



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 40 OF 2017

KATANA KAINGU KATANA.....PLAINTIFF

=VERSUS=

1. GONA SAMSON KALAMA a.k.a

SAMSON GONA KALAMA

2. DAMA KARISA KATANA

3. DANIEL NYIRO.....DEFENDANTS

JUDGMENT

Background

1. By a Complaint dated and filed herein on 24th February 2017, Michael Kaingu Katana (the Plaintiff) prays for Judgment against the three Defendants jointly and severally for:

1. A permanent injunction restraining the Defendants, (their) servants and family members from trespassing, encroaching and further remaining on (his) plot, eviction and vacant possession of the suit premises and demolition of any structures on the Plot (as well as) an order compelling the Defendants to receive compensation as per the terms of the Compensation Agreements.

2. Costs of the suit and interest.

2. Those prayers arise from the Plaintiff's contention that at all times material, he was the beneficial owner of all that piece of land measuring 16 acres situated at Garashi within Magarini Sub-County. He asserts that the 1st, 2nd and 3rd Defendants allegedly bought separately portions of the said property from one Karisa Taura who had no permission to sell the same.

3. The Plaintiff further avers that when his family came to be aware of the said sale, a meeting was convened between them and the Defendants whereupon it was agreed that the Defendants be refunded the money they had spent including the values of the houses they had built on the land. Despite executing an agreement to that effect, the Defendants have refused to accept the refund and or to vacate the land hence this suit.

4. But in his Statement of Defence dated and filed herein on 15th May 2017, Gona Kalama (the 1st Defendant) denies that there was any such arrangements between the parties. On the contrary, he asserts that the matter was handled through the Land Adjudication process which process remains on-going.

5. The 1st Defendant further asserts that his piece of land measuring 2 $\frac{3}{4}$ acres was lawfully sold to him by the late Karisa Taura whose family has never objected to the sale. It is further his case that in recognition of the sale, the Land Adjudication Committee duly proceeded to allocate him the parcel of land being Plot No. 247 and they were still waiting for their title deed when the Plaintiff started this dispute. He however avers that he can accept a refund on compound interest.

6. In a similar Statement of Defence also filed on 15th May 2017, Dama Karisa Katana (the 2nd Defendant) equally denies having entered into any arrangement with the Plaintiff. Instead she asserts that she bought three acres of land from the late Karisa Taura which parcel of land was later allocated to her as Plot No. 248 through the Land Adjudication Process. The 2nd Defendant asserts that she was still waiting to be issued with a title deed for the said Plot No. 248 when the Plaintiff started this dispute.

7. In the alternative, the 2nd Defendant avers that she can accept a refund of the purchase price and other monies spent but on compound interest. She denies that the Plaintiff has done any valuation of her said property and urges the Court to decline the orders sought.

8. Daniel Nyiro (the 3rd Defendant) equally denies that he had any arrangements made with the Plaintiff. In a Statement of Defence similarly dated and filed on 15th May 2017, he avers that he bought a three-acre parcel of land from the late Karisa Taura whose family has raised no objection to the sale to-date. The 3rd Defendant further asserts that having lived on the land for many years, the same was allocated to himself as Plot No. 124 through the Land Adjudication Process. He was waiting for his title deed when the dispute herein arose.

9. In the alternative, the 3rd Defendant equally avers that he is ready to accept a refund of the monies spent on the suit property but only on condition that the same is paid to him on compound interest from 1999 to-date. The 3rd Defendant denies that the Plaintiff has carried out a valuation of the suit property as alleged or at all and urges the Court to dismiss the Plaintiff's claim.

The Plaintiff's Case

10. At the trial herein the Plaintiff called two witnesses in support of his case.

11. PW1- Michael Kaingu Katana is the Plaintiff himself. He told the Court that he is a resident of Watamu and a retired Senior Chief. He testified that the land in dispute belongs to his family. It has been surveyed but remains unregistered. The three Defendants purported to buy the land from one Karisa Taura who had no basis to sell the same.

