



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 311 OF 2016

CONSOLIDATED WITH ELC CASE NO. 2 OF 2017

HADIJA BETUNGA BEMWAMBA

STEPHEN MUNGA NZAKA.....PLAINTIFFS

VERSUS

1. JACOB KITI MBURA

2. BONIFACE GAMBO MBURA

3. ALBERT MWANGALA MBURA

4. THE DISTRICT LAND REGISTRAR-KILIFI

5. THE CHIEF LANDS REGISTRARS

6. THE ATTORNEY GENERAL.....DEFENDANTS

JUDGMENT

BACKGROUND

1. This suit was initially filed by Cosmas Nzaka Ndegwa who subsequently passed away on 16th October 2017. The suit was then amended by the Legal Representatives. By their plaint dated 15th November 2016 as amended on 15th February 2019 Hadija Betinga Bemwamba and Stephen Munga Nzaka (the Plaintiffs) suing for and on behalf of the Estate of the late Cosmas Nzaka Ndegwa (the deceased) pray for Judgment against the six (6) Defendants jointly and severally for: -

a) A finding that the Plaintiffs are the lawful and/or legal owners of the suit premises being Plot No. Kilifi/Kijipwa/245 measuring approximately 0.996 Ha as the Legal Representatives of the Estate of the late Cosmas Nzaka Ndegwa (Deceased);

b) A nullification and/or revocation of the Title Deed for Plot No. Kilifi/Kijipwa/245 measuring approximately 0.0996 Ha and subsequently the same be registered in the names of the Plaintiffs and a Title Deed issued accordingly; and

c) Costs of this suit.

2. These prayers arise from the Plaintiffs' position that at all times material and more so since 1984, their family occupied the disputed parcel of land. Sometime in 1990, the area was declared an adjudication section and the Ministry of Lands thereafter proceeded to allocate the same to the residents on the basis of occupation and/or possession.

3. The Plaintiffs aver that while the parcel of land they occupied was adjudicated and declared to be Plot No. Kilifi/Kijipwa/245, the same was mistakenly and erroneously allocated to one Mbura Kufuja Muniyu (now deceased) and thereafter to Jacob Kiti Mbura, (the 1st Defendant), Boniface Gambo Mbura (the 2nd Defendant) and Albert Mwangala Mbura (the 3rd Defendant). The Plaintiffs assert that they only came to learn of the position in January 2016 but when they approached the 1st, 2nd and 3rd Defendants to negotiate and agree on the way forward, the said Defendants threatened to evict the Plaintiffs from the suit property.

4. But in their Joint Statement of Defence and Counterclaim dated and filed herein on 10th February 2017, Jacob Kiti Mbura, Boniface Gambo Mbura and Albert Mwangala Mbura (the 1st, 2nd and 3rd Defendants) deny that the Plaintiffs have been occupying the suit property since 1984 and or that the same was wrongly adjudicated to their father Mbura Kufuju Munyu during the land adjudication exercise.

5. The 1st, 2nd and 3rd Defendants maintain that they are the registered owners entitled to the exclusive possession of the said parcel of land situated at Msumarini Village containing by measurement 2.5 acres following its transfer to their names on 13th January 2016 after due succession from the original allottee, the late Mbura Kufuja Munyu.

6. The Defendants assert that the suit property was properly allocated and that the same was charged to the Settlement Fund Trustees (SFT) on 17th July 1985. They further aver that the late Mbura duly paid the requisite loans, charges and fees due to the SFT but he died on 14th June 1991 before the Title would be discharged and registered in his name. The Defendants were later on registered as the owners of the property upon due succession.

7. The 1st, 2nd and 3rd Defendants maintain that the Plaintiffs' were for sometime tenants in a building owned by the 2nd Defendant and built on a parcel of land abutting the suit property. Sometime in the year 2007, the Plaintiffs trespassed onto the suit property and subsequently commenced construction of a dwelling house thereon without the permission of the Defendants.

8. The Defendants further maintain that the Plaintiffs have wrongfully been holding themselves out as the true owners of the suit property and that on 25th February 2016, they caused a restriction to be registered against the title at the Kilifi Land Registry forbidding any dealing or transaction thereon without their permission. They also accuse the Plaintiffs of excavating building stones from the property without the permission of the Defendants as a result whereof the Defendants have suffered loss and damage.

