



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 139 OF 2017

JACKSON DZOMBO MWEMBE.....PLAINTIFF

VERSUS

KADZO MBITHA.....DEFENDANT

JUDGMENT

BACKGROUND

1. By this Plaint dated 20th June 2017 as filed herein on 29th June 2017, Jackson Dzombo Mwembe (the Plaintiff) prays for Judgment against Kadzo Mbitha (the Defendant) and for a permanent order of injunction to issue restraining the Defendant from trespassing upon, constructing structures or interfering with an unsurveyed residential Plot situated at Roka within Kilifi County.

2. Those prayers are premised on the Plaintiff's averment that he was allocated the said property by the County Council of Kilifi on 17th July 2012 and that the Defendant has taken advantage of his absence and trespassed onto the land, constructed a store thereon and chased away surveyors sent by the Plaintiff to carry out a survey.

3. But in her Statement of Defence dated 19th July 2017, the Defendant denies that the County Council of Kilifi allocated the Plot of land to the Plaintiff as alleged. It is her case that she is the owner of suit property contrary to the Plaintiff's claim and that she has been in actual peaceful and uninterrupted possession of the property for more than 30 years, has developed the same by establishing a permanent house thereon and that she stands to suffer irreparable loss and damage if the injunction orders sought herein are granted.

THE PLAINTIFF'S CASE

4. At the trial herein, the Plaintiff (PW1) testified as the sole witness in his case. He told the Court that he applied for and was allocated the Plot in question by the County Council of Kilifi vide a letter dated 15th July 1998. As per the requirements in the Letter of Allotment he paid the sum of Kshs 80,310/- and was duly issued with a Receipt by the Council.

5. The Plaintiff further told the Court that the Area Chief also wrote a letter confirming his ownership of the suit property. He had earlier on in 1980 built a mud-walled house on the land before it was later allocated to him. When he had built the house which later collapsed no one had opposed him.

6. The Plaintiff further testified that the Defendant who was his neighbour had now leased out the Plot to someone who is excavating stones therefrom. She has now built a permanent house on the land which she refers to as a store.

7. On cross-examination, the Plaintiff told the Court that he had lived on the land from 1980 to 1986. He was not residing on the land when he applied for it and was allocated the same. He further told the Court that he had misplaced the Original Letter of Allotment and that he had not carried the original receipts indicating payment of Kshs 80,310/- to Court. He further told the Court that while the Letter of Allotment was issued on 15th July 1998, the Receipts for payment were only issued later on 27th November 2013.

THE DEFENCE CASE

8. On her part the Defendant called two witnesses in support of her case.

9. DW1- Kadzo Mbitha is the Defendant herself. She testified that she was the lawful owner of the suit plot having been in actual, peaceful and uninterrupted possession thereof for more than 30 years. She further testified that she has developed the land by establishing her

permanent home thereon in which she rears livestock and plants various crops and fruits.

10. DW1 told the Court that she got the land from the Government and that the Plaintiff had never lived thereon or utilized the same.

11. On cross-examination, DW1 told the Court that the land measures five acres and that she had now leased the same. She told the Court she was given the land through a Letter authored by the Area Chief and that she did not know the Plaintiff.

12. DW2- Kaingu Kirao Shungu is a neighbour of the Defendant. He reiterated that the Defendant has lived on the land for more than 30 years while the Plaintiff lived in a place called Chibana. DW2 testified that he was present when the Defendant was given the land. He also helped her in demarcating it after the survey.

13. On cross-examination, DW2 told the Court that he had documents showing that he owned the land he lived in. The land previously belonged to his father. He further told the Court that his parcel of land was in a Settlement Scheme but the Defendant's parcel was outside the Scheme and probably had no title deed yet.

ANALYSIS AND DETERMINATION

14. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses who testified as well as the evidence produced before the Court. I have equally perused and considered the written submissions as well as the authorities placed before me by the Learned Advocates for both parties.

15. According to the Plaintiff, he is the lawful allottee of the unsurveyed and unregistered Parcel of land located in Roka within Kilifi County. The Defendant on the other hand contends that she has been on the same parcel of land for more than 30 years and that within that period of time she has carried out a number of developments including establishing her home thereon. It is also her case that she has leased out a portion of the land measuring about three acres to a third party for the purposes of stone excavation.

