



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 217 OF 2015

KATANA JEFWA.....PLAINTIFF

VERSUS

KATANA K. MARASHI alias JAMES KENGA KATANA....DEFENDANT

JUDGMENT

BACKGROUND

1. By his Plaint dated 27th November 2015 as amended on 13th May 2016, Katana Kalama Jefwa (the Plaintiff) prays for Judgment against James K. Marashi alias James Kenga Katana (the Defendant) for: -

- a. An order for the rectification of the Register relating to the suit property by cancelling Title No. Kilifi/Kibarani/494 in the name of the Defendant and instead registering the said Title in the name of the Plaintiff;**
- b. A declaration that the Plaintiff owns two acres of Plot No. 494-Kibarani Settlement Scheme within Kilifi County;**
- c. (An) Order for a permanent injunction restraining the Defendant by himself, his agents or any person claiming through him from selling, transferring, charging or in any way dealing with the suit property;**
- d. Costs and interest of this suit.**

2. Those prayers arise from the Plaintiff's contention that on 16th April 2008, the Defendant caused himself to be registered as the owner of the said parcel of land measuring 3.2 acres despite the fact that the Plaintiff has enjoyed possession and use thereof since the year 1965 when he bought the same from one Kapasho Jefwa and Baya Thoya.

3. The Plaintiff asserts that during the identification of settlers in the scheme, the Defendant used his position as a member of the Land Settlement Committee to be allocated the suit property at a time when the Plaintiff was in hospital. The Plaintiff subsequently lodged a claim before the Bahari Land Disputes Tribunal which Tribunal made a finding in the Plaintiff's favour. Despite the said finding, the Defendant proceeded to have himself fraudulently registered as the proprietor of the suit property.

4. But in his Statement of Defence dated and filed herein on 29th June 2016, the Defendant denies the Plaintiff's contention and avers that he is the registered owner of the suit property. The Defendant avers that prior to land adjudication in the area, the Plaintiff and the Defendant had parcels of land bordering each other. The Plaintiff was then allocated Plot No. 516 while the Defendant was allocated the suit property.

5. The Defendant denies using his position as a Member of the Land Settlement Committee to have the suit property allocated to himself. He further avers that the findings of the Bahati Land Disputes Tribunal were not final as the Defendant appealed but the Tribunals were disbanded before the Appeal could be heard and disposed of.

6. The Defendant hence denies the particulars of fraud, misrepresentation or mistake as pleaded by the Plaintiff and avers that the prayer for the rectification of the register does not lie in view of the fact that he lawfully acquired the parcel of land in dispute. The Defendant therefore urges this Court to dismiss the Plaintiff's suit with costs.

The Plaintiff's case

7. At the trial herein, the Plaintiff (PW1) testified as the sole witness in his case. Relying on his Statement dated and filed herein on 13th May

2016, PW1 told the Court that the Defendant resides in a parcel of land adjacent to his own. He had bought his own parcel of land measuring about 2 ½ acres some time in 1965 from two individuals- Kapasho Jefwa and Baya Thoya.

8. PW1 testified that the Defendant subsequently bought the adjacent parcel of land measuring ½ acre from one Abdalla Bimundachi. Sometime in 1978, the Kibarani area was declared a Settlement Scheme. On the date of identification of settlers in the Scheme, PW1 who was in hospital gave his wife his Identity Card with instructions to wait for the Settlement Committee.

9. PW1 told the Court that unknown to himself and his wife however, the Defendant who was a member of the Committee caused himself to be registered as the owner of the suit property and his own adjacent parcel and was on 16th April 2008 issued with title for the parcel measuring 3.2 acres.

10. PW1 further testified that on learning about this occurrence, he lodged a complaint being **Claim No. 74/2006** before the **Bahari Land Disputes Tribunal**. Upon hearing the case, the Tribunal rendered a Judgment in favour of PW1 which Judgment was adopted as an order of the Court by the Kilifi Senior Resident Magistrates Court. Despite the decision, the Defendant caused himself to be registered fraudulently or through misrepresentation as the owner of the suit property.

11. On cross-examination, PW1 conceded he was aware the District Commissioner Kilifi as the Chair of the Settlement Committee had prepared a list and schedule of all landowners before the date of identification and settlement and that no one was allowed to own more than one plot. He further told the Court that after winning the case before the Tribunal, the Defendant had appealed but the Tribunals were disbanded before the Appeal was heard.

The Defence Case

12. The Defendant (DW1) equally testified as the sole witness in support of his case at the trial. Relying on his written Statement dated and filed herein on 29th June 2016, DW1 told the Court he is the registered owner of the suit property which borders the Plaintiff's parcel of land.

13. DW1 testified that when the adjudication officers went round demarcating the land, the Plaintiff was allocated Plot No. Kilifi/Kibarani/516 while he (DW1) was allocated Plot No. Kilifi/Kibarani/494. DW1 told the Court that since the Scheme was about the settlement of squatters no one was allowed to own more than one parcel of land.

14. DW1 further testified that the Land Settlement Committee chaired by the area District Commissioner had prepared a List of Beneficiaries in advance and that on the date of the allocation and settlement, even where one was in hospital, he would be allocated his land if his name was on the list. DW1 told the Court he had obtained a Letter of Offer from the Ministry of Lands and Settlement dated 29th December 1995 and he made the requisite payments between 24th September 1996 and 14th March 2002.

