



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC NO 307 OF 2003 (O.S)**

**KENGA KAZUNGU.....PLAINTIFF**

**VERSUS**

**MWENDA KATANA**

**ALBERT KATANA**

**THE DISTRICT LAND REGISTRAR KILIFI.....DEFENDANTS**

**JUDGEMENT**

**PLEADINGS**

1. The suit was instituted by way of an Originating Summons on 11<sup>th</sup> December 2003 by the plaintiff for orders that:-

- i. The defendants be declared to hold ½ share of a parcel of land known as Plot No. 629 Ngerenya Kilifi in trust for the plaintiff.**
- ii. That an order for sub-division of the said plot do issue to reflect the declaration of this Honourable Court.**
- iii. That the plaintiff be registered as the sole proprietor of ½ share of the said parcel of land Plot No. 629 Ngerenya Kilifi.**
- iv. That costs of this application be provided for.**

2. The summons is supported by the affidavit of Kenga Kazungu Mutava sworn on 11<sup>th</sup> December 2003. He deponed that his family and that of his late brother lived peacefully in the suit property, until 2001 when his late brother passed away. He stated that misunderstanding between the two families arose. He further stated that the 1<sup>st</sup> defendant the widow to his late brother and the 2<sup>nd</sup> defendant her son, are demanding the plaintiff's family to vacate from the suit property since it is registered in the name of his late brother. The plaintiff averred that his late father allowed his late brother to register the suit property in his name to hold it in trust for the whole family. He pleaded with Court to determine the rights in the suit property and allow the orders sought herein.

3. The 2<sup>nd</sup> defendant swore a replying affidavit sworn on 9<sup>th</sup> May 2017, in opposition to the Originating Summons. He stated that the 1<sup>st</sup> defendant was his mother and the administrator of his late father's estate, which included the suit property No. Kilifi/Ngerenya/629. He stated that the suit property was part of a settlement scheme allocated to his late father. He refuted the plaintiff's claim that the suit property belonged to his late father and the father of the plaintiff. He averred that his late father allowed the plaintiff to live on a portion of the suit property. He further stated that sometime in 1988, the plaintiff had his late father arrested, charged and convicted to a six month imprisonment when they disputed over the suit property. The 2<sup>nd</sup> defendant also averred that the plaintiff has a criminal case against his brother Julius Katana over the suit property.

4. The 2<sup>nd</sup> defendant claimed that his late grandfather and father to the plaintiff had a parcel of land in Vitengeni, which the plaintiff can occupy, possess and use. He stated that over the years there have been several meetings with the local administration over the dispute but all have been futile. He further denied being aware of the visit to the suit property on 1<sup>st</sup> September 2003 by the Land Adjudication and Settlement Officer. He further stated that if indeed the meeting happened it was in breach of his late father's right to be heard. He concluded by asking the Court to dismiss the suit with costs as the plaintiff's suit was bad in law and an abuse of the process of Court.

5. On 7<sup>th</sup> June 2018, the plaintiff filed a Notice of Withdrawal against the 1<sup>st</sup> defendant (deceased) with no order as to costs.

## **EVIDENCE**

6. On 29<sup>th</sup> April 2019, PW1 Hassan Kenga Kazungu, the plaintiff herein was examined in chief and adopted his affidavit in support of his Originating summons as evidence. He stated that the suit property was registered in the name of his late brother because his late father Katana Kazungu, had another parcel of land in Vitengeni.

7. On cross examination by Mr. Odhiambo, counsel for the 2<sup>nd</sup> defendant, he stated that his late father had two parcels of land one in Teso, Buridisha while the suit property is in Teso, Mwema. He stated that when they went to resolve the dispute at the chief's office, he was directed to vacate after paying for the coconut trees a decision he disputed. They later subdivided the coconut trees, but they did not discuss the issue of the plot.

8. He testified that the suit property belongs to his late father though he did not have letters of administration to his estate. He also stated that he did not object when the 1<sup>st</sup> defendant obtained the letters of administration to the estate of his late brother and being named as the beneficiary to the suit property. He further stated that he has constructed a mosque and a school on his side of the suit property after being advised by his advocate.

9. When cross examined by Mr. Makuto, Counsel for the 3<sup>rd</sup> defendant, the plaintiff stated that he has not sued the late Katana Kazungu over the suit property and neither did he visit the suit property when the late Katana Kazungu was alive because he was warned not to. He confirmed that his late father had two parcels of land, the suit property in Teso Mwema and another in Teso Buridisha. He stated that he had never seen the agreement made on 12<sup>th</sup> July 2014 before the chief and the elders where he was given 73 coconut trees and the family of his late brother was given 61 coconut trees.

