



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 111 OF 2010

NICHOLAS KOMBE PEMBE.....PLAINTIFF

VERSUS

1. KENGA KOMBE

2. KALESO KOMBE

3. REGISTRAR OF LANDS- KILIFI

4. ATTORNEY GENERAL.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Complaint dated 20th September 2010 as filed herein on 23rd September 2010 and amended on 12th November 2018, Nicholas Kombe Pembe (the Plaintiff) prays for Judgment against the Defendants jointly and severally for:

a) An order directed to the 2nd Defendant that (the) title deed issued in place of Kaloleni/Vishakani/538 be cancelled and the property be registered in the name of the Plaintiff.

b) An order directed to the beneficiaries of Kenga Kombe and Kaleso Kombe (now deceased) to vacate the suit property.

c) Damages.

d) Costs of this (suit) and interest at Court rates.

2. Those prayers arise from the Plaintiff's contention that at all times material to this suit, the said Plot No. Kaloleni/Vishakani/538 was registered in the name of the late Pembe Murogo Kithi and a title deed was issued to him on 19th May 1981. The said Pembe Murogo Kithi died intestate on 17th July 1985 and the Plaintiff herein together with his brother Robert Kitsao were granted Letters of Administration for his estate.

3. The Plaintiff avers that the 1st and 2nd Defendant herein fraudulently representing themselves as the heirs of the estate instituted ***Land Award Case No. 13 of 1996*** which resulted in sub-division of the said Kaloleni/Vishakani/538 measuring 25 Ha into Plot Nos. 876, 877 and 878. Thereafter and based on the fictitious award from the said Case, the 3rd Defendant registered Plot No. Kaloleni/Vishakani/878 in the name of the 2nd Defendant who was a mere trespasser.

4. The Plaintiff asserts that the 1st and 2nd Defendants did not have any authority to act on behalf of the estate and hence the orders sought herein.

5. The suit was initially filed in 2010 against four Defendants named therein as Kenga Kombe (1st Defendant), Kaleso Kombe (2nd Defendant), the Registrar of Lands Kilifi (the 3rd Defendant) and the Honourable the Attorney General (the 4th Defendant). The initial 1st Defendant- the said Kenga Kombe neither entered appearance nor filed a Defence.

6. Kaleso Kombe- previously named as the 2nd Defendant however filed a Statement of Defence on 19th November 2010 wherein he denied the Statement made by the Plaintiff in his Plaint. It was the said 2nd Defendant's case that Plot No. Kaloleni/Vishakani/538 was a joint family land and he accused the late Pembe Murogo Kithi of taking advantage of the illiteracy of his brothers to disinherit them.

7. The 2nd Defendant further stated that he had occupied the entire property since he inherited the same from his father and that the claim was defeated by dint of limitation of time. He accordingly denied trespassing upon the Plaintiff's property and accused him of filing another suit after realizing that he would lose **HCCC No. 2259 of 2007** which he had earlier filed.

8. The Honourable the Attorney General previously sued as the 4th Defendant entered appearance for himself and the Registrar of Lands Kilifi (the 3rd Defendant) but did not file any Statement of Defence nor take part in these proceedings.

9. As it turned out, the 2nd Defendant Kaleso Kombe passed away shortly after he filed the said Defence on 2nd January 2011 and he was substituted by his wife Kadzo Randu Kombe. As fate would have it, the said Kadzo also passed away before this suit could be concluded on 24th January 2013.

10. Upon learning that the 1st Defendant had equally passed away on 12th September 2014 and there being no formally recognized legal representative for the said Kadzo Randu Kombe as the 2nd Defendant, the Plaintiff initiated the amendments of the Plaint as filed herein on 20th November 2018 in which the suit against the 2nd Defendant having abated was abandoned and one Alderstone Kenga Kombe has been sued as the Legal Administrator of the Estate of Kenga Kombe as the 1st Defendant.

11. Upon being served with the claim, the said Alderstone Kenga Kombe filed a Statement of Defence and Counterclaim herein dated 18th March 2019 in which he asserts that the Plaintiff participated in the proceedings in **Land Award Case No. 13 of 1996** where the Tribunal directed that Plot No. Kaloleni/Vishakani/538 be sub-divided into three portions which became Plot Nos. 876, 877 and 878.

