



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 333 OF 2016

1. KOMBO NG'OMBE KOMBO

2. BENSON MWATANA NZAO

3. AMOS WALE NZARO.....PLAINTIFFS

VERSUS

1. ARNOLD TSAMA MWANDONDO

2. DZUYA MWANDORO

3. RONALD MBAKA

4. JUMWA KAGOLI

5. NEBBERT NDUNE MTSUNGA

6. ENOCK SHINDO NDUNE

7. FREDRICK NDUNE MTSUNGA

8. KESI JABALI MWANDINYA

9. NDAGOMVUKO JABALI

10. MBAJI KAULI JABALI.....DEFENDANTS

JUDGEMENT

Background

1. By their Plaint dated 6th December 2016 as amended on 27th February 2018, Kombe Ng'ombe Kombo, Renson Mwatana Nzao and Amos Wale Nzao [hereinafter the Plaintiffs] pray for judgment against the 10 Defendants jointly and severally for;

a) A declaration that the Plaintiffs are the beneficial owners entitled to exclusive possession of the entire suit property comprising 21 acres or thereabouts situated at Miyuni/Mleji Adjudication Section in Rabai within Kilifi county which was sub-divided into 3 portions known as parcel No.s Miyuni/Mleji Adjudication Section /1184, 1185, and 1186 and for an order that the land Adjudication and Settlement Officer- Kilifi do implement the final orders of this court in respect of parcel No's Miyuni/Mleji Adjudication Section /1184, 1185 and 1186

b) An order of a permanent injunction restraining the Defendants by themselves, their servants/ agents or any person claiming through them from trespassing onto and remaining in occupation of the entire suit property comprising 21 acres or thereabouts situated at Miyuni/Mleji Adjudication Section Rabai which was sub-divided into 3 portions known as parcel no. Miyuni/Mleji Adjudication Section /1184, 1185, and 1186 and from cultivating, building, selling or dealing with the suit property in any matter whatsoever and demolition of their buildings and their eviction therefrom;

c) Costs of this suit and interest thereon at Courts rates; and

d) Any other relief that this Honourable Court may deem just to grant.

2. Those prayers arise from the Plaintiffs position that they are the beneficial owners entitled to the exclusive possession of the Suitland the same having been their ancestral land from time immemorial. The Plaintiffs maintain that upon the area being declared an adjudication Section on 12th September 2016 the Defendants herein in anticipation of the exercise hurriedly trespassed onto the suit property, occupied the same and had it subdivided into the said 3 portions which they shared amongst themselves in an attempt to dispossess the Plaintiffs of their ancestral land.

3. The Plaintiffs further aver that prior to the area being declared an adjudication Section as aforesaid, the dispute between the parties herein in regard to the suit property had been the subject of several cases in courts of law and the Land Disputes Tribunals all of which were determined in favour of the Plaintiffs.

4. The Plaintiffs therefore maintain that the Defendants have no colour of right over the said property. In spite of demand given and notice of intention to sue, the Defendants have persisted in their acts of interference and trespass thereby necessitating this suit.

5. In their joint Statement of Defence dated and filed herein on 2nd July 2018, Arnold Tsama Mwandondo, Dzuya Mwandondo, Ronald Mbaka and Jumwa Kagoli [the 1st, 2nd, 3rd and 4th Defendants respectively] deny that the Plaintiffs are the beneficial owners of the suit property. On the contrary, they assert that portion No. Miyuni/Mleji /1184 originally belonged to the Defendants and that the same has been determined to be so in the successive litigation processes before the Tribunals and the Courts.

6. The 1st, 2nd, 3rd and 4th Defendants assert that to their knowledge, even the other portions of land cited by the Plaintiffs do not belong to the Plaintiffs. On the contrary, the Defendants aver that Plot no. 1186 belongs to the 5th, 6th and 7th Defendants, while Plot no. 1185 belongs to the 8th, 9th and 10th Defendants.,

7. The Defendants further aver that in Mombasa PMCC No. 22 of 1987, a determination was made that the Plaintiffs father one Ng'ombe Kombo was entitled to Plot No. 1184 aforesaid. The Defendants' father one Mwandondo Panga however successfully challenged the decision and the determination was reversed on 12th August 1987, a position which has not been set aside to date.

