



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 136 OF 2017

KOI ANTHONY KAHINDI.....PLAINTIFF

VERSUS

ALPHONCE MZUNGU

AUGUSTUS KAHINDI MZUNGU.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By his Plaint dated 21st June 2017, Koi Antony Kahindi (the Plaintiff) prays for Judgment against the two Defendants jointly and severally for:-

- a) A declaration that the Portions of land Nos. 13, 14, 15 and 16 in the Proposed Development Plan belong to the Plaintiff;***
- b) A permanent injunction restraining the Defendant from constructing, building any structures or otherwise dealing with the suit premises;***
- c) Costs and interest thereon.***

2. The prayers arise from the Plaintiff's contention that his father who inherited the land from his grandfather allocated him the said Portions of land and that he obtained beacon certificates thereof when preparation of the Development Plan commenced in the year 2005.

3. The Plaintiff asserts that sometime in the year 2014, the Defendants encroached upon the suit premises and started constructing structures thereon. Despite notice of intention to sue issued to them, the Defendants have failed or ignored to comply therewith.

4. But in their Defence and Counterclaim dated 17th August 2017, Alphonce Mzungu and Augustus Kahindi Mzungu (the Defendants) deny the Plaintiff's allegations. Instead they aver that land in Makao Village has been unsurveyed and undemarcated upto the year 2014 when the National Land Commission came in to set up a Part Development Plan based on occupation of the land.

5. The Defendants aver that they purchased the suit premises for valuable consideration from one Terry N. Kang'atua in August 2003 and that they have since carried out substantial developments by erecting six (6) permanent buildings currently occupied by themselves and their tenants.

6. By a way of a Counterclaim, the Defendants accuse the Plaintiff of using his membership to the Makao Settlement Committee set up by the National Land Commission in 2014 to secretly allocate himself part of their land. Pursuant to the Plaintiff's design to alienate the land, the Defendants accuse him of trespassing on the land and erecting some permanent buildings thereon.

7. Accordingly the Defendants pray for Judgment against the Plaintiff for:-

- a) A declaration that they are the rightful owners of the suit property;***
- b) An order of perpetual injunction restraining the Plaintiff from constructing any structures or trespassing on the suit property***
- c) Costs of the suit.***

THE PLAINTIFF'S CASE.

8. At the trial herein, the Plaintiff called three witnesses in support of his case.

9. PW1-Koi Antony Kahindi is the Plaintiff himself. He testified that he was born on the suit property some 45 years earlier. His father Daniel Koi was also born on the land. At some point the Government decided to settle people on the land and they formed a group called Makao Settlement Scheme.

10. PW1 told the Court that before they could process the Papers, the Defendants arrived and started building on the land claiming they had been authorized by someone. PW1 then wrote a Letter to the National Land Commission (NLC) explaining his predicament. The Chair National Land Commission wrote back on 21st February 2014 asking the Director Physical Planning to prepare a PDP as there was need to know where everybody was located on the ground.

11. PW1 told the Court that they then got a Surveyor who established that Portions 13 to 16 were within his land. The Defendants however continue to encroach some part thereof and have declined all efforts to make them stop the construction.

12. PW2- Daniel Karisa Koi is the Plaintiff's father. He testified that he was born in Makao in 1943 and that the Plaintiff is his first born son. He told the Court that he is now a retiree and that he had distributed his property to his children. He gave the Plaintiff the suit premises as his portion of inheritance.

13. PW2 further told the Court that the Defendants who had never even been his neighbours had now taken over his son's parcel of land.

14. PW3-Katana Kazungu Kilongo is a neighbour of the Plaintiff. He testified that the Plaintiff's family had been his neighbours ever since he was born. He also told the Court that he knew the Defendants and asserted that they had never been their neighbours.

15. PW3 further testified that when the Settlement was established, everyone was shown his place. He knew the portion belonging to PW2 and what had been allocated by PW2 to PW1.

