



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 285 OF 1999

OMAR MAKONDE MTURI PLAINTIFF

VERSUS

BENSON MWADZOMBO HANGA DEFENDANT

J U D G E M E N T

The Plaintiff filed the claim on 16th June, 1999 and sought 6 prayers which he set out in the plaint as follows:

- a) *An order that the Defendant, his servants and or/agents do forthwith exhume the body of the deceased (Mkutano Mwangongo from Plot number 178/Kilifi/Chauringo.*
- b) *A mandatory Injunction permanently restra ining jointly and severally the Defendant his servants, workmen and agents as otherwise howsoever or any other members of his family from interfering with the plaintiff's ownership and possession of Plot number 178/Kilifi/Chauringo.*
- c) *An order that the Defen dant his servants and/or agents do forthwith remove and cut down any coconut and banana trees belonging to the Defendant, his servants and/or his agents found on plot number 178/Kilifi/Chauringo.*
- d) *General Damages*
- e) *Costs of this suit*
- f) *Interest on (a) (b) (c) (d) and (e) at Court rates.*

Filed at the same time with the plaint was an application by chamber summons brought under the Provisions of Order 39 rules 1, 2 and 3 of the Civil Procedure Rules. The application sought the grant of a mandatory Injunction restraining the Defendant, his servants or agents from Interfering with Plot number 178/Kilifi/Chauringo. The said application was heard and dismissed by Kassim Shah, Commissioner of Assize as he then was.

The Defendant filed a defence to the claim on 9th August, 1999. In Paragraphs 3 and 4 therein the Defendant denies that the deceased Mkutano Mwangongo was buried on Plot 178/Kilifi Chauringo but on Plot 177/Kilifi/Chauringo and that the plants alleged to be on Plot 178 were planted on Plot 177. The defence further denies paragraphs 7 and 8 of the Plaint and put the plaintiff to strict proof. The said paragraphs read as follows:

“7 The Defendant has refused and/or did not desist from cultivating the said coconut and banana plantations on the plaintiff's Plot and has failed to exhume the body of the Deceased Mkutano

Mwangongo despite having been requested to do so giving rise to this cause of action 8 By reason of the matters stated above, the plaintiff has been put to great expenses and grave loss and damage and unless the Defendant is mandatorily restrained from interfering with the plaintiff's ownership and quiet possession, the plaintiff stands to suffer and continues to suffer great loss and damage which cannot be compensated by an award of damages”

At paragraph 6 the Defendant admits that he is a grandson of the deceased owner of Plot Number 177/Kilifi/Chauringo but avers that he has been wrongly sued as he is not the legal representative of the deceased's Estate.

The two plots 177 and 178/Kilifi/Chauringo have a long History and dispute lasting between 1980 to 1996 and the hearing herein commenced before Justice Waki as he then was on 31.10.00 but was transferred to Nairobi after hearing the evidence 4 witnesses. This court did proceed from that point.

After the Adjudication process was completed in the Kambe Ribe Location of Kilifi District the Family of the plaintiff were not satisfied with the sub-division as they claimed part of their land was allocated to the Defendant's Family. The various disputes were handled through all the laid down channels and procedures including going through the Appeal stage by the Special District Commissioner's Court sitting on Appeal in land Appeal Case No.88 of 1986. The final Judgement, order and proceedings of that Special court were produced in Evidence by the plaintiff and I will reproduce the Judgement and order which read as follows:-

“JUDGEMENT

I am satisfied that part of the appellant's land was left within land Parcel No. 177 which is currently registered in the name of Mr. Mwangongo Mwachaka. This is the portion on which Mr. Mturi planted his coconut trees from which he is still harvesting coconut fruits even now. This situation must be corrected. For this reason, the appeal is Allowed,

Signed:

JOEL KALUMA INGONGA

S.D.C.

