



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.100 OF 2014

PHILIPH CHILUMO MBARU (suing as the legal administrator

ad litem of the Estate of BAYA NDALE BAYA.....PLAINTIFF

VERSUS

1. DZOMBO CHARLES CHAI

2. RAMA CHARLES CHAI

3. JUMA CHARLES CHAI

4. MATANO CHARLES CHAI

5. KITI CHARLES CHAI.....DEFENDANTS

JUDGMENT

1. By a Plaint dated and filed herein on 6th June 2014, Philip Chilumo Mbaru suing as the legal Administrator ad litem of the Estate of Baya Ndale Baya prays for:-

a) A declaration that the suit property-Chonyi/Galanema/37 belongs to the Estate of Baya Ndale Baya(Deceased);

b) A permanent injunction restraining the five Defendants by themselves, their agents, hirelings, employees and/or servants or any person acting on their behalf from burying the body of their father Charles Dzombo (deceased) on Plot No. Chonyi/Galanema/37 and/or from encroaching, selling, transferring and/or invading the suit Plot and any way interfering with the Plaintiff's quiet and peaceful possession and use thereof;

c) Costs of the suit.

2. The Plaintiff's suit as amended vide an Amended Plaint dated and filed on 12th June 2014 is premised on the contention that the suit property was at all material times registered in his deceased father's name and that they have occupied and cultivated the same since the 1960s. Sometime around the year 2008 one Charles Dzombo who is a father to all the Defendants herein started living on the suit property without the consent of the Plaintiff's family. The said Charles Dzombo passed away on 30th May 2014 and the Defendants were now threatening to bury him on the suit property hence this suit.

3. Filed together with the Plaint was a Notice of Motion application also dated 6th June 2014 wherein the Plaintiffs sought temporary injunction orders to restrain the burial until after this suit was heard and determined. On the same day 6th June 2014 the matter was placed before the Honourable Meoli J who certified the matter as urgent and granted temporary injunction orders restraining the Defendants from burying their father on the suit property.

4. The burial however proceeded on 7th June 2014 and the late Charles Dzombo was buried on the suit property. Subsequently, by an application dated 12th June 2014, the Plaintiff sought orders for committal of the Defendants to Shimo la Tewa Prison for a period of six months for disobedience of the Court Orders issued on 6th June 2014. On 31st October 2014, having heard the said application, the Honourable Justice Angote then seized of the matter, found that the Defendants were indeed in contempt of the order of 6th June 2014.

5. The Learned Judge did not however commit the Defendants to jail as sought by the Plaintiff. Instead, the Court directed them to purge their contempt by exhuming the body and taking it to the nearest morgue at their own cost. The Officer-in-Charge (OCS) Chasimba Police Station and the area Public Health Officer were directed to ensure compliance with the order.

6. As it turned out, the Defendants declined to exhume their father's body as ordered. Following an application made to that effect dated 28th November 2014, the Honourable Justice Angote ordered on 26th June 2015 that warrants of arrest be issued to the OCS Kilifi to arrest the Defendants and to bring them to Court to show cause why they should not be punished for disobedience of Court Orders.

7. On 8th September 2015 following their arrest and arraignment in Court the 1st and 4th Defendants were each fined Kshs 100,000/- in default of which they were sentenced to serve one (1) month in jail.

8. In their Written Statement of Defence filed earlier on 16th July 2014, the Defendants had denied that the suit property belongs to the Plaintiff's father as contended by the Plaintiff. It was their case that the suit property belonged to their clan and that the Plaintiff's father was merely holding the same in trust for the clan.

9. The Defendants further averred that their parents had entered and lived on the suit property since 1974 and there was no need to seek consent from the Plaintiff's family to use the land and/or to bury their deceased father.

10. At the trial herein however, the Defendants did not appear and/or offer any evidence. The Plaintiff on the other hand called two witnesses.

11. Testifying as PW1 in his case, the Plaintiff told the Court that his father Baya Ndale Baya died on 26th November 1980. On 6th June 2014, PW1 was issued with a Grant of Letters of Administration for the Estate of his father. He produced a copy of a title deed issued in the name of his father dated 29th June 1990. The same shows that the land measures 4.4. Ha and that the late Baya Ndale was registered as the owner thereof on 2nd April 1981.

12. PW1 further told the Court that the dispute arose during the lifetime of the father of the Defendants who caused them to be summoned to the Area Chief's Office. The Defendants' father however passed away before the dispute could be resolved. Apprehensive that the Defendants would bury their father on the suit property and stake a claim thereon, the Plaintiff moved to Court and filed this suit.

13. The Plaintiff's second witness and brother-Charo Baya Ndale (PW2) on his part confirmed that the land in dispute is registered in the name of their father. He told the Court that the Defendants' father invaded their land and started claiming that it belonged to him. He later died and was buried on the suit property. The Defendants have since refused to move out of the suit property. He urged the Court to remove the Defendants from the land as the same belongs to his family which consists of his father's nine children.

14. I have considered the pleadings filed herein and the testimony of the Plaintiff's witnesses as well as their evidence. It is not in dispute that the Plaintiff herein is the Administrator of the Estate of Baya Ndale Baya who died on 26th November 1980 pursuant to a Limited Grant Ad Litem issued to him in Malindi High Court Probate & Administration Case No. 14 of 2014.

15. It is also not in dispute that the suit property was on 2nd April 1981 registered in the name of the deceased Baya Ndale Baya. His family proceeded to process the title which was later on issued in his name long after his death on 29th June 1990.

16. While the Defendants do not contest the fact that the Plaintiff's father was registered as the proprietor of the suit property, they contend in the Written Statement of Defence and affidavits filed in these proceedings that the suit property belonged to their Clan and further that the Plaintiff's father was registered to hold the same in trust for the other members of the Clan.

17. As it were, no evidence was placed before me to show that the Defendants father and the father of the Plaintiff belonged to the same Clan. Neither the name of the Clan nor any evidence of the existence of the said trust was placed before me. From the evidence of the Plaintiff and his witnesses, it was apparent that the Defendants' father was not a brother to the Plaintiff's father but was a distant relative who had been grudgingly allowed to stay on a portion of their land from sometime in the year 2008.

18. That being the case and the Defendants having failed to offer any evidence on the contrary, I am satisfied that the Plaintiff has proved his case to the required standard. Accordingly I find and hold that the Plaintiff is deserving of the Orders sought in the Amended Plaint dated and filed herein on 12th June 2014.

19. The Plaintiff's suit is therefore allowed in terms of Prayers a, b, c and d of the Amended Plaint. The Plaintiff will also have the costs of this suit.

Dated, signed and delivered at Malindi this 14th day of March, 2019.

J.O. OLOLA

JUDGE