



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MALINDI ELC CASE NO. 273 OF 2016

KINYUA MUREITHI

KENNEDY KAMAU MUREITHI (Suing as Administrators of the

Estate of ZIPPORAH WANJIKU MUREITHI.....PLAINTIFFS

VERSUS

1. GONA JOHN RUWA HALUWA

2. HABIB ABU MOHAMMED

3. HAWWAYA ANTAR MIRE.....DEFENDANTS

JUDGMENT

Background

1. In their Complaint dated 10th October 2016, Kinyua Mureithi and Kennedy Kamau Mureithi suing as the Administrators of the Estate of Zipporah Wanjiku Mureithi pray for Judgment against the three Defendants jointly and severally for:

1. A permanent mandatory injunction compelling the Defendants by themselves, their employees, servants and/or agents to demolish and remove all the illegal construction within the Plaintiff's parcel of land being Kilifi/Jimba/1143- a sub-division of Kilifi/Jimba/383, and to demolish all the buildings and illegal erections interfering with the activities of the Plaintiffs;

2. Eviction and/or removal of the Defendants, their employees, servants and/or agents from the suit properties;

3. A permanent injunction against the Defendants, their employees, servants and or agents restraining them from interfering with the Plaintiffs' parcels of land in whatsoever manner;

4. Costs of this suit and interest at Court rates.

2. Those prayers arise from the Plaintiffs' contention that the late Zipporah Wanjiku Mureithi was the registered proprietor of the suit property. The Plaintiffs accuse the Defendants of trespassing upon the property on the authority of some purported leases held by them which leases were nullified by the Court on 8th May 2015.

3. The Plaintiffs accuse the Defendants of erecting illegal structures on the property on account of the leases and thereby denying the Plaintiffs the use thereof.

4. The suit as against the 1st Defendant was withdrawn on 26th February 2018 while the 3rd Defendant neither entered appearance nor filed a Statement of Defence.

5. However, by his Statement of Defence dated and filed herein on 11th November 2016, Habib Abu Mohamed (the 2nd Defendant) denies that the deceased Zipporah Wanjiku Mureithi was the registered proprietor of the said LR No. Kilifi/Jimba/1143 and or that the said parcel of land is a sub-division of LR No. Kilifi/Jimba/383 as pleaded by the Plaintiffs.

6. The 2nd Defendant further asserts that Title No. Kilifi/Jimba/1143 does not exist and that LR No. Kilifi/Jimba/383 has never been sub-divided as alleged or at all. It is the 2nd Defendant's case that the 3rd Defendant and himself are the absolute owners of LR No. Kilifi/Jimba/383 having acquired the same from the 1st Defendant for valuable consideration without notice of any defect on 22nd June 2012.

7. Accordingly, the 2nd Defendant maintains that he is not a trespasser on the said parcel of land and that the construction undertaken thereon by himself are lawful. The 2nd Defendant further denies that their title was nullified by the Court as stated by the Plaintiffs or at all.

The Plaintiff's Case

8. At the trial herein, the Plaintiffs called one witness in support of their case.

9. PW1- Kinyua Mureithi is the 1st Plaintiff and a brother to the 2nd Plaintiff herein. Relying on his Statement dated and filed herein on 26th June 2018, PW1 testified that he is a Co-Administrator of the Estate of Zipporah Wanjiku Mureithi who was the owner of that entire parcel of land known as Kilifi/Jimba/1143. PW1 told the Court the late Zipporah had never transferred or alienated the said parcel of land.

10. PW1 told the Court that at some point in time, they learnt that the three Defendants herein had trespassed onto the land claiming that they had leased the same and subsequently sub-divided it. PW1 also came to learn that the leases claimed by the Defendants and the sub-divisions thereon were challenged in Court in **Malindi ELC Case No. 11 of 2013**. In a Judgment delivered on 8th May 2015, the said leases and sub-divisions were nullified.

11. PW1 told the Court that despite the nullification, the Defendants had illegally continued to stay on the land and had gone ahead to erect illegal structures thereon. Their continued presence on the land had made it difficult for the Plaintiffs to administer the suit property and PW1 urged the Court to order their eviction therefrom.

12. On cross-examination, PW1 testified that his mother-the late Zipporah was registered as the proprietor of the land on 28th February 2001. He did not however know how she had acquired the land. PW1 told the Court he had not seen a copy of the transfer to his mother and that they only came across a copy of the title in a safe shortly after his mother's death

13. PW1 testified that Plot No. 383 was sub-divided into Plot Nos. 1142, 1143 and 1144. He did not however know who owns Plot Nos. 1142 and 1143.

14. On being shown the Judgment in **Malindi ELC Case No. 11 of 2013**, PW1 told the Court that he had not read it as a whole. He however conceded that the Judgment did not refer to Plot No. 383.

The Defence Case

15. The Defence similarly called one witness in support of their case at the trial.

16. DW1- Mohamed Habib Abu is a son of 2nd Defendant herein. He told the Court that the 2nd Defendant had suffered a stroke and that he had granted him (DW1) a power of attorney to proceed with the case. Relying on his own statement and that of his father as filed herein, DW1 told the Court that the 2nd and 3rd Defendants bought Plot No. Kilifi/Jimba/383 on 6th March 2012 from the 1st Defendant.

17. DW1 told the Court that at the time of purchase, the 1st Defendant was according to the records held at the Kilifi Land Registry, the registered proprietor of the property. Upon purchase the 2nd and 3rd Defendants took physical possession of the land and have remained thereon ever since.