8. The 1st, 2nd, 3rd and 4th Defendants further aver that the Plaintiffs made objections during the adjudication process but their objections in regard to Plot No's 1184, 1185, and 1186 were dismissed on 30th January 2017 and hence the land remains as adjudicated to the Defendants. Accordingly, they urge the court to dismiss the Plaintiffs suit with costs.

9. Herbert Ndune Mtsunga, Enock Shindo Ndune and Fredrick Ndune Mtsunga sued herein as the 5th, 6th and 7th Defendants respectively neither entered appearance nor filed a response to the Plaintiffs claim.

10. On their part, Kesi Jabali Mwadinya, Ndago Mvuko Jabali and Mbaji Kaulu Jabali [the 8th, 9th and 10th Defendants respectively] filed a joint Statement of Defence dated 3rd February 2017 in which they deny that the portion of land they occupy is 21 acres as stated by the Plaintiffs and they invite the Plaintiffs to strict proof.

11. The 8th, 9th and 10th Defendants deny trespassing upon the suit property and aver that it is the Plaintiffs who found them already settled on the land when the Plaintiffs arrived thereat. They further assert that the Plaintiffs have run to this court after their claim was dismissed by the Land Adjudication Committee and their suit is thus misconceived, incompetent, bad in law and fails to disclose any cause of action against themselves. The 8th, 9th and 10th Defendants accordingly invite this court to dismiss the Plaintiffs suit herein with costs.

The Plaintiffs Case

12. In support of their case, the Plaintiffs called three [3] witnesses at the trial.

13. PW1- Rev. Renson Mwatana Nzao the 2nd Plaintiff is a resident of Rabai and a brother to the 1st and 3rd Plaintiffs. He told the court that the suit land is their ancestral land on which they had lived and utilized from time immemorial. The land was initially settled on and was owned by their grandmother Kombo Lwambi and later on by their father Mzee Ng'ombe Kombo

14. PW1 told the Court the graves of their ancestors form part of the land marks on the property and that their late father was equally buried thereon on 24th May, 2006. Their family also has mature mango trees, orange trees, coconut and other indigenous trees as well as a water pan.

15. PW1 testified that they lived in peace with their neighbours until sometime in the year 1976 when one Kayamba Dofu instituted Land Dispute Case No. 7 of 1976 against their father at the Magistrates Court at Kaloleni. That case was heard and was determined in favour of the Plaintiff's father.

16. PW1 further testified that between the year 1986 and 1988, there cases being Land Award Case No. 20 of 1988, Land Award Case no. 21 of 1988 and Land Award Case no. 22 of 1988 were filed by different people claiming various portion of the suit property from the Plaintiffs father. All the cases were however decided in favour of the Plaintiffs' father and no appeals were preferred therefrom.

17. PW1 told the court their father passed away sometime in the year 2006 and was buried in the suit property. In the year 2014, the area on which the suit property lies was declared an adjudication section. During the adjudication exercise, the Defendants who happen to be the son, grandsons and a daughter in law of the parties who had brought the earlier suits against the Plaintiffs father and lost, came onto the suit property, divided it into 3 portions and apportioned it to themselves before causing their names to be recorded the as the owners thereof in the adjudication register.

18. PW1 further told the court that none of their family members was recorded to own any portion of the suit property. In February 2016, the Plaintiffs raised an objection but the Defendants moved with speed to cut down the trees on the land while one Margaret Mnyazi Mwandondo, a sister to the Defendants, proceeded to erect a home on parcel No., 1184. Seeing that they were being dispossessed of their land, the Plaintiffs obtained the consent of the Land Adjudication and Settlement Officer and filed this suit.

19. On cross – examination, PW1 told the court that he was born on the 21 acres’ piece of land and that he has a house thereon. He conceded that the court had set aside the decision made in Land Tribunal Case No. 22 of 1987 and that the Objection filed by his family during the adjudication process was decided in the Defendants favour.

20. PW2- Kombo Ng’ombe Kombe is a farmer and the 1st Plaintiff herein. He reiterated the averments made by his brother PW1 and adopted the contents thereof in its entirety.

21. On cross – examination, PW1 told the court the Defendants do not live on the land save for one of their sisters who moved in recently. The entire parcel of land has otherwise been occupied and utilized by the Plaintiffs. He told the court that during land adjudication, the Defendants were adjudicated as the owners of the land. The Plaintiffs appealed but lost the Appeal.