12.5.86

ORDER:

1. Land Parcel No. 177 shall be subdivided in such a way that all or most of Mturi's coconut trees are restored to him, separated www.kenyalawreports.or.ke 5 from land Parcel No. 177 as indicated on the sketch map

attached.

2. Each party will pay their own costs of the case.

Signed:

JOEL KALUNA NGONGA

S.D.C.

12.5.86”

Following the decision in land Appeal No.88/86 the District Land Surveyor Kilifi surveyed the two

Plots as indicated on the sketch map given by the Special District Court. The Implementation however took a long time and the actual divisions and acreage instructions given to Chief Land Registrar, Nairobi by the Land Adjudication and Settlement Department as provided for under Section 29 of the Land Adjudication Act Cap 284 on the 15th May, 1996. They in turn instructed the Land Registrar, Kilifi by letter dated 9th October 1997 to implement the Minister's decision on the Appeal. At the bottom of the said letter the Chief Land Registrar has written as follows:

“----- The Minister allowed the appeal. You shall implement this decision by removing the restriction and parcel No.177 subdivided such that Parcel No. 177 is 4.72 hectares and the other portion combined to parcel No. 178 which is now 1.35 hectares. New edition of the R.I.M. together with amended copies of the www.kenyalawreports.or.ke 6 duplicate Adjudication records for Plot Nos.177 and 178 are enclosed herewith for your necessary action.

J.M.E. NJUE

For: Chief Land Registrar”

It is the plaintiff's case that despite the Minister's decision in appeal No. 88/86 and the boundary having been fixed in 1988 in the presence of both parties the Defendant's family were not satisfied and they defaced the boundary. The matter was reported to the District land Registrar, Kilifi. At this point onwards, the plaintiff maintains the Defendant knew where the boundary was expected to be. The District land Registrar wrote to both parties informing them he was to be on the site on 25.7.99 to re-implement the boundary. In her evidence, the Kilifi District Land Registrar said she also received 2 areas maps of the area in dispute from the Chief Land Registrar. The first maps were showing the two parcels of land No. 177 and 178/Kilifi/Chauringo as they appeared after adjudication and the second map was showing the same parcels of land as they were to be implemented on the ground after the Ministers decision. The exercise was carried out and a boundary of sisal plants put in place and all the parties were satisfied save for a complaint about coconut plants that were originally on Plot 177 and now fell under Plot 178. She then prepared a report. However in October 1999, the owners of Plot 177 defaced the boundary and the matter was reported to the Police leading to Criminal Charges being preferred against BENSON MWANGONGO (the Defendant herein), NICHOLAS TEMO, RUWA TEMO, BEDUKA MKUTANO MWANGONGO and NGOME MWADZOMBO HANGA. They faced two charges, the first being Trespass upon private land Contrary to Section 3 (1) of the Trespass Act while Second charge was that of interfering with Boundary features Contrary to Section 24 of the Registered Land Act. They were all acquitted on the first Count but convicted on the second count and sentenced to 2 months jail – Term. The Land Register was emphatic in her Evidence that there has been no Appeal against the Minister's decision and consequently no recorded boundary dispute after the Minister's decision.

Having given the History of the parcels of land I now turn to the issues for consideration, and that is whether the deceased Mkutano Mangongo was buried on Plot 178 and whether there are coconut plants planted by the Defendants on Plot 178 after the boundaries were determined.

The deceased Mkutano Mangongo died on 17.10.98 and buried on 18.10.98. ELVIS MTURI MAKONDE a son to OMAR MAKONDE MTURI the plaintiff testified to the effect that as soon as the body was buried on his father's parcel of land No. 178, the family reported to the Chief who visited the scene and confirmed the same. He said the deceased's grave is about 20 meters inside Plot 178 from the boundary set between Plot 177 and 178 after the Minister's decision on appeal No. 88 of 1986 and that the only other grave to be found on Parcel 178 is that of his mother. He however did concede that following the minister's decision there were over 10 coconut trees that were originally falling within parcel 177 which after the new demarcation would fall within Plot 178. The Kilifi District land Registrar MARY NDALE KAI who had gone to re-implement the Minister's decision in 1998 after the said boundary had been defaced by the Defendant after it was set in 1988, said she was aware that the grave of Mkutano Mangongo fell within parcel 178 and even before implementation of the new boundary which excised part of Parcel 177 to consolidate it with 178, the grave still was on plot 178.

