



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

HCCC CASE NO. 2 OF 2004

JONATHAN NGUMBAO KATA.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

SAMUEL KANOGO RITHO.....2ND DEFENDANT

JUDGMENT

1. This suit was filed on 6th February 2004. By an Amended Plaint dated and filed herein on 20th August 2010, Jonathan Ngumbao Kata (the Plaintiff) prays for Judgment against the two defendants for: -

a) An order of this Honourable Court declaring the adjudication process finding the 2nd Defendant the rightful owner of Chembe/Kibabamshe/414 a nullity ab initio

aa) A declaration that the 2nd Defendant is holding Chembe/Kibabamshe/414 in trust for the Plaintiff and that there is equitable trust, constructive or implied by the 2nd Defendant in favour of the Plaintiff and that the register should be rectified accordingly.

b) An order of this Court declaring that the registration and issuance of Certificate of Title in respect of Chembe/Kibabamshe /414 in the name of the 2nd Defendant(is) a nullity ab initio and that the Plaintiff is the rightful owner thereof and that the register be accordingly rectified.

c) Costs of this suit.

2. Those prayers are anchored on the Plaintiff's assertion that at all times material to this suit, the Ministry of Lands and Settlement was statutorily mandated to adjudicate all parcels of land to which the Land Adjudication Act applied and in the process cause to be certified genuine owners and the acreage to which those genuine owners were entitled. The said Ministry represented herein by the Honourable the Attorney General (the 1st Defendant) carried out that exercise in the area commonly known as Chembe/Kibabamshe in which the Plaintiff was born and brought up through the superintendence of its official Samuel Kanogo Ritho (the 2nd Defendant).

3. The Plaintiff asserts that before the process was conducted in the said area, the Ministry through the 2nd Defendant gave them assurance among them that: -

a) A survey would have to be first carried out in terms of the agreed acreage and position of the indigenous people's land;

b) That the rightful individual indigenous people would then later be issued with title deeds.

4. The Plaintiff avers that contrary to those assurances, the 2nd Defendant did not return after the survey was completed and the 1st and 2nd Defendants thereafter concealed the land registers for the area. It later emerged that the 2nd Defendant had allocated to himself all plots in the area including Plot No. Chembe/Kibabamshe/414. The Plaintiff asserts that the 2nd Defendant was not born and/or brought up in the area and thus has no ancestral claim to the land.

5. Accordingly, the Plaintiff contends that the acquisition of the said Plot No. Chembe/Kibabamshe/414 by the 2nd Defendant was fraudulent and unlawful and that unless the same is reversed he as a beneficiary thereof stands to suffer loss and damage.

6. I went through the file several times but was unable to find any Statement of Defence filed by either the 1st Defendant. On his part, the 2nd Defendant filed a Statement of Defence dated 27th February 2004 as well as a Notice of Preliminary Objection on 11th November 2011 characterising the suit as being time-barred, bad in law and offending the provisions of the Registered Land Act, Cap 300(now repealed). That objection was however dismissed by Meoli J on 22nd March 2012.

7. In his Statement of Defence filed on 1st March 2004, the 2nd Defendant avers that he has never worked as an employee of the Ministry of Lands and Settlement in Kilifi District as alleged by the Plaintiff. He further denies that he was engaged in the land adjudication process in Kilifi District as stated by the Plaintiff.

8. It is further the 2nd Defendant's case that the land rights of the indigenous people of Kilifi/Chembe/Kibabamshe area under customary law ceased to exist when land in the area was subjected to the Land Adjudication process and individual titles were issued on 30th May 1978.

9. Further and in addition to the foregoing, the 2nd Defendant asserts that he has a right under the Constitution to purchase and own land in any part of Kenya and avers that is what he did before 30th May 1978. He denies being party to any fraud and/or illegal transaction and invites the Plaintiff to strict proof of the allegations made in the Plaintiff.

10. At the trial herein, the Plaintiff called one witness in support of his case. None of the Defendants called any witnesses however.

