



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 7 OF 2014

(FORMERLY MOMBASA HCCC NO 100 OF 2010)

DAMARIS AKINYI NONDI AND

CHARLES DUCE OPONDO

(Suing as Administrators and Personal Representatives of the Estate of

James Opiyo Opondo, deceased).....PLAINTIFFS

VERSUS

1. ASGHAR KHANABHAI

2. NOORDIN BHAIJEE

3. SAIFUDIN BHAIJEE.....DEFENDANTS

JUDGMENT

BACKGROUND

1. This suit was filed on 8th April 2010. By an Amended Complaint dated 25th August 2011 as filed herein on 2nd September 2011, Damaris Akinyi Nondi and Charles Duce Opondo suing as the Administrators and personal representatives of the Estate of the late James Opiyo Opondo (the Plaintiffs) pray for Judgment against the three Defendants jointly and severally for: -

a) A declaratory order that the land situated at Kabenderani, Mariakani measuring 2.4 acres (0.99 Ha) or thereabouts, currently known as Plot No. 98 Kawala B Adjudication Section is part of the Estate of the deceased James Opiyo Opondo and not the property of the Defendants.

b) An order of permanent injunction restraining the Defendants either by themselves, their servants, agents or otherwise from trespassing onto the land situated at Kabenderani, Mariakani measuring 2.4 acres or thereabouts, currently known as Plot No. 98 Kawala B Adjudication Section, obtaining title thereto, disposing or developing the same or in any other manner whatsoever and howsoever interfering or inter meddling with the ownership, possession, quiet enjoyment and use thereof by the Estate of the late James Opiyo Opondo;

c) An order of a mandatory injunction compelling the Defendants either by themselves, their servants and or agents to forthwith remove at the Defendants' own costs the building materials the Defendants have deposited on Plot No. 98 Kawala B Adjudication Section and to cover the foundation dug thereon by the Defendants;

d) Damages for trespass onto the estate of the deceased; and

e) Costs of this suit and interest thereon at Court rates.

2. The 1st and 2nd Plaintiffs are a mother and her son and their prayers are premised on their contention that on 3rd August 1989, the late James Opiyo Opondo had purchased the suit property from one John Walter Odiwuor at a consideration of Kshs 250,000/-. It is further their contention that prior to his death, the deceased had constructed a permanent house for a security guard and planted trees on the land.

3. The Plaintiffs accuse the Defendants of invading the suit property between January 2009 and March 2010 and causing damage thereon by demolishing the said guard house, cutting down the trees and erecting their own bill board thereon. They aver that the acts of the Defendants amount to trespass and alienation of the property of the deceased and hence this suit and the prayers cited hereinabove.

4. In their Amended Statement of Defence dated 15th September 2011 as filed herein on 26th July 2012, however, the Defendants deny the Plaintiffs claim in its totality. They aver that the involvement of Asgar Khanabhai (the 1st Defendant) with the suit property is merely limited to taking watch against trespassers and to effect any decisions for and on behalf of the owners of the land being Noordin Bhajee (the 2nd Defendant) and Siajudin Bhajee (the 3rd Defendant).

5. The Defendants deny that they have demolished any house or cut down any trees as alleged. They further deny that their entry into the suit property at any time was or has been wrongful or that they needed the Plaintiffs' consent to enter into the suit property.

6. It is the Defendants' case that as proprietors of the suit property, they are within their legal rights to develop the same and to erect billboards thereon to warn off third parties and would-be trespassers. They urge the Court to dismiss the Plaintiffs claim for both declaratory and injunctive relief on account that the Plaintiffs have failed to meet the bare minimum threshold for the issuance of such orders.

THE PLAINTIFFS' CASE

7. At the trial herein, the Plaintiff called four witnesses in support of their case.

8. PW1-Suleiman Maisoud Rukiri told the Court that he knows the 1st Plaintiff as he used to carry her Mitumba products. He also knew on Juma Dzombo and Walter John Odiwuor. PW1 testified that Walter John Odiwuor bought some three acres of land from Juma Dzombo who was PW1's neighbour. After buying the land, Walter planted cassava and some trees thereon. He also built a house on the land.

