



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 207 OF 2014

HENRY MWAKAMUSHA MOKOWA.....PLAINTIFF

VERSUS

1. BAKARI MWEMA CHARO

2. LAND REGISTRAR KILIFI.....DEFENDANTS

JUDGMENT

BACKGROUND

1. In his Complaint dated and filed herein on 5th November 2014 Henry Mwakamusha Mukowa suing on his own behalf and on behalf of the Estate of Mukoa Kalodzi Ngowa (the Plaintiff) prays for:-

a) A declaration that the Estate of Mukowa Kalodzi Ngowa is the lawful owner of Plot No. 529/Kaloleni/Vishakani being one of the first registered owners;

b) An order that the 1st Defendant do deliver up to the Plaintiff and the 2nd Defendant the title deed for Plot No. 529 Kaloleni/Vishakani and Plot No. 799/Kilifi/Nyalani issued on 5th July 2014 and the 2nd Defendant do cancel the same;

c) An order of a permanent injunction restraining the 1st Defendant either by himself or through his agents/servants and or employees from selling, charging, sub-dividing, taking possession or otherwise dealing in any manner with the said Plot No. 529 Kaloleni/Vishakani and Plot No. 799/Kilifi/Nyalani;

d) A declaration that the Defendants actions violated and breach the Plaintiff's rights as provided for under Article 40 of the Constitution of Kenya;

e) General damages for violation of the Plaintiff's Constitutional rights; and

f) Costs and interests at Court rates.

2. The Plaintiff's prayers are premised on his contention that the deceased Mukoa Kalodzi Ngowa who died on 5th December 2006 together with his four brothers was the registered owners of Plot No. 799/Kilifi/Nyalani measuring 8.6 Ha and Plot No. 529/Kaloleni/Vishakani measuring 1.3 Ha. The said four brothers of Mukoa Kalodzi Ngowa are also deceased.

3. The Plaintiff avers that sometimes in the year 2001, the 1st Defendant filed Kaloleni Land Disputes Tribunal Case No. 36 of 2001 against the deceased. The 1st Defendant then on winning the Tribunal case fraudulently proceeded to register himself as the owners of the suit properties long after the deceased had been issued with title deeds therefor.

4. The Plaintiff contends that the said registration was fraudulent and that the 1st Defendant has not obtained a valid title to the suit properties.

5. But in a Written Statement of Defence dated 15th September 2015 and filed herein on 5th October 2015, Bakari Mwema Mwaro (the 1st Defendant) avers that the deceased has never been a registered owner of the two parcels of land. He avers that he exercised due diligence and followed due process of the law in acquiring the said properties and is therefore unaware and is not a party to the allegations of fraud and

illegalities enumerated in the Plaintiff.

6. The Land Registrar Kilifi (the 2nd Defendant) filed a Statement of Defence through the Honourable the Attorney General on 9th September 2015 in which he denied that the deceased was the registered owner of the two parcels of land. It was further the position of the 2nd Defendant that the Plaintiff had participated in a Citation Cause where the subject matter of the dispute was resolved and that he ought to have appealed if not satisfied with the outcome.

The Plaintiff's Case

7. At the trial herein the Plaintiff called two witnesses in support of his case.

8. PW1-Henry Mwakamusha Mukowa was the Plaintiff himself. He testified that Parcel No. 799 was previously in the name of Syria Kalonzi who was an elder brother to his father. On the other hand Parcel No. 529 was initially registered in the name of his father Joseph Mukuwa Kalonzi and his four brothers namely; Syria Kalonzi, Abdalla Tama Kalonzi, Ndeka Kalonzi and Kutiwa Kalonzi.

9. PW1 further testified that his father and the four brothers had since died and he is the one now in possession of the two parcels of land. He told the Court that his father died on 5th December 2006 and he was issued with a Limited Grant of Letters of Administration on 2nd October 2014 which he used to file this case.

10. Prior to his father's death, PW1 told the Court that he had been sued together with his brother Kutiwa Kalonzi at the Kaloleni Land Disputes Tribunal and there was a decree issued on 30th June 2009 pursuant thereto requiring his father to surrender the two titles.

11. PW1 told the Court that Parcel No. 529 was registered in 1974 and Parcel No. 799 in 1977 long before the decree issued. The 1st Defendant then served the Plaintiff with Citation Cause No. 10 of 2012 in regard to the suit properties. PW1 testified that the Citation referred to Joseph Mukowa Kalonzi and not Syria Kalonzi.

12. PW1 further told the Court that the documents used for the Citation were fake. While the order purported to have been issued by the Honourable Justice Mukunya on 12th March 2013, the Court file in which the Vesting Orders were issued could not be traced.

