



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 33 OF 2017

PETER ZIRO KORO

EZEKIEL ZIRO KORO

JUMWA ZIRO KORO.....PLAINTIFFS

VERSUS

PHILIPH CHILUMO MBARU.....DEFENDANT

RULING

1. In this Notice of Motion dated and filed on 17th February 2017, the three Plaintiffs pray for an order of injunction to issue against the Defendant restraining him from fencing, building, encroaching, trespassing, selling or in any other manner dealing with all that parcel of land known as Kilifi/Mtondia/320 pending the hearing and determination of this suit.

2. The application which is supported by an affidavit sworn by Peter Ziro Koro (the 1st Plaintiff) is based on the grounds inter alia:-

i) That the Plaintiffs are the bonafide owners of the suit property having bought it from one Andrea Chondo way back in 1982;

ii) That the Plaintiffs and their family reside on the land whose title the Defendant has now fraudulently acquired; and

iii) That the Defendant has started fencing off the land and the Plaintiffs stand to suffer immense loss and damage unless the orders sought herein are granted.

3. In response to the application, Philip Chilumo Mbaru (the Defendant) has sworn a Replying Affidavit filed herein on 4th May 2017, wherein he denies that the Plaintiffs are the owners of the disputed property. It is his case that he has at all times material been the registered owner of the disputed property.

4. The Defendant asserts that Plot No. Kilifi/Mtondia/320 no longer exists as the same was sub-divided into various plots of land, namely Kilifi/Mtondia/2093, 2094, 2095 and 2096. The Defendant further avers that the 2nd Plaintiff (who is now deceased) had filed a claim against the Defendant in the Bahari Land Disputes Tribunal. The Tribunal ruled in favour of the 2nd Plaintiff but the Defendant appealed to the Provincial Land Disputes Tribunal in Appeal Case No. 307/2001 which found in favour of the Defendant.

5. The Defendant further avers that the award of the Appeal Tribunal was duly adopted as an order of the Court by the Principal Magistrates Court at Kilifi. The 2nd Plaintiff was however dissatisfied with the decision and he appealed to the High Court via Malindi HCCA No. 4 of 2008. The said appeal was dismissed on 18th September 2013.

6. The Defendant further states that subsequently, the 2nd Plaintiff instituted another case being Malindi CMCC No. 217 of 2014 in respect of Plot No. Kilifi/Mtondia/2096 which was a subdivision of Kilifi/Mtondia/320. The said case was struck out for being an abuse of the process of the Court.

7. Accordingly the Defendant asserts that this claim has conclusively been determined by the Tribunals and Courts of competent jurisdiction. The 1st Plaintiff and the 3rd Plaintiff being son and wife respectively of the 2nd Plaintiff have no separate claim from that already adjudicated by the Courts and this matter should therefore be struck out for being res judicata.

8. I have perused and considered the application and the response thereto. I have equally perused and considered the submissions filed herein by the Learned Advocates for the parties as well as the authorities to which they referred me.

9. The three Plaintiffs crave an order of injunction against the Respondent/Defendant from dealing or in any way interfering with all that property described as Kilifi/Mtondia/320. From the record herein, the 2nd Plaintiff Ezekiel Ziro Karo has since passed away. The 1st Plaintiff is his son while the 3rd Plaintiff is a wife to the deceased. It was their joint case that they bought the piece of land in contention way back in 1982 and the Defendant has recently encroached thereon and started fencing off the same.

10. The Defendant however denies that he has encroached on the said parcel of land as claimed by the Plaintiffs and/or that the land belongs to the Plaintiffs. Indeed he denies that the land described by the Plaintiffs exists and urges this Court to dismiss the Plaintiffs' claim.

11. From the record, it is apparent that land parcel number Kilifi/Mtondia/320 was on 21st April 1997 registered in the name of the Defendant herein. The Plaintiffs accuse the Defendant of obtaining the said registration by fraud.

12. It is also apparent from the record that the parties herein have had a long and protracted dispute over this same parcel of land. In the year 2001, the 2nd Plaintiff filed a claim before the Bahari Divisional Disputes Tribunal against the Defendant herein. That Tribunal gave a verdict in favour of the 2nd Plaintiff and its decision was subsequently endorsed as an order of the Court in Kilifi SRMCC Land Dispute Case No. 10 of 2004.

13. Being dissatisfied with the verdict, the Defendant filed an appeal at the Coast Provincial Land Disputes Appeal Tribunal, being Appeal Case No. 307 of 2001. Having heard the parties, the Provincial Tribunal made a determination on 26th November 2007 as follows:-

“THE DECISION/DETERMINATION OF TRIBUNAL

The Land Disputes Tribunals have no authority to deal with registered land nor order for cancellation of any Title Deed except the High Court. The decision and award of the Bahari Land Disputes Tribunal Kilifi, is set aside. The Appellant to compensate the respondent Ezekiel Ziro Koro for his two temporary shelters and 30 cashewnut trees, 30 coconut trees and 10 mango trees at prevailing agricultural prices.