10. When re-examined by his advocate, he stated that before he filed the suit since he had lived on the suit property for 16 years. He further stated that the father to the 2<sup>nd</sup> defendant was registered as the proprietor of the suit property for payment of tax purposes. He further stated that when he lived in Lango Baya his house and coconut trees were still in the suit property. He stated that his family, the 2<sup>nd</sup> defendant's family and his siblings currently live on the suit property. He sought to clarify that he was not made aware when the widow of his late brother was taking out the letters of administration.

11. David Mwangoma Kalumwa was the plaintiff's second witness. He testified that the plaintiff's late father requested the plaintiff's late brother to subdivide the plot but the two did not agree. He stated that when the plaintiff left Kitengeni for Teso he was allocated two plots in Ngerenya, Tezo. PW2 further stated that the chief told the plaintiff that he could not have two plots registered in his name and, he therefore registered one plot in his name and the other one in his first born son Katana Kazungu. He concluded by stating that the suit property should be divided into two.

12. On cross examination by Mr. Odhiambo, PW2 clarified that Kenga Kazungu Mutara is the son of Kazungu Mutara, who is the brother to Katana Kazungu, the father to the 2<sup>nd</sup> defendant. PW2 admitted that he does not have any evidence to prove that the 1<sup>st</sup> defendant was allocated two plots nor documentation to show the two plots were in the name of Kazungu Mutava. PW2 confirmed that there was a dispute between Katana Kazungu, the 2<sup>nd</sup> defendant's father and the plaintiff. PW2 stated that he has not been shown any letters of administration obtained by the plaintiff over his late father's estate. PW2 could not also confirm that Mwenda Katana Kazungu obtained confirmed letters of administration and that the suit property was given to her.

13. On cross examination by Mr. Mkok counsel for the 3<sup>rd</sup> defendant, PW2 stated that he has no evidence that Mutava lived on the land for over 40 years and neither did he have evidence to show that the land was subdivided.

14. On re-examination, PW2 stated that the two brothers had a long standing dispute but he was not aware why this case was instituted in 2003. PW2 further stated that he was informed by the late plaintiff's father that they sold one plot and lived on the other.

15. With that the plaintiff closed his case.

16. On 25<sup>th</sup> January 2021, the matter came up for defence hearing, Ms Memia was present holding brief for Dr Khaminwa for the plaintiff and there was no appearance from the defendant. The Court perused the affidavit of service dated 22<sup>nd</sup> January 2021 and filed on 25<sup>th</sup> January 2021 and was satisfied that the defendants were duly served with the day's hearing notice. The Court proceeded to close the defendant's case in their absence. The Court then directed parties to file written submission.

## **SUBMISSIONS**

17. The plaintiff filed their submissions on 18<sup>th</sup> March 2021. Counsel for the plaintiff submitted that the suit property was owned by Kazungu Mtava, who was a father to the plaintiff and Katanga Kazungu. That Kazungu Mtava caused the suit property to be registered in the name of Katana Kazungu as a trustee. That the 2<sup>nd</sup> defendant, nephew to the plaintiff had no right to evict the plaintiff from the suit property. Counsel further submitted that the title documents still bear the name of the late Katana Kazungu since his widow, the 1<sup>st</sup> defendant died being, an administrator to the estate of Katana Kazungu but before she could transfer the title documents into her name or that of the 2<sup>nd</sup> defendant.

18. Counsel further submitted that the plaintiff has been in occupation of the suit property for over 12 years and can claim adverse possession. Counsel submitted that the plaintiff had established the 5 elements of adverse possession since he had actual, open and notorious, exclusive, hostile and continuous possession. Counsel submitted that since the plaintiff had met the threshold for adverse possession he should be vested with title to the suit property in trust for the whole family.

19. Counsel further submitted that the 2<sup>nd</sup> defendant has not taken letters of administration for his late mother's estate and as such has no title to the suit property which is still registered in the name of the late Kazungu Katana's name. Counsel submitted that suit property is ancestral land and it was registered in the name of the 2<sup>nd</sup> defendant's father since he was the only one with identification documents for tax payments during the colonial times. Counsel also contended that the title is still in the name of the Katana Kazungu and that the plaintiff had established a case for adverse possession and pleaded with Court to vest the suit property in the plaintiff in trust of the whole family.

20. The 2<sup>nd</sup> defendant filed his submissions on 24<sup>th</sup> May 2021. Counsel for the 2<sup>nd</sup> defendant submitted that the issue before Court is not on adverse possession as claimed by the plaintiff's counsel but rather the issue of cesti que trust as alleged by the plaintiff in his Originating Summons. Counsel submitted that the plaintiff has no cause of action against the 2<sup>nd</sup> defendant, because the 2<sup>nd</sup> defendant does not have title to the suit property. Counsel further submitted that the title documents are in the name of the late Katana Kazungu. Counsel submitted that the certificate of confirmation of the estate of Katana Kazungu (deceased) were issued to the 1<sup>st</sup> defendant. Counsel argued that the suit against the 2<sup>nd</sup> defendant was abated and Court cannot issue judgement against the 2<sup>nd</sup> defendant.