16. From the material placed before me, it was apparent that the land in contention was public land. That must be the reason both the Plaintiff and the Defendant trace their ownership thereof to letters authored by Ngerenya Area Chief one Lenox Baraka Yeri. According to the Plaintiff, the said Chief wrote a letter on 11th day of October 2011 confirming that he owned the parcel of land. The said Letter produced in evidence herein reads in the relevant part as follows:-

“RE JACKSON DZOMBO MWEMBE ID NO 4966843

Kufuatana na Uwezo wa Amri za Ma-Chief, Chiefs Act, Cap 128 Ya Sheria za Jamhuri ya Kenya nina thibitisha Bwana Jackson Dzombo Mwembe ID No. 4966843 anayo sehemu ya Ardhi Ekari Tatu kamili.

Ambayo ameishi hapo na familia ya Watu Saba (7) na wameishi hapo tokea mwaka 1980 had sasa.

Usaidizi wa kupata kibali ni muhimu kwa kuokoa family.

Anapo hitaji usaidizi aweze kusaidiwa.”

17. The Defendant while disputing the authenticity of the Plaintiff's letter produced a similar letter from the very same Chief dated 14th July 2016. The said Letter reads in the relevant portion as follows:-

RE KADZO MBITHA KUI ID NO 2167543

Kufuatana na Uwezo wa Amri za Ma-Chief, “Chiefs Act Cap 128 Sheria za Jamhuri ya Kenya, Mimi Chief Ngerenya ninathibitisha ya kwamba niliemutaja hapo juu anasehemu ya shamba (Ardhi) hapo sehemu ya Zowerani na anaishi pamoja na familia yake ya watu wasiopungua kumi na wawili(12).

Hayo maelezo ni shahihi kufuatana na ufahamu wangu.”

18. As it were the said Ngerenya Area Chief was not called to give evidence on the dispute. In reliance to the said Letter, the Defendant testified that she got her parcel of land from the Government that she had lived on the land for more than 30 years.

19. It was however clear to me that in issuing the Letters, the Area Chief did not purport to allocate the land but was merely confirming those he believes to be on the ground to aid them to acquire documentation for the land.

20. It is apparent that unlike the Defendant, the Plaintiff used the Chief's letter to apply for the allocation of the Plot from the now defunct County Council of Kilifi. In this regard the Plaintiff produced herein a Letter dated 22nd August 2012 from the Council addressed to himself and stating as follows:-

Re: Setting Apart of Land in Tezo Area

Your application to set apart approximate 3.0 acres of land in Tezo-Roka area was discussed and approved in a Town

Planning Committee Meeting held on 17th July 2012 at the County Hall. The decision was ratified in a Full Council Meeting held on 10th August 2012. Attached are extracts of the minutes confirming the same.”

21. The extracts of the Minutes referred to indicates the names of those who were present at the Council Meeting and states at Minute 16/2012 as follows:-

The Works Officer Mr. Kenneth Kazungu informed the members present that the Council had received an application from Mr. Jackson Dzombo Mwembe to set apart a parcel of land in Tezo- Roka to enable him acquire a title deed. He claims to have settled and lived on (the) land with his family of one wife and seven children for the last thirty two(32) years. This information was corroborated by the area Chief Mr. Lennox Baraka Yeri in a Letter introducing Mr. Dzombo to the Council.

The Area Councilor Mr. Gambo Mwambeni said he was aware that the family lived in the area and supported the application. After much deliberation it was:-

Proposed by: Councilor John A. Ongweya and seconded by Councilor Mangi Daniel.

That the application by Jackson Dzombo Mwembe to set apart a 3.0 acre parcel of land in Tezo-Roka be approved by the Council.

22. Arising from the foregoing, I was satisfied that the Plaintiff had followed the proper channel to acquire the parcel of land in dispute. While the Defendant claimed to have established a home on the land, it was evident that she lived elsewhere in a neighbouring portion of land.

23. From her own documents produced in Court, she had by an Agreement dated 15th June 2011 leased a portion of land measuring three acres to an entity known as Jiwestone Limited for purposes of “mining machine cut stones”. Other than the Chief’s Letter I have referred to, she had nothing else to show how she had acquired this three acres portion of land.

24. I was instead persuaded by the Plaintiff’s averments that he was previously a neighbour of the Defendant and that the Defendant took advantage of his absence when he had moved to perform pastoral duties in nearby Kwale to lay claim to the land.

25. In the premises I was satisfied that the Plaintiff had proved his case on a balance of probabilities. Judgment is accordingly entered for the Plaintiff as against the Defendant as prayed in the Plaint, with costs.

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

J.O. OLOLA

JUDGE