



Hinzano & 2 others v Toto & 17 others (Environment & Land Case 1 of 2015) [2018] KEELC 4905 (KLR) (22 February 2018) (Judgment)

Hinzao Ngonyo Hinzano & 2 others v Nelson Toto & 17 Others [2018] eKLR

Neutral citation: [2018] KEELC 4905 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 1 OF 2015

JO OLOLA, J

FEBRUARY 22, 2018

BETWEEN

HINZAO NGONYO HINZANO 1ST PLAINTIFF

SALIM KAPONDA HINZANO 2ND PLAINTIFF

TSANGNOLEM KHAMIS KIPONDA 3RD PLAINTIFF

AND

NELSON TOTO & 17 OTHERS & 17 OTHERS & 17 OTHERS & 17

OTHERS DEFENDANT

JUDGMENT

1. By a Plaint dated and filed herein on 6th January 2015, the 3 Plaintiffs seek the following orders against the 18 Defendants named herein:-
 - a) A permanent injunction restraining the Defendants from obstructing the Plaintiff's endeavor to lay beacons on Title Number Gede/Mijomboni/1282, 1283, 1284 and 1285.
 - b) A permanent injunction restraining the Defendants from obstructing the District Surveyor Malindi to lay beacons on Title Numbers Gede/Mijomboni/1282, 1283, 1284 and 1285 as instructed by the Plaintiffs herein.
 - c) Costs of this Suit.
 - d) Any other relief the Honourable Court may deem fit to grant.
2. The prayers are premised on the Plaintiffs averment that in the year 2014 after being issued with their respective deeds, they embarked on the process of sub dividing the parent title for the land being Title No. Gede/Mijomboni/17 by engaging a Public Surveyor to delineate and beacon the



- said properties but the Defendants armed themselves with pangas and rungas and chased away the Surveyor. It is further the Plaintiffs case that the Defendants subsequently threatened the Plaintiffs with dire consequences should the said Surveyor or any other visit the land again to carry out the survey work.
3. In response to the Plaintiff's suit, the Defendants filed a Memorandum of Appearance on 4th February 2015 together with a Replying Affidavit to the Plaintiffs Notice of Motion application dated 6th January 2015 that had been filed contemporaneously with the Plaint. On 15th April 2015, following complaints by the Plaintiffs that the Defendants had commenced construction on the suit property, this Court ordered a stoppage of the construction and required the parties to maintain the status quo pending the hearing of the application. Subsequently on 14th May 2015, the parties agreed by consent to dispose off the application and to maintain the status quo pending the hearing and determination of the suit.
 4. Thereafter the matter proceeded for pre-trial directions where upon it was discovered that the Defendants had not filed a Statement of Defence to the Plaintiffs claim. The matter was then adjourned a number of times to enable the Defendants to file their papers. By an application dated 26th May 2017, the Defendants' Advocates filed an application to cease acting for the Defendants stating that he had failed to obtain instructions from them. This Court thereafter directed the Plaintiffs to serve the Defendants directly with a hearing notice.
 5. On 1st November 2017 when the matter came up for hearing, the Defendants were not in Court and had not filed a Written Statement of Defence as required. Being satisfied that the Defendants had adequate notice of the hearing date, this Court proceeded to hear the Plaintiffs' case.
 6. (PW1) Isangnolem Khamis Kiponda, the 3rd Plaintiff herein, testified on behalf of his two colleagues. He told the Court that he had authority from the 1st and 2nd Plaintiffs who are his brothers to act on their behalf. The authority to act dated 6th January 2015 was produced in Court.
 7. It was PW1's testimony that he is the registered owner of land portion number Gede/Mijomboni/1282 while the 1st Plaintiff is the registered owner of Gede/Mijomboni/1285. It was his further testimony that his brother John Hinzano who is now deceased was the registered owner of the parcel known as Gede/Mijomboni/1284. PW1 produced copies of the Original Titles for the mentioned parcels of land (Plaintiff Exhibits 1 – 4).
 8. PW1 told the Court that the aforementioned titles were created as a result of the subdivision of the mother title which was Gede/Mijomboni/17 which had been registered in their joint names as the four brothers. A copy of the mother title was produced in Court as Plaintiff Exhibit 5.
 9. In addition PW1 produced a number of documents in support of their contention that they had followed due process in subdividing the land. Amongst these were a letter dated 25th September 2014 from the District Land Surveyor (PEX 6), the Land Control Board Consent dated 11th November 2014 (PEX 8) and Summons issued to the Defendants prior to the subdivision dated 19th September 2014 (PEX 7). The witness also produced in Court the Mutation Form in relation to the parcel Gede/Mijomboni/17 as Plaintiff Exhibit 10.
 10. Upon conclusion of the Plaintiff's case, Ms Mwangi, Learned counsel for the Plaintiffs filed written submissions and authorities in support of her case. She urged the Court to grant Judgment as prayed in the Plaint as the Plaintiffs' testimony and evidence in Court was uncontroverted.
 11. I have considered the evidence tendered by the Plaintiff's sole witness. I have also taken into account the submissions of Learned counsel.



