



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC 41 OF 2017

JOHN MWAU MWONGELA ----- 1ST PLAINTIFF

JOSEPH KIMEU MWONGELA ----- 2ND PLAINTIFF

MIRIAM MUMBUA (*Suing as the administrators of the estate*

***Of Philip Mwongela Kithuka*) ----- 3RD PLAINTIFF**

Versus

DANIEL M. NDIVO -----DEFENDANT

JUDGMENT

1) By their plaint dated 14th April, 2014 and filed in court on even date the plaintiffs pray for judgment against the defendant for:-

1. A declaratory order to the effect that the decision by Land Adjudication/Settlement officer made on 27th October, 2010 altering the boundary of Plot Number 3010 and the unadjudicated Plot owned by the 1st plaintiff was illegal null and void for want of jurisdiction.

2. An order directing the Land Adjudication officer to rectify the adjudication register in line with the order of the Court made in Civil Case No. L. 14 of 1978.

3. An order directing the Land Register to revoke title documents issued to the defendant his servants, agents and assignees in respect of Plot Number 4876.

4. An order of permanent injunction restraining the defendant, his servants, agents from encroaching, carrying out, selling occupying, transferring, leasing or in any manner interfering with the Plaintiffs quiet ownership and ownership and possession of Plot NO. 3010.

5. Costs of the suit.

2) The claim is denied by the defendant in his statement of defence dated 13th May, 2014 and filed in court on even date.

3) When the matter came up for hearing on the 13th July, 2017 the first plaintiff adopted his statement

which he recorded on the 14th April, 2014 on his own behalf and that of his brother and sister as his evidence. He said that he and his co-plaintiffs are joint administrators of the estate of Philip Mwangela Kithuka who was their father pursuant to the grant of letters of administration intestate issued in Nairobi High Court Succession Cause number 2864 of 2006 (PEX no.5). The first plaintiff went on to say that he was aware that his late father was the proprietor of land parcel number 3030 Kalongo adjudication area and that the process leading to issuance of titles was on ongoing pursuant to the adjudication that had taken place.

4) That in 1978 there was a boundary dispute in Kilungu District Magistrate's Court in Civil Case number L 14 of 1978 between his late father and Mbunu Masyuko (deceased), Mwise Masyuko and Daniel Waema. He pointed out that the dispute involved a boundary and judgement was entered in favour of his late father(Pex no. 1) and that the said judgement has never been challenged or set aside. He went on to say that prior to the court's decision, the clan elders had on or about 22nd August, 1976 adjudicated on a boundary dispute involving the said property and many other adjacent properties whereupon it made a decision clearly demarcating the boundaries of the properties in question. That in or about the year 2010, he received summons from the Land Adjudication/Settlement Officer requiring him to appear before the Kalongo Land Office to answer to a claim of P/No 3030 (PEX No. 6). He went on to say that Daniel Mutiso Ndivo was said to be the complainant. The plaintiff said that he honoured the summons and appeared on the 27th October, 2010 where he learnt that the defendant herein had objected to the adjudication register and further claimed that he had bought some land from one Kathuko Nyamai. The plaintiff went on to say that the defendant claimed that he (plaintiff) had encroached on the land that the defendant had bought. The plaintiff said he informed the Land Adjudication Officer that the issue of the boundaries had been settled by the court in the aforementioned L 14 of 1978, an issue the officer ignored in his decision of 17th November, 2010. The plaintiff pointed out that the Land Adjudication Officer allowed the objection by the defendant and directed that a portion of land be extracted from plot number 3030 and awarded it to the defendant.

5) The plaintiff went on to say that being aggrieved by the decision of the Land Adjudication Officer he sought consent of District Land Adjudication and Settlement Officer to file a suit which the latter granted vide a letter dated 18th January, 2012 (PEX no. 4)

6) The plaintiff said that the defendant had the plot which he claimed to be 4876 adjudicated on the strength of the decision by the Land Adjudication/Settlement Officer. According to the plaintiff, plot number 4876 comprised of plot number 3030 as well as a portion that he had bought from one David Kimonyi Mwise. The plaintiff went on to say that plot number 4876 was created illegally since the proceedings and the decision of the Land Adjudication Officer were illegal, null and void for overriding the decision of the court.

7) His evidence in cross-examination by Mr. Kamanda for the defendant was that he relies on case number 14 of 1978. He said that the proceedings in the said case do not refer to the suit land but it mentions its boundary. He also said that the proceedings do not refer to plot number 3030. The plaintiff went on to say that he and the defendant presented their evidence before the Land Adjudication Officer. He said that he could not appeal as he decided to and wait see the portion of land that was to be extracted following the decision of Joel Nzuleo who made his ruling in his capacity as a government officer. He said that when he went to see the Lands Officer when the implementation of the award began, the latter advised him that he ought to have appealed to the minister within 60 days. He said that the boundary was altered by the Lands Officer.

8) The first plaintiff's evidence in re-examination was that L no. 14/78 involved confirmation of his father's land. The plaintiff said that plot number 4876 was partly in 3030 as at 1978.

9) Pius Kyalo Wambua (PW1) told the court that he is the district secretary of Aiini clan. Like the first plaintiff, Wambua (PW1) adopted his undated statement filed in court on 25th October, 2016 as his evidence. He said that on 7th October, 2011 the Aiini Clan elders had a sitting at locational level upon the request of the plaintiff herein who had a boundary dispute with one Katuko Nyamai and Mutiso

Ndivo. He said that during the clan's sitting, it was established that in 1976 clan elders had put boundaries in the area. He pointed out that they also found out that it was not clear how plot number 4876 was established in the year 2011 since plot number 3030 was the last in Kalongo.

