



Makhanu & another v Land Registrar Bungoma County (Environment & Land Case E013 of 2021) [2024] KEELC 5207 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5207 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E013 OF 2021**

EC CHERONO, J

JULY 11, 2024

BETWEEN

DICKSON JUMA MAKHANU 1ST PLAINTIFF

JOHN WANYONYI MAKHANU 2ND PLAINTIFF

AND

LAND REGISTRAR BUNGOMA COUNTY DEFENDANT

JUDGMENT

a. Introduction And Pleadings

1. The plaintiff instituted this suit by way of a plaint dated 21st October, 2021 seeking for the following orders;
 - a. Cancellation of Parcel Number Ndivisi/Khalumuli/2537 and 2538 and the restoration of Land Parel No Ndivisi/Khalumuli/1354 to the name of the deceased Shem Makhanu Katila
 - b. Costs and interests of the suit.
2. It is the Plaintiffs' case that they are administrators of the estate of one Shem Makhanu Katila alongside Netty Nakumincha and Selina Namalwa Masoni as co-administrators having been so appointed in Succession Cause No 156 of 2006. The Plaintiffs' averred that at the time of filing the abovementioned succession cause, Land Parel No Ndivisi/Khalumuli/1354(hereinafter referred to as the 'suit land') was registered in the name of the deceased but during the pendency of the succession cause, the defendant closed the title and created new numbers namely 2537 and 2538. They further averred that all efforts to find out the owners of the new plots was impossible with the defendant alleging that the extracts of the register cannot be found.
3. The Defendant entered appearance and filed an Amended statement of defence dated 16th June, 2022 denying the Plaintiff's claim and averred that if any actions were carried out in relation to registration



over the suit land, the same was done lawfully, in good faith and within the statutory mandate of the defendant. The defendant further averred that Land Parcel No Ndivisi/Khalumuli/1354 was subdivided into three portions and a transfer of Ndivisi/Khalumuli 2538 and 2537 measuring 7 acres made to one Robai Nasambu Makhanu after a tribunal case Misc Application No 265 of 1997 particulars said to be within the knowledge of the Plaintiffs’.

4. The Defendant averred that the consent for subdivision was issued on 09/12/1999 and a mutation form was prepared and registered on 04/02/2003. It was therefore the Defendant’s case that at the time of the death of the said Shem Makhanu in 2004, Ndivisi/Khalumuli 2538 and 2537 had already been subdivided and transferred to Robai Makhanu in compliance with a court order and Ndivisi/Khalumuli 2536 was registered in the name of Shem Makhanu. Therefore, they stated that only Ndivisi/Khalumuli 2536 was available for distribution in succession in the year 2006. The Defendant sought to have the Plaintiff’s claim dismissed.

Parties Evidence

5. The suit was heard on various dates with the Plaintiff calling two witnesses while the Defendant called one witness.
6. PW1 Dickson Juma Makhanu adopted his witness statement dated 21/10/2021 in his testimony-in-chief and produced documents in support of his case as contained in his list of documents of an even date as P-Exhibit 1-8 respectively. In cross-examination, the witness stated that Shem Makhanu died in the year 2004 and denied knowledge of any dispute over Ndivisi/Khalumuli 1354 (hereinafter referred to as ‘the suit land’) and any court order i.e Misc Application No 256 of 1997. He stated that the proceedings attached by the Defendant are in relation to Ndivisi/Muchi 1354 while the land in issue is Ndivisi/Khalumuli 1354. PW1 testified that the said proceedings involved his brothers namely John Wanyonyi, Peter Wafula and Fred Wanyonyi and Reuben Wamalwa. It was his evidence that Robbai Makhanu is his step-mother.
7. PW2 Wanyonyi Makhanu adopted his witness statement dated 21/10/2021 as his testimony-in-chief. In cross-examination, he testified that prior to his death, Shem Makhanu had complained that the suit land had been fraudulently sub-divided. He testified that his father (Shem Makhanu-dcd) had eight (8) wives and that at the time of his death, he had not allocated the suit land to anybody. He also denied knowledge of any case before the tribunal.
8. DW1 Babau Allan Was referred to the Defendant’s list of documents dated 16/06/2022 which he produced as DExhibit 1 to 6 respectively. It was his testimony that Ndivisi/Khalumuli 1354 was first registered in the name of Shem Makhanu (deceased) in 1979 and in 1997, his name was corrected to Shem Makhanu Katila. He stated that a caution was registered in favour of one John Wanyonyi Makhanu in the year 2001 and withdrawn by the cautioner in the year 2003 and in the same year, the title deed was closed on subdivision and new resultant numbers issued being Ndivisi/Khalumuli 2538, 2537 and 2536. He stated that the said subdivision was occasioned by the owner of the land Shem Makhanu who affixed his thumbprint on the mutation form which was accompanied by a court order, a letter from the area chief and proceedings from the Land Dispute tribunal No 146 of 1997.
9. On cross-examination, DW1 noted the difference in the parcel of land in dispute before the Land District Tribunal and this court. It was stated that the Land District Tribunal’s award directed the land registrar to subdivide the land to Shem Makhanu’s five sons. However, it was instead subdivided into three portions. The witness could not tell who was registered as the owner of Ndivisi/Khalumuli 2538 and 2536. On re-examination, the witness stated that the award of the Land District Tribunal was silent on the acreage awarded to each son.



