



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 229 OF 2013

1. ZIRO NGOMA

2. KUFUJA NGOMA

3. MALAU NGOMA

4. HAMISI NGOMA

5. KAZUNGU NGOMA.....PLAINTIFFS

VERSUS

KEA NGOMA DZUYA.....DEFENDANT

JUDGMENT

BACKGROUND

1. In their Complaint dated 9th December 2013 and filed herein on 10th December 2013, the five Plaintiffs pray for Judgment against the Defendant for:

i) A declaration that the defendant holds land parcel No. Kilifi/Mtwapa/12 in trust for the Plaintiffs and an order to share the land two acres to each.

ii) A permanent injunction in terms of paragraph 25 (of the Complaint)

iii) Costs.

2. The long and short of the 28 paragraph Complaint is the contention by the five Plaintiffs that the Defendant who is their brother got himself registered as the owner of all that parcel of land previously known as Kilifi/Mtomondoni/12 (now Kilifi/Mtwapa/12) which land was the family's land by virtue of his being their elder brother.

3. The Plaintiffs aver that their father Ngoma Dzuya was the initial allottee of the said parcel of land by the Settlement Fund Trustees (SFT) but he died before completing the payment for the loan. The Defendant then took over the loan repayment, got himself registered as the owner thereof before gradually kicking out the rest of the family therefrom.

4. In his Statement of Defence filed herein on 21st January 2014, Kea Ngoma (the Defendant) admits that the 1st to 4th Plaintiffs are his brothers. It is however his case that the 5th Plaintiff Kazungu Ngoma was born seven years after the demise of their father Ngoma Dzuya.

5. The Defendant denies that he obtained the suit property by fraud. It is his case that he personally identified, gathered and developed the suitland through a group of persons with whom he had formed a farming group

6. The Defendant asserts that their father died and was buried at their ancestral Bomani home and it is there that the Plaintiffs should go and look for their inheritance and not the suit property which he asserts he acquired through his own hard labour.

The Plaintiff's Case

7. At the trial herein, the Plaintiffs called two witnesses who testified in support of their case.

8. PW1 –Ziro Ngoma Salimu (the 1st Plaintiff) testified that the Defendant is his elder brother and the 2nd to 5th Plaintiffs are also his brothers. He told the Court that when their father died, the Defendant went to the Chief and was registered to take care of the suit property on behalf of the family. The family had previously been using the land for farming.

9. PW1 testified that sometime around 1976, the Defendant called them and told them that they needed to purchase land elsewhere for farming and that they would all use their father’s parcel of land as a home. The Defendant started by buying his own parcel of land in Ganze and the whole family thought that it was a good idea.

10. PW1 told the Court that sometime thereafter, the Defendant obtained title for the family land. He then sold the land he had purchased in Ganze and returned home. When the rest of the family followed him back, he told them that the land had now become his own and urged his brothers to look for their own land.

11. PW1 testified that the Defendant who was born two years before him then proceeded to destroy all the other houses in their father’s homestead. Efforts to resolve the matter amicably had failed and hence the family’s resolve to come to Court.

12. PW2- pivy Mwatata was a neighbour of the Plaintiffs. He told the Court that he knew Mzee Ngoma Dzuya, the father of both the Plaintiffs and the Defendant before he died. PW2 told the Court that he was allocated a 12 acre parcel of land being Plot No. 42 Mtomondoni at the same time when the Plaintiff’s father was allocated Plot No. 12. He told the Court that only those with identify cards were being given land at the time and as the said Ngoma Dzuya’s children were still young at the time, none was given land in their own names.

13. PW2 testified that the Defendant is the one who was presently occupying the land after he chased his brothers away.

The Defence Case

14. DW1- Kea Ngoma Dzuya (the Defendant) told the Court that the Plaintiffs are his siblings. He told the Court that it was not true that he inherited the suit property and/or that he held it in trust for the Plaintiffs. He testified that after his father died, he applied and was given land in his own name.

15. DW1 testified that his brothers never contributed a coin to the purchase of the suit property and he had no reason to let them know when he purchased the same as it was his own business.

