

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 256 OF 2016

ASHA ALI JUMA.....PLAINTIFF

VERSUS

JOSEPH CHARO KAHINDI.....DEFENDANT

JUDGMENT

1. By a Plaint dated and filed herein on 26th September 2016, Asha Ali Juma prays for a mandatory injunction directed at the Defendant for him to partition Plot No. 65 Takaungu Land Adjudication Section(and) thereby carve out 4 $\frac{3}{4}$ acres in favour of the Plaintiff and put the Plaintiff into actual possession.

2. It is the Plaintiffs case that the defendant is the beneficial owner of the said piece of land measuring six acres. By a series of agreements executed in 2012, the Plaintiff bought a portion measuring 4 $\frac{3}{4}$ acres at a consideration of Kshs 1.3 Million. It is the Plaintiff's case that the Defendant subsequently pointed out the boundaries of the land but it has now turned out that 3.2 acres thereof fall outside the suit property.

3. Despite demand made that the Defendant corrects the anomaly the Defendant has failed to correct the same thereby necessitating the filing of this suit.

4. From an Affidavit of Service filed herein on 29th November 2016 sworn by one Tom Odhiambo, a licensed Court Process Server, the Defendant was served with copies of the Summons and Plaint at his home in Takaungu on 10th October 2016. Indeed subsequently the Defendant Joseph Charo Kahindi entered appearance by a Memorandum filed herein in person on 27th October 2016. He did not however file any Statement of Defence and this matter proceeded by way of formal proof.

5. Testifying on behalf of her daughter the Plaintiff pursuant to a Power of Attorney registered at the Mombasa Land Titles Registry as No. PA 19213 of 21st February 2018(Pexh 1), PW1-Ali Mahmoud Juma told the Court that the Defendant sold the land in question in stages to the Plaintiff.

6. At first the Defendant sold two acres. Thereafter he sold one acre before adding another 1 $\frac{3}{4}$ acres. The Plaintiff paid Kshs 1.3 Million for the land as per various Agreements produced and marked as Pexh 2(a) (b) and (c). The Defendant executed an Acknowledgment (Pexh 3) accepting that he had been paid the money.

7. PW1 however told the Court that when they went to have the land surveyed, the measurements was different. The acreage was less by 2.75 acres and the land pointed out also encroached on Plot No. 64 while the Plaintiff was buying Plot No. 65. Even though the Defendant was not told about the differences, he did not take any action. It was therefore the Plaintiff's prayer that the Defendant be compelled to surrender the balance of the land.

8. I have considered the Plaintiff's case and the submissions made herein. From the Sale Agreements, produced as Pexh 2(a), (b) and (c) it is evident that the Defendant sold 4 $\frac{3}{4}$ acres of his piece of land known as Plot No. 65 Takaungu Land Adjudication Section to the Plaintiff at a total consideration of Kshs 1.3 Million. The said Plot No. 65 measures approximately six acres.

9. According to PW1, they proceeded to fence the land as per the boundaries pointed out by the Defendant. Thereafter however, a neighbour complained about the fence and the Plaintiff brought in a Surveyor who established that the land sold fell short of the agreed size by 3.2 acres. This Portion of the land encroached on a neighbouring Plot. The Defendant has since failed to make good the shortfall.

10. As indicated, the Defendant filed a Memorandum of Appearance but did not file a Statement of Defence. Neither did he testify in these proceedings. The facts as narrated by the Plaintiff therefore remain uncontroverted.

11. In the absence of any evidence on the contrary, I have no reason to doubt the Plaintiff's testimony. Accordingly, I do find and hold that the Plaintiff has proved his case to the required standard and I hereby grant Prayer No. 'b' of the Plaint.

12. The Plaintiff shall have the costs of this suit.

Dated, signed and delivered at Malindi this 14th day of December, 2018.

J.O. OLOLA

JUDGE