12. The 1st Defendant further avers that Plot No. Kaloleni/Vishakani/876 was registered in the Plaintiff's name, 877 in the 1st Defendant's father's name while Plot No. 878 is registered in the name of Kaleso Kombe. The 1st Defendant avers that the parties herein are closely related and that the Plaintiff never sought to overturn the Tribunal's findings.

13. By way of Counterclaim, the 1st Defendant asserts that the Plaintiff is currently in illegal occupation of Plot No. Kaloleni/Vishakani/877 which is registered in the name of the 1st Defendant's father. The 1st Defendant contends that the Plaintiff's entry thereon was without his consent or agreement. Accordingly, the 1st Defendant prays that the Plaintiff's suit be dismissed and that instead, Judgment be entered for himself against the Plaintiff for:

- 1. A declaration that the 1st Defendant has acquired the suit property Kaloleni/Vishakani/877 illegally;**
- 2. An order of vacant possession by way of eviction of the Plaintiff from Plot No. Kaloleni/Vishakani/877;**
- 3. An order of permanent injunction restraining the Plaintiffs by themselves, servants, agents from evicting, harassing or interfering with the 1st Defendants occupation and use of the suit property known as Kaloleni/Vishakani/877;**
- 4. The Officer Commanding Station Kaloleni Police Station be directed to assist the 1st Defendant in effecting the decree herein; and**
- 5. Costs of this suit.**

The Plaintiff's Case

14. The Plaintiff accordingly testified as the sole witness in these proceedings. He repeated the account given in his Plaint that the suit property was initially registered in the name of his father Pembe Murogo Kithi on 19th May 1981. His father passed away on 17th July 1985 and as a result, he was together with his brother Robert Kitsao were issued with a grant of letters of administration of the estate on 1st November 2004.

15. The Plaintiff further told the Court that thereafter, the late Kenga Kombe and Kaleso Kombe fraudulently represented themselves as the heirs of the deceased and instituted a case in which the suit property was sub-divided into Plot Nos. 876, 877 and 878. When the Plaintiff and his brother went to the Lands Office, they were informed that the original title had been cancelled and the new titles for the three plots had been issued. The Kilifi Land Registrar had by then registered Plot No. Kaloleni/Vishakani/878 in the name of Kaleso Kombe.

16. The Plaintiff further told the Court that he filed a case against the said Kenga Kombe and Kaleso Kombe for the fraudulent transfer and that Judgment was entered for the cancellation of the new titles. However, when the order was served upon the Land Registrar Kilifi, he declined to cancel the titles on the grounds that the Lower Court had no jurisdiction to issue such orders.

17. I have perused and considered the pleadings filed herein, the oral testimony of the Plaintiff and the evidence adduced at the trial.

18. It is not in dispute that the parcel of land known as Plot No. Kaloleni/Vishakani/538 was registered in the name of the Plaintiff's father one Pembe Murogo Kithi on 19th May 1981. As it turned out the said Pembe Murogo Kithi died intestate on 17th July 1985. Pursuant to

Malindi High Court Succession Cause No. 6 of 1999, a Certificate of Confirmation of Grant of his estate was issued on 1st November 2004 to the Plaintiff and his brother Robert Kitsao.

19. It was also not in dispute that sometime after the late Pembe Murogo Kithi's death, one Kaleso Kombe and the 1st Defendant's father Kenga Kombe instituted a Land Dispute Case at Kaloleni which dispute led to what all the parties herein referred to as **(Kaloleni) Land Award Case No. 13 of 1996**. According to the Plaintiff, the two individuals who filed the dispute fraudulently and secretly filed the case purporting to be the heirs of the late Pembe Murogo Kithi.

20. The 1st Defendant herein however denies that the proceedings before the Tribunal were fraudulent and/or secretive. On the contrary he avers in his Defence and Counterclaim filed herein on 20th March 2019 that the Plaintiff indeed participated in the proceedings **in Land Award Case No. 13 of 1996** and that the Tribunal then directed that Kaloleni/Vishakani/538 be sub-divided into the three disputed portions being Kaloleni/Vishakani/876, Kaloleni/Vishakani/877 and Kaloleni/Vishakani/878. The 1st Defendant further avers that subsequent to the Award Plot No. 876 was registered in the names of the Plaintiffs, Plot No. 877 in the name of his father and Plot No. 878 in the name of the late Kaleso Kombe.

