



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 90 OF 2014

DANIEL MWACHINGA MWACHIDZUNGU.....PLAINTIFF

VERSUS

1. TOM MWACHIDZUNGU.....1ST DEFENDANT

2. PHILIP KATANA MWACHIDZUNGU.....2ND DEFENDANT

3. WILLIAM TSUMA MWACHIDZUNGU.....3RD DEFENDANT

4. PETER MWAGONA KARISA.....4TH DEFENDANT

JUDGMENT

BACKGROUND

1. By a Plaint dated 13th May 2014, Daniel Mwachinga Mwachidzungu (the Plaintiff) prays for Judgment to be entered against the four Defendants jointly and/or severally for:-

a) Vacant possession of the Portion of land trespassed onto by the Defendants on Plot No. Kilifi/Forodhani/4;

b) A permanent injunction restraining the Defendants and/or their agents and/or their employees or servants or any other person acting on their behalf from entering and/or invading and/or cultivating or erecting any structure(s) on Plot No. Kilifi/Forodhani/4 and/or dealing with the suit property in any manner whatsoever detrimental to the rights and interests of the Plaintiff;

c) A mandatory injunction compelling the Defendants to pull down their structures on the Plaintiff's Portion of land on Plot No. Kilifi/Forodhani/4; and

d) Costs of this suit.

2. Those Prayers are premised on the Plaintiff's contention that at all times material he was the registered proprietor of the suit property situate at Mitsajeni, Ribe-Forodhani within Kilifi County. On or around mid -2013, the Defendants unlawfully and without permission entered and or trespassed onto the suit property and started cultivating the same and erecting structures thereon.

3. It is the Plaintiff's case that the Defendants acts aforesaid were aimed at denying and dispossessing him the use of the suit property and as a result, he has suffered irreparable loss and damage. Despite demand made and notice of intention to sue in default, the Defendant have refused to vacate the property hence rendering this suit necessary.

4. In their joint Written Statement of Defence dated 21st April 2017, Tom Mwachidzungu, Philip Katana Mwachidzungu, William Tsuma Mwachidzungu and Peter Mwagona Karisa admit that the Plaintiff is the registered proprietor of the suit property but aver that the said registration was in trust for the Defendants herein.

5. It is the Defendants case that they were born and brought up on the suit property their father having entered the same long before independence and land adjudication in the area. It is their case that by virtue of their long stay which stay was open and continuous for a period exceeding 12 years, the Plaintiff's title was extinguished by operation of the law and they have since acquired the same by virtue of adverse possession.

6. The Defendants further asserts that the Plaintiff's suit is bad in law and that it is otherwise an abuse of the Court process as the same is statutorily time-barred. They further deny being served with any notice of intention to sue as stated by the Plaintiff and urge that the suit be dismissed with costs.

The Plaintiff's Case

7. During the trial herein, the Plaintiff called one witness in support of his case.

8. PW1-Samuel Mwachinga is a son to the Plaintiff and a donee of a power of attorney from the Plaintiff who was said to be unwell. PW1 testified that his father was the registered proprietor of the parcel of land in dispute. He told the Court that the land measuring 30 acres was bought jointly by his father and Karisa Mwakidzungu. The two agreed to sub-divide the land on 15th July 1970 through a Written Agreement.

9. PW1 told the Court that the title deeds for the parcel of land came out on 5th July 1990 and that the Plaintiff's father was assigned parcel No. 4 while Mzee Karisa Mwakidzungu was assigned Parcel No. 190. He told the Court that Mzee Karisa was the father of the Defendants. On 4th April 2014, PW1 did a search and confirmed that Plot No. 190 still belongs to Mzee Karisa.

10. PW1 told the Court that problems started in 2013 when the Defendants invaded the Plaintiff's land and started erecting buildings thereon. Despite the Plaintiff's protest the Defendants refused to vacate the land and remain thereon to-date.

11. During cross-examination, PW1 told the Court that the original Parcel was sub-divided into Plot Nos. 3, 4, 20 and 190. He however agreed that the Plots ought to have followed each other numerically on the ground, which they did not.

12. PW1 admitted that Karisa Mwakidzungu was an elder brother to his father. The said Karisa passed away in 2010 and was buried in Plot No. 4. His wife Duka Karisa and one of their sons were also buried on the same Plot No. 4. PW1 told the Court that they were buried on that Plot because permission was given for the same.

