



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 395 OF 2016

ESHER TALU MWAKICHILU.....PLAINTIFF

VERSUS

ZEDEKIA MWAMVUNYU.....DEFENDANT

JUDGMENT

1. The Plaintiff has filed this suit against the Defendant seeking;

a. An order for the exhumation of the remains of the Deceased Dominic Mwamba Mwaluma from the suit property that is un-surveyed parcel of land situated at Marupu Village, Teri A Sub-location of Sagalla Location.

b. A permanent injunction restraining the Defendant, his agents and/or any other person acting under his authority from encroaching, and/or or trespassing over the suit property.

c. Costs.

d. Any other relief as the court may deem fit.

2. Upon being served with copies of plaint and summons to enter appearance, the Defendant filed a memorandum of appearance dated 15th March 2017. He also filed a replying affidavit to the Plaintiff's Notice of Motion dated 13th November, 2016.

3. It appears the Defendant did not file a statement of defence. However, being a layman and unrepresented I will treat the replying affidavit as a defence to the plaint. He filed a list of witnesses and a list of documents dated 5th September, 2017.

4. It is the Plaintiff's case that the land in dispute belongs to her late husband, Lucas Mwakichuli. That her husband inherited it from his grandfather. She further told the court that the land has not been demarcated. She told the court that her late husband had a dispute with the Defendant's family. The matter was heard by the elders who decided that the land belonged to her husband's grandfather. The Defendant was asked to vacate the suit land.

5. The Plaintiff also told the court that when her husband passed on, the Defendant's family threatened her. Once more, she made a report to the chief who referred her to the Lands Registry in Voi. The officials at the Land Registry referred her to the provincial administration. Later the chief conveyed a meeting of the two families whereupon the Defendant was prevailed upon to vacate the Plaintiff's portion of the land. He promised to do so.

6. However, in 2016 the Defendant's son passed and he forcefully buried him on the land. She produced the minutes of the meetings as exhibit P1 and P2.

7. The Defendant on his part told the court that the land is ancestral land. He told the court that his grandfather had two wives. That the boundaries were well defined.

8. He further told the court that he has been ploughing the land with no problem. That it was not until recently that the Plaintiff started complaining that he has encroached on her portion. He denied that he is ploughing the Plaintiff's portion or that he has encroached on her portion. He prays that the Plaintiff's suit be dismissed.

9. I have considered the pleadings and the evidence on record. The issue for determination is whether the Defendant has encroached on the

Plaintiff's portion of land and buried his son thereon.

10. The Plaintiff called two witnesses. Zablun Chaka confirmed that the suit land belongs to the Plaintiff's late husband Lucas Mwakichuli, who had inherited it from his father.

11. He also confirmed that the dispute was first heard on 2011 and later in 2015 before the chief. The elders asked the Defendant to vacate the land but he refused. This witness also told the court that the Defendant has his own piece of land which he inherited from his father.

12. P.W.3 Mary Mwachaka, a neighbour told the court that the land belongs to Mzee Lewela, who was a grandfather to Lucas Mwakichuli, the Plaintiff's late husband. She also confirmed that the Defendant does not reside on the said land.

13. D.W.2 Oliver Mwasira, told the court that this is ancestral land. He confirmed that the Defendant's son was buried on the portion of the land.

15. D.W.3 Philip Msigula, told the court the Defendant lives on his portion of the land. When cross-examined by the Plaintiff's counsel, he admitted there was a dispute and the elders had deliberated over it. He also admitted the land belonged to the Plaintiff's late husband's grandfather. He confirmed that the Defendant's children had been told to leave the portion of land.

15. The Plaintiff produced the proceedings convened by the Assistant Chief on 7th September, 2015 as exhibit P1 and those of 2012 as exhibit P2.

16. In both instances, the elders observed that the Defendant had refused to vacate the Plaintiff's portion of land. He was ordered to vacate.

17. The Defendant did not produce any documents to contradict these minutes, exhibit P1 and P2. He has also not denied that he buried his son on the suit land. I find that he adduced no evidence to show that he has a claim on the suit land.

18. I am aware that the Plaintiff has not produced any document to show that she is the widow of Lucas Mwakichuli. However, I have considered the evidence in totality and find that this fact is not disputed.

19. I find that the Plaintiff has proved her case on a balance of probability as against the Defendant.

I enter judgment in her favour as follows;

a. That an order be and is hereby issued for the exhumation of the remains of the Deceased Dominic Mwamba Mwaluma from the suit property that is un-surveyed parcel of land situated at Marupu village, Teri A Sub-location of Sagalla location.

b. A permanent injunction do hereby issue and is issued restraining the Defendant, his agents and/or any other person acting under his authority from encroaching and/or trespassing over the suit property.

c. The Plaintiff shall have costs of the suit and interest.

It is ordered.

Dated, Signed and Delivered at Mombasa on the 14th day of March 2018.

L. KOMINGOI

JUDGE

14/3/2018