10) Wambua's (PW1) evidence in cross-examination was that the clan elders were surprised that the survey had created plot number 4876 which they were not aware of.

11) Henry Kamoso Muisa's (PW2) evidence in chief was that the plaintiffs are his neighbours. He went on to say that in 1976, his father was involved in a land dispute with Wandia Kole over Kyangatho area. He said that the clan led by Hhe its chairman went and demarcated the boundary between his father and Wandia and Muthembwa Kioko and the two were allocated a piece of land in ancestral area while Muisia Masyuko and Mbunu Masyuko were allocated land in the grazing field.

12) Mwisu's (PW2) evidence in cross-examination was that the dispute which his father and Wandia concerned the latter moving to the grazing field.

13) He said that boundaries were fixed and that the survey department found the same boundaries that were fixed by the clan when it visited the area in 1990. He added that the survey department visited the area again in 2010. He said that the court visited the area in 1978 where it confirmed the boundaries of Muisia Masyuko, Mbuno Masyuko, Wandia Kole and Philip Mwongela. He said that Daniel Waema was not a party to the dispute of 1978.

14) On the other hand, the defendant's case was that he is the owner of plot number 4876 which he purchased from Kathuku Nyamai who is his neighbour. He said that when the area was adjudicated upon, the same was done within plot number 3030 forcing him to file an objection which was allowed on 17th November, 2010. He produced the objection proceedings and ruling as DEx. No. 1 and added that the ruling has not been appealed against.

15) The defendant's evidence in cross-examination was that although he purchased the land from Katuko Nyamai, he did not have the agreement that he and Katuko entered into. He said that he was not aware that he was required by the law to reduce the agreement in question in writing. It was his evidence that he wasn't aware of any boundary dispute between the plaintiffs' father and Wandia Kole. He denied having encroached into an adjudicated land in Ndiani adjudication site. He also denied having forced a portion of land that had not been adjudicated upon to be merged with Kalongo so as to create plot number 4876.

16) The plaintiffs' and the defendant's counsel on record filed their submissions on the 20th December, 2017 and 25th January, 2018 respectively.

17) Mr. Mwema's submissions were that the decision by the Adjudication Officer reeks of illegality, impunity and ought to be declared null and void ab initio. The counsel further submitted that the court has jurisdiction to overturn an illegal decision and to restore dignity to orders made by courts and local tribunals. The counsel cited section 7(ii) of the Environment and Land Court Act. He also referred the court to the Court of Appeal decision whose correct citation he did not quote. I shall thus pay no attention to the said authority as it was annexed to the submissions that the counsel filed.

18) Lastly the counsel submitted that the defendant's agreement is in breach of section 3(3) of the Law of Contract Act Chapter 23 of the laws of Kenya.

19) The submissions by Mr. Kamanda for the defendant were that the plaintiffs' suit is bad in law and should therefore be dismissed with costs to the defendant.

20) Having read the evidence on record as well as the submissions that were filed, I wish to state that whereas I agree with the plaintiffs' counsel that this court has the power to issue declaratory orders, section 7 of the Environment and Land Court Act no. 19 of 2011 referred to by the plaintiff's counsel relates to qualification and appointment of judges of the Environment and Land Court. I assume the

counsel had section 13(7) (h) of the Act in mind as it deals with the reliefs that the court can make. I need not emphasize the fact that this court has jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of the Environment and Land Court Act or any other law written law relating to the “environment and land”. However the issue of jurisdiction was not in contestation in this case.

21) From the evidence on record, the plaintiff says that the boundary to his plot number 3030 was set by the District Magistrates Court Kilungu in Civil Case Number L 14 of 1978. He further says that the District Court confirmed the boundary that was set by the clan elders in 1976.

22) The first plaintiff did admit that L 14 of 1978 does not refer to the suit land. The proceedings and judgement in L14 of 1978 and the determination of the clan elders are amongst the evidence that the plaintiffs presented before the Land Adjudication/Settlement Officer on the 27th October, 2010. Having determined the objection by the defendant in favour of the defendant herein, the plaintiff had the option of appealing against the determination to the minister under the provision of section 29 of the Land Adjudication Act, Chapter 284 of the Laws of Kenya. The first plaintiff did not do so and the explanation that he gave for his failure to do so was that he waited to see the portion of land that was to be extracted. The explanation is not tenable.

23) It seems to me that the plaintiffs are trying to appeal against the determination of the Land Adjudication/Settlement Officer before this court when they ought to have filed their appeal before the minister. I say so because the plaintiffs have not enjoined the Land Adjudication/Officer as a party to this suit and yet they have averred in paragraph 8 of their plaint that the award by the said officer was illegal, null and void. The plaintiffs have not applied for judicial review. It would be unfair and unjust to condemn the Land Adjudication Officer without giving him/her a hearing since it is his decision that the plaintiff seeks to impugn. .

24) The first plaintiff has not stated the acreage that he was entitled to under the adjudication process. He has not even stated how big his land was after the determination of the court in L 14 of 1978 . This is an issue that would have been settled during the adjudication process which the plaintiffs chose to abandon halfway. I am inclined to agree with the defendant’s counsels’ submissions that the plaintiffs’ suit is bad in law and the same deserves to be dismissed.

25) The upshot of the foregoing is that the plaintiffs have not satisfied this court that they have a cause of action against the defendant. In the circumstances, I hereby proceed to dismiss their suit with costs to the defendant.

Signed, Dated and Delivered at **Makueni** this **4th** Day of **April, 2018**

MBOGO C.G

JUDGE

In the presence of;

1st & 2nd plaintiffs

3rd Defendant Absent

Defendant present

Court Clerk Kwemboi

MBOGO C.G

JUDGE

4/4/2018