12. PW1 told the Court they went to the Land Adjudication Committee who determined that the land belonged to himself. They then went to the Chief's and Lands Office where they agreed that the said Karisa Taura refunds to the Defendants the sum of Kshs 26,500/-. Two of those who had bought, namely, Crispin Katana and Francis Mwalogo Hamisi accepted the refund and agreed to leave. The Defendants herein have however refused to take the money and/or to vacate the suit property.

13. On cross-examination, PW1 admitted that the said Karisa Taura was his uncle, being a younger brother to his father. He told the Court he was not there when Karisa purported to sell the land. PW1 told the Court he had summoned the Defendants to the Chief's office to let them know that the land belonged to his family. He admitted he had offered to give them money to facilitate them to leave the land. He told the Court he was offering the payment on a humanitarian basis.

14. PW2- George Tune Ndaa is a cousin of the Plaintiff and a son of the late Karisa Taura. He told the Court that he is a Security Enforcement Officer with the County Government of Kilifi and that he presently resides in Mjanaheri. PW2 testified that following the death of his own father and his father's brother Katana Taura who was the Plaintiff's father, the Plaintiff took over the leadership of the family.

15. PW2 testified that the land in dispute belonged to their family and that for many years the Plaintiff had been administering the same. The land was never sub-divided and the Plaintiff's family and their own lived together as one family. PW2 told the Court that the Defendants never consulted him when they bought the land and he was unaware that his father had sold the same.

16. On cross-examination, PW2 conceded that on 20th June 2013, he had taken the 1st Defendant to see his father who was then unwell. He told the Court he did not know what the two discussed. He also told the Court he did not know where the 1st Defendant took his father on any other days they had been together and asserted he was unaware the 1st Defendant was buying land from his father.

17. PW2 further conceded that he went to the Land Adjudication Office with his father but told the Court that was because the clan came to know about the land dispute. He told the Court that when he learnt of the alleged sale, his father was still alive and testified that the 1st Defendant was to be refunded his money.

The Defence Case

18. The three Defendants jointly called a total of five witnesses in support of their respective cases.

19. DW1- Gona Samson Kalama is the 1st Defendant herein and a resident of Mutsungutsunguni village, Garashi Location in Magarini. He testified that on 9th August 2004, he approached one Karisa Taura Ndaa who agreed and sold to him 2 ¼ acres of his land at a consideration of Kshs 16,500/-.

20. DW1 testified that before they entered into the Sale Agreement the said Karisa informed him that the land was part of his share of land as given to him by his father Taura Ndaa Kiringi. Karisa further told him that he was the only son of the said Taura Ndaa who had in turn inherited the land from his father only known as Ndaa.

21. DW1 further told the Court that the Plaintiff herein lodged a complaint with the Local Land Adjudication Committee at Garashi Chief's Office. Not being satisfied with the Committee's decision, DW1 filed an appeal to the Land Arbitration Board but the same again went against him. The Board advised them to go and negotiate but the Plaintiff declined does not want to refund him his money.

22. On cross-examination DW1 conceded that they had initially agreed they would leave if refunded their money. The Plaintiff however changed his mind and refused to pay as agreed. He further conceded that the discussions at the Chief's Office went in favour of the Plaintiff and that the Land Adjudication Office equally gave the land to the Plaintiff. It was however his case that there was no justice rendered by the two offices.

23. DW2- Dama Karisa Katana is the 2nd Defendant and also a resident of Garashi in Magarini. She told the Court that she is the registered owner of Plot No. 248-Masindeni Adjudication area having bought the three acres comprised therein from Karisa Taura Ndaa in 2005 at a consideration of Kshs 26,500/-. DW2 testified that since then, she has lived on the land with her seven children and was the first to be registered on the land during the Land Adjudication Process.

