



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 27 OF 2018

JOHN CHARO MWARO

DICKSON KAZUNGU YAA [suing on behalf of the estate of the late Simon Kafadzi Mwaro]PLAINTIFFS

VERSUS

EMMANUEL KATANA CHARO

DANILE KASENA CHARO

ONESMUS RIZIKI KAHINDI

BLANDINA GHAMAGHANA MALIMU

STANLEY M. TSUMA

MRIMA KITL.....DEFENDANTS

JUDGEMENT

1. By the Plaint dated and filed herein on 2nd February 2018, John Charo Mwaro and Dickson Kazungu Yaa suing on behalf of the estate of the late Simon Kafadzi Mwaro [the Plaintiffs] pray for judgement against the six [6] listed Defendants jointly and severally as follows:

a) There be a declaration that the purported sale by the 1st and 2nd Defendants to the 3rd, 4th, 5th and 6th Defendants are irregular, fraudulent and hence null and void;

b) There be a permanent injunction stopping the Defendants either by themselves, their agents or any other persons acting under their names from selling, cultivating, leasing, transferring or dealing with land reference number Kilifi/Ngerenya/303 in any way;

c) That the Defendants be evicted from the Suitland reference number Kilifi/Ngerenya/303 and the eviction be supervised/overseen by the OCS Kilifi;

d) Costs of this suit; and

e) General damages for illegal trespass.

2. Those prayers arise from the Plaintiffs' contention that the suit property measuring approximately 12 acres belongs and was registered in the name of their grandfather Simon Kafadzi Mwaro who passed away in 1982. The Plaintiffs aver that some twenty [20] years back, they welcomed the 1st and 2nd Defendants who are their nephews and were destitute at the time on the suit property.

3. The Plaintiffs assert that the 1st and 2nd Defendants thereafter proceeded to secretly take out Letters of Administration for their deceased grandfather and have now secretly sold portions of the suit property to the 3rd, 4th, 5th and 6th Defendants in the period between the year 2012 and 2013. The Plaintiffs assert that purported sales were irregular and fraudulent and hence the orders sought herein.

4. The six [6] Defendants neither entered appearance nor filed a response. This matter hence proceeded by way of formal proof.
5. In support of their case, the Plaintiffs called one witness. John Charo Mwaro [PW1] is the first Plaintiff and a co-administrator of the estate of the late Simon Kafadzi Mwaro. He told the Court the Plaintiffs were born on the Suitland more than 40 years ago and that they reside on the land to date.
6. PW1 testified that the suit property measuring some 12 acres belongs to their grandfather Simon Kafadzi Mwaro who passed away in the year 1982. The land remains registered in the name of the deceased to date. PW1 told the court that some 20 years back, they welcomed the 1st and 2nd Defendants who were their nephews and were destitute, to the Suitland.
7. PW1 testified that thereafter and unbeknown to themselves, the 1st and 2nd Defendants hatched a plot to steal the property from the Plaintiffs' family. When the Plaintiffs grandmother Dama Simon Mwaro fell sick in the year 2012, the two Defendants threatened her that they needed money to pay dowry and forced her to illegally sell part of the Suitland.
8. PW1 further told the court that the 1st and 2nd Defendants later secretly took out Letters of Administration for the estate of their deceased grandfather and listed themselves and the Plaintiff's grandmother as the only heirs of the estate of the late Simon Kafadzi Mwaro. Thereafter the 1st and 2nd Defendants misled the Plaintiffs then ailing grandmother into signing sale agreements in which they sold portions of the suit property as follows:
 - a. 4 acres' to the 4th defendant on 1st September 2012*
 - b. 3 acres to the 3rd Defendant on 6th September 2013*
 - c. 1 acre to the 4th Defendant on 23rd May 2013; and*
 - d. 2.5 acres to the 5th and 6th Defendants in respect of the same portion.*
9. PW1 told the court that their grandmother subsequently passed away on 7th October 2013. By a letter addressed to the District Lands Adjudication Office dated 15th October 2013 they protested the sale as the same were irregular and fraudulent. Through Malindi, Succession Cause No. 112 of 2012, the Plaintiffs' sought nullification and revocation of the grant issued to the Defendants. On 1st September 2016, the court nullified and revoked the Grant issued to the Defendants and consequently cancelled the purported sale of the land to the 3rd to 6th Defendants.
10. PW1 testified that despite the clarity of the order, the 3rd, 4th, 5th and 6th Defendants continue to cultivate the land and the 3rd Defendant has gone ahead to construct a home thereon despite repeated warnings from the Plaintiff.
11. I have carefully considered the pleadings as filed herein by the plaintiffs, the sole testimony of the Plaintiff's witness as well as the evidence adduced at the trial herein. I have similarly considered the submissions placed before me by Mr. Nyongesa, Learned Counsel for the Plaintiffs .
12. The two Plaintiffs instituted this suit on behalf of the estate of their late grandfather Simon Kafadzi Mwaro. The 1st Plaintiff John Charo Mwaro [PW1] who testified as the sole witness herein produced as exhibit 15 a copy of a limited grant of letters of administration ad litem issued to them on 31st January 2018 vide Malindi Chief Magistrates Probate and Administration cause no. 31 of 2017.
13. It is the Plaintiff's case that they were born on the suit property and that their late grandfather was the registered proprietor thereof. In support of that contention, PW1 produced as exhibit 1 a copy of a Title Deed for Kilifi/Ngerenyi/303 measuring 5.0 Ha issued in the name of their grandfather Simon Mwaro on 29th August 2006. The Plaintiffs told the court their grandfather passed away in the year 1982 but they continued living on the land together with their grandmother Dama Simon Mwaro and other family members.
14. PW1 told the court that at some point in time, they welcomed into the land the 1st and 2nd Defendants, who happened to be their nephews and were destitute at the time. The 1st and 2nd Defendants however subsequently hatched and executed a plot to sell portions of the suit property to the 3rd, 4th, 5th and 6th Defendants. The 1st and 2nd Defendants did this by secretly obtaining a certificate of confirmation of grant of Letters of Administration for the estate of the Plaintiffs' late grandfather by purporting to be the sole heirs of the estate together with the Plaintiffs grandmother Dama Simon Mwaro who was ailing at the time.
15. When the Plaintiffs got wind of what was happening, they successfully petitioned for the revocation and nullification of the grant issued to the 1st and 2nd Defendants vide Malindi High Court Succession Cause No., 115 of 2012. The nullified certificate of confirmation of grant and the letter of administration issued to the 1st and 2nd Defendants were produced herein as exhibits 11 and 12 respectively.
16. As it turned out however, the 1st and 2nd Defendants had with the help of the Plaintiffs grandmother sold portions of the land even before they were issued with the certificate of confirmation of grant that would later on be revoked vide orders issued in the same High Court Succession Cause No. 115 of 2012, on 1st September 2016.
17. While it was not clear to this court whether or not the Defendants herein had been aware of the proceedings to revoke the certificate of confirmation of grant in the said Malindi High Court Succession Cause No. 115 of 2012, the orders issued by the Honourable Justice

