



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 203 OF 2013

VINCENT FONDO.....PLAINTIFF

VERSUS

THOMAS KALUME DOMA

WILLIAM KALUME DOMA

RODGERS KATANA DOMA

GEORGE KAINGU KATANA.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Complaint dated 8th November 2013 and filed herein on 15th November 2013, Vincent Fondo (hereafter “the Plaintiff”) prays for Judgment to be entered against the four Defendants as follows:-

i. A permanent injunction to restrain the defendants in terms of paragraph 9 above(sic);

ii. Costs

2. The said Paragraph 9 of the Complaint reads as follows:-

“9. In the meantime the Plaintiff avers that the Defendants have vowed that they will take back what they call their land oblivious of the fact that for 17 years since 1996 they have never made any such claims neither have they gone to any lawful authority to seek to recover it.”

3. Be that as it may, the Plaintiff’s claim as can be gleaned from Paragraph 3 to 7 of the Complaint is that he was allocated land Parcel No. Kilifi/Jimba/265 on 30th June 1999. Sometime in the year 2012, he sold a Portion of the land to a third party. However when the buyer went to clear the bush for purposes of cultivation, the 1st and 2nd Defendants stopped her claiming that the land was theirs. Attempts to resolve the matter using the Local Provincial Administration failed hence the commencement of this suit.

4. In a Statement of Defence filed herein on 21st May 2014, the four Defendants namely, Thomas Kalume Doma, William Kalume Doma, Rodgers Katana Doma and George Kalume Doma deny the averments contained in the Complaint. The Defendants aver that the Plaintiff did not enter into any sale agreement over the said parcel of land Kilifi/Jimba/265 as he alleges and state that the said parcel of land belongs to their family.

5. In addition the Defendants deny that they have exhibited any form of violence against the Plaintiff and aver that this suit is an abuse of the Court process meant to help the Plaintiff to gain through the back door something that does not belong to him.

The Plaintiff’s Case

6. At the trial herein, the Plaintiff called one witness. The Defendants were however absent and did not testify in support of their Defence.

7. Testifying as PW1 in his case, the Plaintiff told the Court that he is the owner of the suit property being Plot Number Kilifi/Jimba/265. He told the Court that he bought the land from one Katana Doma an uncle of the Defendants who was selling the land on behalf of his brother Charo Doma. The land was sold to him for Kshs 10,000/- in 1996. At the time of the sale, PW1 was told the land measured six acres but it later turned out that the size was less than that.

8. PW1 further testified that the Sale Agreement between himself and the said Katana Doma got burnt when Forest Guards set his house on fire in Kaliapapo village where he lived. He had however taken possession of the land immediately upon purchase and had planted coconuts and mango trees.

9. According to PW1, the Local Land Committee visited the area in 1999 to identify those who had settled on the land. He stood on his Portion and was identified as the owner thereof. However, after about seven years of trying to cultivate the land, he realised it was rather unproductive and moved to Kaliapapo area. Even though he moved, he kept a close watch over the suit property and when various task forces visited the area, he was always present and was the one identified as the owner thereof.

10. It was PW1's testimony that sometime in 2012, he sold two acres of the suit property to one Tina Ngoro after the area Chief agreed. However when Tina Ngoro moved to clear the bush, the 1st and 2nd Defendants moved and stopped her with threats to unleash violence. PW1's attempts to resolve the dispute have not been successful as the Defendants have equally threatened him with violence hence forcing PW1 to file this case.

Analysis and Determination

11. I have considered the pleadings, the Plaintiff's testimony and the evidence placed before this Court. I have equally perused and considered the Written Submissions filed herein by the Learned Counsels for the Plaintiff.

12. I think it is now well established that in order to secure injunctive relief such as the one sought herein, the Plaintiff must first establish a prima facie case with a high chance of success. In the circumstances of this case and at this stage, the Plaintiff must show that he owns and/or is entitled to or had a valid claim, which would be capable of defeating a third party claim in respect of the same property.

13. In the matter before me, the Plaintiff offered a two-pronged approach to demonstrate his entitlement to the suit property. His first ground is that he bought the suit property in 1996 at Kshs 10,000/- from one Katana Doma who was selling the land on behalf of his brother Charo Doma. According to the Plaintiff, the Sale Agreement between himself and the said Katana Doma got burnt in the year 2002 when forest guards set on fire a house that the Plaintiff had built in Kaliapapo area where the Plaintiff claims to have moved upon the realization that the suit property was unproductive.

14. I would have thought that in the absence of the Sale Agreement, the Plaintiff would have brought forth a witness to the agreement or some other form of corroboration now that the Defendants deny that there was any such agreement. Indeed, while the Plaintiff contends that he was on the suitland in 1999 when the local land committee went around and identified him as the owner of the suitland, neither the records of that Committee nor a witness from the said Committee was availed to support that position.

15. At the same time, while the Plaintiff avers that the vendor of the said parcel of land was an uncle to the Defendants, there was no explanation offered why he was selling the property on behalf of his brother the said Charo Doma and the relationship that existed between the said Charo Doma and the four Defendants herein.

16. The second ground that the Plaintiff relies on to prove his ownership of the property is the contention that he was allocated the said property by the Government through the Settlement Fund Trustees. In support of the position, the Plaintiff produced as Plaintiff Exhibit No. 1 a copy of Letter of Offer dated 30th June 1999 from the Director Land Adjudication and Settlement. It was not clear to me why the Plaintiff was applying to be allocated a Plot which he already occupied and which he had purchased barely three years back as he claims from the uncle to the Defendants.

17. Be that as it may, the said Letter of Offer required the Plaintiff to report to the District Land Adjudication and Settlement Officer to be shown the Plot boundaries and be issued with a letter confirming this before documentation." At the same time, that offer was valid for a period of 90 days within which period the Plaintiff was required to pay a 10% deposit for the plot.

18. As it were, the Plaintiff did not demonstrate to this Court that he complied with the terms of that letter and that he was eventually allocated the same and/or shown the boundaries thereof. In my mind, if the payments were made to the Settlement Fund Trustees as demanded and the land allocated and/or discharged to the Plaintiff, those records would be available at an appropriate office and the contention that the Plaintiff's house got burnt in 2002 is no excuse for the failure to produce the same.

19. Indeed while according to the Plaintiff, the genesis of this suit was the 1st and 2nd Defendants' refusal to allow a person he had sold a portion of the land to clear the same and cultivate, the said purchaser was not called as a witness to corroborate the Plaintiff's claim that they had stopped her from using the suit property. It was also instructive to note that the Sale Agreement (PEX 2) between the Plaintiff and the said Tina Ngoro refers to Parcel No. Kilifi/Jimba/264 and not 265 which is the suit property herein.

20. In the circumstances of this case and even though the Defendants did not adduce any evidence in support of their case, I was not satisfied that the Plaintiff had proved its claim on the suit property to the required standard.

21. The upshot is that I did not find merit in the Plaintiff's suit. The same is dismissed with no order as to costs.

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

J.O. OLOLA

JUDGE