11. Testifying as PW1 the Plaintiff told the Court that Plot No. Chembe/Kibabamshe/414 previously belonged to his grandfather. At some point in time, Land Adjudication officers went to their area to carry out the adjudication process. According to him one of those carrying out the exercise was the 2nd Defendant himself.

12. According to PW1 everyone was required to stand on their Plots and he stood on Plot No. 414. They were then told by the 2nd Defendant to wait for their documents. However later on when the list of the beneficiaries came out in 2004, the Plaintiff's name was not there. The 2nd Defendant had instead been allocated Plot No. 414. The names of many people were missing and they went to Nairobi to complain but nothing happened.

13. PW1 told the Court that his family used to cultivate the land measuring 8.5 acres. But presently there is a hotel occupying about one quarter of the area. He told the Court that he had never sold the land to anyone and that the 2nd Defendant could not be allocated the land as he was not a local resident of the area.

14. I have considered the pleadings filed and the sole testimony of the Plaintiff. I have equally perused and considered the Written Submissions filed herein and the authorities to which I was referred by the Learned Counsels acting for the respective parties herein.

15. From the material placed before me, it was evident that the suit property is registered in the name of the 2nd Defendant. The Plaintiff avers that the suit property previously belonged to his grandfather and that there was no way in which the 2nd Defendant could have been registered as the owner thereof unless through a fraudulent and an unlawful process.

16. At paragraph 11 of the Plaintiff, the Plaintiff avers that the 2nd Defendant was not born and/or brought up in the Chembe/Kibabamshe Land Adjudication area and thus had no ancestral claim to the land in question. It is further his case that none of the indigenous people rightly entitled to the land sold their land to the 2nd Defendant.

17. As it were land adjudication is the process through which existing rights in a particular parcel of land are finally and authoritatively ascertained. The Defendants have not denied that Chembe/Kibabamshe was created as a scheme meant to settle the squatters that were already in possession and occupation of the land that fell within the adjudication section.

18. That being the case and the Plaintiff having asserted that the 2nd Defendant was not a resident of the area, I think the onus shifted to the Defendants to demonstrate the manner in which the 2nd Defendant's interests were ascertained within the adjudication section. As it turned out, both Defendants closed their respective cases without testifying or producing any document in support of their respective defences.

19. From a perusal of the record herein a plank of the key defence of the 2nd Defendant was the position that his registration to the suit property was a first one and that therefore in accordance with Section 27(a), 142 and 143 of the Registered Land Act (now repealed), absolute and indefeasible.

20. As Mutungi J observed in *Esther Ndegi Njiru & Another –vs- Leonard Gatei (2014) eKLR*: -

“With respect, I think the position has changed with the repeal of the Registered Land Act as Section 106 (1) of the Land Registration Act No. 3 of 2012 provides that the repealed Acts shall cease to apply.

Section 106(1) provides: -

“On the effective date, the repealed Acts shall cease to apply to a parcel of land to which this Act applies.”

21. Indeed, as the Learned Judge observed in the *Esther Ndegi Njiru Case(supra)*, the equivalent to Section 143(1) of the repealed Act is Section 80(1) of the Land Registration Act which now provides:

“80(1) Subject to Subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

22. The omission of the words “other than first registration” in the new provisions under Section 80(1) of the Land Registration Act must have been intended to free the hands of the Courts in dealing with situations where the fact of a “first registration” was being cited to cover an apparent irregularity which occurred at the time of the said first registration.

23. In the circumstances of this case, the Plaintiff has asserted that the 2nd Defendant was not a resident of Chembe/Kibabamshe Adjudication area at the time of adjudication. The Plaintiff has further asserted that the suit property had been used by his family right from his grandfather and that none of them had sold the land to the 2nd Defendant. That called for some evidence in rebuttal by the defendants. That evidence has not been rebutted and remains unchallenged.

24. In light of the foregoing, I am satisfied that the Plaintiff has established his case to the required standard and is entitled to the prayers sought in the Plaint.

25. Accordingly, the Plaintiffs suit is allowed as prayed in the Amended Plaint dated and filed on 20th August 2010.

26. The Plaintiff will also have the costs of this suit.

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

J.O. OLOLA

JUDGE