



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 202 OF 2014

MKUTANO HINZANO NGALA.....PLAINTIFF

VERSUS

SIMEON PATRICK HINZANO.....1ST DEFENDANT

KALUME HINZANO NGALA.....2ND DEFENDANT

JUDGMENT

BACKGROUND

1. By his Complaint dated 3rd November 2014 as amended on 27th November 2015, Mkutano Hinzano Ngala (the Plaintiff) prays for Judgment against the two Defendants for:-

- a. Vacant possession;**
- b. An order for the sub-division of the suit property;**
- c. An order for the registration of the Plaintiff as the proprietor of one half of the suit property;**
- d. Costs of the suit; and**
- e. Interest at Court rates.**

2. Those prayers arise from the Plaintiff's position that he is an elder brother to the Defendants and that both are Administrators of the estate of their father Hinzano Ngala alias Tony. The Plaintiff avers that his late father was the registered proprietor of all those parcels of land known as Kilifi/Takaye/Musoloni/608 measuring approximately 3.0 Ha and Kilifi/Takaye/Musoloni/294 measuring 1.2 Ha.

3. The said properties have since been transferred to the names of the Plaintiff and his brothers Kalume Hinzano Ngala and Simeon Patrick Hinzano (the defendant). It is the Plaintiff's case that after their father's death they verbally agreed with his brothers to transfer Plot No. 294 to Kalume while the Plaintiff and the Defendant were to share Plot No. 608 (the suit property herein).

4. The Plaintiff asserts that pursuant to the said agreement, he took possession of one half of the property and developed it by planting various crops and fruits while the Defendant remained with the other half. However, before they could engage a surveyor to sub-divide the land, the Defendant trespassed onto his portion built his house thereon, planted some casuarina trees, and has now taken exclusive control of the entire suit property.

5. In his Written Statement of Defence dated 22nd December 2014 and filed herein on 13th January 2015, Simeon Patrick Hinzano (the 1st Defendant) admits that the Plaintiff and himself are both the children of the late Hinzano Ngala. He however asserts that there is no Succession Cause relating to the estate of the deceased and that the same was distributed pursuant to a mutual understanding amongst the children of the deceased.

6. The 1st Defendant further avers that the mutual understanding included other properties and not just Plot No. 608 and accuses the Plaintiff of seeking to have the suit property shared to the exclusion of their other brother Kalume Hinzano Ngala (the 2nd Defendant).

7. The 2nd Defendant –Kalume Hinzano Ngala who applied to be enjoined in these proceedings as a Defendant is equally opposed to the Plaintiff's case. In a Statement of Defence dated and filed herein on 25th May 2016, he reiterates the 1st Defendant's position that the properties were sub-divided pursuant to a mutual agreement between them.

8. The 2nd Defendant in particular denies that he was given Plot No. 294. On the contrary, he states that both Plot No. 294 and 608 were to be equitably shared amongst the brothers and accuses the Plaintiff of being mischievous in trying to have his way with the suit property excluding the other joint owners thereof.

THE PLAINTIFF'S CASE

9. At the trial herein, the Plaintiff testified as the sole witness in his case. Testifying as PW1, the Plaintiff told the Court that both Defendants are his younger brothers. During the adjudication and settlement in the area, their family had two ancestral parcels of land being Kilifi/Takaye/Musoloni/294 and 608. Both parcels are presently registered jointly in the names of the Plaintiff and the Defendants.

10. PW1 told the Court that after the registration, the brothers verbally agreed that they transfer Parcel No. 294 to the 2nd Defendant while himself and the 1st Defendant would share Parcel No. 608. As a result of that agreement, he took possession of his half share of Parcel No. 608 and developed the same by planting mango and coconut trees as well as cultivating some crops while the 1st Defendant remained with the other half.

11. PW1 further testified that before they could engage a surveyor to sub-divide the land into two equal halves, the 1st Defendant trespassed into his portion, built a house thereon, planted Casuarina trees and started utilizing the entire suit property to the Plaintiff's exclusion. Efforts to resolve the dispute with family members and the Area Chief have not borne any fruits hence the institution of this suit.

THE DEFENCE CASE.

