



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 64 OF 2015

1. AGNES NGUMBI NZIOKA

2. ABBUBAKAR MTUKU NGASHO

3. FREDRICK MNAO NGASHO

4. KOKI NGASHO.....PLAINTIFFS

VERSUS

MOCHI NZONGA NGASHO.....DEFENDANT

JUDGMENT

BACKGROUND

1. By their Complaint dated 24th April 2015 Agnes Ngumbi Nzioka, Abubakar Mtuku Ngasho, Fredrick Mnao Ngasho and Koki Ngasho (the Plaintiffs) pray for Judgment against Mochi Nzonga Ngasho (the Defendant) for:

1. A declaration that Plot No. Mwanda/Mbalamweni/276 is family land belonging to the Plaintiffs and the Defendants in equal shares and distribution of the proceeds of sale from sale of Plot No. Mwanda/Mbalamweni/276 in equal shares;

2. A permanent injunction order restraining the Defendant, his agents and/or servants from transferring and disposing off Plot No. Mwanda/Mbalamweni/276;

3. Costs of the suit; and

4. Interest

2. Those prayers arise from the Plaintiffs' contention that the Plaintiffs and the Defendants are family members being the grand children of one Kyalo Nzonga Ngasho. The Plaintiffs assert that their grandfather died leaving behind several pieces of unsurveyed land at Mwanda/Mbalamweni and that the said Plot No. 276 is part and parcel of their grandfather's land.

3. The Plaintiffs aver that when some strangers started trespassing upon their land some time back, the family met and resolved that the Defendant as the eldest grandson should prepare titles to the land and dispose off one parcel to enable them obtain money for that purpose. That in that respect, the Defendant proceeded to obtain title for Plot No. 276 in his name. He then proceeded to sell the same at Kshs 6 Million but refused to share the proceeds thereof with other family members.

4. But in his Statement of Defence dated 26th May 2015, the Defendant denies that Plot No. 276 is part of the land left behind by the late Kyalo Nzonga Ngasho and/or that it was resolved that he would pursue titles for his land on behalf of the family as alleged or at all.

5. The Defendant however asserts that it is the 1st Plaintiff who solicited for a buyer for the said property and proceeded to execute the same as an agent and not a co-owner. He further avers that contrary to the Plaintiffs assertions, they are aware that the purchase price is held in a joint account in the name of the Defendants and the purchaser.