Chitembwe on 1st September 2016 read as follows:

“IT IS HEREBY ORDERED

1. ***That the grant of Letter of Administration issued herein to the Respondents on 26th October 2012 and the Certificate of Confirmation of Grant dated 4th October 2013 be surrendered and be deposited in court within seven days as the same was fraudulently obtained under conspiracy.***
2. ***That the Grant of Administration issued to the Respondents herein be forthwith revoked and/or annulled for the same [were] fraudulently obtained under conspiracy.***
3. ***That any transaction or dealing by the purported administrators herein including sale, subdivision, transfer and /or lease of the estate of Simon Mwaro that took place and/or is in the process by virtue of the Grant of Letters of Administration and the Certificate of Grant issued herein be cancelled and be declared null and void.***
4. ***That [there be] no orders as to costs.***

18. There was no evidence that those orders have since been reviewed and or set aside. On the contrary, the Plaintiffs told the court that despite the said orders, the 3rd, 4th and 6th Defendants continue to cultivate the Suitland. They further told the court that the 3rd Defendant has even gone ahead to construct a home on the land despite their protest. As it were, the Defendants neither entered appearance nor filed a defence to the Plaintiffs claim. The Plaintiffs evidence thus remains uncontroverted and this court did not find any reason to doubt the same.

19. Given that the High Court had already cancelled and declared void any transactions arising from the revoked grant of Letter of Administration issued irregularly to the 1st and 2nd Defendants together with the Plaintiffs grandmother prior to her death in the year 2013, I am unable to find any basis for the continued use of the land by the 3rd, 4th, 5th and 6th Defendants.

20. In the premises, I am satisfied that the Plaintiffs suit is merited and that they have proved their case on a balance of probabilities. I am also satisfied that since the orders issued by the High Court on 1st September 2016, the refusal by the 3rd, 4th, 5th and 6th Defendants to vacate the land constitutes an act of trespass and that the Plaintiffs are entitled to general damages.

21. In their submissions herein, the Plaintiffs have urged the court to award general damages in the sum of Ksh. 2 million. No justification has however been given in support of the figure cited. The measure of damages for trespass has been held to be the difference in the value of the Plaintiffs property immediately after the trespass or the costs of restoration, whichever is less [see ***Hoster –vs- Green Park Development Co. 1986. SW 2d 500 [No. App. 1999].***]

22. In the matter before me, the Plaintiffs have neither provided the value of the land nor the expected cost of its restoration. In the absence of those figures but taking the circumstances of this case into consideration, I am of the view that the sum of Ksh. 800,000/= is a reasonable award for general damages.

23. Accordingly, judgment is hereby entered for the Plaintiff as against the Defendants as follows:

- a) ***A declaration is hereby issued that the purported sale by the 1st and 2nd Defendants to the 3rd, 4th, 5th and 6th Defendants are irregular, fraudulent and hence null and void;***
- b) ***A permanent order of injunction is hereby issued restraining the Defendants either by themselves, their agents or any other persons acting under their names from selling, cultivating, leasing, transferring or dealing with land reference number Kilifi/Ngerenya/303 in any way;***
- c) ***The 3rd, 4th, 5th and 6th Defendants to grant vacant possession of the suit property within 45 days from the date hereof failure to which an order of eviction to issue forthwith to be supervised by the OCS Kilifi.***
- d) ***General damages of Ksh. 800,000/= is hereby awarded to the Plaintiffs to be paid by all the Defendants jointly and severally; and***
- e) ***The Plaintiffs shall have the costs of this suit.***

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

J.O. OLOLA

JUDGE