Analysis and Determination

18. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses and the evidence adduced before me.

19. The Plaintiffs' herein are the Administrators of the Estate of their Mother the late Ziporah Wanjiku Mureithi. It was not clear when the Plaintiffs mother passed away but from a Certificate of Confirmation of Grant issued to them in Nakuru High Court **Succession Cause No. 686 of 2013**, the two were issued with the Grant to administer the estate of their deceased mother on 3rd May 2016.

20. Some five months down the line they instituted this suit seeking eviction of the Defendants herein as well as a permanent injunction to restrain them from interfering with the parcel of land known as Kilifi/Jimba/1143 which they told the Court was a sub-division of the parcel of land known as Kilifi/Jimba/383.

21. In support of their case, the Plaintiffs produced a Copy of a Title Deed showing that their mother was registered as the proprietor of the said Kilifi/Jimba/1143 measuring 0.46 Ha on 28th February 2001. The Plaintiffs told the Court that at some point in time, they came to learn that the Defendants had trespassed onto their Mother's property on account of some leasehold interests which the Defendants claimed to have on the property. It was further their case that the Defendants had illegally caused the sub-division of the suit property into four different parcels of land.

22. The Plaintiffs further told the Court that they came to learn that the Defendants' leasehold interests and the sub-divisions they had occasioned on their Mother's property had been nullified in **Malindi ELC Petition No. 11 of 2012** and that despite that nullification, the

Defendants had continued to trespass on their land wherein, they had since erected some illegal structures.

23. The 1st and 3rd Defendants neither entered appearance nor filed a Statement of Defence. The Plaintiffs however proceeded to withdraw the suit against the 1st Defendant on 26th February 2018 having learnt that he had passed away.

24. The 2nd Defendant was therefore the only one who opposed the Plaintiffs' case. The 2nd Defendant told the Court that he had jointly with the 3rd Defendant purchased the parcel of land known as Kilifi/Jimba/383 from the 1st Defendant on 6th March 2012 for valuable consideration. It was his case that prior to the said purchase, they had done due diligence and established that the suit property was vacant and that the 1st Defendant was the duly registered owner thereof. In support of his case, the 2nd Defendant produced a Copy of a Sale Agreement and a Certificate of Lease issued in the name of the 1st Defendant on 29th September 2010 for LR No. Kilifi/Jimba /383 measuring 2.8 Ha.

25. In his oral testimony before the Court, the 1st Plaintiff told the Court that he did not know how his mother acquired the title for the parcel of land known as Kilifi/Jimba/1143. It was his case that they only came across a Copy of the title shortly after his mother had died. While he insisted that his mother's title was a sub-division of the Defendant's title, there was nothing much to show any nexus between the two titles.

26. I say so because the Plaintiffs only produced a Copy of the title deed for LR No. Kilifi/Jimba/1143. That title was registered in the name of their mother on 28th February 2001 long before the title registered in the name of the 1st Defendant could be issued in 2010. In my mind, it was only the 2nd Defendant's title which could be a sub-division of the Plaintiffs' mother's title and not vice versa.

27. Secondly, from the material placed before me, the Mutation Form for Parcel No. 1143 is dated 7th November 2000. There was however no evidence that it was ever registered at the Kilifi Land Registry. One would have expected the Plaintiffs herein to either call the Land Registrar to produce the records in respect of the said parcel and or to produce a Copy of the Green Card for Parcel No. 383 to show that the Mutation was registered and that the Parcel No. 383 was then sub-divided to create the other parcels including Parcel No. 1143.

28. In the absence of such evidence, there was no basis upon which this Court could make an inference that Parcel No. 1143 exists as a sub-division of Parcel No. 383. In my considered view, the onus fell upon the Plaintiffs to prove that the Title Deed in the name of the late Zipporah Wanjiku Mureithi was issued to her either upon registration, upon transfer or upon transmission by a proprietor thereof.

29. In proof of registration or transfer, the Plaintiffs were expected to produce a Certificate of Official Search or the Green Card which would show the root of their title. As it stands, there was nothing placed before me to demonstrate that the Title Deed in the name of Zipporah is indeed registered at the Kilifi Land Registry.

30. On the other hand, the Plaintiffs told the Court that the Defendants' leasehold interests had in any event been nullified in a Judgment issued on 8th May 2015 in **Malindi ELC Petition No. 11 of 2012**. A copy of that Judgment was shown to the 1st Plaintiff who was their sole witness herein during cross-examination and the 1st Plaintiff conceded that the parties herein were not parties in the said Petition nor did the Judgment mention anything to do with the Parcel No. Kilifi/Jimba/383.

31. As it were, the 2nd Defendant has demonstrated by way of evidence that he and the 3rd Defendant jointly acquired the Parcel of land known as Kilifi/Jimba/383 from the 1st Defendant for a sum of Kshs 3,375,000/-. He has produced a copy of the Agreement of sale dated 6th March 2012, a Copy of Title Deed issued in the name of the 1st Defendant on 29th September 2010 as well as a copy of Title Deed issued in his name jointly with the 3rd Defendant on 22nd June 2012.

32. In the premises, this Court was not persuaded that there was any merit in the Plaintiffs' case against the Defendants. Accordingly, the Plaintiffs' suit is hereby dismissed with costs to the 2nd Defendant.

Dated, signed and delivered at Malindi this 18th day of September, 2020.

J.O. OLOLA

JUDGE