



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT OF KENYA
AT MALINDI
LAND CASE NO. 132 OF 2010

1. KARIJA KITUNGA JEFA

2. KAINGU KITUNGA JEFA *suing as the Administrator of the Estate of KITUNGA*

JEFWA KITUNGA(DECEASED).....PLAINTIFFS

=VERSUS=

1. SAID BWANA MKUU

2. MARGARET SAID.....DEFENDANTS

J U D G E M E N T

Introduction

1. The Plaintiffs commenced this suit by way of a Plaint. In the Plaint, the Plaintiffs have averred that they are the administrators of the Estate of Kitunga Jefwa Kitunga; that by virtue of an Agreement dated 14th August, 1989, their father, Kitunga Jefwa Kitunga sold a parcel of land measuring $\frac{3}{4}$ of an acre of the then Gede/Kirepwe “B”/43 to the Defendants for Kshs.15,000 and that without consulting them, the Defendants engaged a private surveyor who carried out the sub-division of Gede/Kirepwe “B”/43.

2. During the survey of Gede/Kirepwe “B”/43, it has been averred, the Defendants allocated themselves a whole 0.471Ha, which was more than the $\frac{3}{4}$ of an acre that they purchased.

3. It is the Plaintiffs contention in the Plaint that the Defendants carried out the subdivision of Gede/Kirepwe “B”/43 without the consent of the Land Control Board or that of the Plaintiffs’ family; that the Defendants obtained a Title Deed without a Transfer being executed by the Plaintiffs and that the Defendants presented to the District Land Registrar title deed documents to secure registration and issuance of a Title Deed.

4. The Plaintiffs are claiming for a declaration that the title deed for Gede/Kirepwe “B”/118 registered in favour of the Defendants was fraudulently obtained and a declaration that the Plaintiffs are entitled to the excess portion of 0.1710Ha which was irregularly acquired by the Defendants.

6. In their Defence, the Defendants stated that they acquired a title to the suit property on 24th April, 1997 procedurally and lawfully and that the suit is time barred.

The Plaintiffs case

6. According to the 1st Plaintiff, Pw 1, the Defendants purchased from their late father $\frac{3}{4}$ of an acre of land and an agreement was prepared and signed to that effect. Pw 1 produced the agreement dated 14th August 1989.

7. It was the evidence of Pw 1 that the whole land measured $1\frac{1}{4}$ of an acre and after the sale to the Defendants, $\frac{1}{2}$ an acre remained. However, the Defendants subsequently obtained a title deed for the whole land instead of $\frac{3}{4}$ of an acre that they had purchased.

8. It was the evidence of Pw 1 that the Defendants took the original title deed from their mother after the death of their father and proceeded to have the suit property registered in their names.

9. According to Pw 1, they went to the Land Control Board and agreed that $\frac{3}{4}$ of an acre of their land should be sold to the Defendants and not the whole land.

10. In cross-examination, Pw 1 stated that before his father died, he had agreed to sell part of their land to the Defendants. The initial land was known as parcel number Gede/Kirepwe "B" 43.

11. Pw 1 admitted that their late father sought for the consent of the Board for the subdivision of parcel number Gede/Kirepwe "B" 43 which created Plot No.118 amongst others. Pw 1 stated that Plot No.118 is the one that was sold to the Defendants. Pw 1 further admitted that his father also sold the other subdivision being Plot No.120 and that he was present when the agreement for the sale of the two parcels of land was done.

12. It was the evidence of Pw 1 that he was aware that the land that he 1st Defendant purchased from his father was Plot No.120 before he exchanged it with another purchaser known as Said Kadir. Mr. Said's parcel of land was Plot No.118. Pw 1 acknowledged that it was his father who sold plot No.118 which measures $\frac{1}{4}$ of an acre.

13. In re-examination, Pw 1 stated that he was aware that the 1st Defendant and Mr. Said exchanged their portions of land after his father's death and that Plot Number 118 which was sold to Said was bigger than plot No.120.

14. According to the 2nd Plaintiff, Pw 2, they have sued the Defendants because their father only sold to him $\frac{3}{4}$ of an acre only and that they are claiming for 1 acre from the Defendants. Their claim is for the difference that was not sold to the Defendants by their father.

15. It was the evidence of Pw 2 that Gede/Kirepwe "B" 43 was sub-divided into four portions although he could not recall the portion that was sold to the Defendants. Pw 2 produced the search for Plot No.118 as PEXB4.

The Defendant's case

16. The 1st Defendant, Dw 1, informed the court that the 2nd Defendant is his wife. According to Dw 1, he entered into an agreement with the Plaintiff's father on 10th August 1990 for the purchase of part of Gede/Kirepwe "B" 43 for Ksh.15,000. The agreement was produced as DEXB1. Later on, and with the consent of the Board, the Plaintiff's father subdivided the land into four portions, to wit, 117, 118, 119 and 120. The mutation forms showing the sub-division was produced as DEXB2.

17. It was the evidence of Dw 1 that the land he bought was parcel of land number 120 after the Plaintiff's father obtained the consent of the Board. The Application for the consent of the Board and the consent

that was granted by the Board was produced as DEXB 3 and 4 respectively. Dw 1 stated that the land that he bought measured 0.44Ha (approximately 1 acre). The property was then transferred to Defendants by virtue of the transfer dated 3rd January, 1991 which was produced as DEXB5.

18. Dw 1 stated that another person purchased from the Plaintiff's father parcel of land number 118. He agreed with the person who had bought portion number 118 to exchange the two plots. The said exchange was duly approved by the Board. The consent for the exchange of the two plots was produced as DEXB7 and a title deed for plot number 118 was duly registered in the Defendants' names. Dw 1 denied knowledge of an agreement dated 14th August, 1989 which shows that he purchased $\frac{3}{4}$ of an acre and not 1 acre.

Submissions

19. The Plaintiffs' advocate did not file his submissions. The Defendants' advocate filed his submissions and reiterated that the Defendants purchased from the Plaintiff's father parcel of land number Gede/Kirepwe "B"/120 which he later exchanged with one Mr. Kadir who had purchased No.118.

20. The Defendants' counsel submitted that the evidence of Pw 1 and Pw 2 is insufficient and unreliable to make for the court to grant the reliefs sought in the Plaint and that in any event the Plaintiffs' suit is time barred.

Analysis and findings

21. The Plaintiffs claim is for a declaration that the title deed for Gede/Kirepwe "B"/118 was fraudulently obtained and that the said title should be nullified by this court.

22. The evidence by Pw 1 and Pw 2 was that their late father sold to the Defendants $\frac{3}{4}$ of an acre of land. However, the Plaintiffs were not aware that the parcel of land that they want this court to nullify was initially sold to a Mr. Kadir before the same was exchanged with the Defendant.

23. Indeed, the Plaintiffs admitted that they are aware that their late father sub-divided parcel of land Gede/Kirepwe "B" 43 into four portions of land, to wit, 117, 118, 119 and 120. The Plaintiffs admitted that one of the parcels of land was sold by their father to Mr. Kadir and another one to the Defendants.

24. The Plaintiffs produced an agreement dated 14th August 1999 between their late father and the Defendants. The agreement shows that the Defendants bought $\frac{3}{4}$ of an acre of Gede/Kirepwe "B" 43. The 1st Defendant denied that he signed that agreement. However, a further agreement that was produced by the Defendant as DEXB1 acknowledges the fact that he paid to the Plaintiffs' father Ksh.15,000 on 14th August 1989, a confirmation that an agreement dated 14th August 1989 produced by the Plaintiffs was actually signed by the Defendants.

25. The Plaintiffs did not however show the nexus between the portion of land that the Defendants bought from their father and Plot no.118 which the Defendants exchanged with Mr. Kadir.

26. The Defendants produced in evidence the mutation forms showing the sub-division of Gede/Kirepwe "B"/43 which gave rise to plot numbers 117,118,119 and 120. The Defendants further produced in evidence the consent of the Malindi Land Control Board for the transfer of plot Gede/Kirepwe "B"/120 measuring 0.444ha from the Plaintiff's father to the Defendants and the Transfer of that plot dated 3rd January, 1991.

27. Whether the agreement that was entered into between the Plaintiffs' father and the Defendants was for $\frac{3}{4}$ of an acre and not for 0.444Ha is irrelevant considering that the Plaintiffs father signed the transfer document for Plot NO.120 after sub-division. The land was eventually registered in favour of the Defendants.

28. The Defendants further showed how they came to own plot no.118 which had been sold to Sayeed Hassan Kadri by the Plaintiff's father. The Defendants produced the Transfer document being the "transfer way of exchange with Plot No. 120". The said transfer was between the Defendants and Sayed Hassan Kadri. The land in respect of Plot No.118 was eventually transferred from Sayed Hassan Kadri to the Defendants and the title deed for plot number 118 was issued to the Defendants on 24th April, 1997.

29. It is because of the above chronology of events that I hold that there is no correlation between the Plaintiffs claim and the transfer parcel of land number Gede/Kirepwe "B"/118 to the Defendants by Mr. Kadri.

30. The transfer of Gede/Kirepwe "B"/118 to the Defendants by Mr. Kadri was done lawfully and the Plaintiffs' claim fails on that account. I will not even consider if the Plaintiffs claim is time barred as submitted by the Defendants' counsel.

31. For the reasons I have given above I dismiss the Plaintiffs' Complaint dated 5th November, 2010 with costs.

Dated and delivered in Malindi this 11th day of July, 2014.

O. A. Angote

Judge