



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 2 OF 2016

1. JONATHAN KITHI KALU

2. EDISON CHARO BIRYA

3. JEFA KALU BIRYA.....PLAINTIFFS

VERSUS

1. KALAMA KADENGE MBWIYA

2. HARRISON MALINGI

3. THE LAND ADJUDICATION & SETTLEMENT OFFICER-KILIFI

4. THE ATTORNEY GENERAL.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Plaint dated 30th December 2015 as filed herein on 5th January 2016 and amended on 17th May 2017, Jonathan Kithi Kalu, Edison Charo Biryra and Jefa Kalu Biryra (the Plaintiffs) pray for Judgment against the Defendants jointly and severally for:

a) A declaration that the allocation of the suit property to Kalama Kadenge Mbwiya and subsequent registration of the said Kalama Kadenge Mbwiya as the absolute proprietor of the suit property was obtained by means of fraud, mistake and/or misrepresentation and an order of rectification of the Register relating to Title No. Malindi/Ramada/125 (to issue) by cancelling the registration of Kalama Kadenge Mbwiya as the absolute proprietor of the said property and instead registering the Plaintiffs as the proprietors thereof in their capacity as the Administrators of (the Estate of) Charo Biryra Ngombo;

b) An order of permanent injunction (to issue) against the Defendants restraining them, their servants and/or agents for entering onto the property, carrying on any activity, selling, charging or dealing with the suit property in any manner whatsoever;

c) Costs of the suit and interest thereon at Court rates; and

d) Any other relief that this Honourable Court may deem just to grant.

2. Those prayers arise from the Plaintiffs contention that they are the Administrators of the Estate of Charo Biryra Ngombo who settled on the then unregistered suit property together with other family members sometime before the year 1970 and proceeded to develop it by building their residences, cultivating crops and planting trees.

3. The Plaintiffs aver that some time in the year 1989, the area was declared an Adjudication Section and the parcel of land measuring 30 acres designated as Title No. Malindi/Ramada/125. However unknown to the Plaintiffs, the name Kalama Kadenge Mbwiya was erroneously included in the list of people to be allocated the suit property despite the fact that he was not a member of the deceased's family and had never occupied or utilized the suit property.

4. The Plaintiffs aver that when they discovered the error, they raised objections with the Land Adjudication and Settlement Officer Kilifi (the 3rd Defendant) but were never given a hearing. During the registration exercise, the said Kalama Kadenge Mbwiya who was the father of

those jointly named as the 1st Defendant and 2nd Defendants herein obtained registration of the suit property in his own name and excluded the deceased and his family.

5. The Plaintiffs maintain that the said registration was obtained by means of fraud, mistake and/or misrepresentation as a result whereof they have suffered loss and damage.

6. But in a Statement of Defence dated and filed herein on 27th September 2016 by Harrison Malingi (the 2nd Defendant) but which was also apparently relied on by the 1st Defendant, the 2nd Defendant avers that his father Kalama Kadenge Mbwiya who was initially sued as the 1st Defendant herein but who has also since passed away, was the registered proprietor of the suit property. He asserts that his father was issued with a genuine title deed for the same on 11th August 2006 and asserts that the allegations of fraud are without basis.

7. The 2nd Defendant further avers that if the Plaintiffs have been residing in, or cultivating the said parcel of land, they have been trespassers thereon and any development, building or structure of any kind allegedly put up are illegal.

8. The 2nd Defendant further asserts that there was no error on the part of the 3rd Defendant in issuing his father with a Letter of Allotment for the suit property and wonders why the Plaintiffs waited until the death of his father to institute the suit herein.

9. The 3rd Defendant and the Honourable the Attorney General (the 4th Defendant) neither entered appearance nor did they file a Statement of Defence herein.

The Plaintiffs Case

10. The Plaintiffs called a total of five (5) witnesses who gave testimony in support of their case.

11. PW1- Jonathan Kithi Kalu, is the 1st Plaintiff and a resident of Ramada. He told the Court he was one of the Administrators of the Estate of Charo Birya Ngombo (Deceased). He testified that prior to 1970, the deceased together with other family members settled on the then unregistered parcel of land at Nzovuni Village within Ramada and proceeded to build their residences thereon and to cultivate the land.

12. PW1 testified that in 1989, the area was declared an Adjudication Section and that the deceased's ancestral land measuring 30 acres or thereabouts was allocated title No. Malindi/Ramada/125. He further told the Court the deceased continued to utilize the property openly and exclusively without interruption from the Defendant or any other person.

13. PW1 told the Court that the deceased's family members were allocated adjacent parcels of land with Plot No. 125 going to Charo Birya Ngombo; Plot No. 126- Daktari Birya Ngombo; Plot No. 127- Jonathan Kithi Kalu; Plot No. 128- Kadhengi Birya Ngombo and Plot No. 134- Mwalimu Birya Ngombo. Each of these parcels of land measured 30 acres or thereabouts.