13. During cross-examination, the Plaintiff conceded that his uncle the late Syria Kalonzi had his own children and that he (PW1) had no document giving him authority to sue on behalf of Syria Kalonzi's Estate.

14. PW1 further told the Court that when the dispute started, the two suit properties had no title deeds as the same only came to be issued in the year 2000. He further told the Court that his father Joseph Mukowa Kalonzi processed the titles to the properties while the matter was pending in Court.

15. PW1 further told the Court that when the Citation was served upon him he went to Court and that Syria Kalonzi's son Gibson then told the Court that their family had no issue with the 1st Defendant taking over the land.

16. PW2-Timothy Kiringi Kitsao is a Court Assistant employed at Kituo cha Sheria, the Institute representing the Plaintiff in these proceedings. He testified that he is related to the Plaintiff and that he was aware that they had filed a Citation No. 10 of 2012 in regard to the Estate of Joseph Mukowa Kilonzi. He further told the Court that he was aware the 1st Defendant had obtained 'fake' vesting orders.

17. PW2 told the Court that he took it upon himself to follow up as the application that generated the orders had never been served upon them. They then wrote letters to all concerned including the CID, the Lands Office Kilifi and the Court in Mombasa. The Court confirmed that the file was missing.

18. PW2 testified that the 2nd Defendant aided the 1st Defendant even after PW2's family informed him of the fake orders.

The Defence Case

19. The 1st Defendant called two witnesses in support of their case while the 2nd Defendant did not call any witness.

20. DW1-Bakari Mwema Mwaro is the 1st Defendant. He testified that he followed all the procedures required to get the titles. In 1983, they had gone to Court with the Plaintiff's father before a Panel of Elders at Kaloleni. The elders decided the dispute in DW1's favour. The matter then went to the High Court where it remained pending for about nine years.

21. DW1 further told the Court that the Plaintiff's father sued him again before the Kaloleni Land District Tribunal and he was again awarded the suit property. He told the Court that the Plaintiff does not represent anyone else in their family and urged the Court to note that one of the parcels in dispute is solely in the name of the Plaintiff's uncle-Syria Kalonzi.

22. During cross-examination, DW1 told the Court that they had many cases before the Land Disputes Tribunal. He however denied filing Tribunal Case No. 36 of 2001- stating that he was the one who was sued. He later filed High Court Miscellaneous Application No. 3 of 2012 in Mombasa asking the Plaintiff's father to return the title as it was to be revoked and for a Vesting Order. By then the Plaintiff's father was dead.

23. DW1 told the Court that he then filed Citation Cause No. 10 of 2012 which he served upon the Plaintiff but not the other family members or children of Joseph Mukowa Kalonzi. He also served Gibson for Syria Kalonzi's family.

24. DW1 conceded that he did not have the proceedings of the Vesting Order in Court. He did not also recall if the Respondents were served before the proceedings were taken. He told the Court that more than 12 years had lapsed from the time the titles were issued to the time of the Vesting Order.

25. DW2- Gibson Sirya Kalonzi was the eldest son of the late Syria Kalonzi. He told the Court that his father died in 1989 and that before then there had been a dispute between the 1st Defendant and his father. The 1st Defendant had sued DW2's father at the DO's office. The DO gave a verdict in favour of the 1st Defendant.

26. DW2 told the Court that the matter then moved to the Provincial level where again a decision was made that the land in dispute belonged to the 1st Defendant. By the time the decision at the Provincial level was made, DW2's father had died. The matter was then taken over by DW2's uncle-Joseph Mukowa Kalonzi, the Plaintiff's father.

27. DW2 recalled that the 1st Defendant then filed a Succession cause in Mombasa and the late Syria Kalonzi's children were summoned. DW2 produced an affidavit sworn on 22nd December 2013 in which he told the Court that he had no issue with the 1st Defendant. At the time the titles were with Timothy Kitsao (PW2) who was the Clan Chair. They refused to release the titles.

28. DW2 then reported the matter to the Police and he was issued with a Police abstract. DW2 testified that the Plaintiff's claim herein is all false.

29. On cross examination, DW2 told the Court his father had five wives four of whom are still alive. Eight of his father's children were still alive and he had no evidence to show that the others had also been served with the hearing notice for the Citation proceedings. He further conceded that he has never taken out Letters of Administration for his father's estate.

30. The 2nd Defendant did not call any witness at the trial.

Analysis and Determination

31. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses as well as the evidence produced in the course of the trial. I have equally considered the Written Submissions as filed by the Learned Advocates for the parties.

