



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 140 OF 2013

CECILIA KADZO EMMANUEL

(Suing as the Administrator of the Estate

of JONATHAN M. KARISA (Deceased).....PLAINTIFFS

VERSUS

MIRIAM CHEA MUNGAI.....DEFENDANT

JUDGMENT

BACKGROUND

1. By her Complaint dated 12th August 2013 as filed herein on 14th August 2013, Cecilia Kadzo Emmanuel (The Plaintiff) brings this suit on her own behalf and on behalf of the Estate of her husband the late Jonathan M. Karisa praying for the orders framed as follows:-

a) A declaration that the Plaintiff is the legal owner of the suit land being Plot No. 490 and a permanent injunction restraining the Defendant, her agents, servants, hirelings, heirs or legal representatives from interfering with Plaintiff's quiet enjoyment, possession and use of the suit land;

b) A declaration that if Plot No. 490 is the same as LR No. 5054/328 then the Defendant is barred by operation of law from recovering the same and a permanent injunction against the Defendants, her agents, servants, hirelings and heirs or legal representatives from interfering with the Plaintiff's quiet possession, use and occupation of the same and an order that the Grant issued to the Defendant be revoked and the same be issued to the Plaintiff pursuant to Sections 7, 13, 17, 37 and 38 of the Limitation of Actions Act, Section 7 of the Land Act, Section 101 of the Land Registration Act and the Constitution of Kenya;

c) An order that the Defendant do remove at her own cost, the developments she made on the suit land;

d) Compensation being Kshs 25,425/- for the trees damaged by the Defendant;

e) Exemplary damages for mental torture; and

f) Costs of and incidental to this suit.

2. Those prayers are premised on the Plaintiff's contention that at all times material, the said parcel of land situated at Mabirikani Area, Kilifi belonged to her late husband and that without any lawful excuse the Defendant has trespassed thereon and began construction purporting the same to be LR No. 5054/328 which the Defendant claims to own.

3. But in her Statement of Defence and Counterclaim dated 14th May 2015 and filed herein on 15th May 2015, Miriam Chea (the Defendant) denies the Plaintiff's claim. It is her case that while the Plaintiff claims to have been allocated the said Plot No. 490 by the Kalolo Kibaoni Bayamagonzi Upgrading Scheme (KKB), she was allocated her unsurveyed Plot No. 16 by the Government of Kenya.

4. The Defendant avers that on 30th April 2008, she was issued with the Title Deed for her unsurveyed Plot No. 16 which hence became LR No. 5054/328 Kilifi Township and the Grant issued by the Commissioner of Lands was registered on 25th September 2012.

5. By way of Counterclaim, the Defendant accuses the Plaintiff of encroaching on her said parcel of land sometime in the year 2008 and

proceeding in the year 2010 to destroy the beacons placed thereon by the District Surveyor, Kilifi. Accordingly the Defendant prays for:

- a) A declaration that LR No. 5054/328 Kilifi Township (formerly unsurveyed Plot No. 16 Kilifi Township) belongs to the defendant absolutely and has no connection with the Plaintiff's Plot No. 490 in the Kalolo Kibaoni Bayamagonzi Upgrading Scheme (KKB);**
- b) A permanent injunction do issue, restraining the Plaintiff by herself, her servants, agents, and or any other party claiming title under her or otherwise connected with her howsoever from entering into, alienating with the defendant's parcel of land LR No. 5054/328 Kilifi Township;**
- c) An order directed to the Plaintiff to remove her structures on LR No. 5054/328 Kilifi Township within Fourteen Days from the Court's Ruling in this matter, failure to which the defendant be at liberty to remove such structures at the Plaintiff's costs and under the supervision of the OCS Kilifi Police Station;**
- d) General Damages for Loss of User of the suit property since 2012, income and profit opportunities;**
- e) Costs of this suit;**
- f) Any further relief that this court deems fit in the circumstances.**

THE PLAINTIFF'S CASE

6. In support of her case, the Plaintiff called three witnesses who testified at the trial herein.

7. PW1-Cecilia Kadzo Emmanuel is the Plaintiff herein. She relied on her Statement dated 12th August 2013 and filed herein on 14th August 2013 as part of her evidence-in-Chief. In the said Statement PW1 states that her late husband Jonathan Karisa was allocated Plot No. 490, Mabirikani under the Kalolo Kibaoni Bayamagonzi (KKB) Upgrading Project. Her husband paid all the requisite fees and they had lived on the Plot since 1982.