14. PW1 told the Court that unknown to the deceased, Kalama Kadenge Mbwiya was subsequently erroneously included in the list of people to be allocated the suit property notwithstanding the fact that the said Kalama was not a member of the deceased's family and had never occupied nor utilized the property. PW1 told the Court that Kalama's

ancestors had sold their land which was adjacent to the deceased's parcel to third parties well before the adjudication exercise and they had relocated to another village called Kibaoni in Fundisa Location.

15. PW1 further testified that on realizing what had happened, the deceased raised objections with the 3rd Defendant but his objection was not recorded and he was also not given a hearing. During the subsequent registration exercise, the said Kalama proceeded to obtain registration singularly in his own name and completely excluded the deceased.

16. PW1 told the Court that the 2nd Defendant who is a son of the said Kalama has now threatened to take possession of the suit property on the strength of the said registration and urged the Court to protect the deceased's interests on the property.

17. PW2- Edison Charo Birya is the 2nd Plaintiff and a younger brother to PW1. He supported his elder brother's testimony and urged that the contents thereof be treated as his own testimony herein.

18. PW3- Jefa Kalu Birya is the 3rd Plaintiff and a younger brother of both PW1 and PW2. He similarly supported the position taken by his elder brother PW1.

19. PW4- Loda Makombo Dena is a farmer in Ramada. He told the Court the suit property belonged to the late Charo Birya and that he was with him when they were given their respective parcels. He told the Court he did not know how the Defendant came to be registered as the proprietor of the suit property.

20. On cross examination, PW4 denied that he had stated in his recorded statement that the late Charo Birya had many parcels of land. He further told the Court he knew Kalama Kadenge Mbwiya as the Chairman of the then ruling party KANU and as his neighbor.

21. PW5- Benson Lala is a farmer and a son in law to the late Charo Birya. He told the Court his plot in Ramada is No. 111 and that he was present during adjudication when his father-in-law was given plot No. 125. He told the Court the 2nd Defendant's father was also present during the adjudication and that he was given a separate Plot.

The Defence Case.

22. The Defendants called one witness who gave testimony on their behalf.

23. DW1- Harrison Sulubu Maingi is the 2nd Defendant and a son to Kalama Kadenge Mbwiya (now also deceased). He told the Court he had only inherited the land from his father and that as at the time of his death, there was no suit pending against him over the suit property.

24. DW1 further told the Court he was wrongly sued as the Grant of Letters of Administration was issued to their mothers who were to share the property equally among the beneficiaries. He further told the Court no objection had been raised when the suit property was given to them.

25. On cross-examination DW1 conceded that they live in Kibaoni and that at the time of his death in 2014, their father lived in Kivumbi. He admitted that by then they had moved out from Ramada due to drought. While he could not remember when the land adjudication was done in the area, he told the Court they were already on the land when the Scheme was started.

26. DW1 told the Court the 1st Plaintiff was the one currently using the land. He testified that the Plaintiffs moved into the land in 2002 when their (Defendants) father was already sick. He denied that his grandfather had long sold the land that belonged to his family.

Analysis and Determination.

27. I have perused and considered the pleadings filed herein by the parties, the testimonies of their witnesses and the evidence adduced at the trial. I have also taken time to peruse and consider the written submissions and authorities placed before me by the Learned Advocates for the parties.

28. The Plaintiffs urge for a declaration that the allocation and registration of the parcel of land known as Malindi/Ramada/125 in the name of Kalama Kadenge Mbwiya was obtained by means of fraud, mistake and/or misrepresentation. They accordingly pray for an order of rectification of the concerned register to reflect that the suit property belonged to their father the late Charo Biry Ngombo and for an order of injunction to restrain the Defendants from entering onto the suit property.

29. As at the time this suit was initially instituted on 5th January 2016, the said Kalama Kadenge Mbwiya was listed as the 1st Defendant herein with his son Harrison Malingi as the 2nd Defendant. It did however turn out that the said Kalama had passed away on 13th October 2014, almost two years before the suit would be instituted.

30. Subsequently and by an application dated 21st March 2017, the Plaintiffs sought an order that the 1st Defendant's legal representatives, namely, Johnson Kahindi, Ngoro Malingi, Johnson Kahindi Malingi and Edward Katana Kalama be made parties in this case. When the said application came up for hearing on 27th April 2017, it was allowed as prayed after the 1st and 2nd Defendants' Counsel informed the Court that they were not opposed to the same. Accordingly, all the four listed legal representatives were enjoined herein collectively as the 1st Defendant.

31. It was not clear if the persons collectively referred to as the 1st Defendant were served with the suit papers. What was clear is that they did not formally file a Statement of Defence but instead chose to rely on the Statement of Defence earlier on filed by their brother- the 2nd Defendant- on 27th September 2016.

32. It was not contested that the Plaintiffs are the Administrators of the Estate of the late Charo Biry Ngombo. In support of that position, they produced a Limited Grant of Letters of Administration- Ad Litem issued to them on 26th October 2015 in **Malindi High Court Succession Cause No. 56 of 2015**. A perusal of the Limited Grant reveals that the said Charo Biry Ngombo passed away on 5th July 2010, some six (6) years before this suit was instituted.

