



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.101 OF 2017

MWANYANJE NYOKA NDAHUMA

KONDE MWANGONA KONDE.....PLAINTIFFS

VERSUS

1. KARISA MBARUKU RASHID

2. KAZUNGU MBARUKU RASHID

3. CHIVATSI SORI BANZI

4. KINGI MBARUKU RASHID

5. BENSON MBARUKU RASHID

6. THE COUNTY REGISTRAR OF LANDS KILIFI.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Complaint dated 25th April 2017, Mwanyanje Nyoka Ndahuma and Konde Mwangona Konde (the Plaintiffs) pray for Judgment against the six listed Defendants for:-

a) A declaration that the Plaintiffs are the owners of the suit property herein known as Plot No. Kilifi/Mwapula/Magogoni/429;

b) A declaration that the Defendants names on the said Plot No. Kilifi/Mwapula/Magogoni/429 be deleted and the Plaintiffs' name be reflected as the owners; and

c) Costs of this suit.

2. These prayers arise from the Plaintiffs' contention that at all times material, their father the late Mwangona Konde Pande was the proprietor of the suit property. On or about 20th June 2011 however, the Land Registrar Kilifi (the 6th Defendant) issued a title deed for the suit property in the names of the 1st to 5th Defendants herein. It is the Plaintiff's case that the said registration was fraudulent and that as a result thereof, even though they remain in the possession of the suit property, they stand to suffer loss and damage.

3. But in their Statement of Defence and Counterclaim dated 7th August 2017, Karisa Mbaruku Rashid, Kazungu Mbaruku Rashid, Chivatsi Sori Banzi, Kingi Mbaruku Rashid and Benson Mbaruku Rashid (the 1st to 5th Defendants) deny that the suit property belongs to the Plaintiffs. On the contrary, they assert that they are the lawful owners thereof having been in actual possession and use thereof.

4. The 1st to 5th Defendants aver that in 2011 they were issued with a title deed signifying their ownership of the land and accuse the Plaintiffs and other groups of persons of illegally invading and occupying the same at the beginning of 2017.

5. The 1st to 5th Defendants further accuse the Plaintiffs of trying to dispossess them of their land using money, muscles and official and political power to deny them access to the suit property. By way of their Counterclaim they urge the Court to dismiss the Plaintiffs case and

to issue orders:-

a) For a permanent injunction restraining the Plaintiffs, their servants or agents from trespassing, constructing on, selling, transferring or in any manner whatsoever dealing with the suit property; and

b) Costs of and incidental to this suit.

6. The Land Registrar Kilifi (the 6th Defendant) is similarly opposed to this suit. In a Statement of Defence dated 27th September 2017, the 6th Defendant avers that the Plaintiffs have not demonstrated the requisite capacity to initiate the proceedings and hence assert that the suit as filed is incompetent, bad in law and a nullity.

7. The 6th Defendant denies that the Plaintiffs are the proprietors of the suit property and assert that if the Defendants are the registered owners thereof, the said registration was done in good faith and in strict adherence to the law. Accordingly the 6th Defendant denies that the registration was fraudulent, illegal and/or irregular in any manner whatsoever.

The Plaintiff's Case

8. At the trial herein the two Plaintiffs both testified in support of their case.

9. PW1-Mwanyake Nyoka Ndahuma is the 1st Plaintiff and a brother to the 2nd Plaintiff. He testified that the 1st to 5th Defendants herein used to be their neighbours in Mwapula Magogoni area. PW1 told the Court that the suit property was part of their ancestral land. During land adjudication in 1993 however the 1st to 5th Defendants laid a claim thereon. This prompted PW1's parents to file a claim before the Land Adjudication Committee.

10. PW1 told the Court that the dispute was however not heard by the committee and was referred to the Arbitration Board which commenced hearing much later on 6th January 2001. The Board resolved that the land belonged to PW1's father Mwagona Konde Pande. PW1 further testified that the Defendants did not appeal against that decision. To the family's surprise however, on 20th June 2011, the 6th Defendant herein issued a title in the names of the Defendants.

11. PW1 testified that by a letter dated 22nd October 2014, the Land Adjudication and Settlement Officer Kilifi wrote to its director in Nairobi requesting for the rectification of the names in the title but that has not happened. PW1 told the Court that the actions of the 6th Defendant were fraudulent as the 6th Defendant was aware of the decision of the Arbitration Board. PW1 therefore urged the Court to revoke the title issued on 20th June 2011.