8. PW1 told the Court that sometime in 2010, the Defendant's Advocate wrote to her a demand letter alleging that she had trespassed onto the Defendant's land which was shown in the letter as Plot No. 5054/328 unsurveyed Plot No. 16 Kilifi Township). That plot according to the Kilifi County Physical Planning Officer was in the Old Ferry area and not near PW1's place in Mabirikani. As such PW1 was certain that the Defendant was mistaken as to the position of her plot of land.

9. PW1 testified that sometime in September 2012, the Defendant sent surveyors onto her parcel of land for reasons she did not understand. PW1 reported the matter to the Police but no action has been taken to-date against the Defendant. Thereafter, the Defendant sent people who cut down PW1's trees. PW1 moved to Court but her suit was struck out on a technicality. The cost of the damaged trees was assessed as KShs 25,425/-.

10. PW2- Henry Manyiso Jefa is a neighbour of the Plaintiff and a former Committee member of the KKB Group. He testified that the KKB Committee has a list of all those who own the land in the area. He testified further that the Plaintiff has two plots in the area-Plot No. 490 is in her late husband's name while Plot No. 450 is in her name.

11. PW2 further told the Court that he does not know the Defendant and has never seen her in the area. He testified that the Ferry Area and Mabirikani are about 2km apart and that unsurveyed Plot No. 16 is in the Ferry Area. It was PW2's testimony that when he moved to his residence in 1985, he found the Plaintiff already living in the area. He could not therefor understand how the Defendant acquired title to a parcel of land which according to him belonged to the Plaintiff

12. PW3-Patrick Sambini Yaa is the Assistant Chief, Hospital Sub-Location, Kilifi Township. He testified that he personally knows the Plaintiff and that she and her family have been living on the disputed parcel of land since 1984. He told the Court that the area in dispute was within his area of jurisdiction and he did not understand how the Defendant whom he has never seen or known could have acquired the title to the land

THE DEFENCE CASE

13. The Defence equally called three witnesses in support of their Defence and Counterclaim.

14. DW1-Miriam Chea Mungai is the Defendant herein. She relied on her Statement dated 14th May 2015 and filed herein on 15th May 2015 as her evidence-in-chief. In the said Statement, DW1 avers that she is the registered proprietor of LR No. 5054/328 Kilifi Township. She was initially allocated the same on 4th November 1987 when the land was still an unsurveyed plot and she took physical possession thereof in 1991.

15. DW1 told the Court that the Plaintiff appeared in the area sometime in 1993 and proceeded to build temporary structures in the area adjacent to DW1's Plot. In 1994, DW1 got the District Surveyor to erect beacons on the Plot and the same were replaced in 1997. After the Plot was surveyed, DW1 was issued with a Title Deed for the land as LR No. 5054/328 Kilifi Township on 25th September 2012.

16. DW1 testified that in 2004, the Plaintiff constructed a cowshed on the edge of DW1's plot and DW1 requested her to remove it. The Plaintiff refused. In 2006, the Plaintiff's house built on the adjacent plot fell and she started putting up a temporary structure on DW1's land.

A boundary dispute then ensued and DW1 called the District Surveyor to come to the site and to re-establish the beacons. DW1 then fenced the Plot in the presence of the Area Chief and other witnesses.

17. DW1 further told the Court that at some point in time, they referred the matter to the local KKB Committee which was in charge of settling squatters and the landless in the area and they confirmed that the Plaintiff's Plot is located at Kalolo and that it is Plot No. 490. That was different from DW1's Plot which is located at Mabirikani, an area owned by the Government and which was allocated through the Commissioner of Lands.

18. DW2-Jackson Nzaro Ruwa is a former Chair of the KKB. He told the Court that the Plaintiff's case has nothing to do with the Defendant as their two Plots are very different. The Plaintiff's Plot was within the KKB area while that of the Defendant is not. DW2 told the Court that they tried to show the Plaintiff her Plot but she insisted on taking over the Defendant's.

19. DW2 told the Court that from the KKB Project records, the Plaintiff's Plot was number 450 while her late husband owned Plot No. 490. The Plots are still in the KKB Maps and the KKB Committee had tried to resolve the dispute in vain.

20. DW3-David Njoroge Kiama is the District Surveyor Kilifi. He gave his testimony pursuant to a Court order issued on 8th March 2017. He testified that pursuant to the order, he visited Plot No. 490 and LR No. 5054/328 and prepared a Report dated 5th May 2017.

21. DW3 testified that he visited the disputed land with the Physical Planner and were shown the land by the Plaintiff in the absence of the Defendant who was unrepresented. Their findings indicated that the owner of Plot No. 490 encroaches on Plot No. 5054/328.

22. DW3 further testified that the KKB Scheme is not surveyed and that the Plaintiff's cowshed is completely in the Defendant's plot as was part of the Plaintiff's house which had been demolished. DW3 further testified that according to their records Plot No. 5054/328 is in Mariakani but adjacent to the Kalolo Area.

ANALYSIS AND DETERMINATION

23. I have perused and considered the pleadings herein. I have equally considered the oral testimonies of all the witnesses who testified, the evidence produced at the trial herein and the detailed submissions of the Learned Advocates for the parties.

24. The Plaintiff filed this suit on her own behalf and in her capacity as the administratrix of the Estate of Jonathan M. Karisa who was her husband. It was the Plaintiff's case that the disputed parcel of land which she describes as Plot No. 490 Mabirikani was allocated to her late husband under the Kalolo Kibaoni Bayamagonzi (KKB) Upgrading Project.

25. She accused the Defendant of trespassing upon the said parcel of land on the purport that the same was the Defendant's unsurveyed Plot No. 16 Kilifi Township and commencing construction thereon. It was the Plaintiff's case that she had lived on the disputed parcel of land together with her husband and children since the year 1982 without any interruption from any person including the Defendant and urged the Court to declare her the rightful owner of the land, to restrain the Defendant from any further interference therewith and grant her compensation for the trees which the Defendant had cut down on the land.

26. On her part, the Defendant contended that her property was LR No. 5054/328 (formerly unsurveyed Plot No. 16) Kilifi Township and insisted that the same was separate and distinct from the Plot of land being claimed by the Plaintiff. It was her case that while her parcel of land is situated in Mabirikani area, the Plaintiff's Plot No. 490 was situated in Kalolo Area. She also accused the Plaintiff of wrongly encroaching upon her land and sought by way of a counter claim a declaration that the disputed parcel belongs to her, an injunction to restrain the Plaintiff from interference therewith as well as general damages for loss of user.

27. The Plaintiff and her witnesses testified that the disputed parcel of land was Plot No. 490 and that it belonged to the Plaintiff's late husband Jonathan M. Karisa. In support of her case, the Plaintiff produced documents indicating that her husband had been allocated the said Plot No. 490 by the KKB Squatter Upgrading Project.

28. The Defendant on the other hand produced documents including a Certificate of Grant issued to her by the Commissioner of Lands which documents indicated that the land referred to was previously an unsurveyed Plot No. 16 Kilifi Township which Plot had after survey been renamed LR No. 5054/328 Kilifi Township.

29. As it were, it did appear that the parties were either mistaken as to the correct location of their respective parcels of land or that they were claiming the same parcel of land but giving the same different names and/or references. Appreciating the nature of the dispute, both parties recorded a consent here in Court on 8th March 2017 in which it was ordered that the Physical Planner and the County Surveyor Kilifi do visit the suitland and that each of them produce a report showing the Locations of LR No. 5054/328 Kilifi and Plot No. 490 Kalolo plus any Supporting Maps and documentation.

30. That Order was served upon the said officers. David Njoroge Kiama(DW3) was the District Surveyor who carried out the exercise and his Report dated 2nd May 2017 was filed herein on 4th May 2017. From DW3's testimony here in Court and the Report filed, the visit was conducted in the presence of the Plaintiff but in the absence of the Defendant and/or her representatives on 2nd May 2017. That Report states in the relevant Section as follows:-

“The Survey team visited the site of the suitland on 02/05/2017 and the observations are as follows:-

1. The Survey team was taken round by Plaintiff Madam Ceceilia Kadzo Emmanuel and shown her boundaries which is a life

(sic) fence. She (has) also shown her structures eg house and cowshed. The boundary is shown on the survey observation indicated in red, houses and cow shed are indicated in purple as shown in Survey Sketch Plan attached.

FINDINGS

As per the approved development Plan No. 116 Kilifi Township (Kalolo Squatter Formalization Scheme) Plot No. 5054/328 and Plot No. 490 are two different Plots. Refer the said Plan attached (approved development Plan No. 116 Kilifi Township).

1. From the Survey Point of view the owner of Plot No. 490 as indicated on the above said Plan and Survey carried out in the field has encroached on Plot No. 5054/328 as shown on the attached Survey Sketch Plan. The magnitude of encroachment is shown in colour red on the survey sketch, house and cow shed are in colour purple.

2. Plot No. 5054/328 is already planned and surveyed as shown on approved Survey Plan FR No. 254/3 Attached.”

31. Despite having been the only party that was present on the ground when the Surveyor and Planner visited the land, the Plaintiff rejected the Report. DW3 was taken through that Report in Court and was examined thereon. He maintained that the two plots of land do not occupy the same space on the ground but are instead adjacent to each other.

32. Jackson Nzaro Ruwa (DW2) was the Chair of Kalolo Kibaoni Bayamagonzi Upgrading Project when the dispute was referred to their Committee for resolution. He told the Court both in his Written Statement and oral testimony before the Court that the parties and their lawyers had held several meetings to resolve the dispute. The last such meeting according to DW2 was held at the site on 6th July 2016. The Committee's findings were that Plot No. 490 Kalolo was separate and distinct from the parcel of land owned by the Defendant herein which is at Mibirikani. From their records, Plot No. 490 still belongs to the Plaintiff's husband while the Defendant's plot is not part of the KKB Scheme.

33. I have keenly perused and considered the District Surveyor's Report filed herein as well as the Sketch Plan attached thereto. It is evident that the Plaintiff's Plot abutts that of the Defendant. It is also clear from a perusal thereof that part of the Plaintiff's house as well as her entire cow shed fall within the Defendant's parcel of land as identified in the Report. That evidence corroborates the testimony of DW2 as cited hereinabove. I did not find any reason to doubt the expert testimony in regard to the actual location of the two parcels of land on the ground.

34. Arising from the same, it goes without saying that I did not find any merit in the Plaintiff's case. On the contrary I was instead persuaded that the Defendant had proved to the required standard that she was the rightful proprietor of LR No. 5054/328 Kilifi Township and further that the Plaintiff had encroached thereon. Nothing was however placed before me in proof of loss of user and I make no award on general damages.

35. In the result the Plaintiff's case is dismissed while the Defendant's Counterclaim is allowed.

36. In terms of Prayer No. 'c' of the Counterclaim, the Plaintiff shall have 45 days to remove her structures from LR No. 5054/328 failure to which the same shall be removed at her cost in the manner sought in that Prayer.

37. The Defendant shall have both the costs of the Plaintiff's suit and of the Counterclaim.

38. Order accordingly.

Dated, signed and delivered at Malindi this 24th day of October, 2019.

J.O. OLOLA

JUDGE