



REPUBLIC OF KENYA



KENYA LAW
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**Nguma v Ndalo & 20 others (Environment & Land Case 276 of 2016)
[2022] KEELC 13546 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13546 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 276 OF 2016
JO OLOLA, J
OCTOBER 19, 2022**

BETWEEN

AWADH YISLAM NGUMA PLAINTIFF

AND

MANTANO NDALO 1ST DEFENDANT
CHRISTINE TSIMBA 2ND DEFENDANT
PHILIP GENYA 3RD DEFENDANT
GRACE NGUMBAO 4TH DEFENDANT
GARAMA POLA 5TH DEFENDANT
KARISA KAPITAO 6TH DEFENDANT
JULIUS K. MNGOJA 7TH DEFENDANT
SAMMY ABDULLA 8TH DEFENDANT
FONDO KAHINDI 9TH DEFENDANT
FIKIRANI CHARO 10TH DEFENDANT
CHIRO GRACE NGUMBAO 11TH DEFENDANT
KATOZI KAINGU CHARO 12TH DEFENDANT
ANTHONY FOLO 13TH DEFENDANT
MIA DZOMBO 14TH DEFENDANT
BENJAMIN CHARO 15TH DEFENDANT
PENDO KATANA 16TH DEFENDANT
TEMBO FOLO 17TH DEFENDANT



EDISON MWACHIRO	18TH DEFENDANT
MWARINGA MWAMBALE	19TH DEFENDANT
NATIONAL LAND COMMISSION	20TH DEFENDANT
REGISTRAR OF TITLES MOMBASA COUNTY	21ST DEFENDANT

JUDGMENT

1. By the Plaintiff dated October 11, 2016 as filed herein on October 13, 2016, Awadh Yislam Nguma (the Plaintiff) prays for Judgment against the 21 Defendants jointly and severally for:
 - (i) An order against the 1st to 19th Defendants, their families, servants, agents and or assignees, representatives or any person authorised by them to occupy the suit property to vacate and or handover vacant possession of Plot Number 996/III/MN immediately;
 - (ii) In the alternative to Prayer (i) for an order of eviction against the 1st to 19th Defendants;
 - (iii) An order against the 20th and 21st Defendants to issue the Plaintiff with a title deed in respect of Plot Number 996/III/MN Kanamai immediately;
 - (iv) Costs of this suit; and
 - (v) Any other relief that this Honrouable Court may deem fit and just and fair to grant in the circumstances of this suit.
2. Those prayers arise from the Plaintiff's contention that sometime on August 12, 1968, his father Yislam Awadh Ngumo (now deceased) purchased 5 acres of Plot No 284 Section III Mainland North of Kanamai from one Hero Bin Maalim Bin Hiroo. Upon the aforesaid purchase, the deceased instructed a private surveyor who conducted a survey and hived out to the 5 acres portion through a sub-division of the land and preparation of a Deed Plan which was handed over to the 21st Defendant upon approval by the Director of Surveys for the issuance of a title deed.
3. The 21st Defendant however lost the Deed Plan for the sub-division of the parcel of land that was now known as Plot No 996/III/MN and hence the deceased could not be issued with a title deed despite having taken possession and occupation of the property.
4. The Plaintiff avers that sometime in July 2012 while still waiting for the issuance of the title deed, the deceased noticed that the 1st to the 5th Defendants had trespassed upon his property. Despite all manner of efforts, the 1st to 19th Defendants have since refused to vacate the suit property and hence this suit.
5. But in the joint Written Statement of Defence, the 1st, 2nd, 4th – 7th, 9th, 10th, 11th, 12th, 13th, 15-17th and 19th Defendants deny that the Plaintiff's deceased father purchased the suit property and/or that they have trespassed thereon as stated by the Plaintiff. On the contrary, the Defendants aver that they are the legal and/or beneficial owners of the suit property.
6. The said Defendants aver that they have resided on the suit land since the Plaintiff's father sold it to them between the years 2000 and 2004. In particular the 7th Defendant asserts that he is a stranger to these proceedings as he has never resided in the suit property. The Defendants further assert that the 13th Defendant is a deceased person and that the suit against him is misconceived.