9. PW1 told the Court that sometime after Walter bought the land, he saw some people cutting trees thereon. PW1 called Walter from Mariakani and Walter told him he had not sold the land. Later on, the late James Opiyo bought the land from Walter.

10. PW1 testified that the Defendants have never cultivated or lived on the land as the same belongs to the Plaintiffs.

11. PW2- Kazungu Charo also told the Court that he knew Juma Dzombo. He told the Court that before his death, the said Juma Dzombo had a parcel of land at Kabenderani in Mariakani which he sold to Walter John Odiwuor. He was present when the Sale Agreement was executed between the two.

12. PW2 further told the Court that later on, Walter told him that he had sold the land to Walter's brother-in-law who was married to the 1st Plaintiff herein. PW2 told the Court that the 1st Plaintiff is Walter's sister and that together with her husband they had planted trees on the suit property but someone later went to the land and cleared the trees.

13. PW2 told the Court that he does not know the Defendants and they have never occupied the land.

14. PW3-Damaris Akinyi Nondi is the 1st Plaintiff herein. She told the Court that she is the wife to the late James Opiyo who passed away on 7th November 2007. PW3 told the Court that her husband bought the suit property on 3rd August 1989 for Kshs 250,000/-. At that time, there was a case involving the land between one Chrispus Chai and Juma Dzombo. The matter was determined and it was directed that the land be registered in the name of John Walter Odiwuor who later on sold the land to PW3's husband.

15. PW3 told the Court that after buying the land, her husband fenced it, built a small guard house and planted trees thereon. Sometime between 2009 and 2010, she got a call from a neighbour who told her that some people were building on the land. PW3 went to the suit property and confronted the 1st Defendant whom she found on the land.

16. PW3 testified that the 1st Defendant abused and threatened her. She later reported the matter to the OCS Mariakani Police Station who advised her to go to Court.

17. PW4-Juma Mwanzije Lugwe was on acquaintance of John Walter Odiwuor. He told the Court that he was previously living with his uncle Juma Dzombo when the uncle sold the land to Walter. He recalled that there was a house built of corrugated iron sheets on the land. There were also cassava and other crops.

18. PW4 told the Court that his uncle later died after selling the land. Thereafter, one Chirunga Dzombo also PW4's uncle asked PW4 if it was true that the uncle had sold the land to Walter. PW4 confirmed the sale. Later, PW4 was summoned by the elders in regard to the dispute and he again confirmed the position. Later, Walter sold the land to the Plaintiff's husband.

THE DEFENCE CASE

19. The Defence called two witnesses who testified in support of their case.

20. DW1-Abdalla Mbudzya Ngoka told the Court that he knew John Walter Odiwuor as a resident of Mariakani from around 1995. He told the Court that Walter still repairs hand-carts in Mariakani town to-date.

21. DW1 testified that it is his father Mbudzya Ngoka and one Chirunga Ngoka who sold the suit property to the 2nd and 3rd Defendants. His father died in 2011.

22. DW2-Saifudin Abdulhussein Bhajjee is the 3rd Defendant herein and a brother of the 2nd Defendant. He told the Court that he and his brother were the owners of the suit property in which they had employed the 1st Defendant as a caretaker.

23. DW2 told the Court that he got to know John Walter Oduor. At that time Walter had taken the 2nd Defendant to the Land Tribunal. That case was heard and was determined in favour of the 2nd Defendant. Again, the Plaintiff filed another case against DW2 before the same Tribunal but DW2 won the case.

ANALYSIS AND DETERMINATION

24. I have perused and considered the pleadings, the witness statement and the oral testimonies made before me. I have equally considered the evidence produced by both sides of the dispute as well as the submissions by the Learned Advocates for the parties.

25. In her testimony before the Court, the 1st Plaintiff (PW3) testified that she is the widow of the late James Opiyo Opondo and the Co-administrator of his estate with their son who is the 2nd Plaintiff. The deceased died on 7th November 2007. It was the Plaintiffs' case that prior to his death, the deceased had acquired the suit property by way of purchase from the previous owner on 3rd August 1989.

