



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 153 OF 2012

SUSAN MUMBI KIMANI.....PLAINTIFF

VERSUS

FESTUS KAHINDI MSANZU.....DEFENDANT

RULING

1. By this Notice of Motion application dated 6th April 2018, Susan Mumbi Kimani (the Plaintiff) prays for orders:-

2. That the court be pleased to adopt the Decree in Mombasa Miscellaneous Application No. 560 of 2004 (OS); Omar Salim Chengo –vs- Registrar of Titles Mombasa & 5 Others dated 6th December 2012 as Judgment in this case;

3. That the Plaintiff be adjudged the rightful owner of subdivision No. 6174 registered on CR No. 57077 (being) a subdivision of the Original Plot(Nos) 324 and 334 by virtue of the fact that she is in the physical possession (thereof) as (stated) in Clause 3 and 4 of the Decree dated 6th December 2012; and

4. Costs of this application.

2. The application which is supported by an affidavit sworn by the Plaintiff on the said 6th day of April 2018 is premised on the grounds that:-

i) The issues raised in this case were fully determined by a Court of competent jurisdiction in the said Miscellaneous application No. 560 of 2004;

ii) A decree issued by the said Court is currently being executed through a process of fresh adjudication and re-survey of Plot Nos 324 and 334 which are the mother titles to the subdivision which is the subject matter herein;

iii) The Plaintiff was not aware of the said Mombasa Miscellaneous Application No. 560 of 2004 (OS) at the time of filing this suit.

3. The Defendant- Festus Kahindi Msanzu is however opposed to the application. In a Replying Affidavit sworn and filed herein on 27th June 2018, he avers that he is the legal owner of Plot No. CR 57070 the same having been donated to him by one Philemon Mwasaka. He further avers that the subject matter of this dispute is totally different from the subject matter and the issues raised herein.

4. The Defendant asserts that the decree in the Mombasa case refers to land Parcel Nos. 324 and 334 whereas the subject suit herein is CR 57070 and was formally known as Plot No. 277. The Defendant further asserts that the Plaintiff was never allocated the subject land and that she has been illegally occupying the Defendant's land registered as CR No. 57070 and not the one she claims to be CR No. 57077.

5. I have perused and considered the application and the response thereto. I have equally perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

6. In her Complaint filed herein on 14th September 2012 the Plaintiff prays for a declaration that she is the legal owner of subdivision No. 348 measuring approximately 50ft by 80ft and hived from LR No. MN/III/2875-79 (Original No. 515) Mtwapa. She further seeks a permanent order of injunction restraining the Defendant from alienating, disposing or in any other way interfering with her peaceful and quiet enjoyment of the suit property.

7. In his amended Statement of Defence and Counterclaim dated 5th September 2013, the Defendant accuses the Plaintiff/Applicant of wrongfully entering upon and occupying Sub-division No. 6174 registered as CR No. 57070 without any justification.

8. In her application before me, the Plaintiff has attached a Copy of a Decree apparently emanating from *Mombasa Miscellaneous Application No. 560 of 2004(O.S)* wherein it would appear it was decreed on 30th March 2012 as follows:-

1. That the parcels of land known as Plot No. 324 and Plot No. 334 are Government land by virtue either of surrender to the Government or by operation of the law under Article 62 of the Constitution.

2. That the alleged purported transfer of the suit parcels of land by the 2nd Respondent is invalid.

3. That if the Applicant and or the family he alleges to represent have been on the suit premises since 1963, their long occupation will be considered by the adjudicating authority whenever it is sought to grant individual titles to the land upon survey.

4. That in the meantime the parcels of land known as Plot No. 324 and Plot No. 334 will be held by the Government upon trust for the Applicant and other residents in possession of the land in accordance with Article 62 of the Constitution.

5. That the Originating Summons dated 2nd July 2004 is hereby dismissed.

6. That there are no order as to costs.

9. From a plain reading thereof, the said decree arises from an application filed by one Omar Salim Chengo against the Registrar of Titles and five (5) other people named therein as Percy Dalrymple Townsend, Robert Lunan, Gwendolen Agnes Brandy, George Taylor and Joseph Lewart Tow.

10. Both the Plaintiff and the Defendant herein or even the said Philemon Mwaisaka from whom both claim to derive title were not parties to the suit. The pleadings filed in that suit and the Judgment leading to the said decree have not been attached and this Court is totally unable to discern any connection between the alleged determined suit and the dispute before this Court. Indeed the decree as extracted does not even reveal the name of the Judicial Officer who made the determination resulting into the decree or the Deputy Registrar who executed it.

11. In the premises, I was unable to find any connection between the attached decree and the dispute before this Court.

12. Accordingly, I did not find any merit in the application dated 6th April 2018. The same is dismissed with costs to the Defendant.

Dated, signed and delivered at Malindi this 13th day of May, 2020.

J.O. OLOLA

JUDGE