In Cross-examination by Defence Counsel she denied that the Minister's decision required her office to

take into account issues like graves and trees. She also confirmed the Two Parcels of land have Title document and that the one in respect of parcel 177 was yet to be collected. CARLSON MWATSAKI MUTSOMBA the area Chief at the time confirmed he had received a complaint by the plaintiff that the Defendant's family had buried one Mkutano Mangongo on Parcel 178 on 19.10.98. He then wrote a letter www.kenyalawreports.or.ke 9 to confirm the same which the plaintiff was to use as proof while seeking assistance from those concerned on the issue. He had attempted to solve the problem as he was aware the grave fell within Plot 178 but the Defendant and his family were too quarrelsome. On the issue of coconut trees, he too did concede that there were Coconut as well orange trees that were originally on Plot 177 that now fell onto Plot 178.

CLEOPHAS MUTUA MUSAU the District Land Surveyor Kilifi confirmed having been on site of the disputed boundary in 1988 to implement the Minister's decision and he did put the boundary in place in the presence of both parties to the dispute. He confirmed the excision of part of Plot 177 measuring 17x172m and 38x148m and annexing the same to Plot 178. At the time he used the sisal plants to mark the boundary but the Defendant prevented him and his team from planting the Beacons. He however returned again on 28.1.97 and repeated the exercise and once again the Defendant prevented them from planting the Beacons. He confirmed having seen a grave falling on to Plot 178 before the survey.

The Defendant did concede that the parcel 177 belonged to his deceased grandfather and that he had no letters of administration. He also confirmed that he was aware of the Decision in the Appeal Case but said he was not satisfied with the actual implementation on the ground because it failed to ensure that the plants on the original portion falling on parcel 177 were to remain as the Minister's decision had directed. In his evidence in chief and on cross examination he denies being present when the surveyors and the District land Registrar visited the site on several occasions. He says they were not going there to implement the Minister's decision but to fix the boundary on the behest of the plaintiff who then directed them to fix the plants and the grave in dispute on parcel 178. However the evidence by both the District Land Surveyor and Registrar show that they were implementing the Minister's decision and had received the maps and measurements from the Ministry of lands and settlement and theirs was to implement the same on the ground which they did. He however did concede that no appeal was filed challenging the Minister's decision.

The Defendant has attempted to show that in all the occasions the government officials went to the site to fix the boundary he was never aware including the 1999 one. Yet the evidence by the chief and the District land officer and survey confirm the Defendant's family members were present including the Defendant.

In his submissions Counsel for the plaintiff submitted that after the issuance of Title documents under the Registered land Act in 1996, the Minister had no authority to deal with any disputes if any. The boundaries have not been since altered and yet the disputed burial took place on 18.10.98.

On the issue of the plants he submits there are plants planted by Defendant and his family on Plot 178, but these were planted after 1988 and that it should be the plaintiff to be compensated and not the Defendant on the prayer for a Mandatory Injunction, he relied on the case law in BELLE MAISON –VS- YAYA TOWERS LTD. HCC.2225/92 (UR) NRB.

