanent trees.
19. Counsel submitted that the Sale Agreements are enforceable as the agreement dated December 8, 2012 does not mention consideration passing from the alleged purchaser to the vendor and further that there is evidence of ownership or possession of the land from Nassir Abdalla's family or its passage to Amina Hadii.
20. Mr Kimani also submitted that the Sale Agreement made on December 11, 2012 did not involve the plot owners of plot 10814 from which the $\frac{3}{4}$ of an acre was to be excised and that the 1st Defendant had admitted that he had not undertaken requisite due diligence. Further that the agreement was made without involving Karisa Chai from whom Amina Hadii allegedly bought the land or Coast Development authority from whom they are still pursuing a certificate of title.
21. It was counsel's submission that the sale of the trees was unnecessary by virtue of the fact that the 1st Defendant had purchased the suit land with all the trees thereon. Further that the suit land was agricultural and any dealings with the suit land was subject to the Land Control Act and there is no evidence that parties to the agreement sought or obtained a letter of consent from Malindi Land Control Board.

Defendants' submissions

22. Counsel for the defendants submitted that the plaintiff has not adduced any evidence to prove ownership of the suit land. Counsel relied on Section 107 (1) of the Evidence Act Chapter 80 of the Laws of Kenya and stated that the onus is on the plaintiff to prove that the suit land originally belonged to his grandfather and that his grandfather later on gave him the suit land.
23. It was counsel's submission that the Sale Agreement dated December 11, 2012 is enforceable as it indicates the suit property was sold to the 1st Defendant by the 2nd, 3rd and 4th Defendants and the consideration is mentioned.
24. Counsel further submitted that there was no need for the Land Control Board as Section 6 of the Land Control Act applies to agricultural land as defined in Section 2 (a) of the Act and that the Plaintiff did not adduce any evidence to prove that the suit land is situated outside a Municipality or township.
25. On the issue of payment of stamp duty, counsel submitted that the mere fact that the stamp duty chargeable on the documents had not been paid by the time of the hearing of the suit does not render



Defendants exhibit No 1, 2 and 3 inadmissible as evidence in view of the provision of Section 19 (3) (c) of the Act which provides at the relevant part as follows:-

- 19 - In all other cases, unless otherwise provided in this Act, the instrument
- (3) shall, saving all just exceptions on other grounds, be received in evidence upon
- (c) payment to the court, arbitrator or referee of the amount of the unpaid duty and penalty specified in subsection (5) and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.'

26. Counsel relied on the case of ABok James Odera t/a Odera & Associates v John Patrick Machirat/a Machira & Company Advocates [2013] eKLR quoted with approval in Keshavji Jivraj Shah v kanwal Sarjit Singh Dhiman as well as the decision of Diamond Trust Bank Kenya Limited v Jaswinder Singh Enterprises and submitted that instruments chargeable with stamp duty are admissible in Court as evidence, that non-compliance with the provisions of the Act does not per se render the instruments inadmissible in evidence as the stamp duty can be paid later or even waived by the collector of stamp duty.
27. Counsel therefore urged the court to dismiss the plaintiff's case with costs.

Analysis and Determination

28. The issues for determination are whether the plaintiff has proved ownership of the suit land and whether he is entitled to the reliefs sought.
29. It was the Plaintiff's case that he is the beneficial and original owner of a portion of land at 'Thalatha Meli' which his grandfather cleared, cultivated, developed and utilized during his lifetime and further that before demise of his grandfather, he bequeathed him the suit land in 1989 of which he has been cultivating and in occupation of without interruption or interference from the 1st Defendant or any other person.
30. It is also on record that the Defendant is his brother in law and that the 2nd to 5th Defendants are his cousins who sold the suit property to the 1st Defendant. It is further the Plaintiff's case that he had seen the Sale Agreement between the Defendants in respect of the suit property and the trees but the same neither discloses the price of the trees nor where the trees are.
31. The burden of proof lies on a party who alleges must prove as per Section 107 and 108 of the Evidence Act which provides: -
 107. Burden of proof
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."



32. The Plaintiff was under a duty to prove that that he inherited the suit land from his grandfather and also disprove the Defendants claim that there was a sale of the suit land together with the purchase of the coconut and mango trees for Kshs 20,000/.
33. The Plaintiff also confirmed that he had seen the Sale Agreement but stated that the same did not disclose the amount and where the trees were.
34. I have perused the agreements and notice that the agreement dated December 8, 2012 and December 13, 2012 was for sale of the 12 mango trees and 2 coconut trees for Kshs 20,000/= to allow the family of Nassir Abdalla to take their land. The agreement was in writing and witnessed by 5 witnesses. This agreement has not been controverted either as being fake or non-existent. In fact, the Plaintiff stated that he had seen the agreement but argued that the sale was subject to Land Control Board and that the Defendant had not paid stamp duty. There was no evidence that the suit land was subject to Land Control Board as alleged by the Plaintiff.
35. The Plaintiff was under a duty to prove his case on a balance of probabilities which he fell short of. I have considered the evidence adduced by the Plaintiff and the Defendants and find that the Plaintiff has not proved his case and the same is therefore dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24TH DAY OF OCTOBER, 2022.

M A ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