12. PW2-Konde Mwagona Konde is the 2nd Plaintiff. He reiterated the testimony of his brother (PW1) and told the Court that they have held many meetings with the staff of the 6th Defendant but they had failed to revoke the registration of the 1st to 5th Defendants as the proprietors of the suit property. PW2 told the Court their family stands to suffer irreparable loss and damage unless the changes requested are effected on the title.

Analysis and Determination

13. I have perused and considered the pleadings filed herein, the oral testimonies of the two Plaintiffs herein together with the evidence adduced at the trial. I have equally perused and considered the written submissions placed before me by Mr. Gekonde, Learned Advocate for the Plaintiffs.

14. Despite filing a Statement of Defence and Counterclaim the 1st to 5th Defendants neither took part in the proceedings at the trial nor did they call any oral testimony. That was the same for the 6th Defendant and the trial herein therefore proceeded ex-parte.

15. The two Plaintiffs are the sons of the late Mwagona Konde Pande who died domiciled in the Republic of Kenya on 7th May 1994. According to the Plaintiffs, their father was the lawful owner of all that parcel of land known as Kilifi/Mwapula/Magogoni/429.

16. The Plaintiffs told the Court that when land adjudication commenced in their area around 1993, their father was declared as the rightful owner of the land and they have since peacefully lived thereon. Sometime in 2011 however, they came to learn that the 6th Defendant herein had registered and issued a title deed for the suit property on 20th June 2011. Despite their attempts to have the title rectified, the Defendants refused to co-operate with them thereby necessitating the institution of this suit.

17. In support of their case, the Plaintiffs produced a copy of the proceedings filed before the Land Adjudication Committee, Mwapula Magogoni Section, Kauma Location of Kilifi District on 12th July 1993. Those proceedings show that the said Mwagona Konde Pande and one Mwanyanje Nyoka Ndahuma were the Defendants in a claim brought by one Barisa Mbaruku Rashid.

18. In a determination eventually made by the Arbitration Board on 16th January 2001, the suit property measuring 33.38 Ha was awarded to the said Mwagona Konde Pande. As per the Plaintiffs testimony before me, I could not find any evidence that the decision of the Board was appealed.

19. It was also evident from the material placed before me that when the 6th Defendant herein eventually issued a Title Deed for the suit

property on 20th June 2011, the same was not in the name of the said Mwagona Konde Pande but in that of the 1st to 5th Defendants herein. It was not clear how the Defendants obtained their registration to a parcel of land that had been adjudicated after a long dispute to the Plaintiffs' father.

20. In an attempt to rectify the anomaly, the Kilifi District Land Adjudication & Settlement Officer Felix Kiteto wrote to the Director Land Adjudication & Settlement on 22nd October 2014 as follows:-

RE: CHANGE OF NAMES-MWAPULA/MAGOGONI PLOT NO. 429

In reference to Mwanje Nyoka Ndahuma's letter dated 11/9/2014, regarding un-implemented Arbitration Board decision, it has been established that the above parcel in the said Section was affected during adjudication process in two stages as follows:-

1) Land Committee Stage vide Case Number 22/11/1994 of 1994 of 2/11/1993 (see attached case proceedings).

2) Arbitration Board Stage vide Case Number 19/93-94 of 16/1/1994 of 16/01/1994 (see attached case proceedings).

Since it had no pending appeals to the Minister on it I am requesting you to change A/R duplicate and authorize the change of the original A/R to read Plaintiff names Mr. Mwagona Konde Pande, as per Arbitration Board Decision."

21. This letter apparently written in good faith by the District Land Adjudication & Settlement Officer Kilifi to set the records straight has apparently never been acted on and the resulting confusing appears to have given the 1st to 5th Defendants some motivation to lay a claim on the land.

22. As it were, the decision of the Arbitration Board is clear that the suit property was adjudicated to Mwagona Konde Pande and no amount of prevarications and pussy-footing can change that fact. In the absence of any appeal from the decision of the Board, the only conclusion is that the registration of the 1st to 5th Defendants was procured by fraud and/or misrepresentation.

23. As stated hereinabove, the said Mwagona Konde Pande passed away on 7th December 1994 before the decision of the Board. Two months before filing this suit, the Plaintiffs as his sons obtained a Limited Grant of Letters of Administration ad Litem for his estate on 27th February 2017 vide ***Malindi High Court P& A Cause No. 14 of 2017.***

24. That being the case and in light of the evidence adduced by the Plaintiffs herein I am persuaded that the Plaintiffs have proved their case to the required standards.

25. In the premises, the Defendants Counterclaim is dismissed and Judgment is hereby entered for the Plaintiffs as prayed in the Plaint.

26. The Plaintiffs shall have the costs of both their suit and the Defendants' Counterclaim.

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

J.O. OLOLA

JUDGE