



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ENVIRONMENT AND LAND CASE NO. 12 OF 2018

TITUS MUSYIMI MUNUVI.....PLAINTIFF

VERSUS

DANIEL MWENDWA MULI.....DEFENDANT

JUDGEMENT

INTRODUCTION

1. The Plaintiff has instituted this suit against the Defendant for declaratory order, a permanent injunction and costs incidental thereto.
2. In a plaint dated 23rd February 2017 and filed on 3rd March 2017, the Plaintiff averred that he is the proprietor of all that unsurveyed piece of land situated at Usueni Sub-Location Tseikuru Sub-County of Kitui County measuring approximately 20 acres.
3. The Plaintiff further averred that he acquired the said parcel of land through purchase sometime in the year 1979 and has been in occupation since then to date.
4. It is further alleged that sometime between December 2016 and January 2017 the defendant without any colour of right trespassed and encroached on the said parcel of land claiming ownership and, has caused wanton destruction by cutting down indigenous trees thereby exposing the land to soil erosion and degradation.
5. The Plaintiff simultaneously filed this suit together with a Notice of Motion under Order 40 Civil Procedure Rules in which he sought, temporary orders pending the hearing and determination of the main suit.
6. That application was supported by an affidavit sworn by the Plaintiff/Applicant on 23/02/2017. The application was further supported by numerous documents attached to the supporting affidavit.
7. The Defendant/Respondent filed a replying affidavit sworn on 14th March opposing the said application. On 30th May 2017 this Honourable Court rendered itself on the said Notice of Motion thereby paving way for the hearing and determination of the main suit.

PLAINTIFF'S CASE:

8. The Plaintiff testified that he is the proprietor of all that unsurveyed parcel of land measuring approximately 20 acres. He said that he bought the land sometime in 1979. He stated that on 24/2/1987 the Defendant's mother in the company of the village elder one Muli went to Maithya his house.
9. The Defendant's mother known as Muthimbe Muli (now deceased) requested him to give her a temporary land to occupy as they had been evicted by their uncle known as Kiu Mbao. After consulting with his family they agreed to give them a place to live temporarily.
10. The Defendant's mother gave him a 'token' of Kshs.6,000/= and a 20 litres container of local brew (traditional liquor). That was not purchase price but a present. Also in attendance was one P.K. Kimwele Muthui Muli, Mulaki Muli who were the Dependents witnesses.
11. In his side were his brother Mwandikwa Munuke and his wife. They took minutes of the meeting. He also drew a sketch map of the land, he leased to the Defendant's mother. Mulaki Muli did not sign the minutes as he left early. The Defendant was not in that meeting since he was a student by then.
12. Early in the morning the following day he took the Defendant's mother and showed the land they were to occupy temporarily. He stated that when he went on retirement in the year 2013, he gave them notice to vacate. He wrote to Muthui Muli whom he had given the land but

passed on, he went to the Chief's Office who is the Defendant herein. The Defendant told him he had no land there.

13. PW2 was one Muthui Muli. He is the Defendant's elder brother. He recalled that sometime in 1987 he went with his mother and brother Mulaki Muli to the Plaintiff's house to request for a land to farm. The Plaintiff agreed to give them a parcel of land. His mother took the Plaintiff some traditional brew and Kshs.6,000/= as appreciation the following day. They also took two witnesses namely Kimwele and Muli Maithya. He later constructed a house on that land and cleared the bush for farming.

THE DEFENDANT'S CASE:

14. The Defendant on his part testified to the effect that on 14/5/1984 his late brother Julius Mulaki Muli bought a parcel of land from the Plaintiff herein at a price of Kshs.6,000/=. An agreement was drawn by one Paul Munuve who is also the Plaintiff's brother. They went with their witnesses namely Muthui Muli (brother), Peter Kimwele and himself.