THE DEFENCE CASE

16. The Defence equally called three witnesses in support of their case at the trial herein.

17. DW1-Augustus Kahindi Mzungu is the 2nd Defendant. He testified that he knew the Plaintiff but denied trespassing on his land. DW1 told the Court that the land was sold to him by one Teresiah Njeri Ngatua in the year 2003. He further testified that they have since built houses on the land and denied entering the same in 2014.

18. DW1 told the Court that he was not aware the plots had been given numbers until sometime in 2014 when he was summoned by the Makao Settlement Committee of which the Plaintiff is a member. DW1 told the Court that he was not involved in the sub-division. When he went to the Committee, he agreed to pay for Plot Nos. 15 and 16 but the Committee declined payment for Nos. 13 and 14. At that time on 19th July 2017, he was told the money was to be used to survey the land.

19. DW2-Kazungu Karani Mbitha was previously a neighbour to the Plaintiff. He told the Court that the Plaintiff is a son to his brother and that they both descended from the Mwangone family. DW2 told the Court that he sold the land in dispute to one Teresiah Njeri King'atua some 20 years ago. The said Teresiah later sold the land to the two Defendants.

20. DW3-Karabu Kazungu Kithongo is an acquaintance of the parties. He testified that the 2nd Defendant had employed him on his land after which he was made a caretaker thereof. He told the Court that that was some 8-10 years earlier. The 2nd Defendant proceeded to build some six houses on the land which neighbours DW3's home.

ANALYSIS AND DETERMINATION

21. I have perused and considered the pleadings filed by the parties, the oral testimonies of the witnesses and the evidence adduced before the Court. I have equally perused and considered the written submissions filed herein by Mr. Kenzi, Learned Counsel for the Defendants.

22. The Plaintiff has urged this Court to declare that the suit premises described herein as Land Portion Nos. 13, 14, 15 and 16 Makao Village belong to him. He also desires that a permanent injunction be issued restraining the two Defendants from carrying out any construction on, or otherwise dealing in any way whatsoever with the premises.

23. It is the Plaintiff's case that the suit premises was their ancestral land allocated to his grandfather one Koi Mungumba and that his own father Daniel Karisa Koi (PW2) allocated the said Portions of land to him as his inheritance.

24. The Plaintiff told the Court that when preparation of the Part Development Plan (PDP) commenced for the area in the year 2005, he proceeded to obtain beacon certificates for the suit premises. He would then peacefully occupy the premises without any interference from anyone until the year 2014 when the two Defendants herein encroached upon the premises, and commenced construction of all manner of structures thereon without the Plaintiff's authority. The Defendants have since ignored all efforts to have them vacate the land.

25. The Defendants however deny the Plaintiff's claim. It is their case that they purchased the suit premises for valuable consideration from

one Teresiah Njeri King'atua in August 2003 and that immediately after the said purchase, they had constructed at least six (6) permanent buildings which they have since been occupying and renting out to tenants. The Defendants accuse the Plaintiff of using his position as a member of the Makao Settlement Committee, a group created by the members to help squatters acquire the land, to deprive them of the ownership of the suit premises.

26. From the material placed before me it was clear that the disputed parcels of land have been unsurveyed and undemarcated for a long period of time. It is also apparent that contrary to the Plaintiff's assertion that the dispute began when the Defendants encroached on the land in 2014, the parties have had this dispute for a relatively long period of time.

27. From a letter dated 8th November 2004 (Pexh 2) written for the Commissioner of Lands and addressed to the Kilifi District Physical Planning Officer, it is evident that some ten years earlier the Plaintiff was already visiting various Government offices seeking to be declared the owner of the suit premises. In the said letter, the Commissioner of Lands directs as follows:-

RE: Land Claim-Koi Antony Kahindi

Enclosed find a sketch plan of the land being claimed by the above person and I request you to visit the site and prepare a part development plan for the land that has developments only and forward the same for my further action."

28. The Plaintiff's appeal to the Commissioner of Lands appears to have been precipitated by the situation on the ground as confirmed to the Commissioner by a Letter from Kilifi District Lands Officer dated 3rd May 2004 (Pexh 3) which reads in the relevant portion as follows:-

RE: Land Claim-Koi Antony Kahindi

Your letter reference...dated 1st March 2004 in connection with the above subject refers:-

Kindly note that I visited the site and found the plots edged red on the sketch plan are fully occupied with unplanned developments several of which are permanent structures and appear to have been built within the past six years.

While I agree that some squatters appear genuine like Koi's family whose case is supported by the Assistant Chief's letter dated 6th July 2002....., I suspect that other squatters might have moved recently to bar the Councilors who were allocated the same site by the Government in 1992 as confirmed by the Town Clerk vide his letter refer....dated 6th February....."

29. Arising from the said correspondence, it was clear to me that while the Plaintiff asserted that that this was their ancestral land and that he was a beneficial owner of the suit premises having been allocated the same by his father (PW2), there was no evidence of such ancestral ownership. Instead, the occupants of the area were all squatters thereon.

30. According to the Defendants, they had purchased the suit property from one Teresiah Njeri who owned the same in the year 2003. The Plaintiff has himself attached a copy of the Written Agreement between the Defendants and the said Teresiah dated 11th August 2003 (Pexh 6). While in his suit herein he accuses the Defendants of trespassing into the land in the year 2014, it is evident from his letter dated 12th July 2005 (Pexh 3) that long before 2014, he was not only aware of the Agreement between the Defendants and Teresiah but also the fact that the Defendants had erected permanent buildings on the land.

31. In the said letter dated 12th July 2005, the Plaintiff writes to the Officer Commanding Kilifi Police Station and the Officer in Charge Kilifi GK Prison where he was then serving a sentence as follows:-

"RE: Land Claim INO KOI Antony Kahindi

I am reporting to your office that Kazungu Karani Mbitha and Teresiah King'atua are setting up permanent building on my piece of land. Yet I am convicted in Kilifi Prison since 6.12.2004 upto date and I cannot even see them following this problem.

Therefore please I am requesting your Office to take the necessary action against them. If possible against his offence-Forcible Detainer contrary to Section 91 of the Penal Code."

32. While it was not clear to me from these proceedings when the Plaintiff left prison, it was again clear that his claim that the Defendants had only entered the suit premises and started erecting structures thereon in 2014 was untrue and aimed at misleading this Court.

33. As it were, the said Kazungu Karani Mbitha (DW2) who was a relative of the Plaintiff confirmed having sold the land to the said Teresiah Njeri Kang'atua who in turn sold it to the Defendants herein as per the agreement dated 11th August 2003.

34. While the Plaintiff claimed he did not know the said Kazungu Karani Mbitha even after writing about him while in prison, his own father (PW2) confirmed that Kazungu was his cousin and that he had lived on the parcel of land. While PW2 contended that he is the one who had invited Kazungu to the land and given him the piece where he had built his home before re-locating, there was no evidence to that effect. Indeed testifying herein as DW2, Kazungu himself claimed to have been the one who gave the Plaintiff's father the portion of land in which he built his house.

35. In the premises I was not satisfied that the Plaintiff was truthful and or that there was any merit in his case. On the contrary, I was satisfied that the Defendants had demonstrated that they were bonafide purchasers for value of the suit premises and that they had carried out

substantial developments thereon before the Plaintiff brought this claim.

36. Accordingly, I hereby dismiss the Plaintiff's suit and allow the Defendant's Counterclaim as prayed.

37. The Defendants shall have both the Costs of the Plaintiff's suit as well as their Counterclaim.

Dated, signed and delivered at Malindi this 6th day of May, 2020.

J.O. OLOLA

JUDGE