21. Neither the proceedings of the Tribunal nor the record of the said **Land Award Case No. 13 of 1996** were placed before the Court by either party and it was therefore unclear to me who the exact parties in those proceedings were and when the decision to sub-divide the land parcel known as Kaloleni/Vishakani/538 was made. Going by the citation of the case as **Land Award Case No. 13 of 1996**, it was apparent that those proceedings and or the decision was made more than ten years after the death of the previously registered proprietor of the property and almost a similar period before the Plaintiff and his brother would obtain a Grant of Letters of Administration for the Estate of his father, the late Pembe Murogo Kithi.

22. From the pleadings filed by the late Kaleso Kombe on 19th November 2010 prior to this death, it was clear to me that he was either a brother or close relative of the Plaintiff herein and that he did not take kindly to the fact that the Plaintiff had been registered as the sole owner of the said Kaloleni/Vishakani/538 which from the record was some 25.0 Ha. Accordingly and at paragraphs 3 of his Statement of Defence, the late Kaleso Kombe asserted as follows:

“3. Paragraph 5 of the Plaint is denied. The 2nd Defendant avers that the said Plot No. Kaloleni/Vishakani/538 was a family parcel and the late Pembe Murogo took advantage of the illiteracy of his brothers to disinherit them.”

23. That indeed is the same line of Defence taken by the 1st Defendant whose father was similarly sued in the original suit herein. However, while it may as well have been true that the Plaintiff's father had taken advantage of his brothers to have the entire suit property registered in his name, it was clear to me that the Land Dispute Tribunal could not order the cancellation of his title and a sub-division of the land in the manner purported to have been done in **Land Award Case No. 13 of 1996**.

24. As it were, the Land Disputes Tribunals were established under Section 4 of the Land Disputes Tribunals Act, 1990 (now repealed). The Tribunals had their jurisdiction specified under Section 3 (1) of the said Act as follows: -

“Subject to this Act, all cases of a civil nature involving a dispute as to-

a) The division of, or the determination of boundaries to land, including land held in common;

b) A claim to occupy or work land; or

c) Trespass to land Shall be heard and determined by a tribunal established under Section 4.”

25. That being the case, disputes over ownership or title to land were clearly not within the mandate of those tribunals. Accordingly in purporting to award parcels of land already registered in the name of the Plaintiff's father to the Defendants, the Tribunal clearly went beyond its jurisdiction and the purported award cannot stand.

26. From the record, it was clear to me that the Plaintiff has overtime relentlessly made efforts to correct this anomaly. Having obtained a Confirmed Grant of Letters of Administration in the year 2004, the Plaintiff moved on 4th April 2006 and filed **Mombasa High Court Civil Suit No. 63 of 2006; Nicholas Kombe Pembe –vs- Kenga Kombe and Kaleso Kombe**. That suit was by an order made on 13th June 2007 transferred to the Chief Magistrates Court at Mombasa for hearing and disposal.

27. On 28th November 2007, the Chief Magistrates Court having heard the dispute now registered as **Mombasa CMCC No. 2259 of 2007** decreed that the Title Deeds issued arising after the sub-division of the property known as Kaloleni/Vishakani/538 be cancelled and that the said property be registered in the Plaintiff's name. Perhaps as a measure of the apparent vested interest in the property, the Land Registrar Kilifi chose to ignore the fact that the suit had initially been properly filed by the Plaintiff in the High Court and refused to carry out the orders on the purport that the Lower Court had no jurisdiction to cancel the titles.

28. In the confusion that ensued, the Plaintiff was compelled to file a fresh the present suit. Another Judgment awarded in favour of the Plaintiff herein on 3rd July 2015 was again set aside after it emerged that the matter had proceeded despite the then Defendants having passed away.

29. The Plaintiff's testimony during all these proceedings has remained consistent and unchallenged. In the premises, I am satisfied that he has proved his case on a balance of probabilities. I did not however find any basis for an award of damages as sought under prayer 'C' of the

Plaint.

30. Accordingly, the 1st Defendant's Counterclaim is dismissed and Judgment is hereby entered for the Plaintiff as prayed in Amended Plaintiff dated 12th November 2018.

31. The Plaintiff shall have the costs of this suit and of the Counterclaim.

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

J.O. OLOLA

JUDGE