24. DW2 told the Court that the Plaintiff had lodged several complaints about the land with the Land Adjudication Committee. Both the Committee and the Arbitration Board unfairly determined that the land belongs to the Plaintiff but before the outcome, they were told to go negotiate with the Plaintiff. The Plaintiff does not however want to honour their agreement for a refund of the money.

25. On cross- examination, DW2 told the Court they bought the land from Karisa and it is only later on after Karisa's death that they were told the land did not belong to Karisa. When she was called to the Chief, she was only told to place her finger prints on the documents so that she could be paid and leave. The same thing happened at the Lands Office.

26. DW3- Daniel Nyiro is the 3rd Defendant and a resident of Masindeni in Garashi Location, Magarini. DW3 told the Court that sometimes in 1980, his grandmother one Mbuhe Murabu was given a piece of land by her cousin Ndaa Kiringi to cultivate. DW3's mother Bendera Nyiro joined the grandmother in developing the land and took it over once DW3's grandmother passed away.

27. DW3 further told the Court that on 8th January 1999, one Karisa Taura Ndaa approached his mother and asked her to purchase four acres of his land at Kshs 2,000/- per acre. DW3 thereafter appended his signature on the Sale Agreement on behalf of his mother and brother known as Gilbert. The Agreement equally executed by the said Karisa Taura was witnessed by the Area Assistant Chief one Benjamin Charo Dau and one Wilson Kaingu as witnesses. They thereafter took over the land.

28. DW3 however told the Court that in 2011 they were summoned to the Chief's Office where they found the Plaintiff claiming to be the owner of the land. The Chief then resolved that all the Defendants herein be paid all their monies in full and 10% compound interest from the date of purchase of the land. The Plaintiff did not however honour the agreement.

29. DW3 told the Court that when land adjudication commenced, they were registered as the owners but the same was changed upon a complaint made by the Plaintiff. He told the Court the Plaintiff is not a direct family member of Karisa Taura Ndaa who passed away in 2013 and cannot therefore claim to own the land.

30. On cross- examination, DW3 acknowledged that PW2- George Tune Ndaa was the son of Karisa. He however insisted that PW2 did not tell the Court the truth in his testimony that his father did not sell the land.

31. DW4- Thomas Mrabu Mramba is a farmer and a resident of Singwaya Sub-Location in Garashi, Magarini. He testified that he was present when Karisa Taura Ndaa sold his land to DW3 and his brother Gilbert Sulubu Nyiro in 1999. DW4 further told the Court the transaction was executed through village elders and that all parties were sober.

32. DW4 further told the Court that he had been a neighbor of the said Karisa for a long time and knew him to have been the only child of Taura Ndaa Taura from whom he inherited the land. By the time the land adjudication process in the area started, DW3 and his brother had already developed the land and they were shocked to hear that his name had been cancelled from the register.

33. On cross-examination, DW4 insisted that Karisa Taura had sold his land to DW3. He did not know however that the land dispute went to the Chief. He came to hear the matter came to the Land Adjudication Arbitration Board but was unaware of the outcome.

34. DW5- Gavuna Ndaa is also a resident of Singwaya in Magarini. He told the Court he witnessed on 9th August 2014 when Karisa Taura sold his land to the 1st Defendant. On that date Karisa was paid Kshs 12,000/-. He was also present on 21st November 2005 when the balance of Kshs 4,500/- was paid to Karisa.

35. On cross- examination, DW5 admitted that two people against whom the Plaintiff had also complained were paid and left the land. He however told the Court he did not know if the Defendant had refused to accept any money from the Plaintiff.

Analysis and Determination

36. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses and the evidence adduced at the trial.

37. The Plaintiff and the three Defendants before me are tussling over an unregistered parcel of land measuring 16 acres situated at Garashi Location within Magarini Sub-County. The Plaintiff- Michael Kaingu Katana, a retired Senior Chief of Watamu Location urges this Court to restrain the Defendants from trespassing upon, encroaching on and or remaining in the said parcel of land. In addition, he urges this Court to order for the eviction of the Defendants, and the demolition of the houses and other structures they have put on the suit property. He also asks this Court to compel the Defendants to receive compensation for their parcels of land as per a compensation agreement reached between the parties.