21. Counsel contended that the plaintiff has no evidence that the 2<sup>nd</sup> defendant is holding the suit property in trust for the plaintiff. Counsel questioned why the plaintiff never lodged a suit against the 2<sup>nd</sup> defendant's father when he was alive if indeed it was true their father told them to subdivide the suit property. Counsel also questioned why the plaintiff did not call his other siblings as witnesses to corroborate that the suit property belongs to his late father. Counsel summarized the plaintiff's claim as an afterthought since he has not proved that he was in occupation of half of the suit property. Counsel concluded by asking Court to dismiss the suit against the 2<sup>nd</sup> defendant since he was not the registered proprietor of the suit property neither was he the administrator of his late father's estate.

### **ANALYSIS AND DETERMINATION**

22. I have considered the pleadings, the evidence adduced and the submissions made. The issues for determination is whether the plaintiff should be granted the orders sought. In the originating summons, the plaintiff seeks orders that the defendants be declared to hold ½ share of a piece of land known as Plot No. 629 Ngerenya Kilifi in trust for the plaintiff; and an order for subdivision of the said plot and for the plaintiff to be registered as the sole proprietor of ½ share of the said piece of land.

23. The 1<sup>st</sup> defendant is the plaintiff's sister-in-law and widow of the plaintiff's deceased brother, while the 2<sup>nd</sup> defendant is her son. The 1<sup>st</sup> defendant is now deceased and the suit against her was withdrawn on 7<sup>th</sup> June 2018. From the material on record, the suit land was registered in the name of the late Katana Kazungu, husband to the 1<sup>st</sup> defendant and father to the 2<sup>nd</sup> defendant. It is also clear from the material on record that following the demise of the late Katana Kazungu, letters of administration in respect of his estate were issued to his widow who is also now deceased. In this case, the plaintiff is seeking orders against the 2<sup>nd</sup> defendant who is neither the registered owner of the suit parcel of land nor the legal administrator of the estate of the registered owner. There was no evidence to show that the 2<sup>nd</sup> defendant herein is the registered owner of the suit land. There is also no evidence indicating that the 2<sup>nd</sup> defendant herein had taken out and obtained letters of administration in respect to the estate of his parents, both of whom are now deceased.

24. As the 1<sup>st</sup> defendant was the legal representative of the estate of the registered owner of the suit land, if any orders were to be given, it would have been against the 1<sup>st</sup> defendant. However the evidence on record is clear that the 1<sup>st</sup> defendant passed on and the suit against her was in any event withdrawn. There was no order for substitution of the 1<sup>st</sup> defendant that was made. Therefore, the 2<sup>nd</sup> defendant in my view has no capacity or locus standi to defend the suit. Legal capacity of a party is everything and without it, the suit against the 2<sup>nd</sup> defendant is incompetent.

25. In the result, the Court finds that it cannot and would not grant the orders against the 2<sup>nd</sup> defendant who has not been shown to hold the suit land in his name in any capacity. There was no evidence adduced indicating that the suit land was ever registered in the name of the 2<sup>nd</sup> defendant or that the 2<sup>nd</sup> defendant has been holding the said parcel of land in trust for the plaintiff as pleaded.

26. Although the defendants in this case did not tender any evidence and their case was closed, the onus was still upon the plaintiff to prove his case on a balance of probabilities. In as much as the plaintiff's evidence was not challenged, the plaintiff is challenging title to the suit property which title is in the name of the deceased person and yet the legal administrator of the estate of the deceased has not been sued. In the absence of letters of administration, the Court cannot hold the 2<sup>nd</sup> defendant liable to find that the suit land is held in trust for the plaintiff.

27. Accordingly, and in light to the above I find that the plaintiff's case against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants has no merit for the reason that the plaintiff has sued the 2<sup>nd</sup> defendant who is not the legal representative to the estate of Mwenda Katana (deceased) or Katana Kazungu (deceased), and for failing to prove the alleged trust.

28. For those reasons I dismiss the plaintiff's suit. Considering the relationship of the parties, who are an uncle and his nephew, I direct that parties bear their own costs.

29. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 1<sup>ST</sup> DAY OF JULY 2021.**

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**C.K. YANO**

**JUDGE**

**In the presence of:**

**Ms Memia holding brief for Dr. Khaminwa for the plaintiff**

**N/A for the defendants.**

**Court Assistant – Yumna**

**C. K. YANO**

**JUDGE**