



IN THE HIGH COURT AT MALINDI

CIVIL CASE NO. 150 OF 2010 (LAND)

KAZUNGU MKANYI MERI1ST PLAINTIFF

KATANA MWAMZAME2ND PLAINTIFF

KALUME MKANYI3RD PLAINTIFF

VERSUS

SAMUEL JEMBE TSUMA1ST DEFENDANT

THE DISTRICT LANDS REGISTRAR, KILIFI2ND DEFENDANT

KALUME MKANYI3RD DEFENDANT

JUDGMENT

1. The plaintiffs' suit against the defendants is grounded on mistake and/or fraud. They allege that the 1st defendant was in the 1940s allowed to cultivate Plot No. KILIFI/MWANDEJE/1 (suit property) by the plaintiff's family. However, during the adjudication exercise, the 1st defendant claiming to be the lawful occupant or owner thereof procured registration of the parcel in his favour by the 2nd defendant. The plaintiffs are seeking the nullification of the title deed in favor of the 1st defendant and registration in their own names.
2. The 1st defendant filed a defence asserting that he purchased the suit property in 1964, took possession and thereafter developed the same. That he remained in possession and was properly registered as the owner thereof during the adjudication exercise upon dismissal of objections raised by the plaintiffs under the Land Adjudication Act. The 2nd and 3rd defendants also filed a defence denying the plaintiffs' claim but did not participate during the trial.
3. During the trial the plaintiffs and the 1st defendant adduced evidence. From the evidence adduced on both sides the uncontested history of the dispute is as follows: The 1st defendant moved into the suit property in 1964 with the consent of the plaintiffs and their extended Waremere family. The suit property was unregistered at the time. During the land adjudication exercise the plaintiffs raised objections under the Land Adjudication Act and eventually filed an appeal to the Minister, which appeal also failed. Subsequently the 1st defendant was issued with a title as the first registered proprietor. It is clear from these facts that the plaintiffs' suit before this court constitutes an attempt to reopen the land adjudication process. Rather than seek review of the decision of the Minister, the plaintiffs filed a fresh suit.

4. On the substance, the facts and the law stand in the 1st defendant's favour. Unlike the plaintiffs whose verbal assertion of a lease or "rehani" was not backed up by any document, the 1st defendant relied on the document executed between the plaintiffs' Waremere family and signed by plaintiffs' clan leader in 1964. Although it is true as submitted by the plaintiffs' advocate that the document may not legally qualify as an agreement for the sale of land, it is at least an acknowledgement by the plaintiffs' relatives, particularly the family/clan head one Tsuma Chigube that the sum of Shs. 2400/- was received by them in respect of the sale of the suit land to the 1st defendant.
5. The plaintiffs gave contradictory statements as to whether or not Chigube was present at the agreement between them and the 1st defendant but agree that he too filed objections during adjudication. The plaintiffs admitted receiving Shs. 2400/- which they claim was used as dowry for Katana Mwamzame (PW2) and that in exchange of the money the 1st defendant was given possession of the suit property.
6. The plaintiffs' assertion that the 1st defendant took the land in 1964 on a lease is displaced by the document they signed in 1964 and produced by the 1st defendant. Secondly, the plaintiffs said they tried to pay back the 'loan' in 1978 but the 1st defendant rejected the same. It is not clear why, despite the 1st defendant's continued occupation and use of the land, they did nothing until the adjudication process commenced in the new millennium.
7. The plaintiffs had a duty to prove their averments on a balance of probabilities. Their evidence is wanting. The alleged fraud or mistake on the part of the defendants, and in particular the 1st defendant has not been proved. As a first registration under the repealed Registered Land Act the 1st defendant's title cannot be defeated without proper proof of fraud or mistake. Section 143 of the Registered Lands Act states:
 1. **Subject to subsection (2) the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.**
 2. **The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."**
8. The rationale behind the above provision is that the process culminating in a first registration was an elaborate one under the Land Adjudication Act allowing for the prior ventilation of disputes and settlement of claims. The decision of the minister under the Act could not be challenged in court save by way of Judicial Review. This practice was intended to give finality to the adjudication process and to secure the titles issued to land owners after adjudication.

The plaintiffs herein availed themselves of that process without success and by bringing this suit are attempting another bite at the cherry. Their case has no merit and is dismissed with costs.

Delivered and signed at Malindi this 9th day of **June, 2014** in the presence of: Mr. Mwadilo holding brief for Mr. Shujaa for the 1st defendant.

Court clerk Samwel

C. W. Meoli

JUDGE