



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 163 OF 2013

JULIUS MKAUMA TSUMA..... PLAINTIFF

VERSUS

JUMA MOHAMED MAGONGO.....DEFENDANT

JUDGMENT

1. By a Plaint dated 3rd May 2013 and filed herein on 20th September 2013, the Plaintiff Julius Mkauma Tsama prays for an Order to remove the restriction registered by the Defendants against land title No. Mgumo/Patsa/Mazeras 135. The Plaintiff also prays for costs of this suit as well as interest thereon.
2. According to the Plaintiff, the aforesaid parcel of land was at all material times owned by his father the late Tsama Mkuzi Saha. However, on or about the 5th day of March 2005, the Plaintiff conducted an official search at the Kilifi Land Registry whereupon he was informed that Juma Mohamed Magongo, the 1st Defendant herein had caused a restriction to be registered upon the land by the Land Registrar Kilifi (the 2nd Defendant). Thereafter, the Plaintiff wrote to the 2nd Defendant requesting for the removal of the restriction but the 2nd Defendant refused and/or neglected to do so, thereby necessitating the filing of this suit.
3. In a Statement of Defence filed herein on 21st May 2014, the 1st Defendant avers that the Plaintiff is not entitled to make any dealing with the said land known as Mgumo Patsa/Mazeras/135 as the same does not belong to the Plaintiff's deceased father. The 1st Defendant further avers that since he is seeking the revocation of the grant of letters issued to the Plaintiff to administer his father's estate in Mombasa High Court Succession Cause No. 216 of 2010, the Plaintiff is not entitled to the Orders sought herein.
4. The Land Registrar Kilifi, sued herein as the 2nd Defendant neither entered appearance nor filed a defence to this suit.
5. On or about the 3rd November 2016 when this matter came up for hearing, an application was made on behalf of the 1st Defendant for the matter to be adjourned to another date on the basis that counsel for the 1st Defendant was indisposed. Having considered the same, the Honourable Angote J, then seized of the matter declined to adjourn the same and proceeded to take the Plaintiff's evidence.
6. From the record, the Plaintiff testified on his own behalf (as PW1) and called a witness, his brother Mkuzi Saha who testified as PW2. It was the Plaintiff's case that he is the administrator of the estate of his father, the late Tsama Mkuzi Saha for which estate he had obtained a grant of Letters of Administration. The said grant, a copy whereof was produced in Court and marked PEX1 was confirmed on 26th October 2012.
7. The Plaintiff told the Court that the 1st Defendant is his relative though he hails from a different clan. According to the plaintiff, his late father was at one time embroiled in a dispute concerning a different parcel of land known as Mgumo/Patsa/Mazera/130 with the 1st Defendant. The Plaintiff testified that the said dispute was heard by the Kilifi District Land Disputes Tribunal as Tribunal Case No. 51 of 2005. He produced the proceedings before the Tribunal which shows that the decision of the Tribunal was adopted as a Judgment of the Resident Magistrate's Court at Kaloleni in Land Award Case No. 27 of 2006 on 7th October 2006.
8. It was the Plaintiff's case that while the Tribunal made a finding that there was no dispute on Title No Mgumo/Patsa/Mazeras/135, the 1st Defendant had used the fact of the pendency of the Land Disputes Tribunal Case in regard to Title No. Mgumo/Patsa/Mazeras/130 to cause the 2nd Defendant to register the restriction which is the subject matter of these proceedings.
9. It is further the Plaintiff's case that in spite of the conclusion and adoption of the tribunals findings that Parcel No. 135 aforesaid solely belonged to the Plaintiff's deceased father, the Defendants had failed and/or refused to lift the restriction even after being notified of the

obtaining position by the Plaintiff.

10. The Defendants did not call any witness to controvert the testimony of both PW1 and PW2 and/or in support of their case. Instead, by an application dated 25th November 2016 and filed in Court on 7th February 2017, the 1st Defendant sought to stay these proceedings pending the hearing and revocation of the grant issued to the plaintiff which was said to have been filed in Mombasa High Court Succession Cause No. 216 of 2010. Having heard and considered the same, the said application was dismissed by this Court on 12th May 2017.

11. Arising from the foregoing, it was not denied that the 1st Defendant had caused the 2nd Defendant to place the subject restriction on land Parcel No. Mgumo/Patsa/Mazeras/135. From a perusal of the decision of the Kilifi District Land Disputes Tribunal Case No. 51 of 2005 which was produced by the Plaintiffs in support of their case, it is evident that the Tribunal found at page 5 of the decision as follows:-

“Plot No. 135 belongs to Tsama Mkuzi Saha who is (the) absolute proprietor and the Title Deed is held by Julius Mkama Tsama who is the sole beneficiary of his late father’s property....”

The land in dispute which is Plot No. 130 has three names namely, Tsama Mkuzi Saha (The Objector’s father), Kango Mkuzi Mdzavudzo and Mkusi Saha Panga. These are the sole beneficiaries of the land.

The decision of the Tribunal is that the names of the sole beneficiaries remain intact as there were no objections filed within the stipulated six months time but it was after two years which (is) already time-barred. All the three names should be on the Title Deed and Sub-Division of the land (comprised in) Plot No. 130 should be done into three equal parts....”

12. The decision of the Tribunal as we have seen was adopted as a Judgment of the Court in Kaloleni Resident Magistrate’s Court Land Award Case No. 27 of 2006 on 17th October 2006. Accordingly, that decision remains binding and is enforceable as an order of the Court.

13. In the bundle of documents produced by the Plaintiff herein, there is a letter dated 30th August 2010 addressed by the Plaintiff to the 2nd Defendant herein clarifying that the restrictions was placed on the wrong parcel of land and requesting for its removal. On 30th October 2010, the 2nd Defendant responded and sought to find out from the Plaintiff in what capacity he sought to have the restriction removed. It is further evident from the exhibits availed that copies of the certificate of confirmation of grant issued to the Plaintiff were thereafter availed to the 2nd Defendant. The said restriction however remains in place to-date.

14. Section 78 of the Land Registration Act, No. 3 of 2012 provides that:-

“78(1) The Registrar may, at any time and on application by any person interested or at the Registrar’s own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or valuation of a restriction.

(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the Court may order a restriction to be removed, varied, or (issue any) other order as it deems fit, and may make an order as to costs.

15. In the present circumstances and in view of the foregoing, I am satisfied that the 2nd Defendant has failed and/or refused to act as mandated under Section 78(1) of the Land Registration Act aforesaid.

16. Accordingly, I find that the Plaintiff has proved his case on a balance of probability as by law required. As a result, and in light of the powers conferred upon this Court by dint of Section 78(2) of the Land Registration Act aforesaid, the 2nd Defendant is hereby directed to forthwith withdraw the restriction registered against Land Parcel No. Mgumo/Patsa/Mazeras/135.

17. The Plaintiff shall also have the costs of this suit.

Dated, signed and delivered at Malindi this 19th day of April, 2018.

J.O. OLOLA

JUDGE