



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 57 OF 2016

MBURA WASHE LEWA.....PLAINTIFF

VERSUS

MUKAMBE KITI.....1ST DEFENDANT

BONIFACE DECHE KAI.....2ND DEFENDANT

JUDGMENT

1. By this Plaint dated and filed herein on 14th March 2016, Mbura Washe Lewa (the Plaintiff) prays for Judgment against the two (2) Defendants for:-

i. A declaration that he is entitled to exclusive and unimpeded right of possession and occupation of Plot No. Kilifi/Kijipwa/161 (the suit Property);

ii. The Honourable Court to issue (an order for) the exhumation of the interred remains belonging to the Defendants and the OCS Kijipwa Police Station to provide security and enforcement of the said Orders; and

iii. General damages for trespass and costs of this suit.

2. Those prayers arise from the Plaintiff's contention that he is the registered proprietor of the suit property while the Defendants are in possession of an adjacent parcel of land. The Plaintiff avers that in or around November 2015, one Sebastian Kai Mwanguzi passed on and that by use of force, the Defendants trespassed into and interred his remains on the suit property.

3. The Plaintiff asserts that the deceased was not his kinsman and the interment was against his cultural and customary practices and has unjustifiably impeded his right of possession, use and quiet enjoyment of the suit property.

4. Both Mukambe Kiti and Bonface Deche Kai sued herein as the 1st and 2nd Defendant filed a Memorandum of Appearance on 21st April 2016 through Messrs Madzayo Mrima & Jadi Advocates. They further filed a List of Witnesses and Documents but I was unable to find any Statement of Defence filed on their part.

5. In support of his case, the Plaintiff called two witnesses at the trial. The Defendants neither testified nor called any oral testimony having been absent on the date fixed for the hearing of their case.

6. PW1-Mbura Washe Lewa is the Plaintiff. He told the Court that he has lived on the land since time immemorial and that it was subsequently allocated to himself in 1989. PW1 testified that sometime in November 2015, his neighbour Sebastian Kai Mwanguzi passed on. The two Defendants who are PW1's neighbours then decided to bury him on PW1's parcel of land.

7. PW1 told the Court that he protested against the burial and reported the matter to Kijipwa Police Station. He also sought an order of injunction but by then the Defendants who are the mother and son of the deceased had proceeded with the burial. He further told the Court that at the time of the burial preparations the Defendants were fully aware that the suit property belonged to him but decided to ignore the fact.

8. PW1 told the Court that it was against his customary and cultural practices to have someone who is not his kin interred in his parcel of land. He further told the Court that due to the burial he had suffered loss and damage as the same had unduly restricted his use and development of the property.

9. In cross-examination, PW1 admitted that the deceased was a younger brother to his father and that they were previously staying somewhere near the Chief's place. While he had planted some trees on the land, the Defendants had proceeded to build a house on the land after the Plaintiff got his title therefor. He further told the Court that the deceased and the Defendants had buried other relatives on the land but without his consent.

10. PW2- Michael Washe Mbura is the eldest son of the Plaintiff. He told the Court he was born in 1983 on the suit property where they have lived ever since. He helped his father settle the loan and acquisition of the suit property.

11. PW2 testified that there was a subsequent sub-division which had slightly interfered with the boundaries of the suit property. He further told the Court that the Defendants forcefully buried Sebastian on the suit property despite their protests. His father had gotten the land after an adjudication process after which he was registered as the proprietor thereof.

12. On cross-examination PW2 admitted that he knew the Defendants and that they belonged to the same clan. He however told the Court that the late Sebastian and the Defendants had previously been on a separate parcel of land. After some sub-division, the boundaries of PW2's family land was adjusted a bit to a portion which was occupied by Sebastian's family.

13. I have perused and considered the pleadings and the oral testimonies of the Plaintiff's witnesses herein. I have equally perused the evidence adduced at the trial and the submissions of the Learned Advocates for the Plaintiffs. I did not find any submissions on the part of the Defendants.

