



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.125 OF 2017

KOMBO NG'OMBE KOMBO

RENSON MWATANA NZAO

AMOS WALE NZAO.....PLAINTIFFS

VERSUS

MWIDADI SAHA MWAGULA.....DEFENDANT

JUDGMENT

BACKGROUND

1. By a Plaintiff dated 2nd June 2017 as amended on 12th April 2018, Kombo Ng'ombe Kombo, Renson Mwatana Nzao and Amos Wale Nzao (the Plaintiffs) pray for Judgment to be entered against Mwidadi Saha Mwagula (the Defendant) for:-

a) A declaration that the Plaintiffs are the beneficial owners of all that parcel of land situated at Miyuni/Mleji "B" Adjudication Section in Rabai within Kilifi County measuring two acres or thereabouts and known as Parcel No. 935 Miyuni/Mleji 'B' and for an order that the Kilifi Land Adjudication & Settlement Officer does implement the final orders of this Court in respect of the said property;

b) An order of permanent injunction (to issue) restraining the Defendant by himself, his servants/agents or any person claiming through him from trespassing onto and remaining in occupation of the entire suit property and from cultivating, building, selling or dealing with the said property in any manner whatsoever and demolition of his building erected thereon and his eviction from the said parcel of land; and

c) Costs of this suit and interest.

2. Those prayers are based on the Plaintiff's contention that the suit property is their ancestral land and that the Defendant has illegally and unlawfully trespassed thereon and buried his grandfather on 25th February 2017. By reason of the said actions, the Plaintiffs aver that they have been deprived of the use and enjoyment of the land and that they have thereby suffered loss and damage.

3. But in his Statement of Defence dated and filed herein on 24th April 2018, Mwidadi Saha Mwagula (the Defendant) denies that the Plaintiff inherited the land from their father as alleged. Instead, the Defendant avers that the land in question belonged to his grandfather and that they have occupied the same for centuries now without the interference of anyone.

4. The Defendant further avers that the Plaintiffs did not object to the burial of his grandfather on the land since they are aware of the ownership thereof and he therefore denies that they have suffered any loss and damage as alleged or at all.

5. The Defendant further avers that the issue of the ownership of the said parcel of land has been dealt with by the Land Adjudication & Settlement Committee and that by its findings dated 5th August 2016, the Committee properly determined that the suit property belongs to the Defendant.

The Plaintiff's Case

6. All the Plaintiffs testified at the trial herein in support of their case.

7. PW1-Renson Mwatana Nzao is the 2nd Plaintiff. He testified that they inherited the said Plot No. 935 in Mulechi, Rabai from their father Ng'ombe Kombo who inherited the same from his father Kombo Lwambi. On 12th September 2014, the area known as Miyuni/Muleji was declared an Adjudication Section. During that process, the Defendant claimed ownership of the property and on demarcation, the Defendant together with the 1st Plaintiff were adjudicated as the owners despite the Plaintiffs' objections.

8. PW1 further told the Court that following the hearing of the matter by the Adjudication Committee in August 2016, the 1st Plaintiff's name was removed and the land was awarded to the Defendant. The Plaintiffs lodged an objection on 9th August 2016 but before the case could be heard, the Defendant entered the property, cut down some trees and buried his grandmother on the land in 2017.

9. PW1 testified that the Defendant is not a member of their family and he could not therefore inherit the Plaintiffs family land. PW1 told the Court that their father had allowed the Defendant's grandfather to be buried on a portion of the property because he was known to their father and at the time he had no place where he could have been buried.

10. On cross-examination, PW1 told the Court that the Defendant's grandfather was buried on the suitland following a request made to PW1's father by one of the deceased's sons. He conceded that their objection had been dismissed by the Land Adjudication Committee but told the Court they did not agree with the findings.

11. PW2-Kombo Ng'ombe Kombe is the 1st Plaintiff. He reiterated the testimony of PW1 and told the Court that they are the rightful owners entitled to the exclusive possession and occupation of the suit property.

12. PW3- Amos Wale Ngao is the 3rd Plaintiff. He equally reiterated the testimony of PW1 and asserted that they are the rightful owners of the property.

The Defence Case.

13. On his part the Defendant called two witnesses at the trial.

14. DW1-Mwidadi Saha Mwangula is the Defendant himself. He testified that the Plaintiffs are members of his family in that they are all his uncles. DW1 told the Court that the suit property previously belonged to his grandfather who was a brother to the Plaintiffs' father.

15. DW1 told the Court that both the said grandfather and his grandmother were buried on the land without any objection from anyone. During the land adjudication for the area however, the Plaintiffs filed an objection but the same was dismissed by the Land Adjudication Officer.

16. During cross-examination, DW1 testified that his father is Saha Mwangula while the Plaintiffs' father is Ng'ombe Kombo. DW1's grandfather was known as Mwangula Kombo. He conceded that his father was alive and living on a separate parcel of land but told the Court his father had bought the land in which he lives.

17. DW1 testified that the suit property was given to him by his family when his grandfather passed away in 2005. He conceded that he built his house on the land after the case was filed in Court.

18. DW2-Amold Kombo Mwangula is an uncle to the Defendant. He told the Court that the property belonged to his father who had inherited the land in 1984. When his father died in 2005, he was buried on the land.

19. On cross-examination, DW2 told the Court that the suit property was given to his father by the Plaintiffs' father. The two were cousins as their grandfathers were brothers.

