



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBSA

ELC NO. 153 OF 2015

MAKUTANO MAKUMBA SELF HELP GROUP.....PLAINTIFF

VERSUS

ABDUL WAHAB MAJID.....DEFENDANT

JUDGMENT

(Suit by a self-help group seeking orders that members be declared owners of the suit land and be issued with title; case incompetent for a self-help group has no capacity to sue in its own name; the members who are said to have a dispute not disclosed; the land being claimed not described in the plaint; evidence showing that what the plaintiff may be claiming is land under a wakf and that at most some persons were issued with licences and permission to erect houses under a house without land arrangement; no right to title in such an instance; plaintiff's suit dismissed with costs)

1. This suit was commenced through a plaint which was filed on 10 July 2015. The plaintiff is described in the plaint as “an organization which has 200 members who own different plots in Mshomoroni area within Mombasa County of which they pay ground rents annually.” It is averred that on diverse dates, the “plaintiffs”(sic) entered into an agreement with the defendant to lease various plots of land and that the defendant promised to give them title deeds for the plots after a period of time. It is pleaded that the “plaintiffs” (sic) have been paying ground rates for the same annually besides making some payment to the defendant as down payment for the plots. It is pleaded that the “plaintiffs” (sic) have put up businesses, schools, a church and even hospitals on the said premises with the defendant’s knowledge, and that the defendant has now refused to give the “plaintiffs” (sic) title deeds. In the suit, the plaintiff has sought the following orders :-

- (a) A declaration that the plaintiff and all its members have property interests in the parcel of land belonging to the defendant.*
- (b) An order directing and compelling the defendant to process and cause to be issued title deeds to the “plaintiffs” (sic).*
- (c) An injunction restraining the defendant by himself, his authorized agents and anybody acting on his behalf from interfering with the plaintiffs (sic) quiet possession of the land.*
- (d) Costs and interest.*

2. The defendant filed a statement of defence vide which he denied the claims in the plaint. He denied any knowledge of the existence of the plaintiff. He denied promising the “plaintiffs”(sic) any titles. He denied any knowledge of payment of ground rents or that there are some who have put up businesses, churches , or schools. In other words all claims in the plaint were refuted and the plaintiff put to strict proof.

3. PW-1 was one John Odhiambo Muga. He testified that he is a member of Makutano Makumba Self Help Group and that he is the Chairman. He stated that the Group is registered and produced a Certificate of Registration. He said that they (assuming members of the group) came together and bought land from the defendant. He stated that each person bought separately and go ahead was given to develop. He averred that the defendant refused to subdivide the land claiming that it is a Wakf. He stated that when they purchased the land they were never shown the title and all that they got were tenancy agreements.

4. Cross-examined, he testified that the defendant was never notified of the formation of the Group which was registered in the year 2013. He mentioned that he knew of a Plot No.220 but he has never seen the title. He did not understand much about a Wakf property. He said that their membership is about 200 but 57 are in court.

5. PW- 2 was Henry Tingi who said that he is also a member of Makutano Makumba Self Help Group. He stated that he was caretaker of the Plot No. 220. He stated that in the year 2007 , he purchased a plot from Mzee Makutano. To date the portion has not been registered in his name.

6. PW-3 was Khadija Hassan Mzungu. He stated that he bought a plot from someone who had bought it. He was taken by the caretaker to the defendant and he paid KShs. 170,000/= to the original buyer and KShs. 30,000/= as transfer fees. He was then told that he could pay KShs. 200/= per month. No title deed has been issued to him.

7. With the above evidence, the plaintiff closed its case.

8. The defendant testified that he only came to know of the existence of the plaintiff after this suit was filed. He stated that the property in issue is not his property but that the same is the property of a Wakf created by his late father. He produced the instrument of the Wakf showing two properties, Plots No. 187/Section III/MN and 220/II/MN, the one in dispute thought to be the Plot No. 220. The Wakf was created in the year 1942. He stated that the land was vacant until the year 2000 when the family decided to rent it out. One would pay an amount as goodwill or premium and thereafter some monthly payments. One could build a house and there was no term. He (defendant) could go back and reclaim the land so long as he compensated for the house. He stated that there are many people on the land some of whom he recognises as tenants, but not purchasers of land. He stated that if one wishes to sell his house, he will come with the buyer, so that he can now recognise him as the new tenant. He stated that some tenants wished to buy the land but he told them that this was not possible as the land is Wakf property. His role is to administer the Wakf property. He stated under cross-examination that if there is no one to benefit from the property, it is to revert to Al Madhri Mosque, as noted in the Wakf instrument. He had no problem with those who had built houses with his permission. Some agreements were put to him and he denied ever signing them.