7. The 3rd, 8th, 11th, 14th, 18th, 20th and 21st Defendants neither entered appearance nor filed a statement of Defence.

The Plaintiff's Case

8. The Plaintiff testified as the sole witness in his case. Testifying as PW1, the Plaintiff told the Court that he is the trustee of the estate of his father Yislam Awadh Ngumo who passed away on March 20, 2014.
9. PW1 testified that on August 12, 1968, his father purchased 5 acres that was to be hived out of plot No. 284 Section III Mainland North at Kanamai from one Hero Bin Maalim Bin Hiroo. Thereafter his father instructed Messrs Hime & Zimmerlin licensed Surveyors to hive out the portion and prepare a deed plan for purposes of registration of the Plaintiff's father as the owner thereof.
10. PW1 told the Court the said surveyors conducted the sub-division and prepared a deed plan which as the law requires was handed over to the Registrar of Titles Mombasa (the 21 Defendant) upon approval thereof by the Director of Survey on June 20, 2002. PW1 told the Court the 21st Defendant lost the Deed Plan for the sub-division which was known as Plot No 996/III/MN and as a result his father could not be issued with a title deed and could not develop the same due to uncertainty concerning its correct location.
11. PW1 further told the Court that as they awaited the issuance of the title deed, his father noticed that the 1st to 5th Defendants had trespassed onto the land sometime in July 2012. Despite his father's best efforts the Defendants refused to vacate the land.
12. PW1 testified that his father then sought the intervention of the area District Officer who arranged for a meeting but the 1st to 19th Defendants refused to vacate the land and the District Officer advised the Plaintiff and his father to file a suit in Court. PW1 told the Court his father passed away on March 20, 2014 before he could institute this claim.
13. On cross-examination, PW1 conceded that his identity card number was the same as the one appearing in the sale agreements produced by the Defendants. He told the Court they have signed many documents with the Defendants and it was possible they got their number from those documents.
14. PW1 further testified that they were yet to get a title for the property and that all they had was a Deed Plan. He further denied that the Defendants were on the suit property in 2002 insisting they only came to the land in 2012. He told the Court they had built a house on the land but the Defendants had destroyed the same.

Defence Case

15. On their part, the Defendants called a total of seven (7) witnesses in support of their case.
16. DW1 – Grace Kadzo Ngumbao is the 4th Defendant and a farmer in Kanamai Barani. DW1 told the Court she resides in Plot No 284/90/III/MN measuring 50 ft by 50 ft. The plot was sold to her by the Plaintiff's father, his son Twahib Yislam and Yislam Awadh Nguma (the Plaintiff) on June 12, 2003 for Kshs 6,000/-. DW1 further told the Court she has lived on the land ever since.
17. On cross-examination DW1 told the Court the Plaintiff was one of those who sold to her the land and that it was him who brought someone to draft the agreement which was signed before Karisa Kapitao and other village elders.
18. DW2 – Julius Kahindi Mngoja is the 6th Defendant and a fisherman in Kanamai. He told the Court his plot measuring 50 by 50 feet was sold to him by the Plaintiff's father, his sons Twahib and the Plaintiff



herein on May 15, 2003 at a consideration of Kshs 8,500/-. His purchase and entry on the land was witnessed by village elders and he has lived thereon ever since.

19. On cross examination, DW2 told the Court Mzee Karisa Kapitao was one of the witnesses to the agreement. He conceded the agreement did not show the parcel of land that had been sold to him. He told the Court he signed the agreement as the leader of the group that was buying the land while the deceased Mzee Yislam signed as the owner.
20. DW3 – Karisa Kapitao Kiti is the 7th Defendant and a resident of Majengo Kanamai. He told the Court he had no agreement giving him any parcel of land and that he does not live on the disputed parcel of land. DW3 told the Court he witnesses and stamped all the sale agreements in respect to the disputed parcel of land.
21. DW3 testified that he knew the Plaintiff some 3 days after they were summoned to the District Officer's Office on a date that he is unable to recall. As far as DW3 is concerned, the land does not belong to the Plaintiff.
22. On cross-examination, DW3 testified that the Plaintiff's brother Twalib is the one who had asked him to witness and stamp the documents. That was because it was expensive to go to an Advocate. He further told the Court it was Twahib who was drafting the agreements. DW3 told the Court he was paid Kshs 200/- for stamping the documents.
23. DW4 – Matano Ndalo is a stone cutter in Majengo Kanamai. He told the Court that he has built a house on the land he bought and that there are about 88 people on the land.
24. On cross-examination, DW4 told the Court his plot is 50 by 50 feet and that the same was sold to himself by the Plaintiff's father and his son Twahib. He refuted the claim that they agreed at the District Officer's office to be given time to leave the land.
25. DW5 – Garama Pola is a resident of Majengo Kanamai. He told the Court he had developed his parcel of land which was sold to him by the Plaintiff's father.
26. On cross-examination, he told the Court the seller of the land had since died. He denied invading the land and told the Court he had entered therein with the full knowledge of the owners and the village elders.
27. DW6 – Paul Mwariga Mwambale is a businessman in Kanamai. He told the Court the plot he occupies was sold to him by the Plaintiff's father in 2003. He denied that they had forged the documents of sale.
28. DW7 – Katozi Kaingu Charo is a farmer in Kibarani. She told the Court she bought the land she lives in to-date from the Plaintiff's father. They executed a sale agreement and she has lived on the land to-date. She told the Court she was aware people had been summoned to the District Officer's office but she did not attend as she had travelled.