26. According to the Plaintiffs, the suit property was part of a bigger parcel of land which earlier on belonged to one Juma N Dzombo. Sometime in 1985, the said Juma sub-divided his parcel of land and proceeded to sell Plot No. 1B to one John Walter Odiwuor. It is the said Walter Odiwuor, a brother of PW3 who subsequently sold the land to PW3's husband for a consideration of Kshs 250,000/-

27. It was further the Plaintiff's case that following his acquisition of the said property, the deceased proceeded to construct a guard house on the suit premises and had planted trees and deposited some building blocks thereon. PW3 told the Court that sometimes between January and March 2010, the Defendants invaded the premises, demolished the guard house and carried away the building blocks.

28. PW3 further told the Court that the Defendants then brought their own building materials and started some construction on the land. The Defendants went further and erected a site-board which read:

“Private Property”. The Plot is not for sale. Trespassers will be prosecuted.”

29. The Defendants however deny the Plaintiffs' contentions. According to the 3rd Defendant who testified herein as DW2, they purchased the suit property together with his brother (the 2nd Defendant) in the year 1996 from one Mbudzya Ngoka and Chirunge Dzombo Ngoka for a consideration of Kshs 150,000/-

30. DW2 testified that sometime in the year 2000, one John Walter Odiwuor lodged a complaint before the Land Dispute Tribunal at Mariakani claiming ownership of the suit property. The Tribunal proceeded to enter Judgment in favour of DW2.

31. DW2 further testified that once again in the year 2010 or thereabouts, the Plaintiffs herein lodged a suit against their agent-the 1st Defendant herein. The pleadings in that case were later amended to include DW2 and the 2nd Defendant. As this case was pending in Court, the 1st Plaintiff lodged another case at the Land Disputes Tribunal which case was also dismissed.

32. The Defendants aver that the suit property was vacant when they bought it from the mentioned vendors and they have thereafter always had possession thereof.

33. In his Written Statement lodged in Court on 16th November 2017, DW2 also states that before this suit was lodged the process of obtaining a title had been commenced and while the suit was pending, the Land Registrar has since processed and issued a title in the names of himself and the 2nd Defendant herein.

34. From the material placed before me, it is apparent that the land in dispute initially belonged to and/or was under the control of the late Juma N Dzombo. The Plaintiffs' Exhibit No. 3 is an extract of proceedings from the Mombasa Resident Magistrate's Court Land **Award Case No. 13 of 1985**. A perusal of those proceedings reveals that one Chrispus Chai had referred a land dispute over the suit property and other parcels of land to a Panel of Elders presided over by the then District Officer, Kaloleni.

35. In that case, the said Juma N Dzombo and one Kitsao Masha Gona alias Kidude Masha were named as the Defendants. After several sittings and a visitation of the land, the Panel of Elders made a decision that the disputed land be sub-divided and that each of the parties be given a portion of it. That decision was filed in Court on 7th May 1985 and was subsequently ratified by Honourable S.O. Oguk then SRM Mombasa on 10th July 1985 after an initial disagreement between the Claimant and Kitsao Masha Gona were settled by a second visit to the land by the area District Officer.

36. In his letter annexed to the proceedings dated 11th July 1985 forwarding the findings of the Panel of Elders to the SRM's Court at Mombasa as aforesaid, the then District Officer V.N. Andera states as follows:

“The three (3) parties concerned were shown their common boundaries and explained that the decision of the Panel was that the

disputed land be sub-divided among them.

I attach herewith a copy of my sketch for your further necessary action.

I discovered that their common boundaries actually existed and were well marked out and I tried as much as possible to go by the same boundaries. All the parties were satisfied with this decision. The whole land under dispute is approximately 1.8 km by 1 km.

Plot No. 1 belongs to Juma N Dzombo (ID No 2177151/65) on the North.

Plot No. 2 borders with Iha Menza's Plot.

Plot No. 2 belongs to Chrispus Chai.

Plot No. 3 belongs to Kitsao Kidude Masha Gona.

37. The attached sketch Plan to the DO's letter shows that the said Juma Dzombo is Plot No. 1 had already by then been sub-divided into Plot Nos. 1A to 1G. The first Plot shown to be fenced and adjacent to the Nairobi-Mombasa Road is marked 1B and the key to the Sketch Plan shows that it was Joseph Owuor's Plot. It is this Plot No. 1B which the Plaintiffs assert was bought by the late James Opiyo Opondo on 3rd August 1989.

38. According to the Defendants however, they purchased the suit property in 1996 from Mbudzya Ngoka Mbudzya and Chirunge Dzombo Ngoka for a consideration of Kshs 150,000/-. DW1- Abdalla Mbudzya Ngoka is a son to the said Mbudzya Ngoka Mbudzya who is now said to be deceased. Testifying before this Court, DW1 confirmed to the Court that he was aware that the suit property was sold to the 2nd and 3rd Defendants by his father and a cousin of his Dzombo Ngoka for the said consideration in the year 1996.

39. As it were DW1 did not explain to this Court how his father came to acquire the suit property which as we have seen from the Land **Award Case No. 13 of 1985** had already been decreed to belong to Juma N Dzombo. Other than claiming that they visited the land prior to the purchase, the Defendants have themselves not produced anything before me to indicate how the two vendors convinced them that they owned the land in question prior to their purchase thereof.

40. A glimpse of how the Defendants may have come to purchase the land from the two vendors was provided by Pastor Juma Mwanziye Lugwe(PW4) a nephew of Juma Dzombo. PW4 was previously living with Juma Dzombo at the time he is said to have sold the suit property to PW3's brother.

41. According to PW4, he was present and witnessed when his uncle sold the land to PW3's brother. After his uncle's death however, another of his uncles by the name Chirunga Dzombo visited them and enquired from him if it was true that the late Juma Dzombo had sold the land to PW3's brother. Later on, Juma Dzombo's brother Mbudziya and Chirunga purported to sell the land to the Defendants.

42. Given the resolution of the ownership of the suit property in Land **Award Case No. 13 of 1985**, I am unable to see how Juma Dzombo's brothers and/or relatives could just crawl out of the woodworks after his death and, without even a grant of Letters of Administration purport to sell the same to the Defendants herein. The Defendants as it were purchased the property from persons who neither owned nor possessed the land.

43. In support of their case, the Plaintiffs have produced a Sale Agreement dated 3rd August 1989 between John Walter Odiwuor and the late James Opiyo Opondo evidencing the fact that the suit property was sold to the deceased for a sum of Kshs 250,000/- While the Defendants contended that it was not clear whether the vendor herein was the same person shown on the sketch map afore cited as Joseph Owuor, I was convinced from the evidence of PW1, PW2 and PW4 that the vendor went by the said names and was also known locally in Mariakani as "Mrefu".

44. The Defendants attacked these proceedings on the basis that the area in question was under adjudication and that the plaintiffs had no consent to institute these proceedings. I have perused the Letters dated 24th April 2010 and 12th August 2010 from the District Land Adjudication Officer (Pexh 4A and 4B) and I am satisfied that the Plaintiffs obtained the necessary consent under the Land Adjudication Act prior to the institution of this suit.

45. In the circumstances, I am satisfied that the Plaintiffs have proved their case on a balance of probabilities.

46. When they instituted this suit, the Plaintiffs sought and obtained an injunction on 27th May 2011 against the Defendants restraining them from in any manner dealing with the suit property. In the course of these proceedings, it became apparent, more so from the 3rd Defendant's statement lodged herein on 16th November 2017, that the 2nd and 3rd Defendants had been issued with a title deed for the suit property.

47. If true that title was acquired illegally during the pendency of these proceedings and in violation of the injunction order. Any title resulting from such an illegality and violation of a court order is a nullity and of no consequence.

48. The long and short of this is that I find merit in the Plaintiffs' case. However, while the Plaintiffs pleaded for damages for trespass, it was evident that following the injunction granted as aforesaid, the Defendants were restrained and did not continue to be on the land. I will therefore not grant any damages in that regard.

49. Otherwise, the Plaintiffs case is allowed in terms of Prayers a, b, and c of the Amended Plaint dated 25th August 2011.

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

Dated, signed and delivered at Malindi this 20th day of September, 2019.

J.O. OLOLA

JUDGE