



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC SUIT NO. 215 OF 2017

CHARLES KAVAI MUASYA1ST PLAINTIFF

BARNABAS MUTHUSI MUASYA 2ND PLAINTIFF

VERSUS

ISAAC KATINDA KALYUKI1ST DEFENDANT

DISTRICT SURVEYOR, MAKUENI COUNTY2ND DEFENDANT

THE HON. ATTORNEY GENERAL..... 3RD DEFENDANT

JUDGEMENT

1. The Plaintiffs herein commenced this suit by way of a plaint dated 10th March, 2015 and filed in court on even date. They pray for Judgement against the Defendants for: -

a) A declaration that Land Title Number Kisau/Mukiwani/543, is registered solely in the name of Boniface Muasya Kalyuki (now deceased) hence it is wholly constitutes part of the Estate of the said Boniface Muasya Kalyuki.

b) A declaration that any action such as trespass onto or touching on ownership of Land Title Number Kisau/Mukimwani/543 by the 2nd Defendant at Nairobi Succession Cause Number 13 of 2004 without reference to High Court is illegal as it amounts to intermeddling with the Estate of Boniface Muasya Kalyuki.

c) A permanent injunction restraining the 1st and 2nd Defendants by themselves, their agents, servants or employees from trespassing onto or in any other manner whatsoever interfering with Land Title Number Kisau/Mukimwani/543.

d) Costs of this suit.

2. The Plaintiffs have averred in paragraphs 8, 10, 11, 14 and 15 of their plaint that their rural home is built on Land Title Number Kisau/Mukimwani/543 situated in Kisau Division, Mbooni-East District, Makueni County in which home their mother and other beneficiaries of the estate of Boniface Muasya Kalyuki (now deceased) reside, that on or about the 5th March, 2015, the Plaintiffs received a letter dated 10th February, 2015 written by or for the District Land Surveyor, Makueni County and addressed to the latter, the 1st Defendant and other persons communicating that the surveyor would carry out an undisclosed exercise on the 12th March, 2015 purportedly in furtherance of "implementation of Land Case Number 18 of 2006", that the Plaintiffs aver that the said land case number 18 of 2006 is strange to them as the only dispute known to them was referred to the Makueni District, Land Disputes Tribunal vide Kisau Division LDT Case Number 91 of 2006, that the Plaintiffs aver that the 2nd Defendant, at the behest and/or instigation OF the 1st Defendant, has threatened to illegally enter the suit property with a view to carrying out a clearly illegal and unconstitutional exercise and that the Plaintiffs aver that the Land Title Number Kisau/Mukimwani/543 wholly constitutes part of the Estate of Boniface Muasya Kalyuki hence subject of High Court at Nairobi Succession Cause Number 3691 of 2004 in which no objection proceedings have been filed by the 1st Defendant or any other person laying claim to part of the said land and that consequently, the attempt by the 2nd Defendant to interfere with the ownership of the aid land or any part thereof amounts to intermeddling with the estate of the deceased contrary to the law.

3. The Plaintiffs' claim is denied by the 2nd and the 3rd Defendants vide their statement of defence dated 28th May, 2015 and filed in court on 8th June, 2015. The two Defendants have urged the court to dismiss the suit with costs.