32. The Plaintiff herein is the Administrator of the Estate of his father the late Mukowa Kalodzi Ngowa who passed away on 5th December 2006. He asserts correctly that with the demise of the deceased, his estate vests in the administrator of his estate by virtue of Section 79 of the Law of Succession Act, Cap 160 of the Laws of Kenya. In support of this position, the Plaintiff produced a Limited Grant of Letters of Administration ad Litem issued to him in regard to his father's estate in Mombasa Probate and Administration Cause No. 310 of 2014 on 2nd October 2014.

33. In his claim before the Court, the Plaintiff demands that the 1st Defendant yields two parcels of land, namely LR No. 529 Kaloleni/Vishakani measuring approximately 1.3 Ha and LR No. 799 Kilifi/Nyalani measuring approximately 8.6 Ha.

34. At Paragraph 5 of the Plaintiff, the Plaintiff avers as follows:-

“5. That at the time of his death on 5th December 2006, Mukowa Kalodzi Ngowa with his brothers Sirya Kalonzi, Abdalla Tama Kalonzi, Ndeka Kalonzi and Kutiwa Kalonzi were the registered owners of Plot No. 799/Kilifi/Nyalani measuring 8.6 Hectares or thereabouts and Plot No. 529 Kaloleni/Vishakani measuring 1.3 Hectares or thereabouts, registered in the names of Sirya Kalonzi the title deed having been issued on 18th February 2000.”

35. A perusal of the Title Deeds for the two parcels of land as produced herein by the Plaintiff however reveals that the Plaintiff was mixed up on the description of the sizes of the two Parcels of land. Contrary to what is stated at paragraph 5 of the Plaintiff, it is LR No. Kilifi/Nyalani/799 measuring 8.6 Ha which was registered in the name of Syria Kalonzi while LR No. Kaloleni/Vishakani/529 measuring 1.3 Ha was registered in the names of five people being the said Syria Kalonzi, Abdalla Tama Kalonzi, the Plaintiff's father Joseph Mukowa Kalonzi, Ndeka Kalonzi and Kutiwa Kalonzi.

36. Indeed in his testimony before this Court, the Plaintiff confirmed the above position. He further told the Court that the four others listed with his father as owning LR No. Kaloleni/Vishakani/529 were brothers to his father and that they were all now deceased. As a result of their deaths, the Plaintiff was now holding the two title deeds for the suit properties.

37. Other than the fact that his uncle Syria Kilonzi is dead, the Plaintiff did not explain why he was holding on to the title for LR No. Kilifi/Nyalani/799 in his name and/or why he wanted this Court to issue an order that the 1st Defendant delivers the same to him and the 2nd Defendant for cancellation.

38. I say so because during his cross-examination herein, the Plaintiff conceded that Parcel Number 799 was not registered in the name of his father. Unlike in the case of his father where he had a Limited Grant ad Litem issued to him before he filed the suit, he had no document authorizing him to sue on behalf of the estate of his uncle Syria Kalonzi.