12. From the material placed before me it is evident that the suit herein arises from a sub-division of land parcel No. Gede/Mijomboni/17 by family members. On or about 18th November 2014, the said parcel was sub-divided into 5 different parcels and registered as follows:-

- (a) Gede/Mijomboni/1281- The Public Trustee
- (b) Gede/Mijomboni/1282- Islanglonen Khamisi Kiponda(3rd Plaintiff)
- (c) Gede/Mijomboni/1284- John Kiponda Hinzaio
- (d) Gede/Mijomboni/1285- Salim Kiponda Hinzaio(2nd Plaintiff)

13. It is apparent that both the Plaintiffs and the Defendants are descendants of one Monje Ngonyo who is deceased. It is further apparent that upon the death of the said Monje Ngonyo, the administration of the estate was placed in the hands of the Public Trustee, Mombasa. By a letter dated 19th September 2014, the Public Trustee wrote to the District Surveyor Malindi indicating he had no objection to the sub-division of the land provided that the interests of the other beneficiaries are not interfered with. The said letter reads in the relevant part as follows:-

Re: Monje Ngonyo-deceased

Mombasa Admin. Cause No. 438 OF 2000.

The above matter refers

Sub-division Of Plot No. 17 Of Gede Mijomboni

This is to confirm that the administration of the estate of the deceased was completed and half of the undivided share transferred to the following persons:-

1. Hinzano Ngonyo Hinzano
2. Salim Kiponda Hinzano
3. John Kiponda Hinzano
4. Tsangnolem Khamis Kiponda

The remaining half is still held by me in trust in respect of the shares of the estates of Kazungu Ngonyo Hinzano 2/5 of the estate and the remaining 3/5 to Dama Ngonyo Hinzano and her two children of the deceased.

However, I have no objection to the subdivision of the land provided that the interests of the other beneficiaries are not interfered with.

Signed.....

14. A perusal of paragraph 5 of the Replying Affidavit the Defendants had filed herein reveals that they opposed the placing of beacons on the basis that they were many in the family and according to them there was no space to place the beacons. The said paragraph states as follows:-

- “ 5. That the suit premises is occupied by over 200 people, including the parties herein, being one big extended and/or polygamous family and that the said land is fully developed without any empty space where beacons can be fixed.”

15. I am however unable to accept that argument given the letter from the Public Trustee which clearly shows that the entire family had been taken care of in the distribution of the estate. In any event, the



Plaintiffs have demonstrated that subsequent to the Public Trustee's letter aforesaid, they proceeded to process title deeds for their portions of the land and are now merely seeking to have them clearly marked out by beacons. The said titles have not been challenged by the Defendants.

16. Section 24(a) of the *Land Adjudication Act*, 2012 provides as follows:-

“Subject to the Act-

- (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b)

17. At the same time, Section 26(1) of the said Act provides that :-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

- (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

18. Accordingly and by virtue of their registration as the proprietors of the suit properties, the Plaintiffs are vested with all rights and privileges belonging or appurtenant thereto. The Plaintiffs intend to have their land surveyed and for beacons to be placed thereon. It is their testimony that the Defendants have without any justifiable cause obstructed and chased the surveyor from the land. The Defendants have not controverted the Plaintiffs testimony. Their said acts of blocking the survey of the land is malicious, illegal and without any basis.

19. I am satisfied that the Plaintiffs have made out their case on a balance of probabilities and are entitled to the orders sought. I therefore do enter Judgment for the Plaintiffs as against the Defendants jointly and severally as prayed in the Complaint and particularized at paragraphs 1(a) to (c) of this Judgment.

20. The costs of this suit shall be borne by the Defendants jointly or severally. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF FEBRUARY, 2018.

J.O. OLOLA

JUDGE