38. It was not in dispute that at the time the Plaintiff instituted this suit, Gona Samson Kalama, Dama Karisa Katana and Daniel Nyiro (the three Defendants herein) had been on the suit property for a few years. The trio traced their claim on various portions of the land to separate agreements executed between themselves and one Karisa Taura Ndaa who, as fate would have it, had passed away some four (4) years before this suit was filed.

39. From the evidence placed before me, the 1st Defendant entered into a handwritten agreement with the said Karisa Taura Ndaa for the

purchase of a parcel of land said to be measuring $2\frac{3}{4}$ acres on 9th August 2004. On the said day, Karisa received a sum of Kshs 12,000/- for the land which was being sold for Kshs 16,500/-. The balance of the purchase price (Kshs 4,500) was received vide another hand-written agreement executed on 21st November 2005.

40. By a similar agreement dated 19th October 2006, Karisa Taura sold another portion of the land said to be measuring three acres to the 2nd Defendant at a consideration of Kshs 26,000/-. On the date of the agreement Karisa received a sum of Kshs 15,000/- from the 2nd Defendant with the balance of Kshs 11,000/- being paid through another similarly hand-written agreement on 10th January 2008.

41. The 3rd Defendant was apparently the first to buy a portion of the suit property. While it was generally accepted that he bought the land on which he resides, it was not very clear to me how much he paid for the land. While he told the Court that he entered into an agreement with the said Karisa Taura Ndaa on 8th January 1999, I did not find a copy of that agreement among the exhibits produced herein. There was however a hand-written acknowledgment note dated 28th June 2005 wherein the said Karisa acknowledged receipt of money from the 3rd Defendant and his brother Gilbert Sulubu Nyiro being the final instalment of the purchase price. While the 3rd Defendant indicated he bought four acres for Kshs 8,000/-, the acknowledgment from Karisa indicates however that he received a sum of Kshs 13,500/- from the two brothers on that date.

42. While the Plaintiff acknowledged that those payments may have been made by the Defendants to Karisa, it was his case that he is the beneficial owner of all that parcel of land measuring 16 acres being the head of the Taura Kiringi family. The Plaintiff told the Court that the said Karisa neither had his authority as the head of the family nor the permission of the rest of the family to sell portions of the property to the Defendants as he had purported to do.

43. The Plaintiff told the Court that when their family learnt about the sale, they convened a meeting with the Defendants whereby the Defendants agreed with him that he would refund to them the money they had spent in purchasing the portions of the suit property. The Defendants later turned round and refused to accept the refund from him as a result whereof he referred the dispute to the local land arbitration tribunal located at the Garashi Chief Office.

44. It was the Plaintiff's case that having heard the dispute, the Land Committee decided in his favour. Dissatisfied with the decision, the Defendants herein appealed to the Malindi Land Arbitration Board which similarly upheld the decision in favour of the Plaintiff. The Plaintiff told the Court that the Defendants appealed again to the Ministry of Lands where they again lost the case. Thereafter the Defendants agreed to a refund of the money with interest and later, again, changed their minds.

45. In their respective separate Statements of Defence filed herein, the Defendants appeared to acknowledge the fact that the dispute was dealt with by a team from the Land Adjudication Department, after they refused to vacate the land. They told the Court that they however rejected their verdict as it was the same people who heard the case as well as the appeal to the Board. On account of that fact, the Defendants indeed told the Court that the suitland is now under land adjudication process and urged this Court to dismiss the suit on account that the Plaintiff did not obtain consent from the area Land Adjudication Officer as required by law before commencing this suit.