The Plaintiffs' Case

6. The Plaintiffs called a total of four witnesses who testified in support of their case at the trial.
7. PW1- Agnes Ngumbi Nzioka is a resident of Mariakani and the 1st Plaintiff herein. He told the Court the Defendant is his cousin as his father is a brother to PW1's father. PW1 testified that the suit property belonged to her father who inherited the same from her grandfather.
8. PW1 testified that they had an issue at home and they asked the Defendant to represent the family. They were trying to sell a portion of the land to get money to deal with some case brought against them by some Giriama Clan at the Chief's Office at Kajongooni. PW1 told the Court that as the eldest member of the family, they settled on the Defendant to prepare the documents required and to sell the land as a trustee of the family. He was expected to convene a meeting after the sale and to distribute the proceeds to the family.
9. PW1 testified that on 6th December 2013, the Defendant summoned her together with one Bimba Kazungu Shuhuli to the offices of a certain lawyer in Mombasa after they had found a buyer willing to purchase the land. PW1 testified that at the said offices she was made to sign an agreement. Being illiterate, she thought she was signing as a co-owner but it turned out this was not the case.
10. PW1 further told the Court that because they did not have a joint account, the Defendant told her that he would have the cheque for Kshs 4 Million drawn in his favour after which he would encash the same and transfer the proceeds to a joint account once they opened one. Later on when asked to open the joint account the Defendant turned round and started claiming he had only sold his own land. He declined to share the proceeds with anyone.
11. On cross-examination, PW1 conceded that she belongs to the Muyombe Clan while the Defendant belongs to the Mtondo Clan. PW1 told the Court her father Nzioka Muyalo Mumo was a brother to the Defendant's father- Makinamasio Ndonga. She further told the Court she knew of Plot Nos 275, 276, 563 and 564 in the area and that there were some objection proceedings that had taken place at Kaloleni. She told the Court that that was the case that made them to go sub-divide their land. She was however unaware that a decision was made thereon on 24th October 2013.
12. On further cross-examination, PW1 conceded that she had filed an Objection in relation to Plot No. 276. She told the Court that case was still going on and that a decision was yet to be made. She further told the Court that for now the land remains in the name of David Mwamudzi.
13. PW1 further told the Court that on the day they signed the agreement, they were only bought a soda. She denied that she was paid Kshs 400,000/- as commission fees.
14. PW2- Fredrick Mnao Ngasho is also a resident of Mariakani and the 3rd Plaintiff herein. He told the Court that PW1 is his cousin while the Defendant is his elder brother.
15. DW2 testified that sometimes back, their family had a dispute with a rival clan who were threatening to take their land. As the family had no money, they met and resolved to sell one of the properties so as to be able to defend the rest of the land. The family then unanimously settled on the Defendant as the eldest male member of the family to prepare the documents and to find a buyer for Plot No. 276 as a trustee for the family.
16. PW2 later came to learn that the Defendant had received Kshs 4 Million as proceeds for the sale of the said Plot but the Defendant refused to share the proceeds claiming the land he sold actually belonged to him.
17. On cross- examination, PW2 conceded he was aware of the cases before the Land Adjudication Committee at Kaloleni. He further conceded he was aware the Defendant had filed a case against David Mwamudzi before that Committee. A decision was then made that the land belongs to Mwamudzi. PW2 told the Court he was not aware if any Objection was filed thereafter. He further conceded that he was not there when PW1 executed the Sale Agreement and told the Court he had never seen that Agreement.
18. PW3- Abubakar Nzuku Ngasho is a driver residing at Mariakani Weigh Bridge and the 2nd Plaintiff herein. He told the Court that PW1 is his eldest Sister while the Defendant was his elder brother. He told the Court his father and the Defendants are the same but their Mothers are different. He reiterated the evidence of PW1 and PW2 in regard to the disputed property.
19. On cross- examination, PW3 told the Court they belong to the Kiptondo Clan together with the 1st Plaintiff and that his father was a cousin to the 1st Plaintiff's father. He further told the Court his father had two wives. The Defendant's mother was the first wife to the father while PW3's mother was the second wife.
20. PW3 told the Court Plot No. 276 was sold by the Defendant. He however had nothing to show that the Defendant received Kshs 4 Million as proceeds of the sale. The land was still there and is occupied by the 1st Plaintiff who cultivates the same. He conceded he was aware there was an objection filed before the Adjudication Committee at Kaloleni. He was also aware that one David Mwamudzi was claiming the land and a decision had been made in his favour on 24th October 2013. The proceedings were however still on-going.
21. PW4- George Mbejera Lugogo is a farmer in Mariakani. He told the Court he had previously worked with the Defendant and that he had also known the 1st Plaintiff's mother for a long time. PW4 told the Court the Plaintiffs approached him as a Village Elder to resolve the dispute. A meeting was then called for that purpose on 25th January 2015. The Defendant however became hostile at the meeting forcing a postponement thereof.
22. At the second meeting held on 1st February 2015, the Defendant when confronted by other family members conceded that he had not involved them in selling the suit property as previously agreed. He also admitted that he had not deposited the purchase price in a joint bank

account as the family had agreed. He pledged to deposit the amount in such an account before another meeting which was scheduled for 8th February 2015.

23. PW4 testified that the Defendant however refused to attend any subsequent meetings and told his family that he would never share the proceeds of the sale with them. PW4 told the Court he recorded the minutes of the meetings held on 25th January 2015 and on 1st February 2015.

24. On cross- examination, PW4 denied that he was a land dealer or broker. He however conceded that he resides in Kwale County and that he was a Duruma by tribe while the disputants herein were Kambas. He denied that by virtue of his tribe, he was disqualified from presiding over the dispute as an elder. He further told the Court those who had attended the meeting were only the sons of the 1st Plaintiff.

25. PW4 told the Court he did not know the Number of the Plot in dispute and that he only came to learn it was in Kibao Kiche. He also did not know that the land had been adjudicated to one David Mwamudzi. He did not also know that other than the 1st Plaintiff, the second witness to the agreement was the 1st Plaintiff's husband.

The Defence Case.

26. On his part, the Defendant- Mochi Nzonga Ngasho (DW1) testified as the sole witness in his case.

27. DW1 testified that Plot No. 276 solely belongs to himself, but during land adjudication, the same was apportioned to David Mwamudzi. That prompted the Defendant to lodge an appeal to the Land Adjudication Tribunal which appeal remains pending hearing and determination.