9. By way of their Counterclaim, the 1st, 2nd and 3rd Defendants pray for Judgment against the Plaintiffs for: -

a) An order of vacant possession of the suit property being all that parcel of land situated at Msumarini Village within Kilifi County in the Republic of Kenya containing by measurement 2.5 acres or thereabouts and known as Title No. Kilifi/Kijipwa/245, the demolition of the Defendant's houses on the said suit property and the eviction of the (Plaintiffs) from the suit property.

b) An order directing the Land Registrar Kilifi Land Registry to remove the restriction registered against Title No. Kilifi/Kijipwa/245 on 25th February 2016 as Entry No. 6;

c) Costs of this suit and interest thereon at court rates; and

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

10. As it turned out, the current Plaintiffs' husband and father (the deceased) had prior to the institution of this suit also filed an Originating Summons being **ELC Case No. 132 of 2016 (OS)** on 31st May 2016 against the 1st, 2nd and 3rd Defendants herein seeking a declaration that he had acquired the suit property by virtue of adverse possession. That suit was however withdrawn a week before the present suit was filed on 10th November 2016.

11. Subsequently and by their Plaint dated and filed herein on 5th January 2017, the 1st, 2nd and 3rd Defendant filed **Malindi ELC Case No. 2 of 2017** against the deceased seeking virtually similar orders as set out in their Counterclaim herein together with a prayer for an order of injunction restraining the Plaintiffs from continuing to remain in the suit property, selling, charging or in any manner dealing therewith.

12. On 10th July 2019, this matter being **ELC No. 311 of 2016** and the said **ELC No. 2 of 2017** were consolidated by the consent of the parties with this **ELC No. 311 of 2016** being the lead file.

The Plaintiffs' Case

13. At the trial herein the Plaintiffs called one witness in support of their case.

14. PW1- Hadija Betinga Bemwamba is the 1st Plaintiff herein and the wife to Cosmas Nzaka Ndegwa who had initially initiated this suit. She told the Court she has lived on the suit property since 1986 when she got married to the deceased.

15. Adopting her husband's statement filed herein on 15th November 2016, PW1 told the Court that her husband moved onto the parcel of land in 1984. As at the time they established a home on the suit property it had neither been adjudicated nor demarcated. Unknown to the PW1's husband, the entire Kijipwa Area was declared an adjudication section around 1990.

16. PW1 told the Court that their parcel of land was then adjudicated and designated as Plot No. Kilifi/Kijipwa/245 measuring approximately 0.0996 Ha. It was however erroneously allocated to Mbura Kufuja Munyu before being transferred to the 1st, 2nd and 3rd Defendants. PW1 testified that upon discovering the erroneous allocation in 2016, they sought help from the National Land Commission but by then the Defendants had already been issued with a title deed.

17. PW1 further told the Court that the Defendants are their immediate neighbours and that she had buried her daughter Beatrice on the land on 21st June 2015 without any protest from the Defendants. She had also buried her husband on the property on 24th October 2017.

18. On cross-examination, PW1 denied that they lived on a parcel of land owned by the 2nd Defendant upon her marriage in 1986. She told the Court Kijipwa Settlement Scheme was initially private land and everyone who lived thereon before the Scheme was a squatter. Each squatter was thereafter allocated 2.5 acres.

19. PW1 further testified that they were on the land when the surveyors arrived there and that her husband was allocated the land. She however conceded she had nothing to show that her husband was allocated the land or that he made any payments to the authorities thereafter. PW1 told the Court they had lived well until November 2015 when the Defendants who lived on a different parcel of land being Plot No. 277 started claiming the land.

10. PW1 further told the Court that her husband placed a restriction on the land on 24th February 2016. In 1999, they had installed piped water and electricity on the land although she had not carried any documents in regard to those installations to Court. She told the Court the officers at the Land Registrar's office had given the title for the suit property to the wrong person and urged the Court to restore their title.

The Defence Case

21. Like the Plaintiffs, the 1st, 2nd and 3rd Defendants also called a single witness in support of their case. The 4th, 5th and 6th Defendants did not call any witness.

22. DW1- Jacob Kiti Ngura Mbura is the 1st Defendant and a brother of the 2nd and 3rd Defendants. DW1 told the Court that together with his brothers, they were now the registered proprietors of the suit property following its transfer to themselves from their father's name on 13th January 2016.

23. DW1 testified that the suit property had been allocated to their father and that it was charged to the Settlement Fund Trustees (SFT) on 17th July 1985. Their father had paid all the loans, charges and requisite fees due to the Settlement Funds Trustee but he died on 14th June 1991 before the Title was discharged and registered in his name.

24. DW1 further told the Court that their father had planted coconut and mango trees on the land after being allocated the same. He further told the Court the Plaintiffs' family were at some point in time tenants in a building owned by the 2nd Defendant. That building is on a parcel of land abutting the suit property. In 2007, the Plaintiffs trespassed into the suit property and commenced construction of a dwelling house thereon without the Defendants' permission.