Analysis and Determination

16. I have considered the pleadings herein and the testimony of the witnesses who testified before me. I have also considered the evidence placed before me and the submissions filed herein by the Learned Advocates for the parties.

17. The five Plaintiffs and the Defendant herein are brothers. Indeed, the Defendants and the 1st, 2nd and 5th Plaintiffs are the sons of the first wife of Mzee Ngoma Dzuya who is said to have died shortly after Kenya gained independence in 1963. The 3rd and 4th Plaintiffs are the sons of Mzee Ngoma Dzuya’s second wife.

18. The Plaintiffs have brought this suit against the Defendant who is their eldest brother claiming a share of all that parcel of land known as Kilifi/Mtwapa/12 measuring approximately 5.0725 Ha (12 acres) (hereafter the suit property). From a Certificate of Title produced by the Defendant at the trial herein, the said property was registered in the Defendant’s name and he was issued with a Certificate of Title on 9th October 1986.

19. According to the Plaintiffs’ however, the suit property is family land allocated to their father by the government when they were still young and they want the Defendant to be ordered to share the same with them on an equal basis. It is the Plaintiff’s case that upon the death of their father, the Defendant in his capacity as the first born son took over the management of their family and everything else including the running of the suit property was entrusted to him on account of tradition.

20. According to Ziro Ngoma (PW1) who was born third after the Defendant, their father settled on the suit property and they continued to live there after his death each of them with his own house until sometime when the Defendant devised a clever scheme to remove them from the land. PW1 told the Court that the Defendant persuaded his brothers to move to a place called Bale near Kilifi town for the purpose of obtaining land for cultivation.

21. In this regard, according to PW1, the Defendant led by example as he was the first to move out and acquire some land in Bale (also called Kachororoni) area. But once the whole family moved out and acquired their parcels of land, the Defendant abruptly sold the parcel he had acquired and returned back to the suit property where he systematically proceeded to demolish the dwelling houses left behind by his brothers save for that of Malau Ngoma (the 3rd Plaintiff) who continues to live on the land on certain conditions placed by the Defendant to-date. Those conditions include the fact that the 3rd Plaintiff can only utilize the land with the Defendant’s permission.

22. According to the Defendant however, his late father and the family initially stayed at Bomani near Kilifi town. Shortly before the country gained independence in 1963, the family moved to Mtomodoni (Kitauni) near Mtwapa where they occupied an area of about three acres. After independence however, the family was evicted from the area and they moved to stay with their father’s brother one Sanga Chama. The said Sanga Chama would later re-marry the Defendant’s mother after his father died and the union according to the Defendant,

produced the 5th Plaintiff herein.

23. The Defendant told the Court that as his father died landless, the village elders decided that he should be buried at his father's home at Bomani near Kilifi. The family however continued to stay at his brother Sanga Chama's place for two years. Thereafter Mzee Ngoma Dzuya's second wife and the mother of the 3rd and 4th Plaintiffs herein was remarried to one Kalume Dzuya who was then residing at the said Bomani area and she therefore moved with all her children to Bomani.

24. The Defendant further testified that after his mother was remarried, they remained at Mtomodoni (Kitauni). Some three years after the death of their father, the Government commenced the process of giving land to the landless people in the Coast region. Only those who were adults were being given the land and the Defendant who was then married was subsequently allocated the 12 acres in dispute. All his brothers did not participate in the exercise and so they never got a piece of land.

25. It was the Defendant's case that subsequently, his step father Sanga Chama built a house for his mother on the parcel of land which had been allocated to him and they continued living there. Later on, even the family of his father's second wife that had initially moved to Bomani came back and joined them.

26. The Defendant told the Court that he allowed the family to stay on his land until later on when they sought to farm the land. That is when he told them to go and acquire their own land after telling them that the land belonged exclusively to himself. His brothers did not resist and indeed they moved to Kachororoni area near Ganze, acquired their own parcels of land and went on with their lives. The Defendant also acquired a parcel of land there measuring about 3 ½ acres which he later sold.