14. The Plaintiff herein prays for a declaration that he is entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land known as Plot No. Kilifi/Kijipwa/161 (the suit property). He further urges this Court to order the exhumation of a body buried thereon by the Defendants and that those orders be enforced by the OCS Kijipwa Police Station. The Plaintiff also prays for general damages for trespass.

15. In support of his case, the Plaintiff supported by his eldest son (PW2) testified that he is the registered proprietor of the suit property the same having been allocated to himself by way of adjudication. He was thereafter issued with a title deed thereof on 17th August 2015.

16. It was the Plaintiff's case that in violation of his rights as the sole proprietor of the suit property, the Defendants had in November 2015 interred the remains of one Sebastian Kai Mwanguzi (Sebastian) on the suit property without his consent. He therefore urged this Court to order the exhumation of the body of the said Sebastian and to declare that the suit property exclusively belongs to himself.

17. Despite filing a Witness Statement and some documents herein, the Defendants neither filed a Statement of Defence nor called any evidence at the trial.

18. From the material placed before me, it was apparent that the Plaintiff and the Defendants are relatives residing on adjacent portions of land within Kijipwa Settlement Scheme. Indeed in his cross examination before this Court, the Plaintiff conceded that the late Sebastian whose burial precipitated the dispute herein, was indeed a younger brother to his (the Plaintiff's) father.

19. The evidence placed before me further shows that the suit property was allocated to the Plaintiff way back in 1988 by the Settlement Fund Trustees (SFT) and that he paid the loan due to the SFT and obtained a Discharge of the Charge on 12th January 2010. The suit property was subsequently transferred to the Plaintiff's name following the discharge on 22nd November 2011. On 17th August 2015, he was issued with a title deed for the parcel of land measuring 1.052 Ha.

20. It would appear that for some reason, the late Sebastian and the Defendants herein were not happy with the allotment of the suit property to the Plaintiff. The Defendants did not however testify before me and there was no evidence that they had despite their grievance ever succeeded to impeach the Plaintiff's title.

21. As was stated in *Esther Ndegi Njiru & Another –vs- Leonard Gatei (2014) eKLR:-*

“.....the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

From the material placed before me, it was not disputed that the suit property was previously Government land and that the same was allocated to the Plaintiff by the Settlement Fund Trustees. In accordance with the Charge imposed by the SFT, the Plaintiff paid the loan granted thereunder and had the title discharged and transferred to his name on 22nd November 2011. He was subsequently issued with a title deed therefore some three months before the Defendants buried the late Sebastian thereon without his consent and or permission.

23. The effect of the Plaintiff's registration as the proprietor of the land is provided for at Section 24(a) of the Land Registration Act as follows:-

“Subject to this Act-

a. The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...”

b.'

24. Arising from the foregoing and given the undisputed evidence that the Defendants interred the remains of the late Sebastian Kai Mwanguzi on the suit property without the Plaintiff's consent, it is my considered view that the Defendants had no justification whatsoever to do so and their actions were wrongful and amounted to trespass upon the Plaintiff's property.

25. In the premises I am satisfied that the Plaintiff has proved his case on a balance of probabilities. Judgment is accordingly entered for the Plaintiff as against the Defendants jointly and severally as follows:-

i. A declaration is hereby made that the Plaintiff is entitled to the exclusive and unimpeded right of possession and occupation of all that parcel of land known as Kilifi/Kijipwa/161

ii. The Defendants jointly and severally shall exhume the remains of Sebastian Kai Mwanguzi from the said Plot No. Kilifi/Kijipwa/161 within 30 days from today and in default, the Officer Commanding Station, Kijipwa Police Station is hereby directed and authorized to exhume the remains of the said Sebastian Kai Mwanguzi from Plot No. Kilifi/Kijipwa/161 and to have the same interred in any public cemetery at the cost of the Defendants.

iii. The Plaintiff shall have the costs of this suit.

Dated, signed and delivered at Malindi this 25th day of June, 2020.

J.O. OLOLA

JUDGE