The Respondent Ezekiel Ziro Koro to move out of the Plot No. Kilifi/Mtondia/320 as the Plot is the property of the Appellant Philip C. Mbaru.”

14. The Plaintiffs were in turn not happy with the decision of the Provincial Tribunal. Accordingly, through a Memorandum of Appeal dated 24th January 2008, the 2nd Plaintiff lodged at the Malindi High Court, Civil Appeal No. 4 of 2008 where he sought orders that the Tribunal's decision be set aside and Judgment be entered for himself endorsing the earlier decision of the Bahari Land Disputes Tribunal as endorsed in Kilifi SRMC Land Disputes Case No. 10 of 2004.

15. As it turned out, on 18th September 2013, the said Appeal was dismissed by the High Court for want of prosecution. Subsequently by a Plaint dated 5th August 2014 and lodged at the Chief Magistrates Court at Malindi as CMCC No. 217 of 2014, the 2nd Plaintiff filed a fresh suit seeking a declaration that the registration of the Defendant as the owner of all that parcel of land known as Kilifi/Mtondia/2096 was irregular, illegal, null and void. In the alternative, the 2nd Plaintiff sought an order that he had acquired the said parcel of land by virtue of continuous undisputed possession under the doctrine of adverse possession.

16. At paragraphs 32 to 36 of the Plaint filed before the Chief Magistrates Court, the 2nd Plaintiff admitted to the many proceedings before the Tribunals and the Courts as captured hereinabove. It was however his case that all those proceedings as well as the appeal before the High Court were inconsequential as it was true that the Bahari Divisional Tribunal had no jurisdiction to deal with the matter and as such the only option he was left with was to file a fresh suit in a Court clothed with jurisdiction.

17. By an application dated 22nd September 2014, the Defendant moved the Chief Magistrates Court to strike out the Plaint and dismiss the suit on the basis that it amounted to an abuse of the Court process and the issues raised were re judicata. In a Ruling delivered on 15th March 2015, this to the Defendants.

18. The e Malindi Chief Magistrate's Court agreed with the Defendant and struck out the suit with costthree Plaintiffs subsequently moved to this Court on 17th February 2017 and filed this suit and the application before me. At paragraph 11 of the Plaint, the Plaintiffs aver that there is no suit pending between themselves and the Defendant over the subject matter of the dispute herein. The Defendant does not agree. As he did in the Chief Magistrates Court he has characterized the proceedings herein as an abuse of the Court process and urged the Court to dismiss the same as being res judicata.

19. The principle of res judicata is captured at Section 7 of the Civil Procedure Act as follows:-

“7 No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and subsequently in issue in a former suit between the same parties, or between the same parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

20. In the matter before me, it is evident that the subject matter is the very same one that the parties have been litigating over since the year 2001. While the previous proceedings were instituted solely by the 2nd Plaintiff on the basis that he had purchased the disputed property sometime in 1982, he has now been joined in the current one by his wife (the 3rd Plaintiff) and son (the 1st Plaintiff). The 2nd Plaintiff's wife and son have no claim on their own. The thrust of their case remains that the 2nd Plaintiff bought the disputed parcel of land in 1982 and hence they are the beneficial owners thereof.

21. This is basically the third suit that the Plaintiffs have filed in the Courts after the matter moved from the Tribunals. When the Chief Magistrate Court dismissed their case as being an abuse of the process of Court on 15th March 2015, they neither appealed nor sought the orders to be set aside. Instead they went home and waited for the Defendant to assert his rights over the impugned parcel of land. When he did so, they strolled back to the Court, as if the Courts had said nothing before, and filed the present suit.

22. As the Court of Appeal observed in *William Koros –vs- Hezekiah Kiptoo Komen & 4 Others(2015) eKLR:-*

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving a determination of the same.”

23. In the circumstances of this case, the Plaintiff's suit and the application before me are clearly nothing but a gross abuse of the Court process. The Plaintiffs long lost their case and their resort to a multiplicity of suits and applications is ill-advised and bound to fail.

24. Their suit dated and filed herein on 17th February 2017 and the application before me have no legs to stand on. Both must fail. Accordingly, I strike out the application and dismiss their suit with costs to the Defendant/Respondent.

Dated, signed and delivered at Malindi this 30th day of July, 2019.

J.O. OLOLA

JUDGE