



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 58 OF 2013

RODGERS MUNDU MUNGA.....PLAINTIFF

VERSUS

PATRICK CHISHENGA MUNGA

EDISON KASHINDO MUNGA

BENSON RUNYA MUNGA.....DEFENDANTS

JUDGEMENT

Background

1. By a Complaint dated 22nd March 2013 but filed herein on 8th April 2013, Rodgers Mundu Munga [hereinafter the Plaintiff] prays for judgment against the three [3] Defendants for the following relief:

a) That this Honourable Court be pleased to issue a permanent injunction order restraining the Defendants, their families, agents, employees, servants and/or any person deriving interest from them, from building, cultivating, planting, staying, using, alienating and/or in any manner interfering with the Plaintiff's parcel of land Kilifi/Roka/1083;

b) The Honourable court be pleased to issue eviction orders against the Defendants to give vacant possession to the Plaintiff and any structure erected on the Suitland by the Defendants be demolished; and

c) Costs of the suit.

2. The prayers arise from the Plaintiff's contention that at all times material, the Plaintiff was and still is the beneficial owner of the parcel of land known as Kilifi/Roka/1083 measuring approximately 12.40 acres having bought the same. He accused the Defendants who are his brothers of illegally and unlawfully occupying the land and on the purport that the same belonged to their father Munga Chirao Horomwe.

3. It is further the Plaintiff's case that the dispute concerning the ownership of the land between himself and his father was long settled in his favour in Kilifi RMCC Land Case No. 7 of 2006 but the Defendants have since refused to vacate the Suitland.

4. But in their joint statement of Defence dated 19th April 2013 as amended and filed herein on 1st October 2015, Patrick Chisenga, Edison Kashindo Munga and Benson Runya Munga [the 1st, 2nd and 3rd Defendant respectively] deny that the land in issue belongs to the Plaintiff. On the contrary, they aver that the suit property belongs to their father Munga Chirao Horomwe and the Plaintiff was merely a custodian thereof being their father's eldest son.

5. By way of their Counterclaim, the three Defendants claim ownership of the parcel of land bought by their father through adverse possession. They accuse the Plaintiff of fraudulently registering himself as the proprietor of the suit property while knowing that the Defendant had been born on and were raised on the land where they continue to reside to-date.

6. Accordingly the Defendants, urge the court to dismiss the Plaintiff's suit and to instead enter judgement in their favour and grant the following relief:

a) A declaration that the Defendants are entitled to part of Plot No. Kilifi/Roka/1083 situated at Matsangoni in Kilifi county.

b) [An] order to compel the Registrar of Lands Kilifi to cancel the title deed issued to the Plaintiff and the same be subdivided and registered in the joint names of the Defendants.

The Plaintiff's Case

7. At the trial herein the Plaintiff called two witnesses who testified in support of his case. The Defendants neither testified nor produced any evidence at the trial.

8. PW1- Rodgers Mundu Munga is the Plaintiff herein and a resident of Matsangoni within Kilifi. He told the court he bought the suit property jointly with one Rodgers Malili from some five [5] people namely; Ndiro Waru, Rodgers Kazungu, Jara Wario and some two other people whose names he was unable to recall in 1969. PW1 further told the court that the said Rodgers Malili is his brother-in-law and that those from whom they bought the land had since died.

9. PW1 told the court that as at the time of the purchase, the land situated in a Settlement Scheme had been surveyed and that it was measuring 12 acres. They were not given any documents of ownership at the time but the land had fruits and trees thereon.

10. PW1 testified that his in-law subsequently moved away and sold to PW1 his portion of 6 acres. PW1 was thereafter registered as the sole proprietor of the land and was issued with a title deed therefor in August 2006.

11. PW1 further told the court that the Defendants are his brothers. A dispute arose between them and they went to the area chief for a resolution. That happened after his father the late Munga Chirao Horomwe started telling the Defendants to pay money to PW1 to enable him [their father] be registered as the owner of the land. This dispute later went to the Land Disputes Tribunal which tribunal decided in PW1's favour and required their father to vacate the land.