15. DW1 further told the Court that in the year 2008, he was issued with a Certificate of Title and the Plaintiff never made any objection thereto. He told the Court the Plaintiff had his own title and it was unfair to be asked to surrender his (DW1's) title to the Plaintiff.

16. On cross- examination, DW1 denied that his home and that of the Plaintiff are near each other. On the contrary, the two homes were about 300 ft apart. He told the Court he had no idea how big his plot was before the Scheme as they had not measured them. They however knew the boundaries which exists to-date.

17. DW1 conceded that he was a member of the Squatter Settlement Scheme. He denied using that position to take over the Plaintiff's land and testified that everyone was apportioned 2 ½ acres. In this respect, he told the Court he was not aware that his portion was 3 ½ acres. While conceding that after the survey some of the Plaintiff's trees were adjudicated to his side. DW1 told the Court he made an offer to compensate the Plaintiff for the same.

Analysis and Determination

18. I have perused and considered the pleadings filed by the parties herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly considered the rival submissions as filed by the Learned Advocates for the parties.

19. The Plaintiff herein has urged the Court to rectify the Register relating to the suit property by cancelling the Defendant's title No. Kilifi/Kibarani/494 and to cause the same to be registered instead in the Plaintiff's name. He further wants a declaration made that he owns two acres of the said property as well as an order of injunction restraining the Defendant from selling, transferring or in any manner dealing with the suit property.

20. In support of those prayers, the Plaintiff told the Court that he bought the suit property way back in 1965 from some two individuals. According to him the property he bought measured some 2 ½ acres. The Defendant subsequently came to the area and bought an adjacent parcel measuring a half (1/2) an acre.

21. It was the Plaintiff's case that sometime in 1978, the Kibarani Area was declared a Settlement Scheme. On the date set aside for identification of Settlers on the Scheme however, the Plaintiff was unwell and went to hospital leaving his wife behind with his Identity Card to facilitate the registration.

22. The Plaintiff told the Court that unbeknown to his wife and himself, the Defendant who was a member of the Land Settlement Committee caused himself to be registered as the owner of the suit property together with his own adjacent half acre piece of land. The Plaintiff told the Court he protested this development and filed **Bahari Land Disputes Tribunal Case No. 22 of 2006**. Despite the Tribunal rendering a

decision in his favour, the title to the suit property was still issued in the name of the Defendant on 16th April 2008. It is the Plaintiff's case that the registration and issuance of the title in the name of the Defendant was the result of fraud, misrepresentation and/or mistake and hence the orders sought herein.

23. The Defendant on his part does not deny being the registered proprietor of the suit property. It is however his case that the said registration followed all the due process and that he had lawfully acquired the parcel of land.

24. It was interesting to note that while the Plaintiff insisted that his portion of land was 2 ½ acres while that of the Defendant was only 1/2 acre, there was no evidence that the land had been surveyed prior to the establishment of the Settlement Scheme and nothing was placed before me to demonstrate how the Plaintiff came to ascertain the measurement of the parcels of land prior to the adjudication process.

25. From the material placed before me, it was apparent that the figure 2 ½ acres emerged during the adjudication process wherein every squatter was to be allocated 2.5 acres of land. It was equally interesting to note that while both sides to this dispute agreed that every squatter was only entitled to one parcel of land, the Plaintiff despite pleading that his 2 ½ acres of land were amalgamated by the Defendant into his own large piece admitted to being in possession of another portion of land at the Scheme.

26. The Plaintiff did not explain to this Court how he came to be allocated or acquire the parcel of land he now occupies. Indeed, while his pleadings and testimony suggests that the Defendant took all his land, his submissions herein appeared to suggest that he was now amending his claim to assert that the Defendant's parcel of land was larger than what all the squatters were entitled to by some 0.71 acres.

27. There was however no evidence that the extra acreage held by the Defendant had been as a result of fraud or misrepresentation by the Defendant. Indeed, no evidence was adduced whatsoever as to the size of the Plaintiff's current parcel. None of the parties called evidence from the Land Adjudication and Settlement Office and it was not possible for the Court to ascertain if indeed there had been any encroachment as alleged.

28. From a Report prepared on the orders of this Court by the District Surveyor Athman Ngoka and dated 18th April 2017, it was apparent that both the Plaintiff and the Defendant have their houses on Parcel No. Kilifi/Kibarani/493 and not the suit property. While the Defendant pointed the correct boundaries of the suitland with a slight encroachment on a road reserve to the north, the Report notes that the boundary shown by the Plaintiff for the suit property included part of the suit property as well as Parcel No. 493 in which the two disputants now reside.

29. While the Defendant conceded that upon allocation of the suit property, some of the Plaintiff's trees were on his part of the boundary, it was acknowledged even by the Plaintiff himself in cross-examination that after the demarcation of the boundaries, one was allowed to harvest his trees and fruits if they were found to be in a parcel allocated to another person.

30. Arising from the foregoing, I did not find anything to warrant the accusation that the Defendant had acquired the Plaintiff's parcel of land either by fraud or otherwise.

31. The result is that the Plaintiff's case fails and I dismiss the same with costs to the Defendant.

Dated, signed and delivered at Malindi this 19th day of February, 2021.

J.O. OLOLA

JUDGE