On his part Counsel for the Defence submitted that the plaintiff failed to proof his case as when the Defendant buried his Uncle and complaint was raised. However evidence on record shows otherwise. The evidence by ELVIS MTURI MAKONDE son of plaintiff and the Chief confirmed the complaint was immediate that is on the next day and it was the chief who advised the plaintiff to consider other avenues and plaintiff did file a case seeking an order for an Injunction before the Magistrate's court. On his submission that Title should not have issued when the defendant was not happy with the ground implementation, I would say this does not assist him at this stage as there is no counter-claim nor did the Defendant file an appeal against the Minister's decision and before issuance of Titles. The Defendant claims he was denied Title document yet in his evidence admits he has no locus to demand for the said Title. And even if he did have the Locus, the District land Registrar did testify to the effect that Title in favour of the Defendant's grandfather the registered owner of Plot 177 is still awaiting collection at their

Registry. As to the grant of the prayer of a Mandatory Injunction, the Defence Counsel submitted the plaintiff cannot benefit from the same as this being an equitable remedy, the plaintiff had not shown good faith since he secretly invited the land Registrar and Surveyor to fix the boundaries. This again has been discounted by the evidence by the said two officers who did even produce letters to confirm the defendant's family was aware and the Defendant was personally present and even prevented them from performing their duties on two occasions. This evidence was not challenged. The plaintiff has also through various witnesses including the chief shown that the body of Mkutano Mangongo was buried on 18.10.98 and that at that time the boundary had been set, way back in 1988 and a repeat in 1997 to implement the Ministers decision. It is also the evidence of District Land Register, the Surveyor and the Chief that the area where the disputed body was buried is well within the original parcel 178. This would mean that even if it was to be found that a dispute on the boundary still does exist which in my earlier finding I have said does not, the said grave is still outside the portion giving rise to the dispute. I did observe the Defendant's demeanor and he did strike me as someone who is not completely honest.

The burial of the late Mkutano on Plot No.178 in my analysis was a well calculated and deliberate move to perhaps frustrate the plaintiff and the Survey department in the implementation of the Minister's decision or even to perhaps influence them to change the boundary in such a way that the grave was within the land owned by the Defendant's family. This would explain why the Defendant in his defence said his dispute was only based on the failure of the Survey to ensure all their plants and the grave were falling on their part of the land. I am aware that in granting of a mandatory injunction the court must exercise great care. Halsbury's Laws of England 4th Edition at page 533 paragraph 946, says as follows:-

“----- but every injunction, whether restrictive or mandatory, ought to be granted with care and caution, and no more care or caution is required in the case of a mandatory injunction than a restrictive injunction”

A mandatory injunction being permanent in nature applies in cases where the injury cannot possibly be compensated by Damages. In this case, the plaintiff is unable to utilize his portion of the land on which the late Mkutano is buried and this is a situation that cannot be compensated by Damages. The two families are not related. I am also alive to the fact that the African Society pays a lot of respect to the dead and therefore the plaintiffs would find themselves in a not too comfortable situation knowing the grave is on their land. I am aware that on application for grant of the said orders at the Interlocutory stage were denied but Kassim Shah, Commissioner of Assize was clear that at that stage, the plaintiff appeared to be using the court machinery to assert and stamp his perceived claim on the land before the court had determined the same. Now that the Court has determined the same, I see no reason why the said Mandatory Injunction should not issue. And having found that the body of the deceased Mkutano was buried on Plot 178 long after boundary disputes were settled. I will also grant an order to exhume the said body for burial on Plot 177.

As to the prayer for the plants on Plot 178 planted by the Defendant and which the plaintiff's concedes 10 of them were planted prior to 1986, the Defendant shall be compensated at the rate of Kshs.300/= per tree as no evidence on actual value was lead. No compensation will be awarded for the others as the plants were planted with the knowledge that they fell outside their boundary and after the Minister's decision. And as to Damages to the plaintiffs, I state that no evidence was adduced to prove the number of trees or to show how the amount in compensation was arrived at. The figure only came up at the submission stage.

I would have stopped here, but there is an important issue raised by the defence that need to be considered. This is the defence that the Defendant has no legal capacity to be sued. He admitted the same. Does this mean that the plaintiff's claim should fail?

