



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 57 OF 2018

RAWSON MGWEDE KODI.....PLAINTIFF

VERSUS

URINDA BAYA BENJENI.....DEFENDANT

RULING

1. By this Notice of Motion application dated and filed herein on 20th March 2018 Rawson Mgwede Kodi(the Plaintiff) prays for an order of injunction restraining Urinda Baya Benjeni (the Defendant) from sub-dividing, trespassing onto, encroaching upon and/or remaining on, or taking possession, fencing off or interfering with Plot No. Mwele/Simakeni/865 situated at Rabai, pending the hearing and determination of this suit.

2. The application is supported by the Plaintiff's affidavit and is premised on the grounds listed thereon as follows:-

i) That the Plaintiff is the legal owner of Plot No. Mwele/Simakeni/865 situate at Rabai;

ii) That the Plaintiff has been in possession openly and continuously which he continues to do till this date(sic);

iii) That however, the Defendant has without any colour of right encroached upon and continues to trespass on the suit property without any lawful justification and sub-dividing the suit premises; and

iv) That no prejudice will be suffered by the Defendant in any manner if the application is allowed.

3. In a Replying Affidavit sworn on 26th April 2018 and filed herein on 2nd May 2018, the Defendant avers that Plot No. 865 is part of the ancestral land of the Mwamtukuyu Clan to which he belongs. The Defendant states that the land belonged to his grandfather one Baya Benjeni(now deceased). His grandfather had in 1968 filed a suit against the Plaintiff's grandmother-one Elizabeth a.k.a Bibi Mzuri and the Court adjudicated the dispute in favour of the Defendant's grandfather.

4. The Defendant avers that the said Bibi Mzuri however passed away before the Court order was enforced and she was as a result buried on a Portion of the suitland. During the recent land adjudication exercise carried out in the area, the Defendant complained to the officials and a determination was made that the land be sub-divided to enable the Plaintiff to occupy the portion where his homestead and the graveyard was but the remaining was to be registered in the Defendant's name.

5. The Defendant asserts that the Plaintiff never appealed the decision of the Land Adjudication Officers and as a result the suit property was sub-divided as per the decision made whereby the Plaintiff was left with Plot No. 865 while the Defendant was registered as the owner of the newly created Plot No. 1275. The Defendant accordingly denies trespassing upon the Plaintiff's parcel of land in any manner whatsoever.

6. I have considered the Plaintiff's application and the Defendant's response thereto. I have equally perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

7. From the pleadings and evidence placed before me, it is apparent that both the Plaintiff's and the Defendant's family have had a long running dispute over the suitland spanning as far back as the 1960s. It was also clear that despite the long history, the area concerned only underwent land adjudication recently.

8. Following a complaint made by the Defendant against the Plaintiff to the Land Adjudication Committee of the Mwele/Simakeni Land Adjudication Section, the Committee rendered its decision on 16th December 2016. The said decision required that the suitland be sub-

divided to enable the Plaintiff to occupy the portion where his homestead and their graveyard is allocated but the remaining portion of the land was to be registered in the Defendant's name.

9. The Plaintiff was not happy about the said decision. By a letter dated 18th December 2016 (Annexure RMK 5(a) to his Further Affidavit), he wrote to the Kilifi Land Adjudication and Settlement Officer as follows:-

“Verdict of Case No 45 on Parcel 865 Mwele/Simakeni, Rabai Sub-County

I wish to appeal against the Verdict of the above named case that was given on 16th December 2016 reason being:-

- The Committee ruled against us even after we presented evidence that we have been on the stated land for about 100 years.*
- The verdict made was biased and pre-determined, since the Chairman and four other members of the Committee came from the same clan as our opponent, so we could not expect any justice, it also came to a point where the accuser was boasting that he was told the land was his.*

So I humbly request for a hearing of the case by the Lands Board Kilifi kind consideration.

Signed

Rawson Kodi”

10. It would appear that nothing much happened after the Plaintiff's letter and on 13th March 2018, the Kilifi County Land Adjudication and Settlement Office caused to be sub-divided Plot No. 865 and created another Plot No. 1275 which was registered in the name of the Defendant pursuant to the decision of the Land Adjudication Committee dated 16th December 2016. This is apparently what led to the filing of this suit.

11. From his Further Affidavit filed herein on 17th May 2018, the Plaintiff was aware of the process. He avers at Paragraphs 30 to 34 thereof as follows:-

“30. That to date the appeal which I lodged to the Land Adjudication and Settlement Officer Kilifi has not been heard and determined.

31. That later I got a notice undated that the Committee was coming to sub-divide my land between myself and the defendant on 2/3/2018. Annexed and marked RMK 4 is the said notice.

32. That on 2/3/2018, I was at home and the Committee came and I declined to participate in the said sub-division. The Committee left.

33. That I have seen an annexure to the Defendant's replying affidavit indicating that the sub-division was done on 3/3/2018; and

34. That the sub-division had never been done in my presence and I categorically deny that (it) has ever been done and if it was done without my presence then the whole process is illegal.

12. Arising from the foregoing, it is evident to me that the Plaintiff's claim that the Defendant proceeded to the suit premises and sub-divided the same without any colour of right and/or lawful justification is gravely untruthful. The land was sub-divided following a decision of the Land Adjudication Committee in whose proceedings the Plaintiff participated and whose verdict he sought to appeal.

13. In the result, I find no merit in the application before me. The same is dismissed with costs to the Defendant.

Dated, signed and delivered at Malindi this 18th day of January, 2019.

J.O. OLOLA

JUDGE