39. The Plaintiff infact conceded that his late uncle had adult children who could pursue the family's interests in the land if they wanted to.
40. As it turned out, Gibson Sirya Kalonzi (DW2) who testified herein in support of the 1st Defendant's case is the eldest son of the Plaintiff's uncle Syria Kalonzi. DW2 told the Court that his father died around 1989 and that the family has never filed for Letters of Administration in regard to the disputed parcel of land as they had no issue with 1st Defendant as he had won the case against his father Syria Kalonzi.
41. From the material placed before the Court, DW2 had infact filed an Affidavit sworn by himself in Mombasa High Court Citation Cause No. 10 of 2012 filed by the 1st Defendant herein conceding the 1st Defendant's claim thereto.
42. DW2 indeed told the Court that his father had left behind four wives and eight children and that if there was any claim in regard to the land it was only him and/or his siblings that could bring a claim. In the matter before me, the Plaintiff did not demonstrate that he had a superior interest to his uncle's piece of land over and above those reposing on his wives and children such as DW2 to warrant him bringing this claim.
43. The long and short of it is that in the absence of any Letters of Administration and/or any other plausible interest in the estate of the late Syria Kalonzi, the Plaintiff's claim in regard to LR No. Kilifi/Nyalani/799 has no basis and must, without more, collapse.
44. In regard to LR No. Kaloleni/Vishakani/529, the Plaintiff testified that the same was registered in the name of his father together with this four uncles. It was the Plaintiff's case that the same was registered in the 1st Defendant's name fraudulently through the use of a non-existing Vesting order arising from Mombasa Citation Cause No. 10 of 2012.
45. At it were the Plaintiff told the Court that all those whose names appear on the title have since passed away. It was not clear to me the order in which the Joint owners of the land had passed away. What was clear was that the Plaintiff had only obtained Letters of Administration for the estate of his father who held one fifth shares of the land said to be measuring 1.3 Ha.
46. From his testimony in Court and his pleadings filed herein, the Plaintiff alludes to the long standing dispute between the parties herein. It is his case that in the year 2001, the 1st Defendant filed Kaloleni Land Disputes Tribunal Case No. 36 of 2001 and that the Tribunal made a decision in favour of the 1st Defendant.
47. The Plaintiff's father appealed the decision to the Provincial Appeals Tribunal but his appeal was again dismissed. Thereafter the 1st Defendant filed the Citation Cause in Mombasa Miscellaneous Application No. 23 of 2012 against the Plaintiff's father and his brother Kutiwa Kalonzi. Both were already dead and a new Citation No 10 of 2012 was taken and served upon the Plaintiff.
48. Upon being served, the Plaintiff entered appearance through an Advocate on 19th November 2012. It is however their case that they thereafter discovered that the 1st Respondent had obtained 'fake' Vesting Orders to the suit property in the Citation Cause and that the said 'fake' orders were used to register the 1st Defendant as the proprietor of the suit properties.
49. It is further the Plaintiff's case that the land in question was already registered in the name of his father and his uncles and that the Land Tribunal could not order a cancellation of the existing titles.
50. I have carefully considered the testimonies of the witnesses and the material placed before me. According to the 1st Defendant, this dispute began as early as 1983. This is indeed confirmed by the proceedings in Land Disputes Tribunal Appeal Case No. 183 of 2002 which give the background of the case and in reference to the disputed parcel of land refers to Land Case No. LND/KAL/36 of 1983 between the 1st Defendant and the Plaintiff's father.
51. From a further perusal of the said proceedings, it is also evident that there was a civil dispute in the Kaloleni SRM's Court being SRMCC No. 4 of 1990. The decisions of the Tribunals were consistent that the land belonged to the 1st Defendant.
52. It is indeed evident that when the Plaintiff's father and the four uncles caused the title to be registered in their name on 18th February 2000, the 1st Defendant had a Tribunal Decision in his favour which decision the Plaintiff's father appealed vide the Provincial Land Disputes Tribunal Appeal Case No. 183 of 2002.
53. This comes out clearly at page 4 of the determination of the Provincial Panel made on 24th July 2007 where they observe as follows:-

“DECISION/DETERMINATION OF THE TRIBUNAL

This Tribunal upholds the decision of the Land Dispute Tribunal, Kaloleni. The title deed to be revoked since the Appellant Joseph M. Kalonzi used a back door in obtaining same (Court Contempt). It should be noted that in his Ruling of 31/7/1995 the Senior Resident Magistrate Mombasa Civil Suit No. 4 of 1990 ordered that the Land Dispute between the Appellant and Respondent be transferred and heard by Kilifi Land Disputes Tribunal. But the Appellant ignored this order and went ahead and obtained the Title Deed against the elders decision...”

54. Arising from the foregoing, it was clear to me that there was no valid registration that was done in the year 2000 and the resulting titles issued to the Plaintiff's father and his uncles had no legal basis whatsoever.

55. As it were the decision of the Tribunal was adopted as an order of the Court vide Kaloleni SRMC Land Award Case No. 36 of 2001 and a decree issued therefrom on 30th June 2009. That decree stands and has neither been appealed nor set aside by the Plaintiff.

56. On the contention that the Vesting Order used to procure the 1st Defendant's registration were not genuine, it was clear to me that the Plaintiff was served with notice of the Citation Cause and that by his own admission he entered appearance through an Advocate on 19th November 2012. Having been so served, it was incumbent upon the Plaintiff to take out the requisite Letters of Administration so as to participate in the said Citation. There is no evidence of anything else the Plaintiff did after entering appearance.

57. Other than the fact that the Court file went missing, nothing was placed before me to demonstrate that the Vesting Orders were not granted by the Court. The mere fact that the Plaintiff were able to enter appearance is a pointer that indeed there was a Citation Cause that was filed.

58. As it were, while the Plaintiff was all over claiming that the Vesting Order was in his own words "fake", there was nothing to demonstrate that he and his then legal team made any efforts to reconstruct the Court file which was said to be missing.

59. In the premises, I was not persuaded that the Plaintiff had any claim whatsoever against the Defendants. This suit was nothing but an attempt by the Plaintiff to extend his stranglehold on a parcel of land which the Courts have time and again decreed in favour of the 1st Defendant.

60. The same is dismissed with costs to the Defendants.

Dated, signed and delivered at Malindi this 30th day of January, 2020.

J.O. OLOLA

JUDGE