



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 301 OF 2018

JAMES MWOLOLO MUNGITHIA.....PLAINTIFF

VERSUS

ATHUMAN JUMA TSONZO.....DEFFENDANT

JUDGMENT

(Suit by plaintiff seeking orders inter alia that the Kadhi's Court had no jurisdiction to distribute his property to the defendant and for a permanent injunction to restrain the defendant from the suit property; suit property purchased by the plaintiff from a third party who had an allotment letter; suit property apparently listed by the defendant in the succession cause of his late father before the Kadhi's Court; however, no evidence of the pleadings, proceedings and judgment of the Kadhi's Court produced by the plaintiff; in the circumstances, court unable to make any orders in respect of the decision of the Kadhi's Court; defendant not availing any evidence to demonstrate ownership of the suit property; court holding that as between the plaintiff and defendant, it is the plaintiff who has demonstrated a better title)

1. This suit was commenced through a plaint filed on 19 December 2018. The plaintiff has pleaded that he is the lawful owner of the leasehold title in the land parcel Kwale/Plot No. 633 also known as Kwale Township-Gondoni Plot No. 633 (the suit property). He has pleaded that as proprietor, he applied for and obtained building permission from the Kwale County Government. He has pleaded that on 2 December 2018, he went to the suit property to commence construction but was surprised to find the defendant and his workers excavating the land in readiness for construction. He checked and confirmed that the defendant had no building permit and he reported the trespass at Kwale Police Station. He avers that the defendant has no title but relies on an order allegedly issued on 7 June 2017 by the Kadhi's Court in *Kwale Succession Cause No. 50 of 2016 in the matter of the estate of Tsonzo Mwatsonzo (deceased)*. The plaintiff has pleaded that he is not of Islamic faith and for that reason, the Kadhi's Court had no jurisdiction over the issue. He has further pleaded that the Kadhi's Court has no jurisdiction over alienation of land not forming part of the estate of the late Mwatsonzo. In this matter, the plaintiff seeks the following orders :-

(a) A declaration that he is the lawful allottee of the suit property.

(b) A declaration that the Kadhi's Court had no jurisdiction to determine ownership of the suit property.

(c) A declaration that the orders issued on 7 June 2017 by the Kadhi's Court in Kwale Succession Cause No. 50 of 2016 did not confer ownership of the suit property.

(d) A permanent injunction restraining the defendant from the suit property.

(e) An order of eviction of the defendant from the suit property.

(f) Costs of the suit.

2. The defendant entered appearance and filed a statement of defence vide which he denied that the plaintiff is the owner of the suit property. He pleaded that he (defendant) is the lawful owner along with four others pursuant to the proceedings in the Kadhi's Court. He pleaded that the title of the plaintiff is fraudulent and that the plaintiff colluded for a double allocation of the suit property.

3. In his evidence, the plaintiff testified that the suit property is about one acre and he lives on it. He stated that he has constructed a four bedroomed house on it and has been living on the land since the year 2017. He averred that he purchased the property in the year 2017 from one Bomu Benjira Mumba whose name appeared in the records of the County Government of Kwale as proprietor and he had an allotment letter. He entered into an agreement to purchase the land and he bought the suit property, and a half acre of a Plot No. 637. Upon purchase, he stated that he fenced the land. He then submitted building plans to the County Government of Kwale after which he built his house. In December 2019 (probably meant 2018) he found the defendant on the land constructing. The defendant had a court order from the Kadhi's

Court. It is after that that he filed this case. Cross-examined, he testified that so far no titles to the land have been issued. He acknowledged that he has not filed pleadings to quash the decision of the Kadhi's Court.

4. The defendant was not present when the plaintiff testified, and his learned counsel, Mr. Aminga, sought an adjournment, which I reluctantly granted. The defendant did not however appear at the subsequent hearing and his case was closed without any evidence being taken. I invited counsel to file submissions, but only Mrs. Umara, learned counsel for the plaintiff, filed submissions. None were filed on behalf of the defendant. I have taken note of these submissions.

5. The plaintiff's evidence is uncontroverted as the defendant called no evidence. I have seen that the plaintiff has displayed a letter of allotment dated 9 March 2011, vide which the Town Council of Kwale, allotted the suit property identified as UNS. Residential Plot No. 633 Kwale Township- Godoni, to one Bomu Benjira Mumba. I have also seen a sale agreement dated 29 July 2011, through which Mr. Mumba sold the suit property to the plaintiff. The plaintiff did not avail the proceedings in Kwale Kadhi's Court Succession Case No. 50 of 2016, save for an order issued on 7 June 2017. I have perused that order and I can discern that it was issued in respect of the Estae of Tsonzo Mwatsonzo (deceased). I can also discern that the petitioner in that case was Athuman Juma Tsonzo with one Said Mwazinje Mwadama as respondent. The order as annexed provides as follows :-

It is hereby ordered :-

That the respondent do vacate the parcels of lands :

(a) Kwale/Plot No. 632 Kwale Township – Godoni.

(b) Kwale Township – Godoni Plot No. 633.

(c) Kwale Township – Godoni Plot No. 670.

(d) Kwale Township- Godoni Plot No. 800.

That the Area Chief to assist in the order compliance (sic).

It is so ordered.

Given under my hand and seal of this Court at Kwale this 7th day of June 2017

Said Hamisi Bedzenga

Principal Kadhi

Kwale.

6. As I have said, the above is the only document availed to me from the Kadhi's Court Kwale. I have absolutely no context within which the above orders were made. In any event, from what I can see, the orders were directed at a respondent named Said Mwazinje Mwadama and not the plaintiff. I have seen no judgment or order issued by the Kadhi's Court vesting this land upon the defendant. I regret that with the very limited material presented, I am unable to make any finding of a declaration against the Kadhi's Court. I also cannot tell whether or not the Kadhi's Court had jurisdiction over the matter. The plaintiff ought to have supplied the pleadings and the judgment of the said case for this court to fully appreciate where he is coming from. I am also not fully convinced that a declaration against the Kadhi's Court is the best avenue, because if the plaintiff is aggrieved by an order issued by such a court, the avenue for setting aside would be available, or even an appeal. I cannot therefore make the orders (b), (c), and (d) of the plaint.

7. Prayer (a) of the plaint seeks a declaration that the plaintiff is the lawful allottee of the suit property. At the moment, no titles have been issued and in light of that, I hesitate to make a final declaration on ownership. What I can, and will order, is that as between himself and the defendant, the plaintiff has demonstrated a better title to the suit property, as the defendant called no evidence to support his claim of ownership of the suit property. Having not demonstrated any right over the suit land, I will also issue the order of permanent injunction, against the defendant, in terms of prayer (d) and also issue an order of eviction in terms of prayer (e) of the plaint. The plaintiff will have the costs of this suit.

8. Judgment accordingly.

DATED AND DELIVERED THIS 17TH DAY OF FEBRUARY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA