



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 457 OF 2010

HARRISON MWAMBURI HUSSEIN.....PLAINTIFF

-VERSUS-

JARED MWANDISHA ALLEN

NATHANIEL LANGALI ALLEN.....DEFENDANTS

JUDGEMENT

1. Harrison Mwamburi Hussein sued his two brothers who are named as defendants in this case vide his plaint dated 16th December 2010. The plaintiff sought the following reliefs:

- a) An order that the parcel of land comprised in a free hold known as WERUGHA/WERUGHA/1421 measuring 2.4 Hectares situated at Werugha within Taita District is the lawful property of the Plaintiff and the Defendants have no right to occupy or claim portions of the same.**
- b) An order that the Defendants should be evicted from the parcel of land known as WERUGHA/WERUGHA/1421 together with all their properties and all houses and structures erected or occupied by them should be demolished at their cost.**
- c) A permanent injunction be issued restraining the Defendants by themselves, servants or agents or otherwise howsoever from further entering upon the parcel of land known as WERUGHA/WERUGHA/1421 or from remaining in possession of the same or any part or portion thereof, from cultivating the same and or from interfering with the Plaintiff's occupation of the same in any manner and his proprietary rights over the same.**
- d) An order that all cautions, restrictions and or inhibitory orders registered upon the register of the parcel of land known as WERUGHA/WERUGHA/1421, be removed.**
- e) Damages for trespass plus interest thereon.**
- f) Costs of this suit.**

2. Together with the plaint, the plaintiff filed a list of documents containing 5 documents and two witnesses' statements.

3. A statement of defence on behalf of the 1st and 2nd defendants was filed on 4th June 2015 pursuant to leave of the Court granted on 21.5.2015. The defendants pleaded that the plaintiff caused the title for plot No Werugha/Werugha/1421 to be registered in his name through fraudulent means thus disinheriting his siblings. They urged the Court to dismiss the suit with costs to them.

4. The plaintiff called 3 witnesses in support of his case. At the time of giving his testimony on 29.9.2017, PW 1 informed Court that Nathaniel (2nd defendant) is deceased having died in November of 2016. The plaintiff is claiming the suit parcel No Werugha/Werugha/1421 as it is registered in his name and issued with a title in 1993. The land measures approximately 2.4 ha. PW 1 stated that his father gave him a portion of land measuring 4.1 acres while he bought 1.8 acres which was later consolidated and registered under one title during adjudication. The plaintiff continued that his father also owned a separate land at Lwala wa Nyegete measuring approximately 8.4 acres which land was given to the two defendants to share equally. It is PW 1's evidence that instead the 1st defendant got more land. He produced a certificate of search for plot No 1421 to demonstrate the title bears his name.

5. PW 1 also produced certified copies of the Land Control Board (L.C.B) Consent to transfer dated 23.7.1985 as Pex 3 for plot 1421 and

Land Control Board consent to transfer for parcel No 946 as Pex 4 (a). The consent to share plot No 946 was produced as Pex 4 (c). PW 1 proceeded to also produce the green card for plot No 946 bearing the joint names of the defendants as Pex 5 and the resulting subdivision numbers 1739 & 1740 also in each of the defendants' names respectively as Pex 6 (a) & (b), application for consent to partition plot No 946 as Pex 7. He produced the receipt as Pex 9 showing he obtained these documents from the lands office and copies of searches for the two titles as Pex 10.

6. PW 1 stated further that before filing this suit, he had written demand letters in 1997 & 2010 to the defendants asking them to move out of his land. That the 1st defendant has built on the suit land while the 2nd defendant was living in their father's house situated on the suit land. That the defendants did not move out. PW 1 said he also lives on the suit land with his family. He urged the Court to issue him with an order of eviction as each of the defendants have their share of the land given to them to move to.

7. In cross-examination, PW 1 admitted that the defendants have not lived anywhere other than the suit land. That there are about seven graves of relatives on the suit land. That their father died when they were all living on the suit land. That both plots No 946 & 1421 were in Werugha during adjudication. He did not have the sale agreement for the plot he purchased in the year 1964 – 1965. That the plots he bought did not have numbers but the numbers were subsequently given during adjudication. That the suit land was registered in his father's name who gave all of them permission to build. None of them have taken out letters of administration of their father's estate. He denied any intention to disinherit his brothers. In re-examination, PW 1 said that each of the defendants have a share of land they got from their father.

8. LEONARD AMON NYATA testified as PW 2. Born in 1946, Mzee Leonard testified that he worked with the adjudication office from 1964. That the plaintiff's father had told him about the plots bought by the plaintiff that were to be adjudicated separately. That he signed the document and gave the book to Nathaniel to take to plaintiff's wife. That this dispute is over the 1.8 acres of land which the defendants are clinging on. That adjudication in Werugha was completed in 1968 and he never heard of any objections raised regarding the suit title.

9. In cross-examination, PW 2 said he was the consolidation clerk and he knew how the consolidation process is done. That a person satisfied with his size after measurements on the ground signs the adjudication register. That the land owned by the plaintiff's father was 12.5 acres. That the defendants did not have any parcels of land. That the number given to Allen's (plaintiff's father) land was 1421. He could not remember how many of Allen's plots were consolidated to make the 12.5 acres.

10. In re-examination, PW 2 said the plaintiff was represented by his father during the consolidation while 2nd defendant was a labourer during the exercise.

11. PW 3 is Emanuel Kitsao, a valuer who valued the suit plot together with the developments therein at Kshs 5,680,000. He produced his report as Pex 13. In cross-examination, PW 3 said he is not licensed to practice but was sent by his boss to produce the report. That the report gave a breakdown of all the improvement on the land but did not specify who owned what. This marked the close of the plaintiff's case.

12. The 1st defendant acknowledged the plaintiff as his elder brother. He adopted his statement dated 29th May 2015 as his evidence. The 1st defendant said the suit land was registered in his father's name and their father never transferred it to any of his sons during his lifetime. He produced as Dex 1 copy of the adjudication register for the suit title.

13. The 1st defendant stated that his home is built on the suit title. That the plaintiff only acquired registration in 1993. That their father said they were all entitled to build on the suit land and the plaintiff obtained the registration after the death of their father yet they have not taken out letters of administration. He disputes the plaintiff's claim instead stating that each of them is entitled to 0.2 acres of the suit land. He produced what he called minutes of the family meeting trying to resolve the dispute as Dex 4. He urged the Court to dismiss the plaintiff's case.

14. In cross-examination, the 1st defendant admitted title No 1739 measuring 4 acres is in his name. He did not remember when the partition between him & Nathaniel was made. His problem is that plaintiff had not given him 0.2 acres from the suit land. That the sharing of the land was done after the death of their father and he got his title without undertaking succession process. That he has not sued the plaintiff as he assumed he would not interfere with him. That it is curious the plaintiff is claiming to have bought some land measuring about 0.6 acres which was registered in their father's name yet the size of the suit title had not changed.

15. He admitted the signature on Pex 7 (a) as his. He denied that the plaintiff's share would be smaller if they each got 0.2 acres from the suit land. He did not know who gave the plaintiff his title. That each of them went to collect their titles although it is the 2nd defendant who followed up the process. In re-examination, the 1st defendant said that as at 1995, plot No 946 was in their father's name. This also marked close of 1st defendant's case.

16. Parties filed written submissions supported with case law cited. I have had occasion to read the same. From the evidence and the pleadings, it is not in dispute that the suit land Werugha/Werugha/1421 was first registered in the name of Allen Langali – deceased who is the father of both the plaintiff and the defendants. It is also not in dispute that the 1st defendant did build his home on this parcel of land during the lifetime of their father. The only dispute arising for this Court's determination is whether the plaintiff is entitled to the suit title to the exclusion of all his other siblings particularly the two brothers sued as 1st and 2nd defendants who then should be ordered to vacate the suit land.

17. In support of his case, the plaintiff produced several documents inter alia; title deed for suit plot bearing his name issued on 6th May 1993, several letters of consent from Wundanyi Division Land Control Board consents for both title Nos 1421 and 946 (Pex 4) and application for partition for plot No 946 dated 26th July 1995 (Pex 7 (a)). The plaintiff's case is that he purchased a portion of land measuring 1.8 acres and also got 4.1 acres from his father. That the two parcels were consolidated during adjudication to form plot No 1421 a fact which the defendants disputed.

18. Mzee Allen Waseni Langali – deceased is said to have died in 1989 before transferring the two parcels of land Nos 1421 and 946 to his sons herein. Vide a receipt dated 12th June 2014, (Pex 9) the plaintiff averred that he purchased copies of some of the documents produced from the lands office in respect of the two plots. It was also his evidence that the processing of the two titles were done by the 2nd defendant. PW 2 stated that the 2nd defendant worked with him during the adjudication process for Werugha. Unfortunately he died before he testified but the fact that he worked as an assistant/errand boy for the adjudication committee was not refuted by the 1st defendant.

19. From the documents obtained from the land's registry by the plaintiff are the two consents in respect of the suit title 1421 and plot No 946 dated 23rd July 1985 transferring them to the names of plaintiff and the defendants respectively. Both titles got registered in their different names in 1993 after the death of their father. The 1st defendant denied that his father went to the land board as alleged but he did not present any contrary evidence that show the copies of the Land Control Board consents presented by the plaintiff were forged. Further, the 1st defendant did not deny that plot No 946 was jointly registered in their names with 2nd defendant as at 1993. Infact in cross-examination, the 1st defendant said he did not want the titles to revert back to their father's name although the transfers had been undertaken without letters of administration.

20. To prove his contention that their father had given each son a share of the land, the plaintiff proceeded to produce the green card for plot 946 (Pex 5) in the name of both the defendants and application for partition (Pex 7 (a)), mutation form (Pex 7 (b)) and its map (Pex 7 (c)). The 1st defendant admitted the signature on Pex 7 (b) was his. Thus plot No 946 was partitioned to create numbers 1739 (Pex 6) in the name of 1st defendant measuring 1.8 ha and 1740 (Pex 8) in the name of 2nd defendant measuring 1.2 ha. This partition was done after their father's death.

21. The 1st defendant said that he only wants to be given a portion measuring 0.2 (I couldn't tell whether it is 0.2 ha or 0.2 acre) from the suit land plot No 1421. If the whole land No 1421 belonged to their father on what basis was the 1st defendant saying he is only entitled to 0.2 instead of asking the same to be shared equally amongst the 3 of them? The defence counsel submitted that intermeddling with the deceased estate is prohibited under section 45 of The Law of Succession Act Cap 160 which indeed is true. He urged the Court to nullify the transfers on both titles. This submission is contrary to the wishes of his client. Further there is no evidence presented that the signatures of the consent to transfers obtained by their deceased father was forged. This is a land case and not a succession cause. The defendants also submitted that the "gift" as indicated in the letter of consent did not satisfy the requirements of a valid "donation mortis causa". This is a matter that did not arise both in the pleadings or evidence. I will therefore not determine the validity or otherwise of the gift. In my view for purposes of this case, what the defendants need to controvert and which they did not do was to show that the letters of consent produced by the plaintiff were not genuine. The facts of the case in **Re Beaumont (1902) Ich 889** is therefore distinguishable here.

22. The 1st defendant has submitted that the licence given to him by their father to build on plot No 1421 was irrevocable thus orders of eviction should not issue. The 1st defendant further submits that the plaintiff's claim does not lie until he obtains letters of administration of his father's estate referring this Court to the holding in **Truistik Union International vs Mabeya & Another (2008) I KLR 730**.

23. At the time of filing this suit, the plaintiff was the registered owner of the suit title No 1421. The defence at paragraph 12 pleaded that they have occupied the suit land since birth with the concurrence of their father and have never been dispossessed in any manner whatsoever. They further averred the title was obtained by fraud although in evidence other than stating the transfer was done after the death of their father, they have not shown the plaintiff was party to the fraud thus no fraud was proved. The defendants also did not plead for cancellation of the plaintiff's title whether on account of fraud or mistake.

24. Consequently going by the evidence adduced before the Court, I am satisfied that the plaintiff has satisfied the Court that he is the legal owner of the suit tile No Wewrugha/Werugha/1421. However his ownership is subject to the overriding or unregistered interests of the 1st defendant in terms to the area occupied by the defendants homestead. I state so because the plaintiff did obtain his title while well aware of the existence of homestead built by the 1st defendant. He did not say when this homestead was built but from the evidence on record, it is more than 12 years from the date of registration of the plaintiff as the owner. For this reason I will not issue an order for eviction of the 1st defendant as sought in prayer (b) of the plaint or grant a permanent injunction as sought in prayer (c). It follows then that prayer (d) & (e) also collapses. The plaintiff has the liberty/option to excise the portion covering the 1st defendant's homestead and give the 1st defendant title for the same if he wishes to have the restriction registered on his title removed. In respect of the 2nd defendant, it appears he had not put any structures on the land. He was also not substituted. His claim if any as against the plaintiff in this suit is extinguished by operation of the land as the suit against him as assumed to have abated on November of 2017. I therefore make no orders for or against him. Let it be clear that the 1st defendant's claim over the suit land is limited strictly to the area of his homestead only and no more. As submitted by Mr Kimani on the issue of costs, I am persuaded that the appropriate order to make is for each party to meet their respective costs of the case.

Dated, signed & delivered at Mombasa this 4th October 2018.

A. OMOLLO

JUDGE