12. PW1 told the court the 1st Defendant lodged an appeal against that decision but the appeal was again dismissed in 2011. The Defendants however refused to vacate the land and started cultivating the land. To-date, the 1st Defendant and his son Collins remain on the land.

13. On cross examination, PW1 conceded that he did not have a sale agreement to show how he acquired the land. He told the court he bought the land in 1969 but invited his father to the same in 1971. At the time, the father used to live in Madzuhoni. Upon PW1's invite, he went into the land with PW1's mother. PW1 was then 24 years old. The father later passed away in 2015 – 2016

14. PW1 further testified that the Defendants followed their father onto the land against his wishes. They later got married while living on the Suitland. He told the court the Defendants built on the land without his consent.

15. PW2- Rodgers Mayamba Malingi is a retired farmer and a resident of Ngerenya - Chumani. He told the court he bought the land together with PW1 who is his brother-in-law in 1969. They bought the land from a group of people whose names he was no longer able to recall. They bought the 12 acre piece of land for Ksh. 3000/=.

16. PW2 told the Court that initially, 6 acres of the land belonged to himself. They had fruits and trees on the land. After about 2 years, PW2 decided to leave the area. PW1 then refunded to PW2 his portion of the purchase price. PW2 further told the court that before this dispute came to this court, PW1's father had earlier sued PW1 in a Mombasa court but the case was decided in PW1's favour.

17. On cross- examination, PW1 testified that after he left the land around 1970, the Plaintiff later brought his father and mother who were already old to live on the land. The Defendants followed their father to the land after some time.

Analysis and Determination

18. I have carefully considered the pleadings filed herein, the testimonies of the Plaintiff's witnesses as well as the evidence adduced at the trial. I have similarly considered the submissions filed by the Learned Advocates for the parties.

19. The Plaintiff – Rodgers Mundu Munga has brought this suit seeking an order of permanent injunction to issue restraining the Defendants from building, cultivating, staying in, using or dealing in any manner whatsoever with all that parcel of land known as Kilifi/Roka/1083. The Plaintiff also craves an order of eviction against the Defendant's from the suit property.

20. It was the Plaintiff's case that he is the registered owner of the suit property having purchased the same with his brother-in-law Rodgers Mayamba Mangili [PW2] way back in 1969. The Plaintiff told the court that his brother-in-law later sold his portion of land to himself and that thereafter he invited his parents to come live with him on the land. The Plaintiff told the court that the Defendants herein who are his brothers thereafter followed his father and came to live on his land.

21. The Plaintiff told the court that when he realized the family was becoming too large for the suit property, he asked his brothers to vacate the land. They however refused claiming the land belonged to their father Munga Chirao Horomwe. Apparently, the Plaintiff's father who was still alive at the time sided with the Defendants and even filed a case before the Land Dispute Tribunal seeking to have himself registered as the owner of the land.

22. The Plaintiff told the court that the Tribunal went on to make a determination in his favour but the Defendants refused to vacate the land and that some of them have now started erecting buildings thereon.

23. As it were, the Defendants did not testify at the trial herein. It is however their case from the pleadings filed herein that even though the

Plaintiff is shown on the certificate of title to be the registered proprietor of the land, the suit property belonged to their father [now deceased] and that the Plaintiff was only registered as the proprietor thereof by virtue of his being their eldest brother and that he was to be a custodian of the same on their behalf.

24. In addition to their Statement of Defence, the Defendants also filed a Counterclaim asserting that they are on the property as of right having lived thereon with their parents until their demise. Accordingly and by virtue of the said long stay on the property, the Defendants assert that they have since acquired the same under the doctrine of adverse possession.

25. From the material placed before me, there was no dispute that the subject matter of this dispute was also the subject matter in Bahari Land Disputes Tribunal Case No. 145 of 2005. A perusal of the proceedings exhibited by the Plaintiff herein reveals that the father of the disputants herein the late Munga Chirao Horomwe had sued the Plaintiff herein claiming to be the owner of the suit property having given his son [the Plaintiff] the money to purchase the same in the late 1960's.