Parties Submissions

10. The Plaintiff filed submissions dated 6th May, 2024 where he submitted that the court documents the Defendant relied upon to cause the subdivision of the suit land i.e. Ndivisi/Khalumuli/1354 made reference to Land parcel No Ndivisi/Muchi/1354 which is a completely different parcel of land and therefore the said subdivision was erroneous. He therefore submitted that the subdivision on Ndivisi/Khalumuli/1354 ought to be cancelled and restored to the name of Shem Makahnu Katila.
11. It is imperative to note that at the time of writing this judgment the defendant had not filed her submissions.

Analysis And Determination

12. I have considered the pleadings, the oral and documentary evidence, the written submissions on the subject matter by the parties, the cited authorities and the relevant provisions of the law hereof. It is my considered opinion that the one single issue for determination in this case is whether the Plaintiffs are entitled to the orders sought.
13. According to the plaintiffs, the Defendant irregularly closed the title for Land Parcel No Ndivisi/Kahlumuli/1354 after sub-dividing the same and creating new numbers namely 2537 and 2538. The Defendant on her part argued that the closure and sub-division of the suit land was in compliance with a court order issued in Webuye SRM Misc. Application No 265 of 1997 which adopted the award of Webuye Land District Tribunal in case No 146 of 1997 and that the proprietor at the time i.e. Shem Makhanu prior to his death had applied for the sub-division during his lifetime and as such, the same was done lawfully, in good faith and within their statutory mandate.
14. On examination of the Plaintiff's documents, P-Exhibit 2,3 & 8 which tally with D-Exhibit3, it emerged that the suit land was first registered in the name of Shem Makanu on 2/5/1979 and a title deed issued on 3/8/1993. An amendment was made to the proprietor's name on 16/12/1997 recording the name as Shem Makhanu Katila and a title issued on 31/9/1998. A caution was thereafter registered in favour of John Wanyonyi Makahanu-the 2nd Plaintiff on 16/2/2001 and the same withdrawn on 2/9/2003. The title was thereafter closed on subdivision on 2/9/2003 and three new parcels created namely 2536,2537 and 2538. The Plaintiffs testified and produced a grant for letters of administration as P-Exhibit 6 & 7 which showed that the deceased died on 26th March, 2004.
15. On examination, it emerged that the land in issue in Webuye SRM Misc. Application No 265 of 1997 which adopted the award of Webuye Land District Tribunal in case No 146 of 1997 was Ndivisi/Muchi/1354 while the land in issue in the current case is Ndivisi/Khalumuli/1354. However, it also emerged that the deceased Shem Makahanu had on 20/3/2021 presented for registration a mutation form sanctioning the sub-division of the suit land by affixing his thumb print which registration took effect after the caution that had been placed by the 2nd Plaintiff was lifted/withdrawn. The forgoing is supported by a letter dated 8th July, 2003 produced as D-Exhibit 5 addressed to the Land Registrar Bungoma by the area chief Webuye location confirming the deceased's resolution to subdivide the suit land. It is noteworthy that all this was done prior to the death of the deceased.
16. It is trite law that whoever alleges must prove. Section 107 of the Evidence Act puts to rest the issue of where the burden of proof lies and provides as follows:
 - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

17. When can it be said that the evidence adduced is sufficient to support a finding? I find the answer in the standard and degree of proof required for the particular class of case. The standard and degree of proof in civil cases is proof on a balance of probabilities. In the case of *William Kabogo Gitau v George Thuo & 2 others* [2010] eKLR the court stated:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations he made occurred.”

18. The Court of Appeal in the case of *Palace Investments Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR held that:

“Denning J in *Miller v Minister of Pension* (1947) ALL ER 372 discussing the burden of proof had this to say:

“That degree is now settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability is equal it is not. This burden on a balance of preponderance of probabilities means a win however narrow.”

19. From the analysis and evaluation of the evidence as above and guided by the cited authorities, I find that the Defendant has discharged the burden of proof in that in as much as the order allegedly relied on by the Defendant relates to different piece of land, the Mutation Form and letter from the chief confirm that the deceased-Shem Makahanu applied for the subdivision of the suit land during his lifetime and that the sub-division was also done during his lifetime. This flies on the face of the Plaintiffs claim that the title of the suit land was closed after the deceased died and during the pendency of the Succession Cause.

20. The Plaintiff’s case seems to be filled with inconsistencies and falsehood as can be seen from their plaint where they assert that at the time of filing Succession Cause No 156 of 2006, the suit land was registered in the name of the deceased. It is unclear how the Plaintiffs came to this conclusion noting that in their plaint, it is supported by attached certificates of search showing that the title to the suit land was closed in the year 2003 which is at least three years prior to when they filed the succession cause. In *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* (2014) eKLR the court held;

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averment of the pleadings goes to no issue and must be disregarded....In fact that parties are not allowed to depart from their pleadings is on the authorities basic as this enables the parties to prepare their evidence on the issues



as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation.”

21. Having considered the evidence in its entirety, I find and hold that the Plaintiffs’ herein have not proved their case on the required standard which is on a balance of probabilities. The upshot of the foregoing is that the instant suit as filed by the Plaintiffs is devoid of merit.
22. For all the reasons given, the suit herein is hereby dismissed with costs.
23. It is so ordered.

DATED AND SIGNED BUNGOMA THIS 11TH DAY OF JULY, 2024.

HON.E.C CHERONO

JUDGE

In the presence of;

1st & 2nd plaintiffs-present

Defendant/Advocate-absent

Bett C/A