4. The 1st Defendant did not enter appearance nor did he file his defence despite being served with summons on the 14th March, 2015 as is shown in the affidavit of service sworn by Joseph Nzyokii Mwanthi, the counsel for the Plaintiffs, on 19th March, 2015 and filed in court on 3rd October, 2017. In the circumstances, the matter proceeded as undefended suit against him.
5. During the hearing of the Plaintiffs' case on 1st December, 2020, Charles Kawai Muasya, the 1st Plaintiff herein, adopted his recorded statement that was filed in court on 10th March, 2015 as his evidence. He said that he and his step brother, one Julius Kalyuki, were issued with grant of letters of administration of the estate of their deceased father on 4th April, 2015 vide Machakos High Court Succession Cause number 3691 of 2004. That since his step brother is now deceased, he sought to replace his deceased step brother's name with that of his brother, Bernabas Muthusi Muasya, as a result of which he was issued with another grant of letters of administration on 7th July, 2011 (PEX No. 1).
6. The Plaintiff told the court that land parcel number Kisau/Mukimwani/543 is part of the estate of their late father. He pointed out that his late father was registered as the proprietor of the land on 1st March, 1995 while the 1st Defendant was registered as the sole proprietor of land parcel number Kisau/Mukimwani/1008.
7. The 1st Plaintiff went on to say that on 6th March, 2015, he received a letter dated 10th February, 2015 by or on behalf of the District Land Surveyor, Makueni County addressed to the 2nd Defendant, the 1st Defendant, himself and other persons communicating of the 2nd Defendant's intention to trespass into land parcel number Kisau/Mukimwani/543 on the 12th March, 2015 with a view to carrying out an exercise to implement a decision purported to be in land case number 18 of 2006.
8. According to the 1st Plaintiff, land case number 18 of 2006 is strange to him and the 2nd Plaintiff. That the only dispute known to the two is Makueni District Land District Tribunal Kisau Division LTD case number 91 of 2006. The 1st Plaintiff added that he is aware that the decision in LTD case number 91 of 2006 was reversed on appeal vide Appeal number 13 of 2007 and hence there is no decision capable of being implemented. The Plaintiff went on to add that in any event and to the best of his knowledge, the decision in LTD number 91 of 2006 was never adopted as a judgement of a court of competent jurisdiction or at all and a decree capable of being executed duly extracted.
9. It was also the 1st Plaintiff's evidence that the 1st Defendant is not a beneficiary of the estate of Boniface Muasya Kalyuki and hence he has absolutely no legal claim or interest over land parcel number Kisau/Mukimwani/543. He added that the 1st Defendant was all along aware of Succession Cause number 3691 of 2004 as at the time of lodging LDT number 91 of 2006.
10. The Plaintiff further produced 7 documents in his list of documents dated 10th March, 2015 as PEX Nos 2 to 8 respectively.
11. His evidence in cross examination by Ms. Nyawira for the 2nd and the 3rd Defendants was that the letter from the District Land Surveyor Makueni does not indicate the intention to trespass into the suit land. He said that the exercise referred to in the said letter was to implement the decision in land case No. 18 of 2006 and pointed out that he neither had a copy of the decision nor did he know what the decision was all about.
12. The 1st Plaintiff went on to say that he did not have a letter to show that the surveyor would go to land parcel number Kisau/Mukimwani/543. He admitted that land parcel number Kisau/Mukimwani/543 was not the subject of the appeal he had alluded to. He maintained that his conflict with the 2nd Defendant is due to the latter's intention to trespass into land parcel number Kisau/Mukimwani/543.
13. His evidence in re-examination was that his understanding of the letter by the surveyor was that the latter would trespass onto land parcel number Kisau/Mukimwani/543.
14. The 2nd and 3rd Defendants rested their case without adducing any evidence.
15. The Plaintiff and the 2nd to 3rd Defendants filed their respective submissions as directed by the court.
16. The Plaintiffs' counsel submitted that the Plaintiffs pleaded in their plaint that they were the administrators of the estate of their late father, one Boniface Kalyuki (deceased), by dint of grant of letters of administration issued to them and confirmed by the High Court at Nairobi in Succession Cause number 3691 of 2004. He went on to submit that the Plaintiffs further pleaded that land parcel number Kisau/Mukimwani/543 is and was all at material times registered in the name of the aforesaid person as the sole proprietor, and that the 1st Plaintiff had adduced evidence and also produced documents in support of the averments.
17. It was also submitted that the Plaintiffs had pleaded in paragraphs 10, 11 and 14 of the plaint as follows: -

Ø "On or about the 5th March, 2015, the Plaintiffs received a letter dated 10th February, 2015 written by or for the District Land Surveyor, Makueni County and addressed to the latter, the 1st Defendant and other persons communicating that the surveyor would carry out an undisclosed exercise on the 12th March, 2015 purportedly in furtherance of "implementation of Land Case Number 18 of 2006".

Ø The Plaintiffs avers that the said land case number 18 of 2006 is strange to them as the only dispute known to them was referred to the Makueni District, Land Disputes Tribunal vide Kisau Division LDT Case Number 91 of 2006.

Ø The Plaintiffs avers that the 2nd Defendant, at the behest and/or instigation for the 1st Defendant has threatened to illegally

enter the suit property with a view to carrying out a clearly illegal and unconstitutional exercise.”