22. PW3 – Amos Wale Nzao is a farmer in Mleji sub-location and the 3rd Plaintiff herein. He similarly reiterated the averments made herein by his brother [PW1] and adopted the contents of the statement made by PW1 in its entirety as his evidence-in-chief.

23. On cross – examination, PW3 testified that the land belonged do their grandfather but was given to the Defendants during the land adjudication exercise done in the area in 2015. He told the Court the land was wrongly and fraudulently given to the Defendants.

The Defense Case

24. On their part, the Defendants called a total of four [4] witnesses in support of their case at the trial.

25. DW1- Ronald Mbaka Mwandondo is the 3rd Defendant herein. He told the Court the disputed property belonged to his grandfather who then passed it to his father. Since his father’s death, DW1 told the court he is now the owner of the portion of land that initially belonged to his grandfather.

26. DW1 testified that the suit property has been the subject of many cases some in Mombasa, others in Kaloleni. The Plaintiffs won in one case but when the Defendants appealed the decision in Mombasa the Defendants emerged the winners.

27. DW1 further told the Court that during the land adjudication exercise, the Plaintiffs filed objection cases Nos. 124, 125, and 126 but lost all. DW1 told the court it was not true they had only moved onto the land when this case started. They had always been on the suit property.

28. On cross – examination, DW1 told the Court their land is Plot No. 1184. They do not live on the land but use the same for farming. He further told the court the 1st Defendant is his younger brother while the 2nd Defendant is his elder brother. He conceded that his father is Mwandondo Manga and that they had stated in their pleadings they have lived on the land for 170 years.

29. DW1 further told the Court that his father died in 1991 and was buried in a place called Makanzani and not in the Suitland. He told the court it was his father who first went to the land. He conceded that a dispute arose over the land and that the same was taken to the elders in land case No. 22 of 1987. DW’s father was not satisfied with the decision made in that case by the elders. He told the court he was not aware that a decision was made that the matter be re-heard within 3 months.

30. DW1 father told the court he was aware they had filed an appeal and that the same was decided in his father’s favour. He did not however have any documents indicating they had won the case. DW1 testified that the 4th Defendant was a wife to his brother Kagoli Mwandondo. He however denied that the 4th Defendant has a home on the land. DW1 told the Court the home on the land belongs to his sister Minyazi Mwandondo who built it after the land adjudication exercise.

31. DW2 – Kesi Jabali Mwandinya is the 8th Defendant. He told the Court he has lived on the suit property from time immemorial. He inherited the land from his father Jabali Mwandinya. DW2 told the Court his father initiated land dispute case No. 178 [3] of 1986 against the Plaintiff’s father Ng’ombe Kombo. The elders decided the case in favour of DW1’s father. The Plaintiff’s father challenged the decision in Mombasa PMCC NO. 18 of 1987 but the appeal was dismissed.

32. DW2 testified that sometime in 2014, he was notified that land adjudication exercise would be done in the area. DW1 presented his claim and was awarded the land.

33. On cross – examination, DW1 conceded that he did not have documents to show that they had won the appeal case filed in Mombasa by the Plaintiff’s father. He further conceded that he does not live on the land but only uses the same for farming.

34. DW3 – Ndogo Mvuko Jabali is the 9th Defendant and a son of the 8th Defendant. He told the Court he saw his father tiling the land during his childhood. He reiterated the averments made by his father [DW2] and told the court the land belongs to his family.

35. On cross – examination, DW3 conceded he was not involved in the previous disputes in Kaloleni and Mombasa. He however, told the court that the portion that was in dispute in Mombasa is the same one that was adjudicated to them. It measures 4 ½ acres. He told the Court they are the ones presently using Plot No. 1185.

36. DW4 – Mbaji Kaulu Mbaji is the 10th Defendant and also the son of the 8th Defendant. He equally reiterated the statement made by his father [DW2] in regard to the ownership of the suit property.

37. On cross – examination however DW4 told the court his father was the late Kaulu Jabali and not Kesi Jabali as stated in his written statements filed in court. He told the court his father lived on the Suitland before his death. He testified that he was aware there was a previous case between the Plaintiffs and his grandfather. His grandfather won the case and the plaintiffs appealed. That appeal was also dismissed.