26. Having heard the parties and their witnesses in that case the Tribunal proceeded to award the suit property to the Plaintiff. Being aggrieved by the said decision, the Plaintiff's father filed Appeal Case No. 424 of 2006 at the Coast Provincial Land Appeal Tribunal in Mombasa. A perusal of those proceedings again exhibited by the Plaintiff reveals that the 1st Defendant herein –Patrick Chishenya Munga is the one who testified in the proceedings under a power of attorney donated by their father.

27. In a decision rendered on 13th July 2011, The Provincial Appeals Tribunal again decided the matter in favour of the Plaintiff and directed in the penultimate paragraph as follows:

“DECISION/DETERMINATION OF THE APPEAL COMMITTEE

After a careful consideration of facts and in accordance to customary law this Appeal committee has made the following decision:

That the Appeal be dismissed. The Disputed Land is the property of Rodgers Mundu Munga, the respondent. However, he may consider to give his family a portion if he so wishes. The Appellant, his family or agents should stop interfering with the Disputed Land. The Land Dispute Tribunal Kilifi decision is hereby upheld.

COST AWARD

Each part to meet its own costs of this Appeal.

RIGHT OF APPEAL

Any aggrieved party that is not satisfied with this decision has a right to Appeal to the High Court on a point of law within 60 days from the date of this decision.”

28. There was however no evidence that any such appeal was filed to the High Court. All that is clear from the material placed before me is that following the earlier decision of the Divisional Tribunal, the Plaintiff had on 30th May 2006 moved to court in Kilifi Senior Resident Magistrate's Land Dispute Case No. 7 of 2006 to have the Tribunal's award adopted as an order of the court. That award was indeed adopted as such in the presence of both the Plaintiff and his father on 20th July, 2006.

29. In light of that fact and given that the subsequent appeal filed by the Plaintiff's father was dismissed as aforesaid on 13th July 2011, it follows that the issue of ownership of the parcel of land was long settled in favour of the Plaintiff. The claim by the Defendants that they are on the land on the purport that it belongs to their father can therefore no longer arise as the court had already found and determined that the land belongs to the Plaintiff and not their father. It is a matter already adjudicated upon and is indeed *res judicata*.

30. The Defendant's claim that they have acquired the land by virtue of their long stay under the doctrine of adverse possession is equally tenuous and unsustainable. As the Court of Appeal stated in *Mtana Lewa –vs- Kahindi Ngala Mwamgandi [2005] eKLR*:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya twelve [12] years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner, it must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title of the owner.”

31. There was no dispute in the matter before me that the Defendants moved with their father to the suit property after the same was acquired by the Plaintiff in the late 1960's. Given the findings by the Tribunals that the land belonged to the Plaintiff, their stay on the land could not be said to have been adverse to the Plaintiffs title given that they had entered the land with the full knowledge and permission of the Plaintiff.

32. At any rate given the cases before the Tribunal at which the Plaintiff was confirmed to be the owner of the land it was apparent that time had ceased to run and that 12 years had not lapsed since the Plaintiff was confirmed as the owner of the suit property in the award adopted on 20th July 2006. The Plaintiff was indeed only registered as the proprietor of the property in August 2006 and hence as at the time the Defendants instituted their Counterclaim on 1st October 2015, 12 years had certainly not lapsed.

33. Arising from the foregoing, it was clear to me that the Defendants Counterclaim was misconceived and without any basis either in law or in fact. On the contrary, this court was satisfied that the Plaintiff had proved his case on a balance of probabilities. Having been adjudicated as the lawful owner of the suit property and having been issued with a title in that respect, the Plaintiff has the right to exclusive possession and use of the land without interference from any quarter.

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

35. The Defendants have 45 days to remove themselves and any structures on the suit property failure to which they shall forthwith be evicted therefrom as sought at prayer 'b' of the Plaintiff's suit.

36. The Plaintiff shall have the costs of both his suit and of the Counterclaim.

37. It is so ordered.

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

J.O. OLOLA

JUDGE