18. The counsel went on to submit that in purpose to the above averments, the 2nd and 3rd Defendants in paragraph 4 of their statement of defence averred as follows: -

“The Defendants in response to paragraphs 10, 11 and 14, and 2nd Defendant acted in good faith in accordance to the functions and responsibility its (sic) office.....”

19. According to the counsel, the 2nd and 3rd Defendants have effectively admitted: -

a) That the 2nd Defendant had, on or about 5th March 2015 served the Plaintiffs with a letter dated 10th February, 2015, authored by the said Defendant and addressed to the Plaintiffs, the 1st Defendant and other persons communicating that the Surveyor (2nd Defendant) would carry out an undisclosed exercise on the 12th March 2015 in furtherance of implementation of Land Case Number 18 of 2006.

b) That the 2nd Defendant, at the behest and/or instigation of the 1st Defendant, had threatened to enter the suit property to wit Kisau/Mukimwani/543 with a view to carrying out an exercise, which was not disclosed.

c) That the 2nd Defendant proceeded to justify his actions by stating that he had acted in good faith and in accordance to the functions and responsibilities of his office.

20. The counsel further submitted that such an averment, for its tenor and import to be fully appreciated, has to be read and understood against the provisions of the Survey Act, Cap 299 of the Laws of Kenya particularly Section 23 which stipulates the powers of the Director of Survey and Surveyors to enter upon land. Section 23(1) of the Act provides that: -

“The Director or any Surveyor, or any person authorized in writing by the Director in that behalf either generally or specially, may enter upon any land, with such assistants as may be necessary, for the purpose of –

(a) making or supervising any survey or resurvey; or

(b) affixing or setting up thereon or therein any survey mark; or

(c) inspecting any survey mark; or

(d) altering, repairing, moving or removing any survey mark; or

(e) doing anything necessary for carrying out any of the aforesaid purposes; or

(f) examining or inspecting the conduct of any survey.”

21. The counsel urged the court to take judicial notice that the 2nd Defendant exercises the powers, functions, duties and responsibilities of the Director of Survey in a delegated capacity.

22. The counsel pointed out needless to say, it is only logical that the Plaintiffs upon being informed by the 2nd Defendant about his intention to carry out an undisclosed exercise, interpreted that to mean that the exercise to be one listed under the aforementioned Section 23(1) of the Survey Act and invited the court to so hold and find. The Plaintiffs’ counsel submitted that entry upon the suit land as threatened, without lawful authority, would have amounted to trespass.

23. The Plaintiff’s counsel submitted the Plaintiffs wonder why it was necessary for the 2nd Defendant to write to the 1st Defendant and others notifying them of his intention to carry out an exercise, if that exercise was not one of those aforesaid in Section 23(1) of the Survey Act (Emphasis are mine).

24. The Counsel posited that Section 23(2) of the Survey Act would answer the reason behind the notification by the 2nd Defendant to the Plaintiff and the 2nd Defendant and others.

25. The above mentioned Section provides as hereunder;

“Before so entering upon any land, the Director or other surveyor or person duly authorized shall, whenever practicable, give reasonable notice to the owner or occupier of the land of his intention to enter thereon, and shall, on so entering produce written evidence of his authority to any person reasonably requiring the same.”

26. Arising from the above, the counsel submitted that the 2nd and 3rd Defendants attempts during cross examination to create the narrative that the impugned letter did not specify the exercise to be carried out must be rejected as it contradicts their pleading to the effect that the 2nd Defendant acted in accordance with the functions and responsibilities of his office.

27. In conclusion, the counsel urged that in the absence of any evidence by the Defendants or any of them to controvert the Plaintiffs' evidence, the latter have proved their case on a balance of probabilities.

28. On the other hand, the counsel for the 2nd and the 3rd Defendants was of the view that the issues for determination were two namely:-

i) Whether the Plaintiff has proven the allegations against the 2nd and 3rd Defendants.

ii) Whether the Plaintiff is entitled to the orders sought in the plaint.

29. Regarding the first issue, the counsel cited Section 107 of the Evidence Act which 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.

30. The counsel further cited Section 109 of the same Act which provides that;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

31. Arising from the above, the counsel submitted that it is settled law that a party who wishes the court to give a judgement or to declare any legal right dependent on a particular fact or set of facts has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts.