12. The Defendants called two witnesses in support of their case during the trial.

13. DW1-Simeon Patrick Hinzano is the 1st Defendant herein. He testified that their father Hinzano Ngala died leaving behind three parcels of land, namely Kilifi/Takayo/Musoloni 252, 294 and 608. DW1 told the Court that Parcel No. 252 was a small part of a huge parcel of land which the Plaintiff took over and caused to be registered in his name.

14. DW1 testified that Parcel No. 252 is registered in his name and that of the 2nd Defendant while the other two parcels of land are registered in the joint names of the three brothers. DW1 denied that they agreed that Parcel No. 294 be transferred to the 2nd Defendant. He told the Court that on the contrary, Parcel No. 294 was to be shared between the Plaintiff and the 2nd Defendant and that as a matter of fact, the Plaintiff's son James Shauri Mkutano has already constructed a permanent house on the Plaintiff's portion thereof.

15. DW1 further testified that on 23rd March 2013, they indeed signed an Agreement in which he agreed to remove himself from Parcel No. 294. He asserts that it was further agreed that Parcel No. 608 be left to him. However the Plaintiff refused to remove himself and or to sign the Agreement.

16. DW2-Kalume Hinzano Ngala is the 2nd Defendant herein. He testified that his father left them with three parcels of land including a huge parcel from which Parcel No. 252 was carved from. He told the Court that the Plaintiff registered himself as the owner of the rest of the land although they have been unable to trace the Parcel number thereof.

17. DW2 told the Court that the said Parcel No. 252 is currently registered in his name and that of the 1st Defendant while the other two parcels are registered in the joint names of the three brothers. DW1 denied that it was agreed that Parcel No. 294 be transferred to himself. On the contrary, it was agreed that the 1st Defendant would relinquish any claim to Parcel No. 294 which would then be shared by the Plaintiff and himself while Parcel No. 608 was to go to the 1st Defendant.

18. DW2 told the Court that the Plaintiff's son James has already built a permanent house on his father's portion of Parcel No. 294 but the Plaintiff has refused to relinquish his claim to Parcel No. 608.

Analysis and Determination

18. I have perused and considered the pleadings filed by the parties herein, the oral testimonies of the witnesses and the evidence adduced at the trial. I have equally perused and studied the submissions and authorities placed before me by the Learned Advocates for the parties.

20. Both the Plaintiff and the Defendants herein are the sons of one Hinzano Ngala (now deceased). According to the Plaintiff, their father left them with two parcels of land, namely Kilifi/Takaye/Musoloni/294, measuring approximately 1.2 Ha and Kilifi/Takaye/Musoloni/608 measuring approximately 3.0 Ha.

21. As at the time of their father's death, the said parcels of land were unregistered. The Plaintiff and his two brothers subsequently caused the Parcels of land to be registered in their names as tenants in common. The Plaintiff produced copies of the two Title Deeds in evidence (Pexh 1 and 2).

22. It is the Plaintiff's case that the Defendants and himself subsequently agreed verbally that the Plaintiff and the 1st Defendant do transfer

their interest in Kilifi/Takaye/Musoloni/294 to the 2nd Defendant while Kilifi/Takaye/Musoloni/608 would be shared equally between the Plaintiff and the 1st Defendant. Pursuant to that Agreement, the Plaintiff took possession of one half of the parcel of No. 608 and started developing the same.

23. The Plaintiff told the Court however that before they could engage a Surveyor, the 1st Defendant proceeded to the Plaintiff's half Portion, built his house thereon and took exclusive possession of the entire Parcel No. 608.

24. The two Defendants do not deny that they had an agreement with their Plaintiff brother over the distribution of their ancestral land. It is however their position that the Plaintiff concealed material facts and presented a distorted version of their agreement to Court.

25. Contrary to the Plaintiff's assertion that their father left the two parcels of land, it was their case that there was a third piece of land which the Plaintiff proceeded to register in his name before curving out a piece therefrom which he then registered as Kilifi/Takayo/Musoloni/252 in the name of the Defendants.

26. The Defendants told the Court that this third parcel and some other land being Parcels Nos. 249, 604 and 643 left by their uncle Kazungu Ngala were part of the agreement they had with their elder brother, the Plaintiff. It was their case that as the Plaintiff had taken the land originally occupied by their uncle as well as the larger unidentified parcel of land from which Parcel No. 252 had been curved, the Plaintiff was to relinquish his claim to Parcel No. 608 to the 1st Defendant while Parcel No. 294 would be shared equally between the two Defendants. In addition, the Plaintiff and the 2nd Defendant were to share Parcel No. 252 equally.