13. PW1 further told the Court that each of the Defendants have a house on Plot No. 4.

The Defence Case

14. The Defendants similarly called one witness who testified on their behalf.

15. DW1-Tom Mwachidzungu is the 1st Defendant. He told the Court that his father Karisa Tuma Mwachidzungu had two brothers-Shadrack and Daniel. While the brothers were born in Ribe, they later moved to Ganjoni where they lived in a parcel of land in a place called Mwalupehe. However, some time in the 1950s, they were chased away and they moved to Plot No. 4 where they all built their houses.

16. DW1 told the Court that other than the said Parcel No. 4, the family had other Clan lands numbering about eight which were later sub-divided to the family members. He denied that the suit property was sub-divided and asserts that his father lived on the same until his death in 2010 when he was buried on the land. Earlier on in the year 2000, DW1's mother also passed away and was buried on the land. He denied that anyone gave them permission to bury his mother and father on the land.

17. DW1 told the Court that his father was illiterate and that was why his two brothers registered their own parcels but also registered themselves as co-owners of Plot No. 4.

18. During cross-examination, DW1 told the Court that the Plaintiff has about six other Plots while his father owns Plot No. 190.

Analysis and Determination

19. I have perused and considered the pleadings herein, the oral testimonies of the witnesses as well as the evidence presented before the Court. I have equally considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

20. The Plaintiff asserts that he is the registered proprietor of Plot No. 4 Kilifi/Forodhani. He accuses the four Defendants who are his nephews of invading and trespassing into the said property sometime in 2013 and proceeding to erect temporary structures thereon with the sole aim of alienating the same.

21. On their part the Defendants deny that they have invaded the suit property as alleged by the Plaintiff. It is their case that they lived on the land as a matter of right ever since they were born by virtue of the fact that they are all members of the Mwachidzungu family. They accuse the Plaintiff who is their uncle of secretly inserting his name in the Register during the land adjudication process and assert that any title the Plaintiff has to the property is so held in trust of the members for the Mwachidzungu family.

22. The Plaintiff however denies that the suit property belongs to the entire family. According to the Plaintiff prior to the registration of Plot No. 4 Kilifi/Forodhani in his name, he did enter into an agreement in writing with his two brothers Shadrack Tsuma Mwachidzungu and the late Karisa Mwachidzungu who is the father of the Defendants herein.

23. According to the Plaintiff, by dint of the said Agreement dated 15th July 1970 they agreed to sub-divide some of the unregistered land which they had acquired together measuring about 30 acres into three portions with each of them to get one portion thereof. Thereafter, the

Plaintiff was given the portion of land in which his house stands and which later came to be known after registration as Plot No. Kilifi/Forodhani/4.

24. It is further the Plaintiff's case that his brother Karisa took a portion measuring 3.6 Ha and which later came to be known as Plot No. Kilifi/Forodhani/190 while his brother Shadrack took the last portion that came to be known as Plot No. Kilifi/Forodhani/20. It is therefore the Plaintiff's contention that the Defendants are only entitled to Plot No. 190 where he says they had lived until Mid-2013 when they invaded the Plaintiff's Plot No. 4.

25. I have perused the aforesaid Agreement dated 15th July 1970(Pexh 3). It provides in Kiswahili as follows:-

“MAELEWANO YA KUGAWANYA SHAMBA LETU AMBALO NI KAMA AKARI 30- HUKO MITSAJENI, RIBE-FORODHANI

Sisi Mandugu bwana Daniel Mwachunga Mwachidzungu, Shadrack Tsuma Mwachidzungu, Karisa Tsuma Mwachidzungu. Tume elewana hii leo shamba letu ambalo tulinunua kwa pamoja ligawanywe mara tatu na kuwa kila mmoja apate sehemu yake ambayo ataishi.

Signed:

26. While the said Agreement appears in fact to have been signed by the three brothers, it was not clear to me what was the nexus between it and the disputed property. I say so because the Agreement does not make any reference to the suit property as it is now known nor does it give the acreage that each brother was supposed to take.

27. In his Written Statement dated 13th May 2014 as well as the Affidavit in support of his application for injunction dated the same day, the Plaintiff emphasizes that the property being sub-divided as per his agreement with his brothers was one undivided parcel of land measuring 30 acres.

28. At the trial herein however the Plaintiff changed tune and stated that the parcels of land being said to have been shared amongst the three brothers as per Pexh 3 was not one parcel of land but different parcels situated in different localities.