32. The counsel went on to submit that the Plaintiffs' allegation was that there did not exist any dispute between themselves and the 1st Defendant which was litigated under land case number 18 of 2006 as stated in the 2nd Defendant's letter. The counsel added that to prove the allegation, the 1st Plaintiff produced a ruling of a Tribunal and the ruling of the Eastern Provincial Commissioner's Land Appeal Tribunal case number 13 of 2007.

33. The counsel pointed out that notably, the ruling of the Tribunal did not indicate the same was in respect of LDT case number 91 of 2006 as alleged by the Plaintiff and that the fact of the matter was that the said ruling did not have a number. The counsel submitted that the determination of the case in question is dated 16th November, 2006 wherein the surveyor was directed to go back and share land parcels Kisau/Mukamwani/543, 1007, 1008 and 552 to the sons of Kalyuki equally. The counsel added that the parcels in question are the same ones in the instant suit and that the ruling of the Appeal case number 13 of 2007 relied on by the Plaintiffs was stated to be in respect of land parcel number Kisau/Mukimwani/1008.

34. It was further submitted that upon cross examination, the 1st Plaintiff testified that the letter dated 10th February 2015 from the 2nd Defendant did not indicate that the parcel in dispute was Kisau/Mukimwani/543.

35. From the foregoing, the counsel submitted that the Plaintiff's evidence has not met the required standard of proof in civil cases on a balance of probabilities. In support of her submissions, the counsel cited the case of Susan Kanini Mwangangi & Another –Vs- Patrick Mbithi Kavita [2019] eKLR where Odunga J. held;

“In this appeal, it is clear that the determination of this appeal revolves around the question whether the Appellants proved their case on the balance of probabilities. That the burden of proof was on the Appellants to prove their case is not in doubt. In Evans Nyakwana –Vs- Cleophas Bwana Ongaro (2015) EkLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden.....is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person.....The Appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

26. The question then is what amount to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –Vs- George Thuo & 2 Others [2010] 1 KLR 526 stated that:

“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 that he made occurred.”

27. In Palace Investment Ltd –Vs- Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

“Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say:-

“That degree is well 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. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties..... are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

36. On the issue of whether or not the Plaintiffs are entitled to the orders sought in the plaint, the counsel for the 2nd and 3rd Defendants referred the court to Black’s Law Dictionary 8th Edition, where Trespass is defined as;

“An entry on another’s ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property.”

37. The counsel submitted that during cross examination, the 1st Plaintiff testified that since 2015 up to date, the 2nd Defendant has never trespassed on his land and as such, there cannot be said to be any act of trespass.

38. The counsel added that the Plaintiffs in their submissions rightly stated that the Defendants intended action as stated in the letter dated 10th February, 2015 was implementation of land case number 18 of 2006 and that the entry rightly fell under Section 23 of the Survey Act. The counsel submitted that the 2nd and 3rd Defendants contend that the letter dated 10th February, 2015 was written in response to a letter dated 7th February, 2011 and that the same was procedurally done in execution of the 2nd Defendant’s statutory mandate.

39. It was also the counsel’s submissions that the fact that the 2nd Defendant was not a party to the proceedings relied on by the Plaintiffs’ including Nairobi Succession Cause number 13 of 2004, the 2nd Defendant cannot be accused of intermeddling with the estate of the deceased. The counsel cited Section 45 of the Law of Succession Act which provides;

“Except so far as expressly authorized by this Act, or by any other written law or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.”

40. The counsel further relied on the case of Gladys Nkirete M’Itunga [2016] Eklr where the court stated that;

“Whereas the law of succession does not define what intermeddling with the property of the deceased is, there is ample judicial decisions on acts which may amount to intermeddling. For instances, in the case of BENSON MUTUMA MURIUNGI –VS- C.E.O KENYA POLICE SACCO & ANOTHER [2016] eKLR the court observed that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under Section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate orders(s) of protection of the estate against any person.”

41. Arising from the foregoing, the counsel urged that it is only the High Court that has jurisdiction to deal with allegations of intermeddling with the estate of the deceased thus the Plaintiff has wrongly moved this court.

42. The counsel relied on Section 47 of the Law of Succession Act which provides;

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient; provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

43. The counsel went on to submit that the issue of jurisdiction was determined in the case of Owners of Motor Vessel “Lilian S” –Vs- Caltex Oil (K) Ltd [1989] KLR 1 where the court held that jurisdiction is everything and that a court should down its tools the moment it finds that it does not have jurisdiction to decide on a matter placed before it.