33. It is the Plaintiffs' case that their father and other members of the family settled on the then unregistered suit property way back before the year 1970 and that he proceeded to develop it by putting up his home thereon and by cultivating and planting crops thereon.

34. The Plaintiffs told the Court that during the Land Adjudication exercise conducted in the area some time in 1989, the deceased and the 1st and 2nd Defendants' father were both documented as owners of the suit property notwithstanding the fact that the Defendants father the late Kalama Kadenge Mbwiya had occupied a different parcel of land. The Plaintiffs told the Court that their deceased father raised objections but the same was neither recorded nor heard. The Defendants' father was subsequently registered as the proprietor of the suit property on 11th August 2006. The Plaintiffs assert that the said registration was procured by fraud, mistake or misrepresentation by the Defendants.

35. The Plaintiffs told the Court that despite such registration, they have continued to utilize the suit property as the 1st and 2nd Defendants family subsequently relocated to Fundisa Location where they presently reside.

36. It was however not clear to me why the Plaintiffs objection during the adjudication process went unrecorded and unheard. It was also not clear what steps if any the Plaintiffs father, who remained alive for many years after the said adjudication process took to vindicate his rights upon the suit property.

37. What was clear to me is that the 1st and 2nd Defendants father the late Kalama Kadengi Mbwiya applied for the suit property from the Government and that his application was successful. By a letter addressed to him dated 30th September 1997, the Director Land Adjudication

and Settlement wrote to the late Kalama as follows: -

“LETTER OF OFFER

I am pleased to inform you that your application for a Settlement Plot has been successful.

The Government, through the Settlement Fund Trustees has offered you Plot No. 125 of approximately 30 acres at Ramada Settlement Scheme in Malindi District.

In pursuant thereto, please note that you are required to report to the District Land Adjudication and Settlement Officer Malindi District so that you are shown the Plot boundaries and be issued with a letter confirming this before documentation.

This offer is valid for 90 days from the date of this letter. Within this period, you should pay the 10% deposit for the Plot and be documented accordingly, failure to which will lead to cancellation of the offer without further notice.”

38. It was also clear to me that the late Kalama complied with the letter of offer. In a Letter dated 21st January 1998 authored by the Magarini Settlement Project Manager and addressed to Director Land Adjudication and Settlement in Nairobi, the Manager informs his superior that following his letter dated 30th September 1997, the late Kalama to whom the letter is copied had reported to the Project and had been shown his plot boundaries.

39. That position can indeed be confirmed from a copy of a Ground Verification Report filed in the Plaintiffs’ own Supplementary List of Documents filed herein on 13th February 2017. The Report prepared by the Magarini Settlement Project Manager one Said Komora and dated 9th February 2017 states:

“RE: P/NO. 125- Ramada Scheme

The Plot was allocated to one Kalama Kadenge Mbwiya. He paid the 10% deposit and conveyance fees of 925/- vide MR/No. B1 36 5046 dated 20/1/98.

However, Edison Charo Birya disputed the allocation and on visiting the ground on 14/8/2015, I found the Complainant (Edison) with the following developments:

Maize approximately – 7 acres

Pawpaws- 10 stems

Bananas- 2 stools

Sugarcane- 4 stems

I therefore refer the case for your further advice.”

40. While the tenor and purport of the Ground Verification Report aforesaid was certainly meant to aid the Plaintiffs’ case, I did not find the same useful to their case. As it were, the Report confirms that the parcel of land was adjudicated to the 1st and 2nd Defendants father and that he complied with the requirements of offer by 20th January 1998. It is on record that he was subsequently issued with a title for the suit property on 11th August 2006.

41. The Report does not show that the Plaintiffs and/or their father the late Charo Birya Ngombo filed any objection to the adjudication within the required time or at all. There is also nothing to show that the 2nd Plaintiff- Edison Charo Birya who filed the objection long after the adjudication process was completed and title issued ever applied to be allocated the land and or filed any objection himself to the adjudication.

42. In my view, the mere facts that one proceeds knowingly to plant crops on another person’s land cannot ipso facto entitle that person to be adjudicated and or to become entitled to the parcel of land. From the evidence adduced before me, it was clear that the Plaintiffs took advantage of the relocation of the 1st and 2nd Defendants family away from Ramada to lay claim on the suit land.

43. As it were, the Defendants have produced evidence showing that they acquired the suit property from the Government way back in 1997. Having followed the processes required they were issued with a title deed on 11th August 2006. Section 26 (1) of the land Registration Act provides in this respect as follows: -

“The Certificate of the title issued by the Registrar upon registration... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the said land is the absolute and indefeasible owner... 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”

44. The burden of proving that the 1st and 2nd Defendants’ father was issued with the title document for the suit property fraudulently or by mistake or misrepresentation lay with the Plaintiffs. Other than making generalized claims alleging fraud, mistake or misrepresentation, they have failed to discharge that burden to the Court’s satisfaction.

45. In the premises I find and hold that the Plaintiffs have failed to prove their case against the Defendants. They have no right or entitlement to occupy the suit property and I hereby dismiss their suit with costs to the 1st and 2nd Defendants.

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

J.O. OLOLA

JUDGE