25. DW1 further testified that the Plaintiffs had been holding themselves out as the owners of the suit property. On 26th February 2016 the Plaintiffs had caused to be registered a restriction against the title forbidding the registration of any dealings therewith. They had also been excavating building stones from the land without the Defendant's permission. As a result, the Defendants had suffered loss and damage and they urged that the Plaintiffs be evicted from the land.

26. On cross-examination, DW1 testified that the late Cosmas Nzaka went to the disputed land in 2007 and that he first rented his brother Boniface Gambo Mbura's (2nd Defendant's) house. He however conceded that he had nothing to show that Cosmas was paying rent to his brother.

27. Conceding that there are people who had died and were buried on the land without any objection from themselves, DW1 told the Court that they were initially unaware that the said Plot No. 245 belonged to them. They only came to know when they brought a surveyor to the land. At the time as is the case presently, they resided in Plot No. 277. DW1 told the Court he was unaware if there were mistakes or errors in the Plot Numbers since he was living in Kwale at the time of land adjudication in 1994.

Analysis and Determination.

28. I have perused and considered the rival pleadings, the oral testimonies of the witnesses and the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

29. The dispute herein relates to the registration of a parcel of land measuring approximately 0.0966 Ha (or about 2.5 acres) situated at Msumarini village and more particularly now known as LR No. Kilifi/Kijipwa/245.

30. The two Plaintiffs herein Hadija Betinga Bemwamba and Stephen Munga Nzaka are respectively the widow and son of one Cosmas Nzaka Ndegwa who had initially instituted these proceedings in the year 2016. As fate would have it, Cosmas passed away a year after instituting the proceedings and his widow and son were subsequently substituted in his stead having obtained a Limited Grant of Letters of Administration Ad Litem on 31st January 2018.

31. It was the Plaintiffs case that they had lived on the suitland since 1984 which was a period of almost 10 years before land adjudication was commenced in the area. The Plaintiffs told the Court that upon completion of the adjudication process and unknown to them, the property occupied by themselves was erroneously and/or mistakenly adjudicated to one Mbura Kufuja Munyu who was the father of the 1st, 2nd and 3rd Defendants herein.

32. According to the Plaintiffs, this error was not discovered for a long time and they continued occupying and utilizing the suit property until sometime in January 2016 when they came to discover that the land had been so allocated to the father of the 1st, 2nd and 3rd Defendants. It was their case that when they approached the Defendants they were seemingly unaware of their ownership of the land but upon learning of the same, the Defendants threatened to evict the Plaintiffs from the land.

33. On their part, the brothers Jacob Kiti Mbura, Boniface Gambo Mbura and Albert Mwangala Mbura (the 1st, 2nd and 3rd Defendants) deny that the registration of their father as the proprietor of the suit property was either erroneous or as a result of some mistake. On the contrary, they assert that the property was properly allocated to their father Mbura Kufuja Munyu before it was charged to the Settlement Fund Trustees (SFT) on 17th July 1985.

34. The three Defendants told the Court that prior to their father's death on 14th June 1991, the old man had paid the loan due to the SFT and all other requisite charges and fees. As it turned out however, their father passed away before the title was discharged and registered in his name. The 1st, 2nd and 3rd Defendants would eventually transfer the property to their names upon being granted Letters of Administration for their father's estate. On 13th January 2016, they were issued with a Title Deed in their name.

35. The 1st, 2nd and 3rd Defendants accuse the Plaintiffs of trespassing upon the suit property sometimes in the year 2007 and thereafter proceeding to construct dwelling houses thereon and holding themselves out as the true owners of the suit property. Accordingly, they urge this court to grant them vacant possession and to direct the demolition of the Plaintiffs houses on the suit property.

36. I have agonized over this matter for sometime. From the material placed before me, the property in dispute is as a result of the establishment by the Government sometimes in the 1990s of what came to be known as Kijipwa Settlement Scheme within Kilifi County. None of the parties however called as a witness the Land Adjudication and Settlement Officer and no records were provided from that office as to when and how land adjudication was done in the area.

37. As it turned out, the District Land Registrar Kilifi, the Chief Land Registrar and the Honourable the Attorney General named herein as the 4th, 5th and 6th Defendants did not call any evidence despite filing a Statement of Defence herein on 7th July 2017.

38. This Court found it rather curious that while the 1st, 2nd and 3rd Defendants contend that the Plaintiffs trespassed onto what they considered their property in the year 2007, they seemingly took no action to evict them and continued to let the Plaintiffs enjoy the use and occupation of the said land peacefully until the year 2016 when they started calling for their eviction.