15. On 15/5/84 they planted trees on the boundaries with the Plaintiff. His late brother Julius Mulaki Muli then became sick and agreed to sell him a parcel of the suit land to enable him meet medical expenses. He then fenced off the portion he purchased and started developing the same including building a permanent house where he is living with his family todate.

16. DW2 was Muli Maithya. He recalled that on 13/5/84 Titus Musyimi came to his house and told him that he wanted to sell a portion of his land to Julius Mulaki Muli (deceased). By then the witness was working as a village elder.

17. Julius Mulaki Muli (deceased) later came in company of his brothers Muthui Muli and Daniel Mwendwa Muli (Defendant) together with Peter Kimwele. The parties negotiated and Titus Musyimi Munuvi agreed to sell the portion of land to Julius Mulaki Muli (deceased) at Kshs.6,000/=. Since Julius Mulaki Muli had not carried money at that time it was agreed that he comes with the money the following day on 14/5/84.

18. On 14/5/84, they went to the house of Titus Musyimi Munuvi where the purchase price of Kshs.6,000/= was paid to him. He also signed the agreement as a witness.

19. DW3 was Peter Kimwele who recalled that on 13/5/84 one Julius Mulaki Muli (deceased) came to his house and requested him to witness a land transaction between him and Titus Musyimi Munuvi. They went to the house of Titus Musyimi Munuvi where they met Muli wa Maithya, Muthui Muli and Mwendwa Muli. They were taken round the proposed parcel of land to be sold.

20. After going round the land, the parties negotiated and agreed the purchase price at Kshs.6,000/=. Julius Mulaki Muli did not carry money and it was agreed he brings the following day.

21. On 14/5/84, they went with Julius Mulaki Muli and Muli (deceased), Muthui Muli and Muli Maithya to the house of Titus Musyimi Munuvi where the purchase price was handed over to the seller. An agreement was also drawn and he witnessed. Thereafter, the purchaser Julius Mulaki Muli fenced off his land.

22. DW4 was Peter Musyoka Kimoro. He recalled that on 13/5/84 he was called by the village elder to go and show the boundary between their land and that of Titus Musyimi Munuvi. He was told that the said Titus Musyimi Munuvi wanted to sell a portion of his land to one Julius Mulaki Muli (deceased).

23. At the close of the Plaintiff and the defence case the parties agreed to put in their written submission.

24. I have considered the evidence adduced by both the Plaintiff and the defence together with their witnesses. I have also considered the submissions by counsel for the Plaintiff and the Defendant in person.

25. According to the Constitution of Kenya 2010, land in Kenya is classified as public, community or private. The land in dispute in this case is a customary land which falls within the ambit of community land tenure.

26. In order to acquire and have customary rights recognized under the law, the land in question must be adjudicated for and documented for purposes of registration. It is only then that one can claim and seek protection of the law under the provision of Article 40 of the Constitution.

27. Section 5 (5) of the Community Land Act No. 27 of 2016 provides as follows:

“5 (5) Subject to the provisions of section 46 of this Act, any person who immediately before the commencement of this Act had a subsisting customary right to hold or occupy land shall upon commencement of this Act continue to hold such right.”

28. The Plaintiff has alleged that he bought the suit land from a third party who is not a party to these proceedings. The Defendant has also alleged that he bought a portion of the suit land from this late brother Julius Mulaki Muli.

29. Since the suit land has not been registered, it is not possible for this court to establish what interest the Plaintiff hold in law. Those interests if any must be established first through adjudication process before they are registered.

30. Since the interests sought to be protected by this Honourable Court have not been registered in law, it is impossible for this court to protect the same.

31. For the reasons I have given I find and hold that the Plaintiff has not proved his claim to the required standard. The same is hereby dismissed with each party to bear her own costs.

It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 18TH DAY OF APRIL, 2018.

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HON. E. C. CHERONO

E.L.C. JUDGE

In the presence of:

1. Mr. Ngala for Plaintiff
2. Defendant in person
3. Ijabo Court Clerk.