The claim herein was filed by a Counsel and he ought to have known the implications of bringing forth such a claim in the absence of a Grant of Letters of Administration or any other authority to warrant suing the Defendant on behalf of his family members. And even after the issue was raised by the Defendant in the defence, no attempt to salvage the situation was made. In reply through submissions, Counsel for the plaintiff said the Defendant was sued for his personal involvement in the whole matter. Section 82(a) of

the law of Succession Act confers the power to agitate by way of a suit any Cause of action vested in the deceased person at the time of death on the personal representative. Section 82(a) provides:-

“Personal representative shall subject only to any limitation (a) imposed by their grant have the following powers: - to enforce, by suit or otherwise all causes of action which, by virtue of any law survive the deceased or arise out of his death for his estate”

The interpretation as to who the “Personal representative” is, is found in Section 3 a.

“Personal representative” means the executor or administrator of a deceased person”

In the present case the deceased died intestate and the Defendant admits he has no legal capacity to represent the estate. It would follow then that the Defendant cannot agitate a Defence on behalf of the estate consequently the plaintiff would not be in a position to legally enforce any rights accruing against the wrong defendant. The plaintiff’s Counsel however in his submissions said the Defendant was being sued for his own actions as far as the suit is concerned. The prayers sought by the plaintiff which I reproduced in the beginning support this submission as they are directed at the Defendant. However this is in conflict with the contents of paragraph 4 of the plaint which read:

“The Defendant is the grandson and acts in a representative capacity of the family of Mwangongo Mwachaka (deceased) the registered owner of all that piece of land particularly known as parcel number 177/Kilifi/Chauringo”.

Emphasis mine

The key words herein are “acts in a representative capacity” and the Defendant admitted this description in paragraph 2 of the Defence which reads:

“The Defendant admits the descriptive paragraphs 1, 2, 3 and 4 of the plaint -----“

However in Paragraph 6 of the said defence he goes on to say he has not been proposed as the legal representative.

“The Defendant admits that he is the grandson of the deceased but avers that he has been sued wrongly because he has not been proposed to be the legal representative of the estate of the deceased”

This point I have already dealt with and found he had no legal capacity on behalf of the estate but did he have a legal right to bring the suit in a representative capacity as he is described in the paragraph 4 of the plaint? Order 7 rule 4 (1) of the Civil Procedure Code says the following on the issue of capacity:

“Where the plaintiff sues in a representative capacity the plaint shall state the Capacity in which he is sued and where the defendant is sued in a representative capacity the plaint shall state the capacity in which he is sued , and in both cases it shall be stated how that capacity arises”

Emphasis mine

The Provisions of this rule are mandatory that the capacity Shall be stated. In paragraph 4 of the plaint he is described as “the grandson and acts in a representative capacity of the family of Mwangongo Mwachaka (deceased)”. The capacity has been described but not in detail and this in my opinion is

the cause of the confusion. However from the contents of the other paragraphs in the plaint, the defence filed and the oral evidence tendered both by the plaintiff and the defence, there is no doubt both parties were clear that the main claim was directed at the Defendant in his own capacity and the prayers sought can if the issue be enforced as against the defendant only. Therefore conclude that the plaintiff has proved it’s case as against the defendant and give judgement in his favour as follows:-

- a) A Mandatory Injunction shall issue as against the Defendant, his servants, workmen and agents from interfering with the plaintiff's ownership and possession of Plot 178/Kilifi Chauringo.
- b) The Defendant is to exhume the body of the deceased Mkutano Mwangongo from Plot 178/Kilifi/Chauringo within a period of 30 days from the date hereof.
- c) The Defendant is to arrange to remove his plants falling within Plot 178/Kilifi/Chauringo within a period of 60 days. d) The plaintiff to compensate the Defendant for the 10 trees which is Kshs.3,000/= within 60 days. Administration and the police are to assist in the supervision of the execution of the order of this court.
- e) Each party is to bear its own costs taking into account that the Defendant, may not have necessary been the only one liable for the acts leading to this claim.

Dated and Delivered at Mombasa this 25th day of July, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE