



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 292 OF 2016

OSCAR LULU MWASAMBU

ANDERSON MWARINGA MWASAMBU (Suing as the administrator of

MASUMBUKO JAMBO MWASAMBU.....PLAINTIFFS

VERSUS

HARRISON DZENGO KENGA.....DEFENDANT

JUDGMENT

1. This suit was first filed by the Plaintiff Masumbuko Jambo Mwasambu at the Kilifi Resident Magistrates Court on 25th September 2007. In the Plaintiff filed in that Court, the Plaintiff prays for:-

- a. A declaration that the Defendant is unlawfully and illegally demanding possession of the title to six acres of the suitland;**
- b. An order directing that the caution lodged against the Plaintiff's suitland be removed;**
- c. A permanent or mandatory injunction against the Defendant, his servant or his agents from interfering with the Plaintiff's peaceful enjoyment of the entire suitland;**
- d. Damages for unlawful and illegal lodging of caution against the Plaintiff's suit land;**
- e. Costs of and incidental to this suit; and**
- f. Interest on (d) and (e) above at Court rates.**

2. Upon being served with the suit papers, the Defendant Harrison Dzenzo Kenga proceeded on 17th October 2007 to lodge a Defence and Counterclaim in which he also sought against the Plaintiff the following:-

- a. A declaration that the Plaintiff sold to the Defendant six acres out of Plot No. Kilifi/Ngerenya/868 and that the documentation of the land being sold in the Sale Agreement dated 14th February 1989 and 23rd October 1993 and in the transfer made on 17th January 1996 as Plot No. Kilifi/Ngerenya/898 was erroneous or made by mistake;**
- b. An order (directed) to the Plaintiff to surrender to the Kilifi District Land Registrar the Title Deeds for Plot No. Kilifi/Ngerenya 868 and for Plot No. Kilifi/Ngerenya/1012 for purposes of rectification.**

3. On 17th August 2008, when the matter came up for hearing, the Defendant raised a Preliminary Objection to the effect that the Plaintiff's claim was time barred by dint of Section 7 of the Limitation of Actions Act and further that since the claim was also for removal of the caution registered against the land, it could only be tried by the High Court pursuant to Section 159 of the Registered Land Act (now repealed).

4. Having heard the Objection, the Honourable James Nduna Senior Resident Magistrate dismissed the Objection made pursuant to Section 159 of the Registered Land Act but upheld the Objection to the effect that the suit was time barred. Accordingly, he proceeded to strike out the suit and ordered each party to bear their own costs.

5. The Plaintiff appealed the decision to the High Court at Malindi. By a Judgment delivered on 20th June 2014, the Honourable Justice Oscar Angote having heard the Appeal allowed the same and thus reinstated the suit. Subsequently, the suit was transferred to this Court for hearing and disposal.
6. On 29th January 2018 the parties appeared at the Court Registry and fixed the matter for hearing on 4th April 2018. On the said date however the Plaintiff and his Advocate failed to turn up and the Court dismissed their case for want of prosecution and ordered the Defendant to proceed with his Counterclaim.
7. Testifying as DW1, the Defendant told the Court that on 14th February 1989, the late Masumbuko Jambo Mwasambu(now deceased) sold to him six acres of his parcel of land situated at Ngerenya Village at the price of Kshs 40,000/-. The agreement for sale was reduced into writing. One of the agreements was hand-written while the other was typed (marked as Plaintiff Exhibit 1(a) and (b). On the date of the agreement, DW1 paid Kshs 4,000/- as down payment. The rest of the purchase price was to be paid in instalments.
8. DW1 testified that at the time they entered the agreement, the suit property was unregistered and they agreed that the Vendor would follow up the processing of documentation with the Kilifi Lands Office. According to DW1, he paid further Kshs 1,000/- on 3rd July 1989 and a further sum of Kshs 20,000/- on 23rd July 1989. That brought the total paid at Kshs 25,000/- leaving a balance of Kshs 15,000/-(copy of receipt marked as Pex 2.)
9. DW1 told the Court that they eventually agreed to adjust the purchase price to Kshs 70,000/- which sum he proceeded to pay and they went to the Land Control Board and obtained consent to transfer the land. The new agreement adjusting the sale price was witnessed by the Plaintiff's two witnesses (DW2 and DW3).
10. The Defendants told the Court that on 15th January 1995, a Surveyor carried out a survey of the Vendors land whereupon it was discovered that it contains 12.5 acres. On 6th February 1996 a Title Deed was issued to the Defendant for his portion being Kilifi/Ngerenya/1013 while the other Portion measuring 6.5 acres was registered in the Plaintiff's name being Kilifi/Ngerenya/1012.
11. It was the Defendant's testimony that during the preparation of the agreements, the parties discovered that they had erroneously transacted using a wrong parcel number -898 when the land that the parties meant to transact on was No. 868.
12. DW1 called two witnesses DW2 Hastings Ngala Charo and DW3- Kahindi Dickson Jefwa who corroborated basically what DW1 had told the Court.
13. I have considered the pleadings herein, the testimony of the Defendant and that of his witnesses as well as the evidence placed before me.
14. From the pleadings herein, it was not in dispute that the original Plaintiff herein the late Masumbuko Jambo Mwasambu and the Defendant entered into an agreement for sale of land. While the Agreement referred to Kilifi/Ngerenya/898, the parties intention it would appear was to sell and buy Parcel No. Kilifi/Ngerenya/868 in which both of them resided as at the time of the trial herein.
15. At some point in the year 2009 when the current Plaintiffs Oscar Lulu Mwasambu and Anderson Mwaringa Mwasambu attempted to evict the Defendant from the said parcel of land, they were arrested and charged in ***Kilifi SRM Criminal Case No. 308 of 2009; Republic – vs- Oscar Mwasambu & Another***. In the said case, their father Masumbuko Jambo Mwasambu testified and told the Court that he had sold a Portion of his parcel of land to the Defendant.
16. As I understood the dispute herein, while the Plaintiffs contended that only three acres of the land was sold, the Defendant was insisting that he had been sold six acres. As it turned out, Masumbuko Jambo Mwasambu passed on on 28th December 2012 and did not get a chance to testify in these proceedings.
17. From the material placed before me, it is apparent that following the sale, the parties went to the Land Control Board on 21st January 1993 whereupon consent was given for the transfer. The Land Control Board consent letter of the same date confirms that while the Plaintiff's Plot measured 12 acres in total, he was selling to the Defendant six of the said acres. That indeed confirms the position as indicated in the Agreement executed by the parties dated 23rd October 1993 which adjusted purchase sale price of the land to Kshs 70,000/-. That agreement was witnessed by among others DW2.
18. While the above stated documents all referred to Plot No. 898, the Defendant testified that the parties came to discover the anomaly when preparing the agreements. According to their records both Parcel Numbers 868 and 898 were registered in the name of the said Masumbuko Jambo Mwasambu although both parties came to know that the deceased only owned Plot No. 868 and that Plot No. 898 was owned and occupied by their neighbour one Kombe Nzai Lewa.
19. It was the Defendant's testimony that when they discovered the anomaly in the Parcel numbers, they requested the help of District Land Adjudication & Settlement Officer who then visited the suit property and carried out a ground verification of the properties. That exercise confirmed that the Defendant occupied part of Plot No. 868 while Masumbuko Jambo Mwasambu and his family occupied the remainder of Plot No. 868. Parcel No. 898 was occupied by the said Kombe Nzai Lewa.
20. Thereafter all the parties were summoned by the Kilifi Land Registrar to rectify the error but the Plaintiffs failed to heed the summons or surrender the Title Deeds for purposes of rectification. The Defendant then proceeded to lodge a caution against the title thereby precipitating the lodging of this suit in Court.
21. From the material placed before me, I am satisfied that the Defendant has proved that he bought six acres of land from the Plaintiffs and

not three acres as purported by the Plaintiffs. As it were, the Plaintiff did not testify in defence to the Counterclaim and/or adduce any evidence in rebuttal. The testimony of the Defendant and his two witnesses was thus uncontroverted.

22. In the result, I hereby enter Judgement for the Defendant as pleaded in the Counterclaim dated 17th October 2007.

23. The Defendant shall also have the costs of both the Plaintiff's suit and the Counterclaim.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

J.O. OLOLA

JUDGE