Analysis and Determination

38. I have carefully considered the pleadings filed herein by the parties, the testimonies of the witnesses as well as the evidence adduced at the trial. I have equally considered the submissions and authorities placed before me by the Learned Advocates for the parties. The 5th, 6th and 7th Defendants neither entered appearance nor participated in the proceedings.

39. It is the Plaintiffs case that the suit property is their ancestral land and that it initially comprised a total of 21 acres under their exclusive possession. By a notice dated 12th September 2014, the Miyuni/Mleji area within which the suit land falls was declared an Adjudication Section under Section 5 of the Land Adjudication Act, [Cap 284 of the Laws of Kenya]

40. The Plaintiffs told the Court that in anticipation of the adjudication exercise, the Defendants herein hurriedly trespassed onto the Suitland and caused it to be sub-divided into three portions which they then shared amongst themselves. In this regard, the 1st to 4th Defendants were during the exercise allocated the portion now known as Miyuni/Mleji/1184 while the 8th, 9th and 10th Defendant were allocated the portion now known as Miyuni/Mleji/1185. The 5th, 6th and 7th Defendants have on the other hand taken parcel number Miyuni/Mleji/1186.

41. The Plaintiffs told the court that before the area was declared an Adjudication Section, there had been a number of land disputes cases between their father on the one hand and various relatives of the Defendants on the other in respect to the ownership of the suit property. According to the Plaintiff all these cases were resolved in their father's favour and the Defendants therefore had no basis for their actions.

42. While admitting that the subject property has been the subject of other cases before now, the Defendants deny that they have recently trespassed on the land as stated by the Plaintiffs. On the contrary, the Defendants asserts that they have occupied and used the Suitland from time immemorial. It is further the Defendants position that they are the ones who have emerged victorious in all the previous cases cited by the Plaintiff and urge the court to determine that they are the rightful owners of the suit property.

43. From the material placed before me, the dispute between the parties as to who is the rightful owner of the Suitland has been in existence for decades. As early as 1976 one Ng'ombe Kombo had filed land case no. 7 of 1976 against one Kayamba Dofu before the District Magistrates Court at Kaloleni. The said Ng'ombe Kombo was the father of the Plaintiffs herein. In a decision rendered on 3rd July 1976, the Honourable P. J. D Mwangulo DM III awarded the piece of land to the said Ng'ombe Kombo. It was however not clear to me if the Defendant in the said case - Kayamba Dofu had any relationship with any of the Defendants herein.

44. It was however apparent that sometime in the year 1986, some three people namely, Japhet Katsango, Jabali Mwandinya and Mwandondo Panga instituted Kaloleni Land Disputes case No. 178 of 1986 against the Plaintiff's father Ng'ombe Kombo. From the material placed before me the said Japheth Katsango is the father to the 5th, 6th and 7th Defendants while Jabali Mwandinya is said to be the father of the 8th Defendant and a grandfather to the 9th and 10th Defendant. On the other hand, Mwandondo Panga was the father to the 1st, 2nd and 3rd Defendants and a father-in-law to the 4th Defendant.

45. It was also apparent that shortly after instituting the said Kaloleni Land Disputes Case No. 178 of 1986, the three Claimants disagreed with each of them resolving to pursue their separate cases as against the father of the Plaintiffs herein. Their cases were hence split and renumbered as Kaloleni Land Disputes Case no. 178 [A] of 1986 for Japhet, Katsangu, No. 178 [B] of 1986 for Jabali Mwandinya and No. 178 [c] of 1986 for Mwandondo Panga.

46. From the material placed before me, it was also apparent that the three Claimants and the Plaintiffs' father were cousins. Their cases were placed before a panel of elders headed by the then Kaloleni District Officer one V. N Adera who initially appears to have made a determination in favour of the Plaintiffs father who was the Respondent in the said cases. The Claimants were not happy with the decision made by the elders and they filed separate appeals before the Principal Magistrate's Court at Mombasa.