Analysis and Determination

20. I have perused and considered the pleadings as filed herein by both the Plaintiffs and the Defendants. I have also considered the oral testimonies of the witnesses who testified and the evidence placed before me at the trial as well as the written submissions filed herein by the Learned Advocates for the parties.

21. The Plaintiffs case is that the suit property is their ancestral land which they have utilised from time immemorial. It was their case that they have always used the same without any interference from any quarter. Sometime in the year 2014 however following the declaration of the area as an adjudication section, the Defendant herein laid claim to the suitland. The plaintiffs told the Court that even though they had allowed the Defendant's grandfather to be buried on the land, the Defendant had no claim thereto and had never utilised the land.

22. The Plaintiffs told the Court that they explained this position clearly to the land adjudication officers but to their shock and dismay in August 2016, the Land Adjudication Committee awarded the suit property to the Defendant. The plaintiffs told the Court that consequent upon the said decision, they lodged an objection on 9th August 2016 but before their objection could be heard, the Defendant who had been staying elsewhere invaded the suit property, cleared a portion thereof and started utilizing the same. In 2017 the Defendant proceeded further to bury his grandmother on the land.

23. Aggrieved by the turn of events the plaintiffs sought the consent of the Land Adjudication and Settlement Officer and filed the suit herein.

24. The Defendant did not deny that he had taken over the suit property. It was however his case that he had inherited the same from his father and that he had been utilizing the same for a long period of time. The Defendant told the Court that his grandfather had died and was buried on the suitland in 2005 and that when his grandmother died in 2017, she was equally interred on the suitland without any protest from any quarter. On this account, the Defendant accused the plaintiffs of being the ones who had tried to deprive him of the land when the process of adjudication commenced.

25. From the material placed before me, it was evident that the area known as Miyuni/Mleji within Kilifi County was declared to be an Adjudication Section on 12th September 2014. From a copy of the Demarcation Record dated 17th December 2015 (Pexh 2), it was also evident that the Defendant was adjudicated as the owner of the parcel of land No. 935 which is the suit property herein.

26. The Plaintiffs were aggrieved by the decision which according to them was used by the Defendant to gain entry into the suit property and to take over the same. Accordingly and by a letter dated 13th February 2017, the Plaintiffs sought the consent of the Kilifi District Land Adjudication and Settlement Officer as required under Section 30 of the Land Adjudication Act, to institute this suit. That consent was given by a letter dated 1st August 2017.

27. According to the Defendant, the suit property previously belonged to his grandfather who happened to be a brother of the Plaintiffs' father. It was his case that he had inherited the same from his father and that all his grandparents were buried on the land.

28. I did not however find much evidence to the claim that the suit property was the joint ancestral land of both the Plaintiffs and the Defendants. While it was indeed clear that the Defendant's grandparents had been buried on the suitland, there was no evidence that they had owned the same.

29. The Defendant's uncle and sole witness Arnold Kombo Mwangula (DW2) in his testimony in-chief testified that they had utilized the land until the year 2005 when his father Mwangula Kombo passed away. During cross-examination however, he told the Court that his father was not living on the land and that he had in fact died elsewhere before he was brought and buried on the land.

30. This position was indeed confirmed by all the parties including the Defendant who told the Court that his grandfather (DW2's father) had died in a place where he was living with his grand-parents and that he was only brought on the land for burial.

31. According to the Plaintiffs, their father had allowed the Defendant's grandfather to be buried on the land purely on humanitarian grounds as he knew him and there was nowhere else where he could be buried.

32. The issue of how the Defendant came to inherit the suit property was equally doubtful. While the Defendant claimed to have inherited the same through his father Saha Mwangula, it was clear that his sole witness DW2 was equally claiming to have inherited the land through his father the said Mwangula Kombo. Indeed according to DW2, the land was given to his own father by the Plaintiffs' father.

33. I could not however find a basis why the land was offered as such by the Plaintiffs' father. While in his testimony in-chief, the Defendant had told this Court that the Plaintiffs' father was a brother to his father, he admitted during cross-examination that the two were not related. According to DW2, his father and the Plaintiffs' father were cousins as their grandfathers had been brothers.

34. During his cross-examination, DW2 admitted that they used to live on another parcel of land and that it is the plaintiffs father who was taking care of the land until the time DW2's father passed away in 2005.

35. Even more intriguing given the Defendant's claim to ownership through inheritance was the fact that the Defendant's father Saha Mwangula who is supposed to have sub-divided and given the land to him was not living on the suit property at all. From the testimony of both the Defendant and his witness, his father bought another parcel of land in a place called Mwanjama, where he resides to-date.

36. Despite the fact that his father from whom he claims to have inherited the property was alive and living somewhere nearby, the Defendant chose not to call him as a witness and no explanation was offered for the said omission. At the trial herein, the Defendant conceded that he had only built a house on the suitland during the currency of this suit, a fact which confirms the Plaintiffs' averments that he had only moved into the suit property following the inexplicable award of the land to himself by the Land Adjudication Committee.

37. In the premises, I am satisfied that the Plaintiffs have proved their case to the required standard. Judgment is accordingly hereby entered for the plaintiffs as prayed in the Plaint.

38. The Plaintiffs shall also have the costs of this suit.

Dated, signed and delivered at Malindi this 10th day of July, 2020.

J.O. OLOLA

JUDGE