46. While both sides of the dispute alluded to the dispute herein being dealt with by Land Adjudication Officers, it was interesting to note that neither side offered any evidence from which a conclusion could be made that the land in dispute fell within an area that had been declared an adjudication area under Section 14 of the Land Adjudication Act, Cap 284 of the Laws of Kenya.

47. Where land falls within such an adjudication area under the said Cap 284, Section 30 (1) of the Act denied the Court jurisdiction to deal with a dispute such as the one before me unless the person instituting the suit had obtained the consent in writing of the Land Adjudication Officer responsible for the area. In the matter before me, the Plaintiff did not file any such consent but in the absence of any evidence from the material placed before me that the area within which the suit property had been declared such an adjudication area, I did not find any reason to bar him from proceeding with this suit as filed.

48. In his testimony herein, the Plaintiff emphasized the fact that he is the beneficial owner of the suit property on the account that he is the head of the Taura Kiringi family. Without disclosing how many they were in the said family, the Plaintiff insisted that the late Karisa Taura Ndaa could not have properly sold any land to the Defendants as the said Karisa did not have his authority or the permission of the rest of the family to sell the land.

49. Cross- examined by the Defendant herein, the Plaintiff told the Court that their Taura Kiringi family consisted of many other members other than himself. Without producing any authority, the Plaintiff told the Court the rest of the family had given him authority to prosecute the case. The Plaintiff further conceded that the late Karisa Taura who sold the land to the Defendants herein was a younger brother to his father.

50. As it were, it was evident to me that the Defendants had purchased their properties during the lifetime of the late Karisa Taura Ndaa. His son George Tune Ndaa (PW2) whose evidence I found quite unreliable reluctantly conceded that he saw some of the Defendants herein visit his father during his lifetime. It was also his evidence in support of the Plaintiff's case that the Plaintiff herein took over the leadership of their family following the death of his (PW2's) father, and that he had learnt of the alleged sale of the suit properties when his father was alive.

51. From the evidence placed before me, the said Karisa Taura Ndaa passed away some four years before this suit was filed. By then the Defendants had been on the suit properties for a period ranging between 8 to 13 years. There was no evidence that the Plaintiff who resides in Watamu had ever tried to dispossess the Defendants of the land in Garashi during the lifetime of his uncle.

52. Indeed as confirmed by PW2 who was his own witness, the Plaintiff only took over the leadership if at all, upon the death of PW2's father in 2013. I find it rather preposterous on the part of the Plaintiff that he required the late Karisa Taura who was his father's brother to

obtain permission from him before he could sell the land which he considered to be his own. Perhaps aware of the machinations of the Plaintiff before his death, the late Karisa Taura wrote a hand-written memo in support of the Defendants on 5th January 2013 as follows:

“Kauli ya Mzee Karisa Taura Ndaa Kuhusu Shamba Aliyowauzia kwa hiyari wafuatao: -

1. Gilbert S. Nyiro/Daniel S. Nyiro

2. Dama Karisa Katana

3. Samson Gona Kalama

- Mimi Karisa Taura Ndaa nasema ya kwamba Shamba niliyo wauzia waliotajwa hapo juu na wengineo wote wana haki ya kumiliki na wasisumbuliwe na mtu yeyote kwani mimi nina haki yangu ya kuuza changu na mwenye swali aje kwangu mimi “Karisa Benda” Karisa Taura Ndaa”.

53. That resolution was signed by the late Karisa Taura before some three witnesses and the Plaintiff did not place before me any evidence that he had a better title to the land that was sold than that of his uncle. Indeed, while he appears to claim the land belonging to the entire Taura Kiringi family and that of his brother Karisa Taura, the Plaintiff did not demonstrate that he had acquired any letters of administration or any other document giving him any special authority over the land to the exclusion of other family members.

54. In the premises, I was not persuaded that there was any merit in the Plaintiff’s case. The same is hereby dismissed with costs to the Defendants.

Dated, signed and delivered at Malindi this 24th day of July, 2020.

J.O. OLOLA

JUDGE