



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 386 OF 2010

SAMUEL NJUGUNA GITAKA.....PLAINTIFF

VERSUS

1. THE REGISTRAR OF LANDS KWALE

2. SAMUEL MISILA KAVANDI

3. WAMBUA NZOMO

4. CICILIA LIVISON NDIKU.....DEFENDANTS

JUDGMENT

1. The plaintiff instituted this suit by a plaint dated 25th October, 2010 which was amended on 18th July, 2011 and re-amended on 7th July 2014. The Plaintiff is seeking the following orders against the defendants jointly and severally: -

a. A permanent injunction restraining the defendants by themselves, their agents assigns and/or employees or otherwise from encroaching on and/or continuing to encroach on all those parcels of land known as KASEMENI/ADJUDICATION NUMBERS 393 411, 416 and 418.

b. A declaration that the registration of all those parcels of land known AS KASEMENI/ADJUDICATION NUMBERS 411, 418 and 395 in favour of the 2nd, 3rd and 4th defendants herein was irregular, unlawful and illegal and the said parcels be reinstated and/or re-registered and/or restored forthwith to the plaintiff of the Land Adjudication Act to institute these proceedings by rectification of the register thereof.

c. Further and in the alternative the defendants be ordered to pay to the plaintiff prevailing market value of the suit property at the time of the judgment.

d. Costs and incidentals to this suit.

e. Interest thereof at court rates.

2. The plaintiff's suit as pleaded is that at all material times prior to this suit, the plaintiff was the legal owner of all the parcels of land under adjudication and known as KASEMENI/ADJUDICATION NUMBER 395, 411, 416 and 418. That on or about 3rd day of March, 2002, the 1st defendant's employees, agents, servants and/or assigns after due process of Land Dispute Appeal legally awarded to the plaintiff all those parcels known as KASEMENI/ADJUDICATION NUMBERS 411, 418 and 395. That on or about 9th May, 2007 the 1st defendant's employees, agents, servants and/or assigns without consulting the plaintiff reversed their own decision of 3rd March, 2002 and illegally, fraudulently awarded the said plots to the 2nd, 3rd and 4th defendants herein.

3. The plaintiff has listed particulars of illegality and fraud of the 1st defendant as (a) illegally and unlawfully purporting to reconstitute the same from and alter their previous decisions without according the plaintiff a fair hearing knowing the suit parcels had been awarded to the plaintiff; (b) purporting to pass ownership of the suit properties to the 2nd, 3rd and 4th defendants while the suit property was owned by the plaintiff; (c) colluding with the 2nd, 3rd and 4th defendants so as to fraudulently, wrongfully, illegally and irregularly transferring and/or changing ownership of the suit parcel in favour of the said defendants, and, (d) dealing with the said pieces of land without following the due legal process.

4. The plaintiff has also listed particulars of illegality and fraud against the 2nd, 3rd and 4th defendants as (a) illegally and unlawfully purporting to hold 'title' over the said properties while the same had been awarded to the plaintiff, (b) colluding with the 1st defendant so as to wrongfully, illegally and irregularly cause the said parcels to be re-awarded to them, (c) illegally and unlawfully purporting to remove the plaintiff from his lawful property, and, (d) dealing with the suit property without following the due legal process.

5. Vide a Limited Power of Attorney dated 13th April 2018, the plaintiff owing to ill health appointed Samuel Njuguna Gatuthu to represent him in this matter. The said Samuel Njuguna testified on 12th February, 2019 and adopted his witness statement filed on 29th July, 2018 and produced the documents in the plaintiff's list of documents filed on 29th July, 2018 as p.exhibits 1 to 17. The documents produced are (1) National Identity Card, (2) Power of Attorney (3) Agreement dated 14th December 1981, (4) proceedings for Kasemeni Land Adjudication Committee for parcels Nos. 395, 411, 416 and 418, (5) Kasemeni Adjudication Board Proceedings for parcels Nos. 395, 411, 416 and 418 (6) Kwale Adjudication Area, Kasemeni Adjudication Area Objections for Plots Nos. 411, 416 and 418 (7) letter dated 28th June, 2010, from the Kwale District Land Adjudication and Settlement Office, (8) Letter dated 8th July, 2010 from Kwale District Land Adjudication and Settlement Office and receipt for plot No.395, (9) Letter dated 12th July, 2010 from Kwale District Land Adjudication and Settlement Office and receipt for plot No. 416, (10) Letter dated 12th July, 2010 from Kasemeni District Land Adjudication and Settlement Office, (11) Letter dated 12th July 2010 from Kasemeni District Land Adjudication and Settlement Office with receipt for plot 418, (12) Letter dated 11th June, 2010 from Land Adjudication and Settlement Department, Nairobi, (13) Letter dated 14th June, 2010 from the Kwale District Land Adjudication and Settlement Office, (14) Certificate of Confirmation of Grant with will annexed, (15) Notice dated 26th August, 2010, (16) Letter from the Attorney General dated 21st September, 2010 , and, (17) Computations by Land Adjudication and Settlement Officer Kwale for Plot Nos.411, 416, 418 and 395.