Analysis And Determination

29. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.
30. The Plaintiff herein is seeking an order to have the 1st to 19th Defendants vacate and/or hand over vacant possession of a parcel of land described as Plot No 996/III/MN situated at Kanamai in Kilifi County. In addition, the Plaintiff prays for an order to compel the 20th and 21st Defendants to issue the Plaintiff with a title deed in respect of the said Plot No 996/III/MN.



31. It is the Plaintiff's case that he brings this suit as a trustee of the estate of his deceased father Yislam Awadh Nguma who passed away on March 20, 2014. According to the Plaintiff, his deceased father had sometime on 12th August 1968 purchased some 5 acres of land that was to be excised from Plot No 284 Section III Mainland North of Kanamai from one Hero Bin Maalim Bin Hiroo.
32. The Plaintiff told the Court that upon purchase of the land his father initiated the process of the sub-division and that a Deed Plan was prepared for the sub-division of the 5 acre parcel of land that was to be known as Plot No 996/III/MN. However when the said Deed Plan was handed over to the Registrar of Titles Mombasa (the 21st Defendant), the same was misplaced and the Plaintiff's father was therefore not issued with a title deed for the land.
33. The Plaintiff further told the Court that sometime in the year 2012, his father came to notice that some of the Defendants herein had encroached upon the land. His efforts to have the Defendants to vacate the land were unsuccessful but as the Plaintiff's father was preparing to institute this suit for their eviction, the Plaintiff's father passed away. The Plaintiff thus brings this suit in his capacity as the trustee of the estate of his deceased father. In support of this assertion, the Plaintiff has produced an order issued by the Kadhi's Court at Mombasa on August 19, 2016 in Mombasa Kadhi's Court Succession Cause No 80 of 2014 appointing him a trustee of the deceased's estate. The said order reads as follows in the relevant part:
- “Upon reading the consent agreement and upon hearing the Petitioner and perusal of the file, It is hereby ordered:
1. That, Awadh Yislam Awah is and hereby (sic) appointed as Trustee of the estate property;
 2. That, to hold in trust on his own behalf and that of the other heirs (sic).
34. I have perused through the said order but was unable to find any reference to the suit property. As was stated in *Trouistik Union International & another v Jane Mbeyu & another* (2008) 1 KLR 730:
- “To determine who may agitate by any suit any cause of action vested in the deceased at the time of his death, one must turn to Section 82(a) of the *Law of Succession Act*. That Section confers that power on a personalrepresentative and on them alone.”
35. As it were, the *Law of Succession Act*, cap 160 of the Laws of Kenya is concerned with the administration of the estate of deceased persons. The estate of a deceased person had been defined by the Act as property which the deceased person was legally competent to freely dispose of during his lifetime, and in respect of which his interest has not been terminated by his death.
36. In the matter before me, there was nothing placed before me to suggest even remotely that the subject property herein indeed forms part of the late Yislam Awadh Nguma's property. Other than an abstract purporting that the original Deed Plan for the proposed sub-division No 996/III/MN had been lost, there was no evidence that any title in that regard had been issued or transferred to the Plaintiff's father.
37. As matters stand at now, the only parcel of land in existence is Plot No 284/90/III/MN which parcel of land is in the name of Hero Bin Maalim Bin Hiroo. The Plaintiff does not claim to be the administrator of the estate of the registered proprietor of this parcel of land.
38. This court can only grant orders affecting land to a party who has legal or equitable interest in the said land. Legal interests in land are normally evidenced by title and the only title in existence as at now is the



one registered in the name of the said Hero Bin Maalim Bin Hiroo. It follows that I am not persuaded that the Plaintiff had capacity to institute this claim.

39. In the circumstances, this suit is struck out with costs to the Defendants.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 19TH DAY OF OCTOBER, 2022.

In the presence of:

Mr. Mokanya holding brief for Malombo for the Defendants

No appearance for Aboubakar for the Plaintiffs.

Court assistant - Kendi

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J. O. Olola

JUDGE