39. It was also interesting to note that the three Defendants do not give any basis for their claim to the land prior to the period the adjudication process was undertaken in the area. Their claim to the land appears to me to start from the point in time when the property was charged to the Settlement Fund Trustees. While they told the Court the Charge was registered on 17th July 1985, I did not find any document making reference to their father as regards the disputed property until the year 1988.

40. By a letter dated 11th July 1988, the then Senior Land Adjudication and Settlement Officer Nicholas Richa invited the father to the 1st, 2nd and 3rd Defendants to call his office during working hours any day to sign his land documents and to take with him Kshs 26/- being payment for stamp/legal fees. That call was apparently heeded a few months later and on 7th November 1988, the Settlement Fund Trustees offered the land to Mr. Mbura and asked him to take possession within six months and to fulfill certain conditions associated with the Charge.

41. A year before his death, the Fund demanded by a letter dated 9th August 1989 loan arrears in the sum of Kshs 217/- from Mr. Mbura. By 30th September 1997, some seven years after his death, those arrears stood at Kshs 1810/-. On 30th November 2015, the property was then transferred to the Defendants before they were issued with a title on 13th January 2016.

42. On cross-examination as to how they acquired the land, the 1st Defendant who testified on behalf of his brothers conceded that the Plaintiffs had been living on the suit property for sometime and that they had freely buried their relatives on the land. He told the Court that the Defendants lived on Plot No. 277 and that initially, they had not known that the suit property also belonged to them. They only learnt of that fact when they brought in a surveyor to the land.

43. That in my view would appear to lend credence to the Plaintiffs claim that they had all along lived on the land with the Defendants as their neighbours and that the Defendants only thought of evicting them upon learning sometime around 2016 from the Plaintiffs themselves that the property was registered in the name of their father.

44. This having been a Settlement Scheme where each squatter had been given land on the basis of what they occupied, it was unclear to me how the Defendants father came to be registered as the owner of both Plot No. 245 and 277 within the Kijipwa Settlement Scheme.

45. From a Ground Status Report dated 11th June 2018 prepared by the National Land Commission following a complaint by the Plaintiffs, the Commission made the observations inter alia that:

- i) The plot is developed with three permanent houses with the family of the late Cosmas Nzaka Ndegwa residing on the said Plot;***
- ii) The Plot is also cultivated with two coconuts, two mango and two lemons trees;***
- iii) There is a good road access to the plot;***
- iv) The plot is partly fenced with perimeter wall and barbed wire;***
- v) The Plot is serviced with electricity from the main grid, water from Kilifi-Mariakani Water & Sewerage Company Ltd and disposal by way of soak pit;***

vi) There were two graves which is a clear indication to show the family has been residing on the said plot for many years;

vii) The family claimed that they have lived on the said parcel of land for over 30 years peacefully with their neighbours only to come and realise that the plot title deed was issued to their neighbours;

viii) Currently the title holders are Jacob Mbura, Boniface Gambo Mbura and Albert Mwanga Mbura who are residing in the next Plot 277 at the ground and they have been neighbours for all those years; and

ix) It was observed that the Kijipwa Scheme had some titles overlaps to where people were initially occupying and some were completely left out of the scheme while they were residing on the said Plots.”

46. While it was not clear to me whether the said Report prepared by the Commission’s Chief Land Administration Officer had been arrived at with the participation of the Defendants, it appeared to me to be a true reflection of how the 1st, 2nd and 3rd Defendants came to be registered as the proprietors of the suit property. Their registration as such proprietors clearly arose from an error or mistake that was not supported by the facts on the ground.

47. Under Section 26(1) of the Registration of Land Act, a Title deed can be challenged on the ground that it was procured by fraud or misrepresentation to which the person is proved to be a party, or where it has been acquired illegally or unprocedurally. From the material placed before me, the Defendants were clearly residing in Plot No. 277 and there was no basis upon which they made payments to the Settlement Funds Trustees for the suit property which they knew was occupied by the Plaintiffs. Such payments can only be construed to have been aimed at misrepresenting the facts as to the person who was entitled to the suit property.

48. In the premises, and for the foregoing reasons, I find merit in the Plaintiffs case. I allow the same as prayed and dismiss the Counterclaim as filed herein by the 1st, 2nd and 3rd Defendants.

49. In the circumstances of this case, each party shall bear their own costs.

Dated, signed and delivered at Malindi this 23rd day of March, 2021.

J.O. OLOLA

JUDGE