29. In my mind I found no reason why the Plaintiff and his brothers would sign an Agreement referring to one parcel of land to be sub-divided when the land itself comprised of different parcels not attached to each other and which would as it were require no sub-division.

30. From the material placed before me and contrary to the Plaintiff's assertions, it was apparent that the entire Mwachidzungu family at one point or the other resided in the parcel of land now known as Kilifi/Forodhani/4 before some differences arose between them. This can be discerned from the letters written by the Plaintiff to the Defendants in March 2014 shortly before this dispute came to Court.

31. In the first letter written by the Plaintiff in person dated 2nd March 2014 (Pexh 6) addressed to the 1st and 2nd Defendants herein, the Plaintiff addresses them as follows:-

“REF: KUZUIA UJENGAJI WA NYUMBA MPYA KATIKA PLOT YANGU NO. 4 FORODHANI ADJ SECTION RIBE LOCATION

Kutokana na mikutano miwili iliyo hudhuriwa na Chief wa Ribe Justice Mzungu na Sub-Chief Omar Lumwe na Lameck Chengo na Wazee na ndugu wa pande zote.

Mimi kama mwenye Plot hiyo nilioitaja hapo juu kwa fujo na matatizo ya kuhatarisha maisha kutoka kwenu kuniambia mimi ni mchawi nilimpa notice ya mwaka mmoja mwondoke katika shamba langu na hiyo notice ilimalizika mwaka huu mwezi wa tatu hamjaondoka mpaka leo.

Kwa hivyo kuendelea na ujengaji wa nyumba hiyo kwa lazima ni kuhatarisha maisha ya familia yangu na nyinyi kwa hivyo hiyo nyumba iwachishwe kujengwa mara moja.

Kama mwaona mzaha endeeleni kujenga na huo utovu wa adabu msinilaumu nikichukua hatua ya Kisheria kutoka hivi leo.”

32. In the second letter from the Plaintiff's Advocates on record dated 12th March 2014 (Pexh 7), Counsel addresses the four Defendants in the relevant part as follows:-

“That our Client who is the registered owner of the above mentioned parcel of land agreed with his two brothers namely, Shadrack Tsuma and Karisa Mwachidzungu that his two brothers to take some parcels of land in other areas and our client to remain on the above parcel of land. Facts and particulars whereof are well known within your knowledge.

Your father chose to take a parcel of land situate at Mitsajeni and that is where you carry out your farming activities but you have refused to relocate to the said parcel of land.

Our instructions are therefor to demand from you as we hereby do (that You) immediately relocate to your father's parcel of land

and allow our client to develop and/or use his parcel of land as he wishes which kindly but firmly note....”

33. Clearly from perusal of those two letters, the claim that the Defendants invaded and trespassed onto the suit property in mid- 2013 as asserted by the Plaintiff is an outright lie and without any basis. Indeed in a Letter dated 28th May 2014 by the said Area Chief Ribe Location in support of the Defendants, he confirms as follows in relation to the four Defendants:-

“This is to certify that the persons named above are brothers and son. I know them very well they come(s) from my locality, Ribe Location, Forodhani/Kinunguna Sub-Location, Village Ziwani.

The three brothers lost both parents and the son lost his father and all were buried at home. Since birth they have stayed at home with their(sic) parents until death of their parents and until date or update(sic) they stay at the same place their parents use to stay.”

34. During cross-examination herein the Plaintiff confirmed the assertion by the Defendants as alluded to in the Area Chief’s Letter that when his brother Karisa died, he was buried on the suit property. So was the Defendant’s mother Alice Duka Mwachidzungu. While the Plaintiff contended that the two were buried on the suit property with his permission, nothing was placed before me to demonstrate that his permission was required and/or that it was given before the bodies of the two were interred in the suit property.

35. In my mind, if the Defendants’ father had a home elsewhere, he could only be buried in his homestead and not that of his brother. Indeed it is telling that before his brother’s death in the year 2010, the Plaintiff with his title issued way back on 5th July 1990 had never made any attempt to evict the Defendants.

36. In the circumstances of this case I was not satisfied that the Plaintiff’s claim that the Defendants had recently trespassed into his parcel of land had any truth in it. While the title is certainly registered in the Plaintiff’s name, it was evident that the suit property was family property that had been used by all the members of the Mwachidzungu family over a long period of time.

37. The Plaintiff’s case is accordingly dismissed but given the relationship between the parties herein, I shall make no order as to costs.

Dated, signed and delivered at Malindi this 23rd day of January, 2020.

J.O. OLOLA

JUDGE