47. As it turned out, the elders determinations were invariably set aside in August 1987 by the then Mombasa Principal Magistrate Honourable S. O Ogotu who directed that the disputes be heard a fresh within a period of three months from the date of his Ruling. Some of the grounds for setting aside the elders determination included the fact that they had failed to take into consideration the evidence of some of the witnesses as well as the fact that the record submitted did not reflect that the District Officer had sat with a panel of elders as none of them had signed the final verdict.

48. None of the parties herein placed before the court the subsequent determination by the Panel of Elders. It was however clear to me that

the panel sat and made some determination which were not favorable to the Plaintiff's father. The Claimants who were victorious then instituted Land Award Case Nos. 20 of 1988 [Japhet Katsango] ; No. 21 of 1988 [Jabali Mwandinya] and No. 22 of 1988 [Mwandondo Panga] for purposes of having the awards in their favour adopted as an order of the Court in accordance with the Land Disputes Tribunal Act [now repealed].

49. By a Notice of Motion dated 1st September 1988, the Plaintiffs father sought to stop the adoption of the awards and for the same to be set aside. Having consolidated the three cases on 14th February 1990, the Honourable Principal Magistrate Mombasa J. K Kanyi went on to deliver a Ruling thereon on 19th June 1990 dismissing the application made by the Plaintiff's father. The 2-page Ruling as attached to the Plaintiffs' own supplementary list of documents filed herein on 1st August 2018 reads as follows;

"RULING

Ng'ombe Kombe Lwambi was sued by 3 people – Japhet Katsayo [LA 20/88] Jabali Mwandinya [LA 21/88] and Mwandondo Panga[LA 22/88] in a P/E tribunal chaired by D.O Kaloleni. The dispute was over one big piece of land. As the subject matter in the 3 cases was the same and the day was the same, all parties involved agreed to have the 3 cases consolidated. This is therefore a consolidated ruling in respect of the 3 applications made by the Defendant Ng'ombe Kombo to have the 3 awards set aside.

His questions with the award were:

- 1) Procedure of questions –answer adopted by the P/E was faulty.***
- 2) P/E acted ultra vires in that [what] the panel awarded to the Plaintiffs were not in their original prayers.***
- 3) Decisions indefinite as although the P/E was satisfied that the parcel's belonged to the Defendant, it proceeded to order sub-division.***

There is also another ground [paragraph 5 in the three affidavits] which reads: -

"That once this matter was referred by the Court to be heard and determined against the Rule of Natural Justice were not allowed in that the same P/E order the same chairman heard and determined the same"

I confess that I am unable to decipher the meaning of the paragraph. The powers of the court with regard to a P/E award are exhaustively set out in Section 90 of the MCA. A party wishing to have the court invoke those powers must bring out his case within the ambit.

I have looked at the supporting affidavits in this case. The Defendants quarrel was with the conduct and handling of the evidence during the composition.

He is not alleging bias, fraud or corruption. I concede [sic] that what he is alleging may make some sense if a court had appellate powers over those tribunals.

The legislature however in all its wisdom deprived courts of any such powers.

I'm unable therefore to invoke S.9D. The application is dismissed with costs. Plaintiffs are at liberty to move the court for confirmation of the awards."

50. That being the case, it was not true as purported by the Plaintiffs that the dispute that went before the tribunals and that were subsequently adopted by the courts were in their father's favour. The panel of elders had clearly ordered a sub-division of the land in dispute with portions thereof to be adjudicated in favour of the Defendants predecessors in title. That is the award that the Defendants were allowed to proceed to confirm in the cases filed in 1988 before the Principal Magistrate's court at Mombasa.

51. The Plaintiffs are certainly aware of that position and hence their failure to disclose the awards that were made in favour of the Defendants and whose confirmation they failed to stop and or set aside. There is no evidence that they appealed the Ruling delivered by the court on 19th June 1990 and or that the same was ever set aside.

52. Arising from the foregoing, the Plaintiffs' claim that the Defendants only rushed to occupy the land during the adjudication exercise commenced in September 2014 is a blatant lie meant to mislead this court to revisit a dispute that was long settled in favour of the Defendants. That attempt to mislead the court has not succeeded as I find no merit whatsoever in their claim.

53. The Plaintiff's suit is accordingly dismissed with costs to the 1st, 2nd, 3rd, 4th, 8th 9th and 10th Defendants.

Dated, signed and delivered at Malindi this 31st day of August, 2021.

J.O. OLOLA

JUDGE