



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO 16 OF 2018

ERUSTUS GUNGA & 42 OTHERS.....PLAINTIFFS

VERSUS

KAHINDI KAZUNGU CHARO.....DEFENDANT

JUDGMENT

It is the plaintiff's case that all materials times to this suit, the plaintiffs are residing and or carrying on farming activities within Plot No. 653 situated within Chalalani Mihongani in Kilifi County having purchased the portions of parcels of land from the registered owners. That the plaintiffs aver and state that before the registered owners could sub-divided the portions bought from them and issue the plaintiffs with title deeds, the registered owners passed on. That the plaintiffs aver and state that the defendant has now become hostile to them and has threatened them with eviction from the parcel of land being Plot No. 653. That the plaintiffs aver and state that they have been in occupation of the said Plot No. 653 since 1984 carrying on both farming activities and also have their homesteads constructed thereon. That the plaintiffs aver and state that they purchased the portions of Plot No. 653 from the registered owners of which the defendant is their Legal Representative and the Administrator of the Estate of the registered owners. That the plaintiffs claim against the defendant is a mandatory injunction restraining the defendant from forcefully evicting the plaintiffs from the portions of land which they bought for valuable consideration from the registered owners of Plot No. 653 situated within Kaloleni Area. That the plaintiffs are humbly praying to the Honourable Court to issue an order directing the defendant to carry out subdivision of Plot No. 653.

The plaintiffs' pray that;

- a) A mandatory injunction directed to the defendant from evicting, disposing, alienating and dealing with the undivided portions of Plot No. 653 situated in Kaloleni to the detriment of the plaintiffs.
- b) An order directed to the defendant to carry out subdivision of Plot No. 653 of the portions owned by the plaintiffs so that the plaintiffs can obtain the titles to their portions of Plot No. 653 situated within Kaloleni.
- c) A declaration that the plaintiffs are the owners of the portions of plot no. 653.
- d) Costs and interest of this suit.

The defendant stated that the allegations that the plaintiffs purchased parts of all that parcel of land known as Kilifi/Chalani/653 (hereinafter referred to as 'the suit plot') from the registered owners are unfounded. That it is not true that the plaintiffs have been in occupation of parts of the suit plots since 1984 as alleged or at all. That the plaintiffs have recently trespassed into the suit plot and have used threats and intimidation towards the person of the defendant and his family in their unlawful attempts to grab parts of the suit plot. That the plaintiffs do not have an interest in the suit plot herein which parcel of land is part of the estates of Kahaso Baya Kaleha (deceased) and Charo Yaa Mangi (deceased) as alleged in the plaint or at all. That contrary to the allegations that he is the administrator of the estates of both the registered owners of the suit plot, he is the administrator and also a beneficiary of the estate of Charo Yaa Mangi (deceased); one of the co-owners of the suit plot.

The defendant avers that the plaintiffs have trespassed and/or encroached into the suit plot and are using intimidation against his person and property to continue with their unlawful attempts to interfere with the right of the defendant and other beneficiaries of the estate of the Kahaso Baya Kaleha (deceased) and Charo Yaa Mangi (deceased) the registered owners of the suit plot, to the plot herein. The defendant's counter claim against the plaintiffs is for a declaration that the plaintiffs have no right whatsoever in the suit plot and for an order of eviction of the plaintiffs from the suit plot. The defendant is also seeking for a permanent injunction to issue against the plaintiffs and/or their servants and/or agents to restrain them from trespassing into the suit plot, cultivating and/or building therein and/or interfering with the right of the defendant and other beneficiaries of the estates of the deceased registered owners of the suit plot in any manner whatsoever and seeks the following orders;

1. A declaration that the plaintiffs have no right whatsoever in all that parcel of land known as Kilifi/Chalani/653.

2. An order that the plaintiffs hand over vacant possession of the parts of plot number Kilifi/Chalani/653 into which they have trespassed failure to which the plaintiffs be evicted by the court bailiff and OCS, Kaloleni station or any other police station with jurisdiction to provide security during the eviction of the plaintiffs and or their authorized agents and/or servants.
3. A permanent injunction restraining the plaintiffs and or their servants and or agents from trespassing into the suit plot, cultivating and or building thereon and or interfering with the right of the defendant and other beneficiaries of the estates of the deceased registered owners of PLOT NUMBER KILIFI/CHALANI/653 in any manner whatsoever.
4. Costs of the counter claim.

This court has carefully considered the evidence and the submissions herein. The plaintiffs' claim in this matter is for an order directed to the defendant to carry out subdivision of Plot No. 653 of the portions owned by the plaintiffs so that the plaintiffs can obtain the titles to their portions of Plot No. 653 situated within Kaloleni. They submit that they are buyers and reside therein. Judge Maraga as he then was, in the case of Reliable Electrical Engineers Ltd & Another vs Kenya Petroleum Refinery Ltd (HCC 190 of 2005), held that :

“the jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source.”

The Land Control Act (CAP 302), Section 6, 7 and 8 provide as follows;

6. (1) Each of the following transactions -

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.

It is the plaintiff's (PW1) evidence that he entered into an agreement on 13th May 1984 and bought 4 acres of the suit land from the family for Kshs. 3600/-. The acreage is not indicated in the agreement. He has brought this case on behalf of 61 other people and not 42. He produced 32 agreements (PEX3). He does not know the current proprietors of the land as the original sellers are all dead. Some of the agreements do not have the signature of the seller and it is only the Chief who has signed. They went to the tribunal in 1986 and got the orders that it be subdivided. He confirms that he is using the land. PW2 testified that his father also bought part of the suit land but could not identify and or produce the sale agreement. I have perused copies of the sale agreements annexed and find that some are dated as far back as 1969! Some are illegible and most do not have the description of the land being purchased. The ones with the plot number of the suit land have not been signed PEX on page 19. Whereas it has been established that some of the plaintiffs have lived on the suit land for a long time it is not clear who and where they live exactly. PW1 stated in his testimony that they were 61 and then again said they were 42. Without this clarity the court is unable to grant the orders of subdivision. It is in evidence that the suit land is registered in the name of Charo Yaa and Kahaso Baya Kalela on the 13th October 1993. The defendant is the administrator of Charo Yaa alone. The said Kahaso Baya Kalela or his administrator was never enjoined as a party to this suit. **In the case of Fiat Kenya Ltd vs Ali Jama Roble (1973) EA 11** the Court held that;

“The Court never award specific performance when it is incapable of enforcing the order. By part of reasoning I do not think it should ever award specific performance if it entertains any serious doubt that the contract is capable of performance”.

I find that the subdivision though ordered by the tribunal cannot be done as the court cannot establish with certainty who is entitled to the suit land. The plaintiffs would have been better off with a claim for adverse possession and/ or constructive trust. I find that the plaintiffs have failed to prove their case on a balance of probabilities and the same is dismissed.

DW1 the defendant testified that he is not aware that the plaintiffs bought the suit land. The land is registered in the name of his grandfather and uncle and the plaintiffs are not beneficiaries. He however admits that they are people residing on the land and have put up structures. His uncle Kahaso Baya Kalela is deceased and succession has not been done for his estate. His family uses part of the land. He stated that if they had proof of payment he would not dispute but some of them are squatters. For these reasons, I find that the defendant has failed to establish his counter claim on a balance of probabilities and I dismiss the same. Each party to bear their own costs of this suit.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH OCTOBER 2021.

N.A. MATHEKA

JUDGE