9. With the above evidence, the defendant closed his case.

10. I invited counsel to make written submissions. I have taken note of the written submissions of both counsel for the plaintiff and counsel for the defendant and I hold the following view.

11. At the outset, I must say that I have a serious problem with the suit. First, the plaintiff is noted to be "Makutano Makumba Self Help Group." It is trite that this is not an entity that has capacity to sue or to be sued. Whether a Self Help Group can sue in its own name was considered in the case of *Senti Kumu Community Self Help Group vs Kenya Maritime Authority & Another, Mombasa ELC Petition No.2 of 2019*. In that suit, a petition was filed in the name of a Self Help Group. A preliminary objection was raised that the suit is incompetent for having been filed by an unincorporated entity. The preliminary objection was upheld, the court (Yano J), affirming that an unincorporated body cannot sue in its own name. It is critical that a suit by an unincorporated group be filed by a person or persons with capacity to sue or to be sued. That is not the case here and it follows that the case, as filed, is fatally defective, and must be dismissed.

12. Secondly, and apart from the above, the plaint does not describe what land is being claimed. There is evidence that the land in issue may be Plot No. 220 (which is presumably Plot No. MN/II/220), but without there being a specific pleading identifying the land that is claimed, all the rest will be speculative. If one wishes to file a suit to claim certain land, that land needs to be properly described in the plaint, and there must not be any ambiguity on the land that is the subject matter of the case. That is not the position in this instance, and for that reason, this suit must also fail for failure to properly describe the subject matter in dispute.

13. Thirdly, even assuming that the suit as filed is acceptable, it is not known who exactly within the Self Help Group is suing and has an issue or dispute, and who has no interest in the case. One would expect that there be a list of the persons suing, within the body of the plaint, and what exactly they are asking for. In the evidence of PW-1 it was said that it is 57 people who are suing out of a membership of 200. The names and identities of these 57 persons were never disclosed. I have seen some various witness statements filed by a number of persons, but this does not cure the defect. In every suit, it must be clear who the claimant/s is/are so that the remedies devolve specifically to such persons. This is not the case here. Even if I am to give judgment in favour of the plaintiff, who are the persons that are supposed to benefit from the judgment ?

14. Fourthly, assuming that I have a good suit before me, the defendant has refuted signing any sale agreement with the members of the plaintiff, and given that denial, the plaintiff needed to prove that any purported sale agreements were executed by the defendant, following the provisions of Section 70 of the Evidence Act, Cap 80, Laws of Kenya, which provides as follows :-

S. 70 Proof of allegation that person signed or wrote a document

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

I have no evidence in this suit, which tends to prove that the documents claimed to have been signed by the defendant, were actually signed by him. The defendant has of course denied signing various agreements with persons claiming to be members of the plaintiff, and that being the case, there needed to be proof that the defendant actually signed the documents. There is none in this case. It follows that the plaintiff has not proved that the defendant signed any agreement with any of its members and the defendant cannot therefore be bound by any of the agreements that the plaintiff wishes to rely upon.

15. Even if I am to go to the merits of the case, what I can see is that the defendant, issued some licences or tenancies to some individuals, under the arrangement of "owning a house without land" which is unique in the coastal region, but to my knowledge, is not given specific recognition in our land statutes. In such arrangements, one never gets title, but can build a house on the land, under what I would consider to be some sort of lease or licence. Assuming that this is a suit filed by some members of the plaintiff Group, it is superfluous for the members of the plaintiff to now seek title deeds under the "house without land" arrangement.

16. For the above reasons, I see no merit in this suit. It is hereby dismissed with costs. One may ask, who is going to pay the costs, now that the plaintiff is not a legal entity ? The costs will be paid by the person who swore the verifying affidavit that accompanied the plaint, for I will assume that it is him who instigated the filing of the suit.

17. Judgment accordingly.

DATED AND DELIVERED THIS 25TH DAY OF JUNE 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.