6. The plaintiff testified that by an agreement dated 14th December, 1981 between one Mr. Geoffrey Gatuthu Njuguna (deceased) and Jumaa Khamisi Mtunda, Abdalla Maingu Galana and Kassimu Dzhimbo Dziwe, the former purchased and usurped land (the suit land) measuring approximately 200 acres for Kshs.40, 000/= located within Barangaa, Kasemeni sub-location, Kwale County. That upon the death of the said Geoffrey Gatuthu Njuguna (deceased) a Grant of Letters with will annexed was granted to the plaintiff herein as the legal representative of the estate of the deceased in Succession Cause No.172 of 1988 at the High Court in Nairobi, and the said Grant was confirmed on 16th October, 2001 (p.exhibit 14). That during adjudication process, the land was given numbers 365, 411, 416 and 418.

7. The plaintiff's evidence is that during the said adjudication process, the defendants claimed the said land and presented cases at the Land Adjudication Committee, which ruled in the defendants' favour (p.exhibit 4). The plaintiff was aggrieved and appealed to the Land Adjudication Board and his appeal was allowed (p.exhibit 5). However, the defendants presented objections to the Land Adjudication Officer who, without the knowledge of the plaintiff, heard the said objections and awarded the plots to the defendants (p.exhibits 6, 10-12) and the plots were subsequently registered in names of the defendants. That on learning about these events, the plaintiff sought consent from the District Land Adjudication and Settlement Officer, Kwale/Msambweni which was granted (p.exhibit 12 and 13) to bring the current suit. The plaintiff seeks that the registration of the suit plots in the names of the defendants to be cancelled and restored to the plaintiff.

8. The 1st defendant filed a defence dated 5th December, 2011 in which he denied the plaintiff's claim in toto. The 1st defendant averred that no notice of intention to sue has been given under Section 13A of the Government Proceedings Act Chapter 40 Laws of Kenya. The 1st defendant, however, closed its case without calling any witness.

9. The 2nd, 3rd and 4th defendants did not enter appearance despite being duly served and interlocutory judgment was entered against them and the case proceeded as a formal proof as against them. Both the plaintiff and the 1st defendant filed written submissions which the court has considered.

10. I have considered the pleadings, the evidence adduced and the submissions made. In my view, the issues for determination are whether the plaintiff's suit is competent, whether the plaintiff has proved his case to the required standard and whether the plaintiff is entitled to the prayers sought.

11. In this case, it is not in dispute that the dispute concerns an interest in land in an adjudication section. Under the provisions of Section 30 (1) of the Land Adjudication Act Chapter 284 Laws of Kenya, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29 of the said Act, except with the consent in writing of the adjudication officer. In this case, the plaintiff sought and was granted consent dated 14th June 2010 by the Land Adjudication Officer for Kwale Adjudication area to institute these proceedings in respect of the suit properties which are parcels of land within Kasemeni Adjudication Section. It follows therefore that the plaintiff complied with the provisions of Section 30 (1) of the Land Adjudication Act, and the suit is properly before the court.

12. Further, Section 13A of the Government Proceedings Act Chapter 40 Laws of Kenya provides that notice of intention to sue the 1st defendant ought to be issued to the Attorney General. The plaintiff has produced the notice dated 26th August, 2010 (p.exhibit 15) and the response from the Attorney General dated 21st September, 2010 (p.exhibit 16). In my view, and it is my finding and I so hold that the plaintiff's suit is competent.

13. The next issues for consideration is whether the plaintiff has proved his case on a balance of probabilities and whether the plaintiff is entitled to the prayers sought. From the evidence on record, it is clear that the plaintiff's deceased father purchased the suit land which was then unsurveyed. It is also evident that during adjudication process the 2nd, 3rd and 4th defendants claimed the suit parcels of land and presented cases at the Land Adjudication Committee which ruled in their favour as per p.exhibit 4. Being aggrieved, the plaintiff appealed to the Arbitration Board and his appeal was allowed (p.exhibit 5). Whereas it is apparent that the defendants presented objections to the Land Adjudication Officer who heard the objections and awarded the parcels of land to the defendants (p.exhibits 6, 10-12), there is no evidence that the plaintiff was notified of the said objections. The plaintiff's evidence is that the objections were undertaken without any notification to him and without his knowledge and without his participation. It is therefore the plaintiff's contention that the registration in favour of the

2nd, 3rd and 4th defendants was irregular, fraudulent, unlawful and illegal.

14. In this case, the 2nd, 3rd and 4th defendants did not enter appearance nor filed defence. Although the 1st defendant has denied the plaintiff's claim in the defence filed, no witness was called to give evidence on the 1st defendant's behalf. That means that not only does the plaintiff's case stand unchallenged but the 1st defendant's defence is also unsubstantiated. It is trite that where a party fails to call evidence in supported of its case, that party's pleadings remain mere statement of fact since in doing so the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against the defendants is uncontroverted and therefore unchallenged.

15. From the uncontroverted and unchallenged evidence adduced by the plaintiff, it is my finding that the plaintiff has proved his case on a balance of probabilities and is entitled to the orders sought in the plaint. Consequently, the court enters judgment for the plaintiff against the defendants jointly and severally as prayed for in the re-amended plaintiff. Costs of the suit to be borne by the 2nd, 3rd and 4th defendants.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 19th day of January 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms Kiti for 1st defendant

No appearance for plaintiff

No appearance for 2nd – 4th defendants

Yumna Court Assistant

C.K. YANO

JUDGE