



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 166 OF 2017

TSUWI MKARE TSUWI.....PLAINTIFF

VERSUS

ALEX NZARO CHAI.....DEFENDANT

RULING

1. By a Plaint dated 26th July 2017, Tsuwi Mkare Tsuwi (the Plaintiff) prays for Judgment against Alex Nzaro Chai (the Defendant) for the following: -

a) That the Court do make an order that the land the Plaintiff and his family occupy being approximately 2 ½ acres (respecting the traditional boundary between the Plaintiff and the Defendant family land) be restored and the Land Registrar be ordered to make amendments to the Registry Index Map on Plot No. Kilifi/Kadzonzo/Madzimbani/13 and Kilifi/Kadzonzo/Madzimbani/14 to reflect the position and title (be) issued to the Plaintiff in that regard;

b) Mesne profits; and

c) Costs and interest at Court rates.

2. Those prayers arise from the Plaintiff's contention that the disputed parcel of land was bought by the parents of both the Plaintiff and the Defendant progressively over time until they accumulated a parcel of land measuring 7 acres. In the course of the land adjudication in the Mariakani/Kadzonzo/Madzimbani area around the year 2010-2011, the Defendant influenced the registration of himself as the sole proprietor of what was essentially family land.

3. The Plaintiff asserts that despite his family's objection to the process, the Defendant was still able to register his name as the sole proprietor of the land to the exclusion of the Plaintiff and his family through fraud, illegality and lies and hence this suit.

4. But in his Statement of Defence dated 15th September 2017, the Defendant denies the Plaintiff's claim and avers that he is the lawful owner of the suit premises having acquired the same through allocation and adjudication as lawfully conducted in the area. The Defendant further avers that Section 18(1) (2) of the Land Registration Act, 2012 forbids any Court from entertaining any claim based on boundaries and that since the Plaintiff's claim is merely meant to restore an alleged traditional boundary, this suit is bad in law, a nullity and/or void ab initio and the same ought to be struck out.

5. Subsequent to the filing of his Statement of Defence and by Notice of Preliminary Objection dated 22nd October 2018 and filed herein on 1st November 2018, the Defendant objects to this suit on the grounds: -

1. That the Plaintiff's suit offends the provisions of Section 18(1) and (2) of the Land Registration Act, 2012;

2. That the Plaintiff's suit offends the provisions of Sections 20, 21, 22, 26 and 29 of the Land Adjudication Act (Cap 284) of the Laws of Kenya; and

3. That for the foregoing reasons, the Honourable Court lacks jurisdiction to hear and determine the Plaintiff's claim herein and consequently the same should be struck out with costs.

6. When the matter came up before me on 24th July 2019, it was agreed that the Preliminary Objection be disposed of by way of written submissions and parties were thereafter granted until 20th November 2019 to file the said submissions. It is however apparent that the

Plaintiffs did not file any as I was unable to find any on record. Be that as it may, I have perused and considered the pleadings filed herein as well as the submissions placed before me by the Learned Advocates for the Defendants.

7. From the material placed before me, it is evident that the area known as Kadzonzo/Madzimbani was declared an adjudication area pursuant to the provisions of Section 5 of the Land Adjudication Act, Cap 284 Laws of Kenya sometimes in the year 2007. Upon completion of the adjudication process, the Defendant was awarded the two parcels of land which award the Plaintiff objected to.

8. The Plaintiff's first objection was lodged with the Land Adjudication Officer. While it was not clear on which date it was lodged, the documents annexed to both the Plaintiff's and the Defendant's affidavits filed in regard to the Plaintiff's application earlier on filed herein dated 26th July 2017 reveal that the objection came up for hearing on 25th August 2011 on which date the Adjudication Officer captured the Plaintiff's Statement before his cross-examination by the Defendant as follows: -

"PLAINTIFF'S STATEMENT

A male adult of sound mind duly sworn in states that I filed this objection because the portion I am claiming was ours but was recorded in the names of the respondent and I wish this Court to curve out the portion measuring approximately 2.5 acres and a new number be issued and the same be recorded in the names of Earnest Nzaro Mkare and Tsuwi Mkare Tsuwi. That is all."

9. Having heard the Plaintiff's objection and the Defendant's response thereto, the Land Adjudication Officer rendered his decision on 7th January 2012 as follows: -

"DECISION

The objection is dismissed. The respondent to remain recorded to the plot and 60 days granted to any party aggrieved by the stated decision from the date of this order."

10. From the Defendant's Replying Affidavit filed herein on 20th September 2017, it is evident that the Plaintiff indeed appealed the decision of the Land Adjudication officer to the Minister as required under Section 26 of the Land Adjudication Act in ***Appeal Case No. 11 of 2015***. The Ministerial Panel however again dismissed the Plaintiff's appeal on 4th May 2017 and ordered that the suit properties remain as registered in the name of the Defendant.

11. It is evident that the Plaintiff was once again not satisfied with the decision and hence his statements herein that the Defendant influenced the process and through fraud and other illegalities caused himself to be registered as the proprietor of the suitland. Some two months after the decision, of the Ministerial Panel, he instituted the suit herein making basically the same claims as those that were made before the Land Adjudication Officer and the Ministerial Panel.

12. As it were, Section 29 of the Land Adjudication Act sets out the process and procedure that appeals before the Minister should take and provides thus: -

"29. (1) Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of determination, appeal against the determination to the Minister by: -

a) Delivering to the Minister an appeal in writing specifying the grounds of appeal; and

b) Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such orders thereto as he thinks just and the order shall be final.

13. As can be seen from the provisions of Section 29(1) of the Act as cited above, once the Minister has rendered his decision, that is the end of the matter. From my reading of the Land Adjudication Act, Cap 284 of the Laws of Kenya, the Legislature did not intend that a person whose case fails to succeed before the Ministerial Panel can appeal to this Court or approach it in the manner in which the Plaintiff has done herein.

14. Accordingly, it is my considered view that the dispute in regard to who owns which parts of the disputed property has long been settled and this Court has no jurisdiction to re-open the case and make another determination as to who between the Plaintiff and the Defendant is the rightful owner of the disputed properties.

15. Indeed, even if it were to be taken that the Plaintiff is merely dissatisfied with the boundaries of the disputed parcels of land, it is clear to me that under Section 18(2) of the Land Registration Act, this Court cannot entertain such a dispute unless and until those boundaries had been fixed as required under Section 16 and 19 of the Land Registration Act.

16. In the premises I am satisfied that there is merit in the Defendant's Preliminary Objection and that this suit as filed offends both the Land Adjudication Act and the Land Registration Act. The Plaintiff's suit is accordingly struck out with costs to the Defendant.

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

J.O. OLOLA

JUDGE