



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.103 OF 2014

JAPHETH SULUBU KALUME.....PLAINTIFF/APPLICANT

VERSUS

RAYMOND KITHI KALOKI.....1ST DEFENDANT/RESPONDENT

CHARO MWAVUMBO (NGALA).....2ND DEFENDANT/RESPONDENT

JUDGMENT

BACKGROUND

1. By a Plaint dated and filed in person herein on 6th June 2014, Japhet Sulubu Kalume(the Plaintiff) prays for an order of injunction restraining the 1st and 2nd Defendants from encroaching upon, trespassing into and/or alienating a parcel of land situated at Maweni being part of Plot No. 411/R Group 6521 Malindi(the Suit Property).
2. The Plaintiff's case is premised on his claim that at all times material to this suit and more specifically since the year 1975, he has been the rightful owner of the suit property which he describes as being under Kilio Cha Maskini Welfare Association. According to the Plaintiff, sometime in the year 2013, the 1st Defendant Raymond Kithi Kaloki, without any colour of right encroached on part of the suit property and is now in the process of putting up a structure thereon.
3. The said 1st Defendant apparently purchased a parcel of land bordering the suit property from the 2nd Defendant Charo Mwavumbo (Ngala). The Plaintiff therefor craves an order of injunction against the two Defendants jointly and severally.
4. Initially the Defendants did not file any Defence to the suit but witnesses for both sides proceeded to testify herein on the presumption that a Defence had been filed. When the Court brought the attention of the parties to this anomaly, the parties recorded a consent on 20th February 2019 in which the Defendants were allowed to file a Statement of Defence and the Plaintiff a Reply to the said Defence.
5. Subsequently by separate Statements of Defence filed herein on the same day-20th February 2019, the Defendants responded to the Plaintiff's suit. It is their joint position that the suit property is registered in the names of one Sunil Gopichand Mediratta who thereafter entered into a Sale Agreement with the group known as Kilio Cha Maskini Welfare Association.
6. It is further the Defendants' case that the issue herein had been resolved by their said Association which has already engaged its surveyors who have since separated the Plaintiffs' Plot and that of the 1st Defendant. The Defendants further aver that the 2nd Defendant who was the Plaintiff's neighbor for a longtime has since sold his Plot to the 1st Defendant and that the Plaintiff has no claim whatsoever against them.

THE PLAINTIFF'S CASE

7. At the trial herein, which commenced in 2016 before the Honourable Angote J, the Plaintiff called four witnesses.
8. PW1- Japhet Sulubu Kalume is the Plaintiff herein. He testified that the Defendants had trespassed on his Plot situated at Maweni in Malindi. He further testified that the Plot measures 19.4 m by 18 m and that it does not have a title deed.
9. PW1 told the Court that his parcel of land is within Plot No. 411R which is owned by an Asian. He told the Court he has lived on the land since 1975. The Kilio Cha Maskini Association has since entered into an agreement to buy off the Asian. As a Member PW1 has paid Kshs 36,000/- for the Plot.

10. PW1 told the Court that he does not know Mwavumbo Ngala. He however came to know Charo Mwavumbo-the 2nd Defendant herein. He has sued the 1st Defendant because he encroached on his Plot by 3.2 by 18 metres. PW1 further told the Court that the 1st Defendant has no land in the area.

11. PW1 told the Court that the plot belonging to the 1st Defendant's father is far away across the road and not where his Plot is located. When the dispute arose, Kilio Cha Maskini deliberated on the issue but PW1 did not agree with their decision.

12. PW2- Patrick Chome Ngala was the Chairman of Kilio Cha Maskini in the 1990s. He told the Court that he was one of those who started the Association and that the Plaintiff had been on his portion of the land since 1975. According to him the 2nd Defendant's land was across the road and when the road was constructed, the 2nd Defendant's father's house and other houses were demolished.

13. PW3-Francis Mwamure Thoya told the Court that he is the one who invited the Plaintiff to Maweni Village and gave him the suit property in 1975. Later on around 1977/78, the Plaintiff who was a Civil servant was transferred to Hola. Before he left for Hola, the Plaintiff engaged PW3 to build for him a house on the land. PW3 constructed the house and upon its completion, he rented it out to tenants. The Plaintiff later returned to Malindi in 1988. PW3 testified that he never saw Ngala Mwavumbo occupying the suit property at any single time.

14. PW4- Jonathan Kahindi Ngowa told the Court he was a neighbour to Ngala Mwavumbo, the 2nd Defendant's father. PW4 told the Court he started living in Maweni in 1992 and that Ngala Mwavumbo joined him there after about three years and built a structure near his house. Sometime in 2004, PW4's house and that of Ngala were demolished to pave way for the construction of the road leading to Malindi General Hospital. Both PW4 and Ngala ceased to own land there as it had been converted to a public road and it is the Plaintiff's land that now bordered the road.

THE DEFENCE CASE

15. On their part, the Defence called a total of five witnesses.

16. DW1-Raymond Kithi Kaloki is the 1st Defendant herein. He testified that he purchased the suit property from the 2nd Defendant and his mother through an Agreement dated 8th January 2001. Thereafter he took possession of the land which he used as a Parking lot. Before the purchase, the 2nd Defendant had showed him documents indicating he was a member of Kilio Cha Maskini and they agreed that the 2nd Defendant's name be replaced with DW1's name.

17. DW1 testified that he thereafter paid all dues to the Association. He was thereafter allowed to build and he started by demolishing a mud-walled structure which had been on the land having been built by the 2nd Defendant's father. DW1 then started construction on the land which measures 42 feet by 75 feet.

18. At that point in time a dispute arose over a septic tank built by the Plaintiff between him and the Plaintiff who insisted that they approach the Committee. After hearing them, the Committee recommended that the area with the septic tank should be "no man's land". DW1 was allowed by the Committee to put up his own septic tank in that same "no man's land."

19. When DW1 moved to finish his construction, the Plaintiff stopped him. DW1 denies that his plot was taken up by the road that was opened up in the area.

20. DW2-Ngala Mwavumbo Senga alia Charo is the 2nd Defendant herein. He told the Court it was him and his mother who sold the disputed portion of land to the 1st Defendant. DW2 told the Court they were registered members of Kilio Cha Maskini Association and that when they sold the land, they had houses thereon.

21. DW2 testified that he was aware that when the road was being put up, their neighbour's house was demolished but DW2's house was not affected. DW2 recalls that the Plaintiff was their neighbor and that their portion of land were demarcated by a mango tree.

22. DW3-Peter Kairu is an elder and the Vice-Secretary of Kilio Cha Maskini. He told the Court that the Association purchased the land on 30th January 2014 from one Sunul Medrala Gorinder. The Agreement was that every member would get what was due to them from the land. Both the Plaintiff and the 2nd Defendant were given their portions. The 2nd Defendant later sold his portion to the 1st Defendant.

23. DW3 told the Court that later on some road was constructed but there was a road reserve and the 1st Defendant still remained with his portion in which he started constructing a foundation for a building. That portion exists in the Deed Plan and the Association recognises it.

24. DW4- Reuben Ngugi Murigi told the Court he was a neighbour of both the Plaintiff and the Defendants herein. He recalled that the 2nd Defendant had a house on the land but it was demolished by the 1st Defendant before he started constructing a foundation thereon. DW4 stated that he had lived on the land since 1985 and that the road that was constructed left some space- a road reserve before the 1st Defendant's foundation.

25. DW5-Barisa Haro Kae is a brother to the 2nd Defendant's mother. He told the Court that both his sister and the husband who are now deceased lived in Maweni. He knew their residence and the boundaries thereof. He testified that he lived on the land for a while and that it is not true that when the road was built, his sister's house was destroyed. He recalled that his sister and the son sold their Plot to the 1st Defendant.

ANALYSIS AND DETERMINATION

26. I have perused and considered the pleadings filed herein. I have also considered the oral testimonies of all the witnesses who testified, the evidence adduced and the submissions by the Learned Advocates for the parties.

27. The Plaintiff herein seeks an order of injunction to restrain the Defendant from encroaching on, trespassing and/or alienating a parcel of land said to be measuring 19.4 m by 18 m or thereabouts which parcel of land is part of all that parcel known as Plot No. 411R Group 652 Malindi. Both the Plaintiff and the Defendants trace their connection to the disputed parcel of land through their membership to a Community Based Organisation registered and known as Kilio Cha Maskini Welfare Association.

28. By an Agreement of Sale dated 30th January 2014, the Association bought the mother parcel of land measuring 20.23 acres or thereabout from one Sunil Gopichand Mediratta. It was apparent that many years before the Sale Agreement was executed, members of the Association had occupied and built residential and other structures on the parcel of land and the Association was formed as an umbrella body to enable them to formally acquire the portions they occupied.

29. On that account, it was the Plaintiff's case that he has been in occupation of his portion of the land since 1975. Sometime in the year 2013 however, the 1st Defendant claiming to have bought another portion of land from the 2nd Defendant encroached on a portion of the Plaintiff's land and started digging up a foundation for purposes of constructing a house thereon. The Plaintiff produced in evidence photographs (pexh 5) showing the foundation that was dug.

30. The 1st Defendant does not deny that he was in the process of constructing a house on the disputed portion of the land. It is however his case that the portion of land in which he is putting up a house belonged to the 2nd Defendant from whom he bought the same on 8th August 2001 for a sum of Kshs 30,000/-

31. The 2nd Defendant supports the 1st Defendant's case. He asserts that he was together with his mother the occupants of a portion of land adjacent and abutting the Plaintiff's parcel of land but separate and distinct on its own. In August 2001, they decided to move away from the land situated in Maweni Area of Malindi and sold the land together with their house to the 1st Defendant.

32. The Plaintiff does not dispute that the 2nd Defendant's family used to be his neighbours. He however asserts that the Portion of land which was previously owned by the 2nd Defendant's family ceased to exist in the year 2004 when the road cutting through the Maweni Area to the Malindi General Hospital was being constructed. The Plaintiff maintained that the house belonging to the 2nd Defendant's family was demolished together with other adjacent houses to create room for the road.

33. Both the Plaintiff and the Defendants called a number of witnesses who testified in support of their respective versions of the truth. What came out from their testimonies was the fact that the respective portions of land originally owned or occupied by the Plaintiff and the 2nd Defendant had never been surveyed. Mango trees and other structures were assumed to demarcate the boundaries where there were no walls or fences.

34. Whenever a conflict occurred, there was hardly any consensus on the boundaries as each side had their version of what was right. That is what happened on 27th October 2013 shortly after this dispute erupted and the parties approached their Kilio Cha Maskini Welfare Association for a way out.

35. In their 'Resolution' as signed by both the Chairman and Secretary of the Association and to which is attached a Sketch Map of the area they state as follows:-

"RESOLUTION

After hearing both parties, witnesses and also the information which we gathered from the neighbours of the two parties. We ruled out that from the structure of Mr. Sulubu (the Plaintiff) where the septic tank ends the septic tank is six feet (6ft) so we concluded that the six feet which are covered by the septic tank to be the no man's land and a path to be left for the pedestrians to pave in (sic). So long as we are all squatters staying in unsurveyed land parcel whereby there is no any sub-division that has been made. This plot known as Plot 411/r Group 6521 Malindi containing 20.23 acres is under the Kilio Cha Maskini Welfare Association."

36. The Plaintiff disagreed with the determination of the Association and proceeded to file this suit. As it were, even though he avers that his plot measures 19.4m by 18m the Plaintiff did not disclose to this Court, who other than himself had come up with those measurements. But for his word and hand-written sketches, there was no other way of confirming that what he stated to be the measurements for his parcel of land were what it was on the ground and other official records if any. Even his friend Francis Mwamure Thoya (PW3) who claims to have invited him originally to the land made no mention of those measurements.

37. As it were, I was more inclined to accept the testimony of Peter Kairu (DW3) who testified herein as an elder and Vice-Secretary of Kilio Cha Maskini Association. DW3 told the Court that when they purchased the land on 30th January 2014, the Agreement was that every member would get what was due to them from the land.

38. It was DW3's testimony that when the road through Maweni to Malindi Hospital was built, it affected some structures but there was a road reserve which ensured that the portion of land the 2nd Defendant sold to the 1st Defendant remained largely intact and that it was on that portion which exists in their Deed Plan on which the 1st Defendant had dug the foundation that led to this dispute.

39. That position is indeed corroborated by the Sketch Plan attached to the Association's Resolution made on 27th October 2013 when the parties approached the Association to resolve the dispute. By the said Sketch Map, the Association which is the body on the ground confirms that the Defendants' portion after the road construction still measures 15ft by 68ft. The 1st Defendant in his own Sketch Map exhibited here had stated that his land previously measured 42ft by 75ft and the reduction in size as shown by the Association's Sketch must in my view have taken into account the portion of land taken by the road construction.

40. Arising from the foregoing, I did not find merit in the Plaintiff's case. Accordingly I dismiss the same with costs to the Defendants.

Dated, signed and delivered at Malindi this 8th day of October, 2019.

J.O. OLOLA

JUDGE