28. DW1 further told the Court that his father Ngasho Chalo Nzonga was a brother to the 1st Plaintiff's grandmother Kalekye Chalo. He told the Court the 1st Plaintiff was therefore a distant niece and that they do not belong to the same clan. While she comes from the Miyombe clan, DW1 is from the Mwikitondo Clan.

29. DW1 told the Court the 1st Plaintiff had no right to inherit his property. He testified that his father had allowed the 1st Plaintiff's father Nzioka Kyalo Mnalo to settle on Plot No. 563. He told the Court he is an uncle and not a Cousin of the 1st Plaintiff. The 1st Plaintiff's family still occupies Plot No. 563.

30. DW1 testified that on 6th December 2013, the 1st Plaintiff as an agent of the Vendor took to him Ms Wagemus Properties Ltd to whom he disposed off the said Plot No. 276 and as a result she earned Kshs 400,000/- as commission. She was accompanied by one Bimba Kazungu Shuhuli with whom they witnessed the agreement.

31. DW1 testified that the 1st Plaintiff only turned against him when sometimes in 2015, she approached him for a loan of Kshs 400,000/ to enable her offset a loan she owed to a third party. When DW1 declined, she became angry and went to DW1's step brothers and step mother with whom she sued claiming DW1 had sold family property.

32. On cross- examination, DW1 told the Court the said Plot No. 276 was given to him by his grandmother who had married his mother in accordance with Kamba customs. He told the Court his brothers were present when he was given the land. He however had no document to show the land had been given to himself. While conceding that the 4th Plaintiff had a right to inherit his father's property being his wife, DW1 told the Court she had inherited some land elsewhere while there were some on-going disputes as to the ownership of the others.

Analysis and Determination

33. I have perused and considered the pleadings filed by the rival parties, the testimonies of their witnesses and the evidence adduced before me at the trial.

34. The Plaintiffs pray for a declaration that Plot No. Mwanda/Mbalamweni/276 (the suit property) is family land belonging to both themselves as the Plaintiffs on the one hand and the Defendant on the other in equal shares. They also ask for distribution of the proceeds of the sale of the suit property in equal shares as well as a permanent injunction restraining the Defendant from transferring and disposing off the suit property.

35. Those prayers arise from the Plaintiffs contention that the Defendant and themselves are the grandchildren of one Kyalo Nzonga Ngasho who passed away leaving behind several unsurveyed parcels of land in the area known as Mwanda/Mbalamweni which parcels include the disputed property herein.

36. According to the Plaintiffs, they had a dispute with a rival clan over the property left by their grandfather. As they did not have money to enable them follow up on the dispute, the family met and resolved to sell a portion of their property to enable them get some money to enable them fight the claim from the rival Clan. In this respect the family settled on the Defendant as the eldest grandson and he was tasked with the process of preparing title documents and selling the identified parcel of land.

37. It is however the Plaintiffs case that to their shock and consternation, immediately the Defendant sold the land, he changed the story and told them he could not share the proceeds of sale with any person as the property he had sold solely belonged to himself.

38. The Defendant does not deny selling the land as stated by the Plaintiffs. Indeed as stated, it is his position that the suit property was

given to him by his grandfather and that it solely belonged to himself. He denies that he sold the land pursuant to any agreement or understanding with the rest of the family that they needed money to fight off another case and/or that he would share the proceeds thereof with the rest of the family.

39. For some reason, none of the disputants before me produced a copy of the title to the suit property and it was unclear to me when the suit property was registered and when the title was issued in the name of the Defendant. From Paragraphs 1 and 3 of the Sale Agreement dated 6th December 2013 produced by the Plaintiffs herein (Pexh 2), it was clear to me that the property contains by measurement ten acres or thereabouts and that the same was sold by the Defendant on that day at Kshs 6 Million to M/s Wagemus Properties Ltd. A deposit of Kshs 4 Million was paid by the Vendor while the balance of Kshs 2 Million was to be paid within 90 days of the Agreement.

40. Interestingly, that sale was not done by the Defendant in secrecy. A perusal of the Agreement reveals that the Defendant's signature was witnessed by among others one Bimba Kazungu Shuhuli and Agnes Ngumbi Nzioka (the 1st Plaintiff herein). In her testimony before the Court, the 1st Plaintiff told the Court that she is an illiterate woman and that when she executed the Agreement, she knew she was doing so as a co-owner with the Defendant and not as a mere witness. She did not however make it clear why her three Co-Plaintiffs herein did not execute the Agreement.