27. It is accordingly the Defendant's case that the suit property is not family or ancestral land as claimed by the Plaintiffs. He asserts that the suit property was procedurally allocated to him by the Settlement Funds Trustees and he personally paid all the requisite Charges and the purchase price.

28. I have agonized over the facts of this case and the circumstances thereof. As it were, inspite of their strong protestations against their brother, the Plaintiffs had no documentary support to back any of the claims they made herein. In contrast all the documents produced in regard to the suit property were in the Defendant's name. The Defendant denies that the property ever belonged to his father and that it cannot therefore be family property.

29. Of course, the Plaintiffs also admit that the property is registered in his name. Indeed that is the very reason they are in Court over this matter. Their position is however that the property was originally in the name of their father Ngoma Dzuya before the Defendant added his name to it to read his name- Kea Ngoma Dzuya.

30. I have considered the history and the circumstances of this case. It was the Defendant's case that they used to reside with his father prior to his death at Mtomodoni where his father had moved to stay with his (father's) brother Sanga Chama. The said Sanga Chama later remarried the Defendant's mother two years after the death of the Defendant's father. If the Defendant is to be believed, he was allocated 12 acres of land a year later in his words "3 years after the death of their father". He does not however distinguish if this was a different parcel of land separate from the one the family lived in or if it was the very same one.

31. It however struck me as curious that it is the very same parcel of land in which he claims his uncle and step-father Sanga Chama built for his widowed mother a dwelling house. By this time, the said Sanga Chama had re-married the Defendant's mother and the Defendant does not explain why his mother's house was being built on his "newly" acquired property.

32. Similarly, curious was the fact that when Mzee Ngoma Dzuya's second wife and the mother of the 3rd and 4th Plaintiff returned from Bomani where she had remarried, she came back to live with her family on the same parcel of land in Mtomodoni. According to the Defendant, his step-mother was chased away from Bomani when her children started demanding for their land. In my mind, if indeed that was the case, the only plausible explanation for their return to Mtomodoni was their understanding that that was where the family land was and that must have been the basis the Defendant and his mother who was then still alive welcomed them back. Indeed, it is telling that the 3rd Plaintiff continues to reside on the land with the Defendant albeit with restrictions imposed upon the usage of the land by the Defendant.

33. I think the explanation for the registration of the Defendant as the sole proprietor of the suit property can be discerned from the testimony of Piry Mwatata (PW2) an old man who was a neighbour to the parties herein. It was PW2's testimony that as at the time land adjudication was done in their area, Mzee Ngoma Dzuya's children were too young to be given land. Only those with identification documents were being given land.

34. According to PW2 all their neighbours knew the suit property to have been allocated to Mzee Ngoma Dzuya. When the dispute went before the elders for determination, the elders directed the Defendant to surrender six acres of the suit property to the Plaintiffs. Both the Plaintiffs on the one hand and the Defendant on the other however rejected the decision of the elders. The Plaintiff insisted on equal distribution while the Defendant was willing to only part with five acres.

35. From the evidence and material placed before me, I am persuaded that the only reason for the Defendant's registration as the proprietor of the parcel of land was the fact that he was the only son of Mzee Ngoma Dzuya who was of age at the time the land was adjudicated and allocated to the residents of Mtomodoni area. The property clearly belonged to the family who lived thereon before he was registered as the owner thereof. Such registration must therefore have been in trust for himself and his brothers.

36. Section 25(1) (b) of the Land Registration Act subjects the rights of a proprietor of a parcel of land to such liabilities, rights and interests as affect the same and are declared by Section 28 of the Act not to require noting on the Register. Trusts including customary trust are some of the overriding interests recognized under Section 28 of the Act.

37. Accordingly, I am satisfied that the Plaintiffs have proved their case on a balance of probabilities. Judgment is hereby accordingly entered for the Plaintiffs as against the Defendant as prayed in the Plaint.

38. The Plaintiffs will also have the costs of this suit.

Dated, signed and delivered at Malindi this 26th day of June, 2019.

J.O. OLOLA

JUDGE