



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC. CASE NO. 17 OF 2013.

GODFREY WANJALA WAFULA.....1ST PLAINTIFF

KOLOLI WAFULA NASIOMBE.....2ND PLAINTIFF

VERSUS.

JAIRUS WAKHUNGU NALUNDA.....DEFENDANT

JUDGMENT

[1] The plaintiffs herein filed an originating summons on 28th of February, 2005 for the determination of the following questions;

1. *Whether the applicants and Wafula Mulunda John prior to his demise had been in occupation of and/or in possession of 2.3 acres comprised in TITLE NO. KIMILILI/KIBINGEI/216 for a period of more than 12 years, openly, peacefully, continuously and/or without force.*
2. Whether the applicants and/or WAFULA MULANDA JOHN (deceased) had acquired Title to the said 2.3 acres by adverse possession.
3. *Whether the respondent's Title to the said 2.3 acres was extinguished by operation of Law.*
4. Whether the plaintiffs registration of the Title No. KIMILILI/KIBINGEI/216 as owner conferred a trust obligation to hold part of the said suit land specifically 2.3 acres in Trust of the Estate of WAFULA MULANDA JOHN and/or lawful personal representatives.
5. Whether the applicants should be registered as the proprietors of the 2.3 acres of land comprised in the said Title.

However, when this case came for hearing on 23/2/2016 Mr. Juma the Learned Counsel for the Plaintiffs told the court that the plaintiffs had withdrawn their suit and served the notice on the respondents on 3/10/2015 and that that the issue left was only costs. The Court ruled that the applicant was allowed to withdraw his originating summons with costs to the defendant. The defendant was allowed to fix there counterclaim for hearing and serve the applicant. The counterclaim filed was not opposed as no pleadings were filed to oppose the same.

[2] The advocate for the plaintiff filed an application dated 12/5/2017 praying that the court sets aside the order for formal proof by the respondents in the originating summons and prayed that the court grants the applicants leave to file a counterclaim out of time. The application which was an attempt to resurrect the withdrawn suit was dismissed by the court on 1/3/2018. The respondent in the originating summons then gave his evidence. He said that he lived in Trans-Nzoia County. He told the court that he knew the applicants who were his brothers sons. That his brother was called John Wafula Mulunda who died in 2003. He said that two brothers lived on land Kimilili/Kibingei 699. He told the court that he lived on land Kimilili/Kibingei/216 of 2.8 hectares. He said that he got that land from his father Abraham Mulunda Katwe. He said that his father bought parcel 699 before John Wafula invaded his land. After that invasion the respondent sued him at Kakamega High Court vide *HCCC No. 199 of 1987*. That case was later transferred to Kimilili court and it became RMCC 113 of 1991. The case was later transferred to the then land disputes tribunal Kimilili. The lands disputes tribunal awarded the applicants father 2.3 acres from the respondents parcel 216. The respondent was not satisfied and he filed a Judicial Review of those orders in Bungoma HCC 53 of 1998 and the Judicial Review against the orders of the land disputes tribunal was allowed. He produced the Judicial Review and the orders therein.

[3] In the meantime his brother used the orders granted in the tribunal to subdivide the land into Kimilili Kibingei 2414 and 2415. He registered 2414 in the name of the respondent and 2415 in his name. The respondent went to Kimilili Court vide Miscellaneous Civil Suit No. 4 of 1995 and had those numbers cancelled.

[4] The said John then died, his son filed this suit. The respondent produced the original title of Kimilili/Kibingei/216 in the name of Jairus Wakhungu Mulunda and a green card of the same. He said that he had not exchanged the land with John. He averred that people invaded his land in 1991 and are there upto now. He said that his land had coffee, bananas, blue gum trees and maize. The crops were uprooted and the maize was eaten up. He said that he was harassed by the applicants until he left the land in 2006 fearing for his safety. He told the court that the applicants have their land parcel Kimilili Kibingei/699 and that is where they should go to. He said that they should move out and vacate his land.

On cross examination by Mr. Juma the learned Counsel for the applicants, he said that Kimilili/Kibingei/216 was given to him alone. Further, that his father had many lands which uncluded Kimilili/Kibingei/411 225 and Mt. Elgon/Namorio/96 and that all these lands except Kimililili/Kibingei/216 are still in his fathers names upto now. He testified that land Kimilili/Kibingei/216 was not ancestral land, his father bought it and gave it to him and the land Control Board approved the transaction.

[5] Having heard the evidence of the respondent, I am satisfied that he has proved his case on the balance of probability. The land is truly his alone. It is registered in his name. It was a gift *intervivo*. The applicants should move out and vacate the same. If they do not move out, the respondent shall have them evicted by the court broker with the help of the nearest police station. The respondent shall have the costs of the suit and costs of the said eviction.

It is so ordered.

Judgment read in open Court before the said Counsels.

Dated at Bungoma this 28th day of March, 2018.

S. MUKUNYA

JUDGE

In the presence of:

Joy: Court clerk

Mr. Murunga for M/s Mufutu for the defendant

Miss Achieng for Juma for the Plaintiff