27. In this respect, the Defendant told the Court that the Plaintiff's son one James Shauri Mkutano had already constructed a permanent house on the Plaintiff's portion of Parcel No. 252 but the Plaintiff had refused to give up his claim to Parcel No. 608 in favour of the 1st Defendant as agreed.

28. As it were the agreements between the parties herein were verbal. The written agreements produced by the Defendants herein do not amount to much as they were singularly executed by the Defendants after the Plaintiff refused to do so. In terms of the verbal agreements, the Plaintiff has his own version of what was agreed while his sibling Defendants had their own.

29. I have looked at the Title Deeds for the three parcels of land that the Defendants assert were left for them by their father Hinzano Ngala. A perusal thereof reveals that Parcel No. 294 has an approximate measurement of 2.964 acres, almost same size as parcel No. 252 which has 2.96 acres. On the other hand, Parcel No. 608 contains by measurements 7.41 acres.

30. According to the Defendants, the Plaintiff was only entitled to half of Parcel No. 252 which they were to share with the 2nd Defendant and nothing else. He was accordingly required to give up his claim to Parcel No. 608. The reason for giving the Plaintiff only about 1.5 acres of the about 12 acres comprised in the three parcels of land was because as the Defendants put it, the Plaintiff had other bigger parcels of land including those he took from their uncle Kazungu Ngala which he had refused to share with the Defendants.

31. During his cross-examination herein, the Plaintiff was asked why he declined to execute the agreement with his brothers before the Area Chief. His response was that he refused to sign because they were dealing with other (unrelated) parcels of land. In this context, it may as well be possible that the Plaintiff took advantage of his younger brothers and registered other parcels of land in his name.

32. That allegation was however not supported by any evidence. The Defendants did not produce any Official Certificate of Search to prove the fact that there were any other parcels of land left by their father and/or that Parcel Nos. 249, 604 and 643 previously belonged to their uncle Kazungu Ngala and/or that they are presently registered in the name of the Plaintiff. None of the brothers indeed called any evidence from their relatives or village elders to support their various positions.

33. In a tenancy in common such as the one herein, the two or more shareholders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants and there was therefore no basis for either the Plaintiff or the 1st Defendant to claim and unilaterally occupy any Portion of Parcel No. 608 in the absence of an agreement by the parties.

34. In this respect Section 91 (5) and (6) of the Land Registration Act, 2012 provides that:-

“(5). If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.

(6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.”

35. From the material placed before me, it is apparent that all the parties herein are in agreement that the parcels of land left by their father should be sub-divided so that each is registered in his own portion of land. The only disagreement appears to be the shares each should have. As it were, no evidence was adduced before me to suggest that the Defendants were upon registration of the tenancy to own more shares than the Plaintiff in the three parcels of land.

36. In the absence of any clear agreements on the manner in which the parcels of land were to be shared out by the Co-owners, I am in agreement with the Plaintiff's submissions that there can only be a presumption that the properties were to be shared in equal undivided shares.

37. The proposal by the Defendants that the 1st Defendant should have Parcel No. 608 measuring 7.41 acres to himself while the Plaintiff takes a portion less than 1.5 acres in Parcel No. 294 Kilifi/Takaye/Musoloni will result to an unequal share of the properties jointly co-owned by the parties herein.

38. In the premises, and taking into consideration the relationship of the parties herein, I hereby enter Judgment as follows:-

a. The Kilifi County Land Registrar and Surveyor are hereby directed to ensure that LR Nos. Kilifi/Takaye/Musoloni/294 and 608 are partitioned equally among the three registered proprietors.

b. Upon such partitioning, each of the three registered proprietors be registered with his own portion of land.

c. The three registered proprietors do share equally the costs of partitioning the said properties into three equal portions.

d. Each of the three registered proprietors do meet the costs to transfer their portions into their respective names.

e. In order to foster unity between the three parties who are brothers, each party shall bear their own costs in this suit.

39. It is so ordered.

Dated, signed and delivered at Malindi this 29th day of April, 2020.

J.O. OLOLA

JUDGE