41. According to the Defendant however, the 1st Plaintiff knew he was selling the land and she is the one who introduced the Purchaser to the Defendant. On that account, the Defendant told the Court, the 1st Plaintiff witnessed the Agreement as an agent or broker and pocketed a tidy sum of Kshs 400,000/- for her labours.

42. As it were, the Plaintiffs hinged their claim herein on the basis that they and the Defendant are the grandchildren of one Kyalo Nzonga Ngasho- who died and left behind the contested piece of land, among others. In her Statement filed herein on 27th April 2015, the 1st Plaintiff told the Court that they are all the descendants of the said Kyalo Nzonga Ngasho. She goes ahead to declare in that Statement that the Defendant is her eldest Cousin as her father and the Defendant's father were brothers.

43. The 1st Plaintiff indeed repeated that Statement in her testimony –in –chief before this Court. But that was as far as it could go. Challenged by Ms Waithe, Learned Counsel for the Defendant in cross- examination, she conceded before Court that the Defendant and herself belong to different Clans. While she belongs to the Muyombe Clan, the Defendant belongs to the Mtondo Clan. How that was possible for people whose fathers were brothers can only be left to imagination.

44. The attempt to create a close family nexus was also apparent from the testimony of Abubakar Mzuku Ngasho (PW3). In his testimony-in-chief, PW3 told the Court the 1st Plaintiff was her elder sister while the Defendant was her elder brother. It was his case that his father had two wives and that while the Defendant belonged to the first wife, he (PW3) came from the second wife's house. Upon cross- examination however, PW3 testified that his father- Ngasho Charo was a Cousin to the 1st Plaintiff's father one Nzioka Kyalo.

45. The Defendant was perhaps the more forthcoming about the relationships between the parties herein. He confirmed the 1st Plaintiffs position that they belong to different Clans, which he characterized as the Muyombe Clan for the 1st Plaintiff and the Mwikitondo Clan to which he belonged.

46. The Defendant further gave a chronology of their lineage from which it emerges that his father Ngasho Chalo Nzonga was a brother to Kalekye Chalo who is the grandmother to the 1st Plaintiff. Arising from the foregoing, it was evident to me that the Defendant could only be an uncle of sorts to the 1st Plaintiff and not a brother or cousin as the Plaintiffs had purported. It is only the 1st Plaintiff's father who could refer to the Defendant as a Cousin.

47. On the other hand, it was also clear to me that the 2nd and 3rd Plaintiffs are step brothers of the Defendant while the 4th Plaintiff who did not testify herein is a step-mother to the Defendant. While the Plaintiffs accused the Defendant of failing to bring any documentary evidence to demonstrate how he inherited the suit property, the Plaintiffs themselves did not produce any such evidence in proof of their entitlement.

48. From the material placed before me, it was evident that the area known as Mwanda/Mbalamweni had been undergoing adjudication. While the suit property could have been previously used by the family members of the Plaintiffs at some point in time, it was evident that by dint of the said adjudication process, the land had been parcelised and allocated to individuals.

49. Through that process, the Defendant was allocated the said Plot No. 276 before an Objection was raised by one David Mwamutsi. It is the same process that resulted in the 1st Plaintiff being allocated Plot No. Mwanda/Mbalamweni/563. Indeed, even as the Plaintiffs herein pursued the Defendant over the Plot No. 276, it was clear that the Land Adjudication Committee sitting at Kaloleni had on 24th October 2013 adjudicated the land to the said David Mwamutsi and not the Defendant herein.

50. While the Defendant has appealed the said decision, the parcel of land cannot be said to be his own unless the Defendant succeeds in his appeal. It was rather telling that while they claim the land to belong to their grandfather, none of the Plaintiffs herein was a party in Kaloleni Land Adjudication Committee *Cause Nos 45 and 48 of 2013* which dealt with the ownership of the Parcel Nos. 275 and 276 Mwanda/Mbalamweni.

51. A perusal of those proceedings produced by the Defendant herein as Dexh 9 reveals that it is solely the Defendant who launched a claim for the suit property against the said David Mwamutsi who has not even been enjoined in these proceedings as a party despite his being adjudicated as the owner of the land two years before this suit was filed.

52. Arising from the foregoing, it was clear to me that the Plaintiffs case against the Defendant had been actuated by extraneous considerations. The same has no legs to stand on and must be allowed to collapse. It is dismissed with costs to the Defendant.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE