



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL CASE NO. 269 OF 2004

POLA MWAMANGA MATSAKI.....PLAINTIFF

- VERSUS -

NZARO MUTSONGA MATSAKI.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

JUDGEMENT

1. Pola Mwamanga Matsaki sued Nzaro Mutsonga Matsaki and the Attorney General vide his plaint dated 6th December 2004 asking the Court to grant him the following prayers:

- a. A declaration that the plaintiff is a lawful proprietor for the parcel of land known as Kilifi/Mbwaka Maereni/126.**
- b. An Order directed to the District Land Registrar, Kilifi to rectify the register and indicate the plaintiff as the proprietor.**
- c. In the alternative, an order that the plaintiff be compensated by the defendants jointly and severally for the land at its present commercial value.**
- d. Costs and interests.**

2. In support of his claim, the plaintiff gave his testimony on 13th March 2014 before Mukunya J. The plaintiff opened his case by stating that he lives in Kambe Location of Kaloleni District in Kilifi County. He is a farmer. The 1st defendant is his paternal cousin. That the 1st defendant together with his father took his land No Kilifi/Maereni/126 which he inherited from his father. The witness continued that after the death of his father, his uncle (father to 1st defendant) began threatening them with eviction after his (plaintiff's) mother refused his advances to inherit her.

3. That after the dispute, the uncle entered the land and started planting coconut trees. He sued him to Kaloleni Court in 1973. That Court said he (plaintiff) continues living there. He produced a copy of the adjudication records as **Pex 4** showing he was given the suit land while the defendant was given plot No 127. The witness stated that he needs a title deed for his plot and the records to be rectified to reflect his name. He produced the certificates of official search for the suit title as **Pex 2 (a) & (b)** and green card as **Pex 3**. He also prayed for costs of the suit.

4. In cross – examination, the plaintiff stated that his father is known as Mwamanga Matsaki – deceased. He had no letters of administration of his father's estate. That his father had four brothers namely;

Mwamanga Matsaki- Plaintiff's father

Mutsonga Matsaki- 1st Defendant's father

Meluku Matsaki

Mweni Matsaki

Mgomba Matsaki

The 1st defendant is the son to Mutsonga Matsaki. Mutsonga Matsaki is the name appearing in Pex 3. He died in 1982. The plaintiff does not know who took out letters of administration in regard to his estate.

5. He was referred to the judgment in Kaloleni case No 28 of 1973 which has been produced as Dex 1 and which judgement said the land belongs to Mustonga Matsaki. In 1976, they had another case No 28/75/76 before the Adjudication Committee. The Adjudication Committee in their decision gave him permission to use the land & the fruit trees but the land to be registered in the name of Mutsonga Matsaki. The judgment in the adjudication case was also produced as Dex 2. The witness said he appealed but the decision remained the same. The appeal was to the Arbitration Board in case No 24 of 75/76. He said he knows plot No 105 which is his but he did not bring its official search because it is not part of the case.

6. The plaintiff said he remembers 1995 but he denied signing a memorandum of understanding to move and or vacate the land. That the titles came out in 1984. He did not appeal the proceedings of the Arbitration Board. In re – examination, the plaintiff stated that the plot no 126 was not bought by the 1st defendant. That his house is on plot 126. This was the close of the plaintiff's case.

7. The 1st defendant filed a statement of defence dated 6th January 2005 challenging the plaintiff's case. He testified on 23.5.2017. He also lives in Kambe and he is a peasant farmer. He told this Court that the suit land is registered in the name of Mutsonga Matsaki Mwamanga – deceased. He produced a copy of the title deed as **Dex 1**. He also produced the death certificate of his father as **Dex 2**. That the plaintiff filed this case knowing the registered owner is deceased. That he has other siblings – seven (7) of them. That after his father won all the cases; he was registered as the owner thereof. That the plaintiff filed an objection before the registrar but his father (1st Defendant's) won the case. He produced the proceedings as **Dex 6**. That the Arbitration Board allowed the plaintiff and his mother to live on the land all their life. That him as the 1st defendant he has no dealings on the land. That the plaintiff is using the land by growing coconut and oranges but he is not farming it. The plaintiff's mother is deceased. That all the seven (7) of them are entitled to inherit the land. They have not taken letters of administration because of this case.

8. In cross – examination, the 1st defendant admitted they are cousins with the plaintiff and it is the plaintiff who lives on the land. That the title was issued on 29th June 1990. That the interest of the plaintiff was not indicated on the land. That he has no authority to evict the plaintiff from the land and they have no intention of removing the plaintiff. In re – examination, the 1st defendant said they did not acquire the title fraudulently. That the plaintiff has a farm No 115 which he inherited from his father. This also marked close of 1st defendant's case.

9. The 2nd defendant filed an amended defence on 31st July 2009 but they have not tender any oral evidence.

10. All the parties thereafter filed their written submissions which I have had occasion to read and consider. From the pleadings and evidence adduced, it is not in dispute that: -

- 1. The plaintiff and the 1st defendant are related by birth as they are paternal cousins.**
- 2. The suit land is registered in the name of Mtsonga Matsaki Mwamanga who is deceased.**
- 3. Mtsonga Matsaki Mwamanga is the father of the 1st defendant and uncle to the plaintiff.**
- 4. The plaintiff is living on the suit land.**
- 5. The register for the suit land was opened on 15.10.1984 with Mtsonga Matsaki – deceased as the first registered owner.**
- 6. The plaintiff's interest is not registered on the register of titles of the suit property.**

11. This suit was filed on 8th December 2004. The 1st defendant produced a death certificate in respect of his father Mtsonga Matsaki indicating that he died on 21st August 1981. The 1st defendant stated that the plaintiff was aware of his father's death even at the time of filing of this suit. Given that they all live in Kambe village and they are related, I am persuaded to believe that the plaintiff was aware of the death of Mtsonga Matsaki at the time of filing of this suit. He was also aware that the title to the land bore the name of Mtsonga Matsaki – deceased as he produced as Pex 2 (a) and 4 which are the certificate of official search and the adjudication records respectively.

12. The plaintiff did not produce any evidence linking the 1st defendant as the administrator of the estate of Mtsonga Matsaki-deceased. The 1st defendant also stated that no letters of administration have been taken because of this case. That he had no capacity to be sued. The claim of the plaintiff is for the ownership of the land. However the person sued is not the registered owner. The plaintiff had a lot of time from 1982 to 2004 to cite his cousins to take out the letters of administration of Mtsonga Matsai-deceased but which he did not do. This failure makes the suit is a non – starter because of misjoinder of parties as the suit is brought against the property of a deceased person. The action contravenes the provisions of **section 45 & 82 of the Law of Succession Act CAP 160**. Section 45 provides against intermeddling with the estate of a deceased person while section 82 gives powers to personal representatives to sue (and I believe to be sued).

13. The plaintiff acceded to the fact that Mtsonga Matsaki's registration was a first registration. This is deduced from his pleadings at paragraph 5 & 7 of the plaint and in his evidence that the said registration was done in trust on his behalf hence his prayer that he be declared as the owner of the suit land. Before the registration of Mtsonga, the plaintiff had sued him in Kaloleni land case No 28 of 1973. This case was heard on its merits and the same was dismissed. In the judgement, the trial magistrate observed that the land belonged to Matsaki who was grandfather to this plaintiff and father to Mtsonga – deceased. That Mtsonga being a son of Matsaki had a right to the land bought by his father in priority to the plaintiff's claim. The claim before the Kaloleni Court was over land and not the trees.

14. Not about to give up the plaintiff herein presented another case before the Adjudication Committee in 1975 vide case No 28 of 1975 – 76. After hearing both sides, the Adjudication Committee awarded the land to Mustonga Matsaki and stated that section 21 (3) of Cap 284 was complied with. The plaintiff appealed to the Kilifi District Arbitration Board. The board in its findings stated thus:

“Through the proceedings, the board had proved that Mutsonga’s father bought part of this land from Karisa Mulala. Then Mutsonga later bought the other part from his present witness Mr Hamisi Hawa. The land Adjudication Committee also confirmed that the land was bought by Mustonga and by doing so it became his property. The other part bought by Matsaki is also his right.”

Because of the above findings, the plaintiff’s appeal was dismissed.

15. The plaintiff still lodged an objection vide case No 9/78/79 with the Lands office. After hearing the objection, the Land Adjudication Officer on 5th March 1981 found that the matter having been heard by Kaloleni Court and Land Adjudication Committee & Arbitration Board, it was not proper for him to handle it. He also declined to make an order for Pola Mwamanga to move out of the land where he buried his father who is the brother to Mutsonga (then the defendant). He therefore inserted at paragraph 8 of the adjudication record for plot No 126 that the plaintiff and his mother have a right to live on the land which right did not amount to ownership.

16. The plaintiff did not state either by his pleadings or in evidence that the bodies that heard his cases at the time lacked jurisdiction to do so. The 1st defendant submitted that the present case was res judicata and an abuse of the court process. The 1st defendant buttressed this line of submission by the provisions of section 7 of the Civil Procedure Act and the decision in **Henderson vs Henderson (1843-60) All ER 378 and Pop In Ltd & 3 Others vs Habib Bank AG ZURICH (1990) KLR 609**. The plaintiff said nothing about the previous decided cases between him Mtsonga Mwamanga-deceased and why he decided to commence the process afresh. Having analysed the evidence adduced by both sides, I come to the same conclusion as submitted on behalf of the 1st defendant that the previous cases being between the same parties and having been heard and determined by court and or tribunal competent to hear and determine therein at the time. This makes the present case resjudicata and an abuse of the Court process.

17. The 1st defendant also pleaded at paragraph 8 of his statement of defence and submitted in detail that the plaintiff’s suit is time barred. The suit title was registered into the names of Mtsonga in 1984. This suit was filed in 2004 – some 20 years after this registration. Although the plaintiff has been living on the land, it is my considered opinion and I so hold that his right to claim ownership of the suit land was there from the time he took occupation of thereof and or from 1973 given the existence of previous suits and or in 1984 when Mtsonga was registered as the owner. Assuming we take 1981 as the last date of the Court case, the right accrued from 1981. Section 7 of the Limitation of Actions Act gave him 12 years from 1981 or 1984 to further pursue his claim. He did nothing and even commenced these proceedings without leave of the Court to extend time for him. In the scenario prevailing, this suit is time barred by the statute of limitations.

18. In light of the foregoing issues dealt with in the above paragraphs, I find the plaintiff’s claim does not lie as against the 1st defendant and therefore the 2nd defendant cannot be directed to perform the rectification of the register as prayed in the plaint. The suit also fails on account of res judicata and being statute barred. The 2nd defendant in his submissions urged the court to make appropriate orders for the ends of justice to be met given that the 1st defendant conceded the Plaintiff has a life interest. I would have made an order for such entry to be made if the 1st defendant sued as the legal representative of the late Mtsonga matsaki and if there was such a prayer made. The plaintiff has the decision giving him life interest on the land from the Adjudication Committee. If the 1st Defendant or his siblings attempt to evict him he has that decision to protect him. I will thus refrain myself from directing the Land Registrar to record such an entry in his register for the reasons stated. In conclusion, I do dismiss the suit costs to the 1st defendant.

Dated, signed & delivered at Mombasa this 23rd February 2018

A. OMOLLO

JUDGE