44. The counsel further cited the case of Samuel Kamau Macharia & Anor –Vs- Kenya Commercial Bank Ltd & 2 Others [2012] eKLR where the Supreme Court of Kenya held;

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.....The issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality. It goes to the very heart of the matter. For without jurisdiction, the court cannot entertain any

proceedings where the Constitution exhaustively provides for jurisdiction of a court of law, the court must operate within the constitutional limit. It cannot expand its jurisdiction through judicial craft or innovation.”

45. The counsel concluded by urging the court to dismiss the Plaintiff's suit with costs to the 2nd and the 3rd Defendants.

46. Having read the pleadings and the evidence adduced by the Plaintiff and having read the submissions filed by the counsel for the parties on record, I will adopt the issues for determination as framed by the counsel for the 2nd and 3rd Defendants.

47. With regard to the first issue, the evidence by the Plaintiffs was that the only dispute that was known to them was Makueni Land District Tribunal Kisau Division LDT number 91 of 2006. The Plaintiffs further contend that the said case was reversed on appeal vide Eastern Land Appeal Tribunal number 13 of 2007 and as such, there was no decision capable of being implemented.

48. The Plaintiffs have further asserted that they were not aware of land case number 18 of 2006 which the 2nd Respondent purported to implement vide his letter dated 10th February, 2015. I do note that the Plaintiffs produced proceedings dated 16th November, 2006 as PEX No. 4. As was correctly submitted by the counsel for the 2nd and 3rd Defendants, those proceedings (PEX No. 4) do not show the case file number. As such, they are of no probative value to the suit before me.

49. I further note that the Plaintiffs also produced the ruling in Eastern Provincial Land Appeal number 13 of 2007 where the Tribunal indicated that it had no jurisdiction over title number Kisau/Mukimwani/1008 as it fell under registered land (PEX No. 5). The ruling in the land Appeal Tribunal does not indicate the case number of the ruling that had been appealed against. It is, therefore, not correct to say that land case number 91 of 2006 was overturned on appeal.

50. Whereas, the 2nd Defendant has the mandate under Section 23(1) of the Survey Act to carry out the functions indicated thereunder, as was correctly submitted by the counsel for the 2nd and the 3rd Defendants, the letter dated 10th March, 2015 was in response to a letter dated 7th February, 2011 presumably written by the six (6) persons indicated in the said letter who include the 1st Plaintiff herein. It was upon the 1st Plaintiff to show that he was not party to the writing of the letter referenced KIS/LND/16/1/VOL IV/67 of 7th February, 2011, notwithstanding the fact that he contends that he was not aware of case number 18 of 2006. Having not indicated the parcel number of the land that was to be subjected to the implementation of the land case number 18 of 2006, the Plaintiffs was not justified to conclude that the land that was to be affected was Kisau/Mukimwani/543. In my view, the 1st Plaintiff was not candid and forthright on this issue.

51. On whether the Plaintiffs are entitled to the reliefs sought, I do note that from the Plaintiffs' own evidence, the court in the succession proceedings did make a finding that land parcel number Makueni/Mukimwani/543 is the property of Boniface Muasya Kalyuki and as such the declaration sought by the Plaintiffs before this court is in my view superfluous.

52. I further note that the evidence on record does not show the culpability of the 1st Defendants and as such the Plaintiffs have not satisfied this court that they have a cause of action against him notwithstanding the fact that the 1st Defendant neither entered appearance nor did he file his defence.

53. As for the 2nd and the 3rd Defendants, I would agree with their counsel that since no activity was undertaken by the Defendants upon the suit property, there cannot be said to be any act of trespass.

54. As for intermeddling, I would also agree with the counsel that the court that has jurisdiction to deal with the issue is the High Court and, therefore, the Plaintiffs have wrongfully moved this court.

55. The upshot of the foregoing is that I am not satisfied that the Plaintiffs have a cause of action against the 2nd and the 3rd Defendants. Consequently, the Plaintiffs' case must fail.

56. In the circumstances, the Plaintiffs' suit against the Defendants is hereby dismissed with costs to the 2nd and 3rd Defendants. It is so ordered.

Signed, dated and delivered via email at Makueni this **28th** day of **May, 2021**.

MBOGO C.G.

JUDGE

Court Assistant: Mr. G. Kwemboi.